

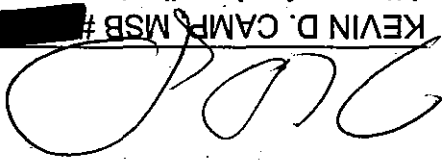
2010-KM-01850-COA T

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. Kevin D. Camp
J. Michael Duncan
Attorneys for the Appellant
The Camp Law Firm, PLLC
1764 Lelia Drive
Jackson, MS 39216
6. Mr. Benjamin White
Appellant
3112 County Line Road
Crystal Springs, MS 39059

Respectfully Submitted,



KEVIN D. CAMP, MSB #

Attorney for Appellant

TABLE OF CONTENTS

INDEX

PAGE

CERTIFICATE OF INTERESTED PERSONS.....	i
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	v
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	2
SUMMARY OF THE ARGUMENT.....	6
ARGUMENT	
I. THE COUNTY COURT ERRED IN FINDING THAT A DISPROPORTIONATE AMOUNT OF WORK WAS DONE TO THE HOME IN QUESTION AS COMPARED TO THE AMOUNT OF MONEY ADVANCED BY THE HOMEOWNERS.....	9
II. THE APPELLANT DID NOT COMMIT HOME REPAIR FRAUD BY STOPPING WORK ON THE HOME IN QUESTION, AS THE CONTRACT SPECIFICALLY PROVIDED THAT IF PAYMENTS ARE NOT MADE THE WORK SHALL CEASE.....	14
III. THE COUNTY COURT JUDGE ERRED IN REFUSING TO GRANT DEFENDANT'S JURY INSTRUCTION D-12.....	16
IV. THE COUNTY COURT ERRED IN ADMITTING EVIDENCE THAT THE APPELLANT HAD FAILED TO PAY SOME OF HIS SUBCONTRACTORS TO BE BROUGHT INTO COURT AND USED TO CONVICT THE APPELLANT OF HOME REPAIR FRAUD.....	19
V. THE COUNTY COURT JUDGE ERRED IN REFUSING TO CONSIDER THE TESTIMONY OF THE DEFENSE'S EXPERT WHEN DETERMINING THE AMOUNT OF RESTITUTION OWED BY THE APPELLANT.....	22

VI.	SUBJECTING THE APPELLANT TO CRIMINAL PROSECUTION WOULD OPERATE TO SUBJECT TO CRIMINAL PROSECUTION AN ENORMOUS NUMBER OF CONTRACTORS WHO OPERATE WITHIN THIS STATE	24
	CONCLUSION.....	26
	CERTIFICATE OF SERVICE.....	28

TABLE OF AUTHORITIES

<u>CASE</u>	<u>PAGE</u>
<i>Addison Const., Inc. v. Lauderdale County School Sys.</i> , 789 So.2d 771 (Miss. 2001).....	23
<i>Am. Bankers' Ins. Co. v. White</i> 158 So. 346 (Miss. 1935).....	14
<i>Chandler v. State</i> 946 So.2d 355 (Miss. 2006).....	17
<i>Craig v. State</i> 660 So.2d 1298 (Miss. 1995).....	18
<i>Dalton v. Cellular South, Inc.</i> 20 So.3d 1227 (Miss. 2009).....	15
<i>G.Q.A. v. Harrison County Dept. of Human Resources</i> , 771 So.2d 331 (Miss. 2000).....	23
<i>Heritage Cablevision v. New Albany Elec. Power Sys.</i> 646 So.2d 1305 (Miss. 1994).....	14
<i>Hooks v. George County</i> , 748 So.2d 678 (Miss. 1999).....	23
<i>Humphrey v. State</i> 759 So.2d (Miss. 2000).....	17,19
<i>In re Estate of Law</i> 869 So.2d 1027 (Miss. 2004).....	13
<i>Levens v. Campbell</i> 733 So.2d 753 (Miss. 1999).....	13
<i>Reed v. State</i> , 749 So.2d 179 (Miss. App. 1999).....	23
<i>State v. Bayer Corp.</i> 32 So.3d 496 (Miss. 2010).....	13
<i>Strickland v. State</i> 980 So.2d 908 (Miss. 2008).....	17

<i>Univ. Med. Ctr. v. Martin</i> , 994 So.2d 740 (Miss. 2008).....	23
---	----

STATUTORY AUTHORITY

PAGE

Miss. Code Ann. § 97-23-103 (Rev. 2004).....	2,3,5,8,9,17,19,20,21,24
--	--------------------------

OTHER AUTHORITY

Mississippi Rules of Evidence 402.....	22
--	----

<i>Black's Law Dictionary</i> 1373 (Bryan A. Garner ed., 8th ed., West 1999).....	23
---	----

