IN THE COURT OF APPEALS OF THE
STATE OF MISSISSIPPI

BENJAMIN WHITE — APPELLANT

VS. — CAUSE NO. 2010-KM-01850-COA

STATE OF MISSISSIPPI — APPELLEE

ON APPEAL FROM
THE CIRCUIT COURT OF MADISON COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Court may evaluate disqualifications or recusal.

1. Honorable Judge William E. Chapman, III
   Madison County Circuit Court Judge
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2. Honorable Judge Edwin Y. Hannan
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Respectfully submitted, this the 7th day of February, 2011.

Scott A. Johnson, MSB[redacted]
Special Assistant Attorney General

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STATEMENT OF THE CASE

A. Nature of the Case

On or about October 11, 2005, homeowners David and Joanne Buchanan entered into a contract with Benjamin White, the Defendant/Appellant, herein, for the performance of certain renovations and additions to their home. The contract obligated Mr. Buchanan to pay Mr. White when payments became "due." Further, the contract contained a clause which explicitly obligated Mr. White to fully pay any subcontractors which he utilized to perform the work covered by the contract.

Mr. Buchanan paid Mr. White periodically for work performed pursuant to their contract until December 16, 2006. By this time, Mr. White had already received substantial advanced payment for work which had not been completed and for building materials which were never delivered as promised. Furthermore, multiple subcontractors had contacted Mr. Buchanan due to the failure of Mr. White to pay them for work which they had performed. Mr. White did not offer any excuse for the subcontractors not being paid, such as a fee dispute or substandard work. Rather, Mr. White just refused to pay his subcontractors, despite Mr. Buchanan having advanced funds to Mr. White sufficient for their timely payment. Due to the huge chasm in the amount of work completed, versus payments already made to Mr. White, and his unjustified failure to pay his subcontractors, no additional payment was "due" pursuant to the terms of the contract. Subsequent to December 16, 2006, the Buchanans left numerous messages on Mr. White's phone over a period of weeks. Mr. White never returned these calls and never returned to the job. He also had no further contact with the Buchanans.

B. Course of Proceedings and Disposition of the Courts Below

See Brief of Appellant.

C. Statement of the Facts

The State of Mississippi agrees with Mr. White's summary of when the subject home repair contract was executed, as to the work to be performed and as to the modification regarding Mr. Buchanan's incurring responsibility for the installation of the counter tops and the obtaining of certain permits. The State further agrees that the contract contained the following language: "If payment is not made when due, contractor may suspend work on the job until such time as all payments due have been made . . . . In the event owner shall fail to pay any periodic or installment payment due hereunder, contractor may cease work without breach pending payment or resolution of any dispute."

The contract also contained the following clause: "In addition, the following general provisions apply: (4.) Contractor may in his discretion engage sub-contractors to perform work hereunder, provided Contractor shall fully pay said sub-contractor . . . ." (State's Exhibit 2, page 4). Testimony was undisputable at trial that Mr. White had failed to pay multiple subcontractors without any legitimate basis being offered for his conduct (i.e., no claims of substandard work by any subcontractor, timely advance payment by Mr. Buchanan to insure fund availability for payment of subcontractors, etc.). (T. 266).

On or about December 16, 2006, Mr. White made a demand upon Mr. Buchanan for an additional payment to be made under the contract. (T. 250). Due to: (1) the work performed not being anywhere near worth the $53,050.00 already advanced to Mr. White; (2) the failure of Mr. White to have delivered promised building materials; (3) the failure of Mr. White to provide

requested receipts regarding his alleged expenses incurred; and (4) Mr. White's breach of the contract by failing to timely pay multiple subcontractors, Mr. Buchanan refused to make further payment. (T. 246-248). Based on Mr. White's deficiencies in these regards, no additional payments were "due" pursuant to Section 10 of the General Provisions. (State's Exhibit 2, page 4).

The State of Mississippi agrees with Mr. White's summary regarding Mr. Buchanan's claims that the multiple delineated items of work under the their contract remained uncompleted as of December 16, 2006 (e.g., provisions 4-14 of Section A, provisions 4-28 of Section B, and none of the provisions in Sections C and D). Mr. Randy Robertson was called by the State and testified as an expert witness that the following work was completed, and as to its reasonable value:

Plumbing rough-in at $2,000.00 (T. 291 & 473)
Form materials at $1,600.00 (T. 291 & 473)
Labor to remove brick, sheetrock and stud walls at $950.00 (T. 291 and 473)
Demolition at $3,250.00 (T. 291 & 473)
Plans at $1,500.00 (T. 293 and 473)

This $9,300.00 is a far cry from the $53,050.00 which Mr. Buchanan had already paid Mr. White when Mr. White demanded more money on or about December 16, 2006. Mr. Bert Green, the expert retained by Mr. White, offered wildly differing amounts as to the value of work performed. (State's Exhibit 6). He acknowledged on the stand, however, that his figures depended in large part upon his review of the Statement which Mr. White gave to the Investigator for the Attorney General's Office (State's Exhibit 1) and his subsequent interviews with Mr. White. (T. 313-314).

