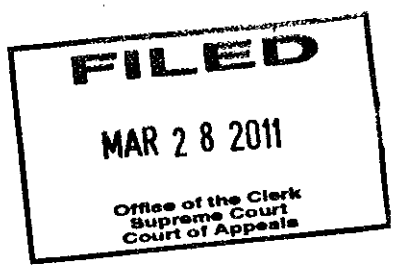
IN THE COURT OF APPEALS OF THE
STATE OF MISSISSIPPI

BENJAMIN WHITE — APPELLANT

VERSUS — CAUSE NO. 2010-KM-01850-COA

STATE OF MISSISSIPPI — APPELLEE



ON APPEAL FROM
THE CIRCUIT COURT OF MADISON COUNTY, MISSISSIPPI

REPLY BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

ATTORNEY FOR APPELLANT:

KEVIN D. CAMP, MSB # [redacted]
The Camp Law Firm, PLLC
1764 Lelia Drive
Jackson, MS 39216
Telephone: (601) 948-5800
Facsimile: (601) 987-9161

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
   P.O. Box 1626
   Canton, MS 39046

2. Honorable Judge Edwin Y. Hannan
   Madison County Court Judge
   P.O. Box 1626
   Canton, MS 39046

3. Honorable Scott A. Johnson
   Office of the Attorney General, State of Mississippi
   P.O. Box 22947
   Jackson, MS 39225

4. Honorable Linda C. Davis
   Office of the Attorney General, State of Mississippi
   P.O. Box 22947
   Jackson, MS 39225-2947

5. Benjamin White, Appellant
   3112 County Line Road
   Crystal Springs, MS 39059

Respectfully Submitted,

KEVIN D. CAMP, MSB [redacted]
Attorney for Appellant

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ARGUMENT

I. DEFENSE EXPERT'S ESTIMATIONS WERE ACCURATE AND WENT TO PROVE THAT A SUBSTANTIAL AMOUNT OF WORK WAS DONE ON THE HOME, WHICH IN TURN PROVES THAT THE APPELLANT WAS NOT GUILTY OF HOME REPAIR FRAUD

The State of Mississippi asserts, in its brief, that several sums of money were paid for items which were never provided and work which was never completed. First, the State claims that the septic system, which Mr. Green estimated to cost approximately $5,500.00, was never installed. However, Mr. Green testified that his analysis proved a different result. In his efforts to determine an appropriate value of the work done on Mr. Buchanan's septic system, Mr. Green went to the health department in order to verify whether any septic work had been done. (T. 325). The health department confirmed for him that a permit for septic work at Mr. Buchanan's home had been issued, and that a septic tank had indeed been installed. (T. 325). While Mr. Buchanan may have testified that no septic work was completed, the factual findings of Mr. Green, an expert in the field of home construction/repair, clearly show different.

Next, the State claims that Mr. Green's estimate of $400 is excessive, as an actual dumpster which was never delivered. Again, Mr. Green, a seasoned expert in the area of home construction/repair, testified that the term "dumpster" does not always mean that an actual, physical dumpster will be placed on the property. (T. 331). Often times, a contractor will simply hire people with a big truck to come along and periodically pick up the trash. (T. 331). These people operate to do the same work as a dumpster would. Mr. Buchanan himself testified under oath that he witnessed people coming to his home and picking up trash. (T. 259). Additionally, as Mr. Green testified, that trash is

normally taken to a landfill, and that the dumping of the trash into such a landfill is not cheap nor is it free. (T. 331).

Third, the State claims Mr. Green's estimate of $500 for electrical work is excessive, as no electrical work was performed on Mr. Buchanan's home. Mr. Buchanan testified that no electrical work was performed, and based this belief in the fact that some electrical outlets were still "live." (T. 257). Mr. Buchanan did not dispute that the electricity was turned off when Mr. White was in the process of removing the old sheet rock. (T. 256). Additionally, as Mr. Green testified, often times the subs will turn the electricity back on while working in order to get their jobs done. (T. 323-24). The State cannot now claim that, because there was some electrical current present in the wires, that no electrical work had ever been completed.