STATEMENT OF THE ISSUES

- I. THE COUNTY COURT ERRED IN FINDING THAT A DISPROPORTIONATE AMOUNT OF WORK WAS DONE TO THE HOME IN QUESTION AS COMPARED TO THE AMOUNT OF MONEY ADVANCED BY THE HOMEOWNERS**
- II. THE APPELLANT DID NOT COMMIT HOME REPAIR FRAUD BY STOPPING WORK ON THE HOME IN QUESTION, AS THE CONTRACT SPECIFICALLY PROVIDED THAT IF PAYMENTS ARE NOT MADE THE WORK SHALL CEASE**
- III. THE COUNTY COURT JUDGE ERRONEOUSLY DENIED THE DEFENDANT'S REQUEST FOR JURY INSTRUCTION D-12 TO BE PRESENTED TO THE JURY**
- IV. THE COUNTY COURT ERRED IN ALLOWING EVIDENCE THAT THE APPELLANT HAD FAILED TO PAY SOME OF HIS SUBCONTRACTORS TO BE BROUGHT INTO COURT AND USED TO CONVICT THE APPELLANT OF HOME REPAIR FRAUD**
- V. THE COUNTY COURT JUDGE SHOULD HAVE TAKEN INTO CONSIDERATION TESTIMONY FROM THE DEFENSE'S EXPERT WITNESS WHEN DETERMINING THE APPROPRIATE AMOUNT OF RESTITUTION TO BE PAID BY THE APPELLANT**
- VI. SUBJECTING THE APPELLANT TO CRIMINAL PROSECUTION WOULD OPERATE TO SUBJECT TO CRIMINAL PROSECUTION AN ENORMOUS NUMBER OF CONTRACTORS WHO CONDUCT BUSINESS WITHIN THIS STATE**

STATEMENT OF THE CASE

A. Nature of the Case

The Appellant appeals his conviction in the County Court of Madison County, Mississippi, and the affirmation of his conviction in the Circuit Court of Madison County, of Home Repair Fraud in violation of Miss. Code Ann. § 97-23-103. The Appellant asserts that the County Court erred in finding that the amount of work done by the Appellant was disproportionate to the amount of money advanced by the homeowners. The Appellant did engage in making repairs to the home and the repairs made were consistent with the amount of money advanced at the time. Further, the Appellant had the contractual right to cease work on the home when the homeowner, Mr. Buchanan, stopped sending in the required payments for the repairs. The contract specifically provided that if the homeowner ceases his payments, work will cease on the home, without resulting in breach of contract, until the dispute is resolved.

The Appellant further asserts that the County Court erred in allowing into court evidence that Mr. White had failed to pay some of his sub-contractors. Whether or not the Appellant paid his sub-contractors for their work is in no way relevant to the charge of home repair fraud of which the Appellant was charged with committing. The Court should not have allowed such evidence to be brought into court, and doing so was error.

The county court judge erred when he refused to take into consideration the defense's expert witness testimony regarding the amount of restitution owed by the Appellant. The judge simply stated that, in his mind, the jury had rejected entirely said expert's testimony. Instead, the judge relied solely on the testimony of the prosecution's expert witness to calculate the restitution owed.

Finally, the judge further erred when he refused to grant the Appellant's jury instruction D-12. Because of the clause in the contract which provided that the Appellant had the right to cease work on the project if a payment dispute arose, the fact that he invoked this clause when a payment dispute arose with Mr. Buchanan is not indicative of home repair fraud and the jury was entitled to receive an instruction on this issue.

B. Course of Proceedings and Disposition of the Courts Below

On or about September 9, 2009, Mr. White entered a plea of not guilty in the County Court of Madison County, Mississippi, on February 26, 2009. (R. 11), and the same was tried before the presiding Judge Ewdin Y. Hannan, sitting with a jury on September 9, 2009. Following a trial *de novo*, Mr. White was found guilty of Home Repair Fraud in violation of Miss. Code Ann. § 97-23-103. (R. 71). On November 5, 2010, the Appellant appealed his conviction to the Circuit Court of Madison County, Mississippi. (R. 84). Circuit Court Judge William Chapman ruled on this appeal, affirming the Appellant's conviction in the County Court. (R. 99-100). Comes now the Appellant and appeals his conviction to this court, the Court of Appeals of the State of Mississippi pursuant to Miss. Code Ann. § 99-35-101 et. seq.

C. Statement of the Facts

On or about October 11, 2005, Mr. and Mrs. David Buchanan entered into a contract with Mr. Ben White, owner of BW Construction, to construct an addition onto their existing home located at 105 Timber Green Lane, Canton, Mississippi. (T. 135 & 137).