Although his expert opinion does not corroborate this assertion, Mr. Green also testified that his estimate took into account the testimony he had heard in this case while sitting in the courtroom. (T. 314). For example, he credited Mr. White with being entitled to payment of $5,500.00 for a new

septic unit *after* having heard Mr. Buchanan testify that no new septic system had ever been installed. (T. 181). In fact, Mr. Buchanan testified in great detail that the only work on any septic system was the installation of a sprinkler system to disperse the effluent on his *existing septic system*, and that this sprinkler system had been installed by Mr. Johnny Crump and paid for by Mr. Buchanan out of his own pocket in the amount of $1,582.00. Mr. Green stood by his original $5,500.00 allowance in favor of Mr. White, notwithstanding hearing Mr. Buchanan's testimony and the complete lack of receipts or any other documentation introduced into evidence to corroborate Mr. White's claim. (T. 326).

In his testimony, Mr. Green asserted that he said that he had "ascertained" from the health department that a permit for a septic tank had been taken out and that a septic tank had been installed. (T. 362). But despite having testified as an expert witness in more than twenty (20) previous cases (and thereby knowing that he would be subject to cross-examination)(T. 346), Mr. Green did not obtain any statement from the health department in this regard or a copy of the phantom permit–allegedly, because of the time constraints placed on him by the Freedom of Information Act, versus the approaching trial date. On cross-examination, *however*, Mr. Green had to admit that Mr. White was not subject to the purported Freedom of Information Act limitations and could have obtained a copy of the permit merely by going to the health department to pick it up. Remarkably, although a seasoned expert witness, Mr. Green did not request Mr. White to obtain a copy of the alleged permit to be used in support of his (Mr. Green's) opinion at trial. (T.363-364). Ultimately, and, not surprisingly, the Defendant found it impossible to produce tangible evidence of something which did not exist.

Mr. Green's credibility was also drawn into question in various other ways. He credited Mr.

White with $400.00 as a "dumpster fee" because Mr. White alleged this expense in the statement which he had given to the Attorney General's Office during its investigation of the case. (T. 369). When confronted with undisputable testimony that no dumpster was ever on the Buchanan job site, he testified that the assessment of a fee for a "dumpster" does not necessarily mean that a dumpster is actually on the job. Rather, a dumpster in his expert opinion could have been the use of a pickup truck or a trailer to haul off trash. (T. 388). Notwithstanding a dumpster being already allowed to *morph* into the possible use of a pickup truck or trailer used to haul trash, Mr. Green then allowed Mr. White a separate credit for an additional $200.00 for "trash removal–labor." (T. 331-332)(State's Exhibit 6). Mr. Green gave Mr. White credit of $752.00 for an alleged termite pretreatment of the construction site, despite no receipt or other proof that any pest control company was ever hired by Mr. White. State's Exhibit 6 (T. 364-365). In fact, Mr. Buchanan had specifically testified earlier in Mr. Green's presence that this spraying had been included in his Terminix termite plan. No proof other than the unsworn and unsubstantiated, out-of-Court statements of Mr. White to Mr. Green weighed in favor of the defense expert giving the defendant contractor any credit for this alleged expense. (T. 182).

Despite Mr. Buchanan's testimony that the only portable toilet on the work site was placed there after Mr. White had departed the job and, further, Mr. Buchanan providing the name of the rental company, the cost and duration of rental and that he (Mr. Buchanan) had paid for this service out of his own pocket (T. 239), Mr. Green still gave Mr. White credit in the amount of $250.00 for portable toilet rental. (T. 332)(State's Exhibit 6). Even Mr. Green, however, on cross-examination was ultimately unable to *maneuver* around the falsity of this fraudulently-claimed expense. (T. 373). Mr. Green said Mr. White was entitled to an additional $455 for soil samples, although no receipts

were produced that Mr. White had ever incurred these expenses (T. 178). Mr. Green went into great detail as to why soil sampling was necessary and as to how it was performed by making bores into the ground. (T. 319). However, he never reviewed any report allegedly performed by a soil engineer in this regard. (T. 373). Further, despite Mr. Green's access to Mr. White and ability to follow up on information gained from their dialogue, he could not produce a name or even provide a list of potential names as to who allegedly performed these soil samples. (T. 356). No soil engineers were ever contacted by the Defendant's expert. From a tactical standpoint for the defense, it made much more sense for the expert to be able to say the Mr. White just could not remember *any* subcontractor's name (other than the ones identified and subpoenaed by the State), than for the expert to have attempted to identify a nonexistent person and then be forced to testify that, despite his best efforts, no soil engineer could be located. Ignorance is bliss.