Fourth, the State asserts that Mr. Green's estimates of $455 and $782 for soil sample testing and termite pretreatment, respectively, are inaccurate. Mr. Buchanan testified that the termite pretreatment was done, but that it was done in accordance with his annual contract with Terminex. (T. 258). However, as Mr. Green testified, at the point in time when the pretreatment was done, Terminex was not allowed to perform pretreatment work. (T. 328). Further, Mr. Green stated that termite pretreatment work is not something that is normally a part of an annual termite contract. (T. 328). Because the pretreatment was completed, it is obvious that it was completed by someone other than Terminex under Mr. Buchanan's annual policy. Additionally, Mr. Green testified that the $455 cost for the soil testing/engineering was reasonable. (T. 319). In formulating his assessment of that cost, Mr. Green examined photos of the jobsite. (T. 319).

The State seems quite occupied by the fact that Mr. Green was paid a sum of money by the defense to analyze his figures and come to court to testify. The State would seem to want this court to give less credence to Mr. Green's testimony based on this compensation. However, it is established law in Mississippi that it is by no means improper to compensate an expert witness for his expenses, nor is it improper for counsel to pay him to come to trial and testify as to his findings. *Paracelsus Health Care Corp. v. Willard*, 754 So.2d 437, 446 (Miss. 1999).

Mr. White does contest the validity of his conviction for home repair fraud, but does not dispute the possibility that there could be some money owed back to Mr. Buchanan. However, this amount is nowhere near the amount which Mr. White was ordered to pay by the trial judge. As can clearly be seen from the testimony at trial, Mr. Green's estimations were based on a solid, evidentiary basis. As Mr. Green has been involved in the construction industry for years, his expert opinion in this matter should have been examined more closely.

Thus, because it is apparent that Mr. White did more work on Mr. Buchanan's home than he was given credit for at trial, his conviction for home repair fraud was indeed an erroneous conviction and the amount of restitution ordered was error.

II. THE APPELLANT DOES NOT ASSERT BREACH OF CONRACT AS AN AFFIRMATIVE DEFENSE TO HOME REPAIR FRAUD; RATHER, BECAUSE THE CONRACT WAS BREACHED BY THE HOMEOWNER, NO HOME REPAIR FRAUD WAS COMMITTED

Mr. White, in this appeal, is not asking this Court to legislate any affirmative defense to the crime of Home Repair Fraud. Mr. White is simply asking this Court to

recognize that he did not commit home repair fraud by suspending work on Mr. Buchanan's home when Mr. Buchanan himself breached the contract.

It is well established in the State of Mississippi that the freedom of parties to enter into contracts is a fundamental right upon which the courts cannot infringe absent fraud, illegality or mutual mistake. *Martin v. Early*, 859 So.2d 1034 (Miss. App. 2003).The courts are likewise without the power to alter or rewrite any contracts where such contracts are not "illegal, immoral or contrary to public policy." *Id.* As stated in the Brief of the Appellant, the clause at issue in this case is not illegal, immoral or against the public policy of this state. The contract at issue in this case is not illegal, as it does not cause any laws of this state to be broken. *See Price v. Purdue Pharma Co.*, 920 So.2d 479 (Miss. 2006). Further, this contract is not an immoral one, as it does not facilitate nor induce an offense against morality. *See Ham v. Wilson*, 86 So.2d 298 (Miss. 1920). Finally, this contract is not against the public policy of this state, as it is not prohibited by the constitution, statute or decision of the Supreme Court. *See Heritage Cablevision v. New Albany Elec. Power Sys.*, 646 So.2d 1305 (Miss. 1994). Therefore, under the precedent set forth by the Supreme Court of this state, the contract at issue here is enforceable and the courts have no authority to infringe upon its provisions.

Because this contract is valid and enforceable, the lower court judge had no legal authority to disregard the provisions of this contract during Mr. White's trial on the charge of home repair fraud. The clause of this contract at issue, Section Ten (10) of the General Provisions, plainly provides that, if a fee dispute arises, Mr. White may cease work on the home until such dispute is resolved. Mr. Buchanan, on December 16, 2005, breached his obligations under the contract when he refused to submit his weekly

payment to Mr. White, giving rise to a fee dispute. (R. 8). At this point, Mr. White was free to invoke Section Ten (10) of this contract which gave him the right to cease work on the project until the fee dispute was resolved.

The State of Mississippi, in its brief, contends that Mr. White is asking this court to legislate an affirmative defense to home repair fraud. This is not the case. Mr. White is not claiming that the fee dispute between the parties is a defense to home repair fraud. Rather, because Mr. Buchanan breached his obligations under the contract, Mr. White submits that no home repair fraud was even committed when he suspended work on the home.