Under the terms of the contract, Mr. White agreed to renovate the Buchanans' existing two car garage into a living room/den area, add a three car garage onto that,

and build a closet space and half bath between the two areas, with the above spaces being an additional bedroom, storage space and bathroom. (T. 138). The original contract stated that the cost of the work to be done would total approximately \$90,300. (T. 139). However, this contract was later amended to provide that the Buchanans would pay for the installation of granite counter-tops and pay the Madison County building and zoning permits. (T. 139). After subtracting these costs, the total amount due by Mr. Buchanan under the contract was \$86,247.45. (T. 163).

The General Provisions of the contract stated that "If payment is not made when due, contractor may suspend work on the job until such time as all payments due have been made. A failure to make payments for a period in excess of two days from the due date of the payment shall be deemed a material breach of this contract." (T. 252). Section 10 of the General Provisions states that "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." (T. 252). On or about December 16, 2006, Mr. Buchanan engaged Mr. White in a phone conversation regarding the payment installation which was due to Mr. White. (T. 250). Mr. Buchanan informed Mr. White that he would not be advancing any more funds because he could not see progress on the job site consistent with the amount of money he had already paid. (Tr. 250-251). At this point, Mr. Buchanan had advanced to Mr. White a total of \$53,050. (T. 176).

At trial, Mr. Buchanan testified that certain portions of the contract were fulfilled by Mr. White. In regards to section A of the contract, Mr. Buchanan testified that provisions # 1 – 3 were completed, but that provisions # 4 – 14 were not completed. (T.

140). Mr. Buchanan also testified that, in regards to section B of the contract, portions # 4 – 28 were not completed. (T. 157-158). Mr. Buchanan finally testified that in regards to sections C and D, none of the provisions in either section was completed. (T.158).

Mr. Bert Green, an expert in residential building and remodeling, testified that the work performed by Mr. White was clearly proportional to the amount of money paid by the Buchanans thus far. Mr. Green testified that the cost of \$4,900 to develop the plans was reasonable (T. 317), that the cost of \$455 for soil engineering was a realistic amount (T. 319), that the cost of \$6,540 for the removal of the driveway was a fair amount (T. 320), that the cost of \$400 for tearing off the brick facing and the existing garage door was reasonable (T. 320), that the cost of \$3,250 to break up, haul off and bury 1,300 square feet of driveway was a reasonable number (T. 321), that the \$500 for electrical work would be the minimum amount an electrician would likely charge (T. 324), that the cost of the plumbing rough-in was within reason (T. 324), that the cost of the septic tank was reasonable (T. 326) and that the cost of \$3,490 for concrete and form materials was a solid number (T. 328). He went on to testify that the costs estimated by Mr. White for each project were indeed reasonable. (T. 328-345). Mr. Green ended his testimony by stating that, had his clients ceased paying him for a job, as the Buchanans did to Mr. White, he too would have ceased work on the project until further payments were made. (T. 345).

At trial, over the defendant's objections, the prosecution elicited from Mr. Buchanan, the homeowner who hired Mr. White, testimony that Mr. White had refused to pay his sub-contractors for their work. (T. 142). This objection was based on the fact that under Mississippi's home repair fraud statute, Miss. Code Ann. § 97-23-103, it is

irrelevant whether or not Mr. White paid his sub-contractors because failure to pay them would not subject him to prosecution for home repair fraud. The presiding judge erroneously overruled the objection. (T. 155-156).

Following the jury's verdict of guilt, the judge heard arguments from both counsel on their proposed jury instructions. When the defense proposed defendant's jury instruction D-12, the prosecution objected to the admission of this instruction. (T. 403). Defense counsel argued that, because the breach of contract by the Buchahans would be an absolute defense for Mr. White, such instruction should be given to the jury. (T. 403). The trial judge erroneously refused to submit this instruction to the jury, saying that because some of Mr. White's subcontractors were not paid, this instruction should not be submitted to the jury as a defense. (T. 411).

Upon the jury's finding Mr. White guilty of home repair fraud, the judge began the sentencing phase which included a judgment of restitution to be paid by Mr. White. The judge ordered Mr. White to pay a total of \$29,965.18 to Mr. Buchanan and \$7,574.15 to the unpaid subcontractors. (T. 475). In his calculations of the restitution to be paid, the trial judge stated that the estimations provided by the defense's expert witness, Mr. Bert Green, on the value of Mr. White's work was "apparently rejected by the jury." (T. 467). The judge went on to use the estimations of the prosecution's expert witness, Mr. Randy Robertson, when calculating the value of Mr. White's work and the amount of restoration due. (T. 473).