Mr. Green gave Mr. White $500.00 credit for electrical work (T. 323-324) despite hearing Mr. Buchanan's testimony that no electrician came on the site and that the existing electrical wiring and outlets in the walls remained live even after Mr. White's workers removed certain sheet rock as part of the initial demolition (T. 256-257). Although stating he did not know what happened with the electricity, Mr. Green volunteered, out of the thin air, that one electrician could have come and disconnected the power to the wiring in the wall and *then* that electrician (or maybe someone else) could have inexplicably came back and turned the dangling wires back on. (T. 365). (At some point, the offering of legitimate expert opinion crosses into the realm of the reckless use of hypotheticals merely to try to help the party who is paying the expert.) Furthermore, despite Mr. White's failure to pay his subcontractors as obligated to do under General Provision 4 of the contract, Mr. Green testified that Mr. White should still be entitled to pay himself a 25% profit

margin and an additional 5% for unscheduled expenses based on the value of the work performed by the subcontractors, and should remain entitled to that money even if he *never* paid those subcontractors. (T. 377-379)

Mr. Green's credibility was further impeached. When asked did he have any complaints filed against him in 2004, he responded in the negative (T. 379). When about to be approached with documents while on the witness stand, Mr. Green then admitted that a supply company had filed a complaint with the Board of Contractors on April 28, 2004, against his business corporation, Bert Green Builder, Incorporated. He admitted that he filed as a defense that "we were contemplating going through bankruptcy at the time" (T. 381). Despite subsequently electing to not actually file for bankruptcy protection, he never informed the Board of Contractors so as to move toward closure of the above-referenced supplier's complaint. (T. 385). When pushed on cross-examination, Mr. Green admitted that the claim was still pending as far as he knew. (T. 382).

Lastly, Mr. Green's testimony at times sounded more like closing argument by defense counsel, rather than assertions by an expert witness tendered in the fields of residential construction and residential remodeling (T. 312-313). For example, at one point he non-responsively blurted out, "[The subcontractors'] services were performed on this property at this time, and whether or not the subs were paid, that's not an issue here. The issue is whether [Mr. Buchanan] got the value in his home that I'm showing here." (T. 378). When asked about Mr. White's inability to identify the soil engineer who had allegedly taken soil samples, Mr. Green responded, "Well, sir, it's been three or four years. [Mr. White] couldn't remember." (T. 356-357). But under further cross-examination, Mr. Green had to acknowledge that Mr. Buchanan, the homeowner, had repetitively asked Mr. White for receipts of such alleged expenditures way back in December of 2005 and January of 2006. Mr.

Green then announced that the contract at issue did not obligate Mr. White to give Mr. Buchanan any receipts. (T. 361). Per Mr. Green's opinion, it appears that Mr. Buchanan was just supposed to pay Mr. White more, and more, and more, on blind faith, despite the paucity of the work performed–much akin to a lamb being fleeced. Mr. Green was paid $1,500.00 to come offer his opinion. (T. 337). He never sought to visit the job site to locate the absent septic tank or for any other purposes in formulating his opinion. (T. 325).

Section 4 of the General Provisions of the contract provides: "Contractor may in his discretion engage sub-contractors to perform work hereunder, provided Contractor shall fully pay said sub-contractor . . . ." (State's Exhibit 2, page 4). *Miss. Code Ann.* § 97-23-103 provides that a person commits home repair fraud if he:

> "(a) enters into an agreement or contract . . . with a person for home repair, and . . . promises *performance* which he does not intend to perform or knows will not be performed . . . ." (emphasis added)

Any reasonable reading of this statute recognizes that the "performance" at issue relates to compliance with the terms of the subject contract for home repair, whether the work was accomplished via the toil of the contractor or that of the subcontractors retained by him. Mr. White both: (A) failed to perform work which justified anywhere near the $53,050.00 he had already been paid when he made an additional demand for payment on or about December 16, 2006; and (B) failed to pay his subcontractors although he had been advanced way in excess of the money necessary to do so.

Once the jury returned a verdict of guilty against Mr. White as to one (1) count of home repair fraud, the jury was discharged. (T. 444). Due to the lateness of the day, the Court then recessed the issue of the restitution owed by Mr. White to a later date. (T. 450). The Court inquired

of counsel for the State and of counsel for the Defendant whether either desired to call witnesses in the restitution phase of the trial. **Both** agreed that further testimony was not necessary, and it was not requested by either party. (T. 449-450). At the restitution hearing, the Court sat as both finder of fact and finder of law, and ordered Mr. White to pay restitution to a project manager, three subcontractors and David Buchanan. (R. 72-73).