By finding Mr. White guilty of home repair fraud, due to his reliance on the provision of the contract to suspend work on the home until the fee dispute between the parties was resolved, the lower court is essentially declaring void the contract negotiated and signed by Mr. White and Mr. Buchanan. As stated in previous paragraphs, persons in this state have the freedom to enter into contracts and to enforce such contracts, absent some illegal, immoral or public policy concern. *Martin v. Early*, 859 So.2d 1034 (Miss. App. 2003). The County Court judge's decision in this case does nothing more than undermine the basic and fundamental freedom of persons in this state to enter into and enforce valid contracts. In finding Mr. White guilty of home repair fraud, the judge is, in essence, making it a crime for a person to abide by the terms of a contract (in this case, making it a crime for Mr. White to suspend work on Mr. Buchanan's home per Section Ten (10) as a result of a fee dispute). Allowing this precedent to stand would subject to prosecution for home repair fraud any contractor who suspended work on a project per the terms of a legal, valid and enforceable

contract. This is a dangerous precedent, and one which is clearly in contradiction with the policies and holdings set forth by this state's Supreme Court. Mr. White had the right to suspend work on Mr. Buchanan's home due to Mr. Buchanan's refusal to submit any more payments. It is unconscionable to think that this action could subject one to criminal prosecution.

III. BECAUSE DEFENDANT'S JURY INSTRUCTION D-12 DID NOT IMPROPERLY STATE THE LAW AND WAS THE ONLY INSTRUCTION ON THE ISSUE OF BREACH OF CONTRACT, IT WAS ERROR FOR THE TRIAL JUDGE TO DENY THIS INSTRUCTION

As stated previously, Mr. White is not asserting breach of contract or "fee dispute" as an affirmative defense to the crime of home repair fraud. Mr. White, in suspending work on Mr. Buchanan's home due to his non-payment, rightfully invoked Section Ten (10) of the contract which allowed him to do just that. Thus, because Mr. White had the contractual right to suspend work on the project in this situation, no home repair fraud was committed. As such, Defendant's Jury Instruction D-12 was not an incorrect statement of the law and should have been given to the jury.

The clause found in Section Ten (10) of the General Provisions of the contract at issue was not void and would not have worked to nullify the home repair fraud statute. The State claims that allowing a contractor to stop work anytime he claims that payment is withheld would operate to nullify the statute. First, it is undisputed that a payment dispute had arisen between Mr. White and Mr. Buchanan; the State does not dispute this. Second, if this court was to nullify clauses such as this in any type of contract, it would do nothing more than impermissibly infringe upon the parties' freedom to contract. *See Martin v. Early*, 859 So.2d 1034 (Miss. App. 2003). It is unconscionable to

believe that if a contractor begins work on a home, and the homeowner later decides to stop paying for the work, the contractor would have means by which to stop work until the payment dispute had been resolved. If this were the case, the homeowner could sign a contract hiring a contractor to build/repair his home, decide he does not want to pay for the work, then force the contractor to complete the job without compensation, the homeowner all the richer. The intent of the home repair fraud statute clearly was not to produce this type of absurd result. Even if Mr. White chose to no longer work for Mr. Buchanan, Mr. Buchanan was not without remedy. He could easily have pursued a civil claim against Mr. White in order to have the money he advanced returned to him. The State seems to believe that the home repair fraud statute is the only available remedy to aggrieved homeowners. This is not the case, as there are any number of civil remedies which have been available long before the home repair fraud statute was enacted in 2003. Miss. Code Ann. § 97-23-103.

The State of Mississippi is correct when it states that courts do not have the right to add to or take anything 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)). However, the law as stated in *Balouch* is wholly inapplicable here. The proposed jury instruction D-12 simply instructs the jury that if they believe Mr. and Mrs. Buchanan breached the contract by failing to make payments, then Mr. White did not commit home repair fraud. (R. 55). This is not being asserted as an affirmative defense. It is being offered to show that Mr. White was in no way guilty of home repair fraud when he suspended work on Mr. Buchanan's home.

The Supreme Court of this state has specifically held that a defendant is "entitled to have jury instructions given which present his theory of the case," provided those instructions properly state the law, is not covered in other instructions and has some foundation in evidence. *Strickland v. State*, 980 So.2d 908 (Miss. 2008) (*citing Chandler v. State*, 946 So.2d 355, 360 (Miss. 2006). Failure to admit a defendant's jury instruction when it has met the above test constituted reversible error. *Roberson v. State*, 838 So.2d 298 (Miss. App. 2002) (*citing Humphrey v. State*, 759 So.2d 368 (Miss. 2000)). Because Defendant's Jury Instruction D-12 did not improperly state the law, was not covered at all in any other instructions given to the jury and had a solid evidentiary basis through the testimony of both Mr. Buchanan and Mr. White, the failure of the County Court judge to admit this instruction to the jury constitutes reversible error.

Furthermore, the State would have this Court believe that the home repair fraud statute is clear and unambiguous. This assertion is wholly inaccurate, as essential parts of this statute are both vague and ambiguous. This statute subjects to criminal prosecution anyone who "promises performance which he does not intend to perform or knows will not be performed." Miss. Code Ann. § 97-23-103. This phrase begs the question: what type of performance is this intended to cover?

The United States Supreme Court, in *Lanzetta v. State*, 306 U.S. 451, 453 (1939), stated it well:

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."

The Court went on to say:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential element of due process."

Id.(citing *Connally v. General Const. Co.*, 269 U.S. 385, 391). The purpose of this above quoted rule is to give the ordinary person fair notice of what is prohibited, so that he may act accordingly and not be trapped by a law which gives insufficient warning of its prohibitions. *Sewell v. Georgia*, 435 U.S. 982 (1978). If an act is unconstitutionally vague, when viewed in light of the above test, it will be considered void. *Id.*

In *Fulgham v. State*, 47 So.3d 698 (Miss. 2010), the Supreme Court addressed the issue of vagueness. In that case, the Court examined Mississippi Code Annotated Section 47-5-193 which prohibited any officer or employee of the State from furnishing an "unauthorized electronic device" to any offenders in the custody of the State. *Id.* The Court, attempting to determine what constituted an "unauthorized electronic device," noted that the statute contained no definition of what constituted such a device, and ultimately remanded the case, stating that it was unclear whether Fulgham received sufficient notice that his actions would be considered illegal. *Id.*

Like *Fulgham*, the language contained in Mississippi Code Annotated Section 97-23-103 is vague. This statute does not define exactly what type of performance is required, and what types of performance are covered. Nowhere in this statute is there a definition of "performance." If the State's interpretation of "performance" were to be applied, then any type of non-performance, no matter how miniscule, by a contractor would be considered criminal. For example, if a contract called for the contractor to

paint the walls in a home lime-green, and the contractor mistakenly pained the walls a shamrock-green, this, by the State's interpretation, would be considered non-performance and thus criminal. It is unconscionable to believe that such a miniscule mistake could subject a contractor to both jail time and fines.

Neither Mr. White nor any reasonable person could have been adequately put on notice as to what type of performance this statute is intended to cover. Reasonable minds can surely differ on its meaning, as can clearly be seen in both the Appellant's and the State's briefs. This statute should have adequately and sufficiently described exactly what type of performance is required by the contractor in order to avoid criminal prosecution. No such definition was provided, which leaves us only to guess and speculate. No person should be required to speculate as to what conduct would be criminal or non-criminal, and forcing one to do so is a grave and unacceptable violation of due process of the law. *Lanzetta*, 306 U.S. 451.

In addition to being unconstitutionally vague, the statute is also ambiguous. Anytime an ambiguity arises in a penal statute, any ambiguity must be construed in favor of the defendant. *Skilling v. U.S.*, 130 S.Ct. 2896, 2932 (2010). In *Moskal v. U.S.* 498 U.S. 103, 108 (1990), the U.S. Supreme Court opined:

> "we have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to "the language and structure, legislative history, and motivating policies" of the statute."

The Rule of Lenity is applicable here. The home repair fraud statute is ambiguous as to exactly what type of conduct it is intended to cover. Nowhere in this statute, via either the plan language or legislative history, does it show an intent to subject to criminal

prosecution a contractor who stops work because of a fee dispute. The State contends that any reasonable interpretation of this statute precludes a clause such as the one at issue here (Section 10 of the General Provisions). It is just as reasonable to believe that this statute is only intended to cover those contractors who take in large sums of money, then disappear without having done any work. In cases such as this, where the language and intent of the statute is ambiguous, such ambiguity should be construed in favor of the defendant. Thus, construing this ambiguity in favor of Mr. White, it is clear that this clause of the contract coupled with his decision to stop work until the fee dispute was cleared up is not the type of conduct intended to be punished by Mississippi's home repair fraud statue.