SUMMARY OF THE ARGUMENT

Benjamin White, the builder, asserts that the amount of work he had completed prior to demanding additional money from Mr. Buchanan on or about December 16, 2006, was proportionate to the $53,050.00 which he had already been paid. A witness for the State, Randy Robertson, testified that the work performed was worth $9,300.00. The Court obviously also considered testimony *other than that* of Mr. Robertson and concluded that Mr. White was to entitled to credit for $15,510.67 (T. 473-474). This latter amount appears to have incorporated certain modifiers asserted by Mr. Green, expert for the defense, in his testimony to be appropriate (i.e., the value of the work performed times 5% for unscheduled expenses and times 25% for profit margin), *plus* some additional entitlement to payment. Simply put, Mr. White failed to perform with respect to the amount of money paid versus work done ($53,050.00 vs. $15,510.67) and, further, with respect to his explicit obligation to pay his subcontractors. Mr. White was properly found to be guilty of home repair fraud.

Mr. White alleges that he should be immunized from criminal culpability because of General Provision 10 of the contract which allowed work to stop until a payment dispute was resolved. First, there is a difference in an argument over a few hundred or even thousand dollars, versus payment of $53,050.00 for only $15,510.67 worth of work. The former is a dispute; the latter is a crime.

Additional payment was not due. Second, Mr. White was in further breach due to his failure to pay his subcontractors as obligated under Section 4 of the General Provisions of the contract. Third, neither Mississippi case law, nor any persuasive authority from any other jurisdiction, provides a "fee dispute" affirmative defense to the crime of home repair fraud. Accordingly, the Court did not err in denying a jury instruction embodying such a defense.

Section 97-23-103 of the Mississippi Code makes it illegal for a contractor to promise *performance* which he does not intend to perform or knows will not be performed in relation to a contract for home repair. "Performance" is in no way limited to the contractor actually "slinging a hammer," but instead encompasses all obligations which must be *performed* pursuant to the terms of the contract to accomplish completion of the "home repair," including the **explicit** contractual provision in this case that the subcontractors must be timely paid.

As to the proper amount of restitution to have been ordered in this case, the Court was sitting as both finder of fact and finder of law at this stage of the trial. The Judge was the appropriate party to weigh the credibility of the witnesses and made his decision to rely heavily, but not entirely, on the testimony of Mr. Randy Robertson. As his decision in this regard was not an abuse of discretion, the amount of restitution should stand.

Mr. White now claims that a dangerous precedent will be set if his conviction is affirmed. In support of this argument, he states, "Contractors such as [me] who provide accurate representations and actually do work on a project as promised should not be subjected to criminal prosecution under this statute." (Brief of Appellant, page 9). As detailed above, Mr. White did not provide "accurate representations" as to the value of the work done or "do work" which in any manner justified entitlement to additional money as demanded on or about December 16, 2006. He

further promised performance which he either did not intend to perform or knew would not be performed when he failed to pay his subcontractors as specifically promised in his contract with the Buchanans. Lastly, Mr. White introduces the alleged defense in his brief that he was just holding "working capital." $53,050.00 (amount paid by Mr. Buchanan) minus $15,510.67 (value of work performed per Judge's conclusion), equals $37,539.33 of money paid for work never provided. This is not just a contractor holding a few extra dollars for upcoming material and labor charges; rather, this amounts to a blatant example of home repair fraud.

ARGUMENT

I. RESPONSE TO MR. WHITE'S ALLEGATION THAT THE COURT ERRED IN FINDING THAT A DISPROPORTIONATE AMOUNT OF WORK WAS DONE COMPARED TO THE MONEY ADVANCED BY THE HOMEOWNERS

Mr. White and the State of Mississippi agree that Mr. White was advanced $53,050.00 by the homeowners, the Buchanans. In preparation for his trial, Mr. White retained the services of Mr. Green and offered him as his expert witness with respect to the alleged value of the work performed. In his testimony, it was clear that Mr. Green relied heavily on the word of Mr. White to arrive at his calculations. Mr. Green gave Mr. White credit for a $5,500.00 septic system when no septic system was ever installed. He gave Mr. White $400.00 credit for a dumpster which Mr. Buchanan testified was never on the construction site. He gave Mr. White credit of $250.00 for portable toilet rental, when the only portable toilet on the site was not delivered until *after* Mr. White was off the job and which was paid for by Mr. Buchanan. While Mr. Green's credibility was rendered suspect by his accepting Mr. White's unsubstantiated allegations with respect to these first two expenses, his credibility suffered a major blow due to his upholding this third, so-called "expense" incurred.

Mr. Green gave Mr. White $500.00 credit for hiring an electrician when the uncontroverted

evidence was that no electrician ever set foot on the property. Mr. Green gave Mr. White $455.00 and $782.00 credit for soil sample testing and termite pretreatment, respectively, despite no receipts, no knowledge of the alleged providers and in complete contradiction to Mr. Buchanan's sworn testimony. He testified that Mr. White was entitled to draw 25% profit from the advanced money, even if no subcontractors were ever paid. Mr. Green opined that Mr. White had performed approximately $49,286.47 worth of work on the project and that he was merely holding the additional $3,763.00 as leftover working capital. Mr. Green was paid $1,500 for appearing as an expert witness.