IV. WHETHER OR NOT THE SUBCONTRACTORS WERE PAID IS IRRELEVANT AS THE HOME REPAIR FRUAD STATUTE DEALS ONLY WITH PERFORMANCE IN RELATION TO THE ACTUAL, PHYSICAL REPAIR OF THE HOME

The State of Mississippi, in its brief, contends that the Mr. White's failure to timely pay his subcontractors is evidence of a failure to perform his duties under the contract, thus constituting home repair fraud. This contention is entirely without merit, as this is not the type of "performance" the statute was intended to cover.

Mississippi's home repair fraud statute, Miss. Code Ann. § 97-23-103, provides a definition of "home repair" and what that phrase is intended to cover. The definition provides:

> "'Home repair' means the fixing, replacing, altering, converting, modernizing, improving of or the making of an addition to any real property primarily designed or used as a residence."

Miss. Code Ann. § 97-23-103(1)(a).

The statute further provides, in pertinent part, that

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

Miss. Code Ann. § 97-23-103(2)(a)(i).

As this statute deals only with *home repair* fraud, the performance referred above is the performance of *home repair*. Thus, the only type of performance that matters here is the actual, physical performance of the contractor in building or repairing the home. While the statute itself does not specifically say that such performance is only related to the actual construction/repair of the home, it is quite clear that, when looking at the statute as a whole, it was the intent of the legislature to limit this performance to only the actual physical construction/repair of the home. Additionally, the Rule of Lenity dictates that any ambiguity in a criminal statute which would impose criminal penalties on a defendant must be construed in favor of the defendant. *Guice v. State*, 952 So.2d 129, 148 (Miss. 2007). *See also U.S. v. Enmons*, 410 U.S. 396 (1973); *State v. Burnham*, 546 So.2d 690, 692 (Miss. 1989); *Univ. of Miss. Med. Ctr. v. Easterling*, 928 So.2d 815, 820 (Miss. 2006).

When reading the statute in its entirety, and construing any ambiguity that might exist in favor of Mr. White, it is clear from the statute itself that the legislature intended that the only the failure to perform the actual construction/repair of the home should subject one to criminal prosecution for home repair fraud. As the Mississippi Supreme Court stated in *Mauldin v. Branch*, the job of the court is simply to interpret the statutes as they are written. 866 So.2d 429, 435 (Miss. 2003). In interpreting a given statute, the

role of the court is to determine the intent of the legislature and construe that statute in accordance with the apparent intent. *Id.*

Furthermore, subjecting Mr. White to criminal guilt for home repair fraud on the basis of his failure to pay the subcontractors would be a far reaching precedent. This holding would essentially impose guilt of home repair fraud upon any contractor who failed to perform any portion of a contract, regardless of the terms of that provision. Such a broad interpretation of this statute would clearly expand its reach to absurd and far reaching lengths. Specifically when dealing with the issue of subcontractors, this interpretation of this statute would subject to prosecution for home repair fraud any general contractor who became involved in a dispute with his subcontractors. For example, if a general contractor became dissatisfied with a subcontractor's subpar performance on a job, such dispute with the subcontractor would equal home repair fraud.

Additionally, the State is attempting to persuade this Court that the portion of the contract dealing with the compensation of the subcontractors by Mr. White very relevant and important, while at the same time asserting that Section 10 of the General Provisions, which Mr. White invoked when a fee dispute arose, is immaterial and irrelevant in this matter. In essence, the State is picking and choosing which parts of the contract should and should not matter, and that is something which cannot be done. Section 10, which allowed Mr. White to suspend work due to a fee dispute, is just as valid and enforceable as the section dealing with the compensation of subcontractors.

Because it is quite clear here that the Mississippi Legislature did not intend that the home repair fraud statute to cover all those provisions in the contract not dealing

with the actual construction/repair of the home, this Court should reverse the County Court's ruling and interpret the meaning of "performance" in the way it was clearly intended to be interpreted when written.

V. THE DECISION OF THE TRIAL JUDGE TO DISREGARD THE TESTIMONY OF THE DEFENSE'S EXPERT WITNESS WAS ERROR AS THE TRIAL RECORD CONTAINED NO SUBSTANTIAL EVIDENCE SUPPORTING HIS DECISION

It is true that the judge, when sitting without a jury in a bench trial, has the authority to determine a witness's credibility and to determine the weight and worth of any conflicting testimony presented by the witnesses. *Reed v. State*, 749 So.2d 179 (Miss. App. 1999). However, in order for the trial judge's determination as to weight and credibility to not be disturbed on appeal, there must be **substantial** supporting evidence in the record to back up the judge's determination. *Univ. Med. Ctr. v. Martin*, 994 So.2d 740 (Miss. 2008)(emphasis added). *See Addison Const., Inc. v. Lauderdale County School Sys.*, 789 So.2d 771 (Miss. 2001). The Supreme Court has defined substantial evidence 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) (*citing Hooks v. George County*, 748 So.2d 678, 680 (Miss. 1999)). Additionally, Black's Law Dictionary defines "scintilla" as "a spark or trace." *Black's Law Dictionary* 1373 (Bryan A. Garner ed., 8th ed., West 1999). It matters not what evidence the State provides; only what supporting evidence the *judge himself* provides.

In the case at bar, there is no substantial evidence whatsoever in the record to back up the County Court judge's determination as to the credibility of the defense's

expert witness, Mr. Bert Green. During the hearing on the issue of restitution, the County Court judge proceeded to accept, in its entirety, the projections and figures of the State's expert witness. When questioned by defense counsel as to why the Mr. Green's testimony was no relied on, the judge simply stated "that [Mr. Green's testimony] was apparently rejected by the jury." (T. 467). In the entire 501 page trial transcript, this is the *only* reasoning given by the trial judge in his decision to disregard, in its entirety, Mr. Green's expert testimony. This one sentence explanation is clearly nothing more than a mere scintilla of evidence of the County Court judge's determination. Nowhere does he explain his own reasoning as to why he believes the State's expert witness to be more credible.

Mr. Green, at trial, provided substantial and detailed estimates of Mr. White's work. As can be seen from his curriculum vitae, Mr. Green's education, as well as his vast experience in the area of home construction/repair, shows that he is quite the expert in this area. As such, it was error for the County Court judge to dismiss his testimony, in its entirety, and rely solely on the testimony of State's expert witness. While the judge did have the authority to determine credibility and weight of testimony, he had the legal obligation to support his determination with substantial evidence. This he did not do, which in turn constitutes reversible error.

CONCLUSION

Mr. White did not commit the offense of home repair fraud. The work he performed on Mr. Buchanan's home was consistent with the amount of money he received from Mr. Buchanan. Further, Mr. White was completely within his contractual right to suspend work on Mr. Buchanan's home when a fee dispute arose between the

parties. Such dispute, in this case, is not being raised as an affirmative defense. It is simply being used to show that no home repair fraud was committed. Persons in this state are free to enter into valid, legal and enforceable contracts. Making it a criminal offense to abide by the terms of a mutually consented to contract is indeed a slippery slope and itself operates to hinder the freedom to contract. Additionally, the issue of breach of contract should have been presented to the jury by way of instruction.

The issue of whether or not Mr. White compensated his subcontractors is, in this case, irrelevant as Mississippi's Home Repair Fraud statute clearly deals only with the actual, physical construction of the home and not with performance of every single element of the contract. If that were the case, a contractor could be convicted of home repair fraud simply for failing to perform even the most insignificant portions of the contract.

Finally, the trial court judge erred when he failed to provide substantial supporting evidence of his decision not to rely on any of the testimony of the defense's expert witness. Failure to provide such evidence is reversible error.

For the foregoing reasons, the Appellant respectfully asks that this court reverse the defendant's conviction or, in the alternative, grant a new trial.

CERTIFICATE OF SERVICE

I, Kevin D. Camp, do hereby certify that I have this day delivered a true and correct copy of the above, foregoing document in a manner prescribed by law to:

Honorable Judge William E. Chapman III
Madison County Circuit Court Judge
P.O. Box 1626
Canton, MS 39046

Honorable Judge Edwin Y. Hannan
Madison County Court Judge
P.O. Box 1626
Canton, MS 39046

Honorable Scott A. Johnson
Office of the Attorney General, State of Mississippi
P.O. Box 22947
Jackson, MS 39225

Honorable Linda C. Davis
Office of the Attorney General, State of Mississippi
P.O. Box 22947
Jackson, MS 39225

Lisha S. Edwards
Madison County Court Reporter
P.O. Box 1626
Canton, MS 39046

Benjamin White
Appellant
3112 County Line Road
Crystal Springs, MS 39059

This service effective this the 28th day of March, 2011.

KEVIN D. CAMP, MSB #[redacted]
Attorney for Appellant