In contrast, Mr. Robertson testified as an expert witness for the State of Mississippi. He received no compensation for his testimony. Mr. Roberts testified that Mr. White had performed only $9,300.00 worth of work. Even if you add a 25% profit margin and 5% unexpected expense charge, as was deemed appropriate by Mr. Green, then Mr. White was only entitled to recover a total of $12,090.00 per Mr. Robertson's testimony.

Both experts testified at length. The disparity between the their figures was submitted to the jury. As stated by the Court of Appeals in the case of *Davis v. Mississippi*:

> The jury, sitting as finders of fact, hears the evidence first hand and has the opportunity to view the witness and observe [his] demeanor on the stand; matters which are invaluable in assessing questions regarding credibility. It is for this reason that a jury's resolution of disputed facts is entitled to deference when reviewed by an appellate court.

863 So.2d 1000, 1005 (Miss. COA 2004)(citing *Hogan v. State*, 854 So.2d 497 (¶ 17)(Miss. COA 2003)).

More recently, the same Court recognized:

It is well settled that "[w]hen evidence is in conflict, the jury is the sole judge of both

> the credibility of a witness and the weight of his testimony." *Payton v. State*, 897 So.2d 921, 940 (¶ 57)(Miss. 2003). **Given the jury's verdict, it is clear which version of events the jury decided to believe.**
>
> *Adams v. State*, 33 So.3d 1179, 1182 (Miss. COA 2010)(emphasis added).

It is also clear here which version of the proper allowances for work performed was believed. Further, when the Court was sitting as finder of fact in the restitution phase of the trial, the Court concluded that Mr. White was only entitled to $15,510.67 or, in other words, $37,539.33 less than the amount he had already been paid by the Buchanans. The magnitude of these discrepancies doesn't lie. Mr. White is guilty of home repair fraud.

II. RESPONSE TO MR. WHITE'S ALLEGATION THAT HE DIDN'T COMMIT HOME REPAIR FRAUD BECAUSE THE CONTRACT ALLOWED HIM TO CEASE WORK

The contract provision upon which Mr. White puts his misplaced reliance states the following:

> (10.) In the event Owner shall fail to pay any periodic or installment **payment due** hereunder, Contractor may cease work without breach pending payment or resolution of any dispute. (emphasis added)

The State of Mississippi would first direct the Court's attention to the fact that Mr. Buchanan, the homeowner, did not refuse to make additional payments until he had advanced $53,050.00 for approximately only $15,000.00 worth of work completed, as discussed in Section I above. Accordingly, no one can with a straight face claim that any additional payment was "due" so as to make this contractual provision applicable.

Second, Mr. White is asking this Court to "legislate" by judicial fiat an affirmative defense to a criminal charge where no such defense has been promulgated by the Mississippi Legislature.

Section 97-23-103 of the Mississippi Code (i.e., the Home Repair Fraud Statute) states in pertinent part:

> A person commits home repair fraud if he: (a) enters into an agreement or contract, written or oral, with a person for home repair, and he . . . promises performance which he does not intend to perform or knows will not be performed . . . .

If this Court were to adopt Mr. White's contorted use of the quoted contractual provision, then every contractor could defend against a charge of home repair fraud by merely refusing to do more work, unless paid more money–no matter how much they had already been overpaid in advance. As stated by our Supreme Court:

> The courts have no right to add anything to or take anything from a statute, where the language is plain and unambiguous. To do so would encroach upon the power of the Legislature. The courts have neither the authority to write into the statute something which the legislators did not write therein, nor to ingraft upon it any exception not included by them.

Balouch v. State, 938 So.2d 253 (Miss. 2006)(citing *Wallace v. Town of Raleigh*, 815 So.2d 1203,1208 (Miss. 2002)).

Our home repair fraud statute does not have a "Get Out of Jail Free" provision which allows the offender to simply claim a fee dispute and thereby immunize himself or herself from prosecution, no matter the other circumstances at play. "Intent and knowledge shall be determined by an evaluation of all circumstances surrounding a transaction and the determination shall not be limited to the time of contract or agreement." *Miss. Code Ann.* § 97-23-103(3).

Mr. White was not prosecuted for having a fee dispute with Mr. Buchanan. He was prosecuted for promising performance in relation to a contract for home repair when he had no intent to perform or knew performance would not be made. He breached his promises, and violated the law, by accepting $53,050.00, but only doing approximately $15,000.00 worth of work; and by

failing to pay his subcontractors.

III. RESPONSE TO MR. WHITE'S ALLEGATION THAT THE COURT ERRED IN REFUSING TO GRANT JURY INSTRUCTION D-12

Mr. White offered instruction D-12, which stated:

> The Court instructs the jury that if the jury believes that David and Joanne Buchanan materially breached the contract entered into for home repair by failing to make payments as required by the contract under the GENERAL PROVISIONS portion of the contract on PAGE 4 of the contract (specifically paragraph 2 and provision (10.)), then the jury should return a verdict of not guilty.

As previously quoted, "The courts have no right to add anything to or take anything from a statute, where the language is plain and unambiguous." *Balouch v. State*, 938 So.2d 253 (Miss. 2006). Mr. White is asking for recognition of an affirmative defense which the Mississippi Legislature has never adopted. As stated by the Court of Appeals, a defendant is not entitled for a jury instruction to be given which is an incorrect statement of law. *Miller v. State*, 801 So.2d 799, 805 (Miss. COA 2001). The proffered instruction was such a misstatement of the applicable law.

Further, under any reasonable interpretation, Section Ten (10) of the General Provisions of the contract should not allow a builder to unilaterally decide to halt construction any time he or she *claims* that payment has been withheld. If not, taken to its logical extreme, a builder could be paid a million dollars up front by a consumer on a two million dollar job; do $50,000.00 worth of work; demand payment of the other million; and then walk off the job with impunity from criminal prosecution–$950,000.00 to the richer. For that type of conduct to be judicially sanctioned would require such a contorted interpretation of the Home Repair Fraud Statute as to be tantamount to its outright nullification by this Court.

Additionally, "As a general rule, an agreement will not be enforced where it conflicts with

the general policy and spirit of the statute which governs it, although there may be no literal conflict." 174 *Am. Jur.2d Contracts* § 232 (citing *Branham v. Miller Electric Co.*, 118 S.E.2d 167 (S.C. 1961)). While Section Ten (10) of the General Provisions of the contract between Mr. White and Mr. Buchanan might have some applicability in a civil context *if a legitimate fee dispute were at issue* (i.e., if the asserted value of the work completed was even in the ballpark with the amount of payment advanced), it cannot not be utilized to trump the very focus of the Home Repair Fraud Statute, that being to criminalize the conduct of builders who defraud consumers by pocketing money way in excess of the value of the work done, and then flying the coop. As artfully stated by the South Carolina Supreme Court:

> [W]here legislative intent to declare an act unlawful is apparent from consideration of the statute, it matters not that the prohibition of the act is not declared in specific language, for an act that violates the general policy and spirit of the statute is no less within its condemnation than one that is in literal conflict with its terms.

Branham v. Miller Electric Co., 118 S.E.2d 167, 170 (S.C. 1961)(citations omitted).

Accordingly, Mr. White cannot wield as a sword, nor employ as a shield, Section Ten (10) of the contract in such a perverted manner as to immunize himself from prosecution under the Home Repair Fraud Statute. Any reasonable interpretation of this statute precludes the applicability of this provision under the facts of this case.

In considering whether Mr. White was guilty of home repair fraud, the jury was charged with reviewing multiple instructions, including, but not limited to, Jury Instruction 10, which set out each element of the offense of home repair fraud that the State had to prove beyond a reasonable doubt before the jury could return a verdict of guilty (R. 68); Instruction No. 7, which advised the jury that reasonable doubt can arise in multiple ways (R. 63); and Instruction No. 8, which advised the jury

that they were the judges of the credibility of the witnesses. (R. 64). The Court also gave nine additional, time-tested jury instructions. (R. 56-69). As voiced by our Supreme Court:

> In determining whether error lies in the granting or refusal of various instructions, the instructions given must be read as a whole. When so read, if the instructions fairly announce the law of the case and create no injustice, no reversible error will be found.
>
> *Coleman v. State*, 697 So.2d 777, 782 (Miss. 1997).

Based on the instructions being read as a whole, the jury was adequately and fairly advised of the correct law pertaining to the offense of home repair fraud. No error, much less reversible error, exists with respect to the issuance of jury instructions.

IV. RESPONSE TO MR. WHITE'S ALLEGATION THAT THE COURT ERRED IN ADMITTING EVIDENCE OF HIS FAILURE TO PAY SUBCONTRACTORS

Paragraph (4) of Page 4 of the contract executed by Mr. White and the Buchanans, provides:

> In addition, the following general provisions apply:
>
> (4.) Contractor may at its discretion engage sub-contractors to perform work hereunder, provided Contractor shall fully pay said sub-contractor . . . . (State's Exhibit 2)

Section 97-23-103 of the Mississippi Code (i.e., the Home Repair Fraud Statute) states in pertinent part:

> A person commits home repair fraud if he: (a) enters into an agreement or contract, written or oral, with a person for home repair, and he . . . promises performance which he does not intend to perform or knows will not be performed . . . .

Just as Mr. White asks you to include legislation which was never adopted by our Legislature (i.e., an affirmative defense of "fee dispute"), now he asks you to redact a portion of the home repair fraud statute. He wants you to artificially restrict the concept of "performance" in relation to the

terms of a contract for home repair to actual "brick and mortar" type work performed personally by the contractor on the job site. Promising to pay the subcontractors in this particular case was just as much an obligated act of "performance," as was promising to pour the necessary concrete slab. In fact, this promise of "performance" was important enough to be an independent provision within the terms of the contract.

> Although a statute imposing criminal penalties must be strictly construed in favor of the accused, it should not be so strict as to override common sense or statutory purpose. *United States v. Brown*, 333 U.S. 18, 25, 68 S.Ct. 376,380, 92 L.Ed. 442, 448 (1948); *see also State v. Burnham*, 546 So.2d 690, 692 (Miss. 1989). Strict construction means reasonable construction. *State v. Martin*, 494 So.2d 501, 502 (Miss. 1986).

Reining v. State, 606 So.2d 1098, 1103 (Miss. 1992).

"This Court must presume the words in the statute were 'intended to convey their usual meaning absent some indication to the contrary.'" *Balouch v. State*, 938 So.2d 253 (Miss. 2006)(citing *Wallace v. Town of Raleigh*, 815 So.2d 1203,1208 (Miss. 2002)). The usual meaning of "performance" in relation to a contract (home repair or otherwise) is a party performing consistent, and in compliance, with the terms which he is obligated to fulfill under the contract. Section 4 of Page 4 (requiring payment of subcontractors) is no different in this regard. Whereas proposed Jury Instruction D-12 misstates the law regarding a contractor's duty to perform (i.e., if contractor makes a claim for additional payment, no matter how unreasonable, and homeowner does not pay, then no charge of home repair fraud can exist), Paragraph (4) of Page 4 of the contract explicitly identifies an example of the "type of performance" contemplated by the explicit wording of the Home Repair Fraud statute.

V. RESPONSE TO MR. WHITE'S ALLEGATION THAT THE COURT ERRED IN REFUSING TO CONSIDER HIS EXPERT WHEN DETERMINING RESTITUTION

During the trial, the Court heard extensive testimony from both Mr. Green, the expert retained by Mr. White, and Mr. Robertson, the expert called by the State of Mississippi, in the form of direct examination, cross-examination, and redirect. Each expert was allowed to fully develop the basis for his findings with respect to the estimated value of the work performed, versus the amount of money which had already been paid to Mr. White by Mr. Buchanan. The Judge also heard testimony from the homeowner, from representatives of subcontractors and from a project manager. Once the jury returned a verdict of guilty, the jury was dismissed. The case was recessed to a later date, and the hearing with respect to the matter of restitution proceeded in the form of a bench trial.

As stated by our Supreme Court:

> [F]or review of the findings of a trial judge sitting without a jury, this Court will reverse "only where the findings of the trial judge are manifestly erroneous or clearly wrong." *Amerson v. State*, 648 So.2d 58, 60 (Miss. 1994). The trial judge has sole authority to determine the credibility of a witness when sitting as the trier of fact in a bench trial. *Rice Researchers, Inc., v. Hiter*, 512 So.2d 1259, 1265 (Miss. 1987). An appellate court will affirm a trial court sitting without a jury on a question of fact unless, based on substantial evidence, the trial court was manifestly wrong. *Brown v. Williams,* 504 So.2d 1188, 1192 (Miss. 1987).

Reed v. State, 749 So.2d 179 (Miss. COA 1999).

The Judge had heard at length from Mr. Green and, upon putting on his "finder of fact" hat, obviously concluded that the testimony of the defense expert was questionable at best. Making such an evaluation as to witness credibility was not only then within the Judge's purview; it was his sole responsibility to do so.

As cited by the Appellant, "substantial evidence" has been described by our Supreme Court as being "such relevant evidence as reasonable minds might accept as adequate to support a

conclusion or, to put it simply, more than a mere 'scintilla' of evidence." *G.Q.A. v. Harrison County Dept. of Human Resources*, 771 So.2d 331, 335 (Miss. 2000)(citations omitted)(Brief of Appellant, Page 23). In the Statement of the Facts, *supra*, pages 4-9, the State delineates multiple reasons why the credibility of Mr. Green's expert testimony is suspect–much beyond the "mere scintilla" threshold. The County Court Judge heard every syllable of this testimony. While the Judge did not offer up a itemized list of such inconsistencies on the record, it certainly does not follow that he did not rely on some or all of this information in assigning the level of credibility and worth which Mr. Green's expert testimony was due. No error exists in this regard.

Further, while it is apparent that the trial court Judge relied heavily on the testimony offered by Randy Robertson, the State's expert, he did *not* adopt it verbatim because the amount credited to Mr. White by the Judge for work performed was *higher* than the amount calculated by utilizing Mr. Robertson's figures alone. Again, the Judge relied on much more than a "mere scintilla" of evidence in calculating restitution due to Mr. Buchanan and the payments due to subcontractors from the Defendant, Mr. White. The Judge gave credibility were he found credibility to be due. No error exists in this regard, nor in his ruling.

VI. RESPONSE TO MR. WHITE'S ALLEGATION THAT HIS PROSECUTION WILL OPERATE TO SUBJECT "ENORMOUS" NUMBERS OF CONTRACTORS TO PROSECUTION

Mr. White offers no authority in support of this argument. Therefore, this issue should be deemed procedurally barred. "Failure to cite relevant authority obviates the appellate court's obligation to review such issues." *Simmons v. State*, 805 So.2d 452, 487 (Miss. 2001)(citing *Williams v. State*, 708 So.2d 1358, 1362-63 (Miss. 1998)).

Potential procedural bar notwithstanding, this threat of the "floodgates of prosecution being

opened" is without merit. "A person commits home repair fraud if he: (a) enters into an agreement or contract, written or oral, with a person for home repair, and he . . . promises performance which he does not intend to perform or knows will not be performed . . . ." *Miss. Code Ann.* § 97-23-103. Accordingly, *only if* a contractor entered into a contract with a homeowner and therein *promised to pay his subcontractors*–while having the intent not to do so or knowing that they would not be paid–would the contractor be criminally liable in this regard. This would be in keeping with the previously cited rule that "[t]he courts have no right to . . . take anything [away] from a statute, where the language is plain and unambiguous." *Balouch v. State*, 938 So.2d 253 (Miss. 2006)(citing *Wallace v. Town of Raleigh*, 815 So.2d 1203,1208 (Miss. 2002)). If an "enormous" amount of contractors, for whatever reason, decide to violate this section of the Home Repair Fraud Statute, then an "enormous" amount merit being prosecuted.

CONCLUSION

Mr. White entered into a contract with the Buchanans to do a renovation/addition to their home. As a contractor, he obligated himself to perform work proportionate to the amount of money being paid to him by the homeowner in draws. Pursuant to an explicit contractual term, he further specifically promised additional "performance"–the timely payment of his subcontractors. Based on developments subsequent to the formation of the contract, it became apparent beyond a reasonable doubt that he did not ever intend to perform or knew that he would not perform consistent with these contractual obligations. He provided work worth less than a third of the money advanced to him by the homeowner, and refused to perform additional work unless he was paid even more money. He refused to pay multiple subcontractors for no reason, other than he decided to keep the money for himself.

In the realm of home repair fraud, there is no affirmative defense via statute or otherwise which allows a perpetrator to escape culpability by merely claiming that a "fee dispute" has developed with the homeowner. Otherwise, all offenders could merely keep demanding additional money from the homeowner, notwithstanding the paucity of the work performed, and cry "fee dispute" when indicted for home repair fraud. Understandably so, our law does not permit such shenanigans.

Mr. White and the State of Mississippi both called expert witnesses to offer their evaluation of the value of the work performed. Determining the credibility of witnesses is within the sole purview of the jury. By way of its verdict, the jury announced that it do not find Mr. White's expert to be credible. In that same vein, when the Judge sat as finder of fact on the issue of restitution after the jury had been discharged, the Judge sat as sole evaluator of the credibility of the witnesses. The Judge had heard at great length both expert witnesses offer testimony as to their respective opinions and the alleged evidence in support thereof. Again, this second finder of fact (the Judge) announced by his conclusions that he did not find Mr. White's expert to be credible.

Mr. White takes issue with the fact that the jury was allowed to hear about his failure to pay his subcontractors and, further, even alleges that the "floodgates of prosecution" will be opened if such testimony and the verdict herein are allowed to stand. Mr. White executed a contract which specifically required that he pay his subcontractors. He thereby promised "performance" of a contractual term inseparably intertwined with the performance of "home repair"–as the State would venture to say that the majority of home repair is accomplished in whole or in part via the contracting builder's utilization of subcontractors. Evidence beyond a reasonable doubt was presented that Mr. White did not intend to abide by this obligation or that he knew performance

would not be made. His fraud in this regard, and that of any and all other similarly culpable contractors in the future, demand a finding of "guilty as charged." Accordingly, for the foregoing reasons, the State of Mississippi respectfully requests that this Court affirm Mr. White's conviction.

CERTIFICATE OF SERVICE

I, Scott A. Johnson, do hereby certify that I have this day delivered a true and correct copy of the above and forgoing document via United States Mail, postage prepaid, to:

Honorable Judge William E. Chapman, III
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This the 7th day of February, 2011.

Scott A. Johnson

SCOTT A. JOHNSON, MSB[redacted]
Special Assistant Attorney General