SUMMARY OF THE ARGUMENT

First, the Appellant asserts that the work he completed on the Buchanans' home was proportionate to the amount of money advanced thus far by the Buchanans. Mr.

White provided the trial court with his labor and materials cost from the work completed on the Buchanans' home and these costs were in line with the amount of money the Buchanans had paid. At the time Mr. White stopped work on the contract, Mr. Buchanan had paid a total of \$53,050. According to Mr. Bert Green, an expert in the field of residential home repair, Mr. White had expended approximately \$49,286.47 on labor and material costs. The extra \$3,763 advanced by Mr. Buchanan was simply leftover upfront working capital in order for Mr. White to finance the construction. Mr. White made no misrepresentations as to the terms or the total cost of the work to be done. The cost of the work done was proportional to the amount of money paid, and the work was being completed just as the contract provided that it would be. Further, Mr. White made no false promises of performance. He promised to build an addition onto Mr. Buchanan's home, and that is what he was in the process of doing when Mr. Buchanan stopped payment. Thus, because there were no false promises or misrepresentations, no home repair fraud was committed by Mr. White.

Further, the Appellant asserts that he did not commit home repair fraud when he stopped work on the contract. Section 10 of the General Provisions of the contract between Mr. White and Mr. Buchanan specifically provides that if a payment dispute arises between the two parties, work on the project would stop until such dispute is resolved. This clause in the contract should be enforced because it was not ambiguous nor was it against any public policy of the State of Mississippi. The clause clearly provides that work will stop if a payment dispute arises. Further, there is no constitutional, statutory or Supreme Court authority in this state which would suggest that such clauses are invalid. Mr. Buchanan did cease his payments to Mr. White,

saying that he would not pay any more money until he saw more work. This was clearly a payment dispute between the two parties which led Mr. White to activate this clause and cease his work on the home. Thus, because this was a valid and enforceable clause under the contract, Mr. White should not be found guilty of home repair fraud simply for enforcing that clause and stopping work on the Buchanans' home.

Because the aforementioned clause was included in the contract between Mr. White and Mr. Buchanan, the fact that Mr. White chose to invoke this clause and stop work when the payment dispute arose between the two parties was by no means a breach of contract nor was it any evidence of home repair fraud. Therefore, the jury was entitled to receive an instruction on this issue and the failure of the judge to allow such instruction was error.

The county court judge further erred when he admitted evidence that Mr. White had failed to compensate some of his subcontractors for their work on Mr. Buchanan's home. Whether or not Mr. White paid these subcontractors is irrelevant to the charge of home repair fraud. Miss. Code Ann. § 97-23-103 defines what the term "home repair" means and what it entails. Nowhere in this definition does it include paying one's subcontractors as an element of home repair. The statute does provide that fraudulent making promises of performance to repair a home can constitute home repair fraud. However, such promises of performance relate only to the promises for the actual physical repair of the home. Because paying the subcontractors was simply a general provision of the contract and did not effect Mr. Buchanan in any way, this evidence was inadmissible and should not have been allowed to be presented to the jury.

During the sentencing phase when the county court judge was attempting to determine the proper amount of restitution to be paid by Mr. White, the judge refused to consider the estimates provided by the defense's expert witness. Instead, the judge solely relied on the testimony of the prosecution's expert witness relating to the value of the work that was done on the home. This expert witness provided a much lower estimate than did the defense's expert witness regarding the value of the work. Thus, in relying solely on the prosecution's expert witness' estimates, the judge ordered a much higher restitution judgment than he would have if he had taken into consideration the defense's expert witness' estimates.

Allowing Mr. White's conviction to stand would set a dangerous precedent in this state. This precedent would subject to criminal penalties any contractor who charged more on the front end of a contract to build up working capital. Also, any contractor who ceases work on a contract when the other party stops payments would also be subject to criminal prosecution. This statute was intended to punish only those people who made fraudulent misrepresentations or false promises of performance in regards to the repair of a home. Contractors such as Mr. White who provide accurate representations and actually do work on a project as promised should not be subjected to criminal prosecution under this statute.

ARGUMENT

I. THE COUNTY COURT ERRED IN FINDING THAT A DISPROPORTIONATE AMOUNT OF WORK WAS DONE TO THE HOME IN QUESTION AS COMPARED TO THE AMOUNT OF MONEY ADVANCED BY THE HOMEOWNERS

Miss. Code Ann. § 97-23-103 provides that 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 knowingly misrepresents a material fact relating to the terms of the contract or agreement or the preexisting or existing condition of any portion of the property involved, or creates or confirms another's impression which is false and which he does not believe to be true, or promises performance which he does not intend to perform or knows will not be performed; uses or employs any deception, false pretense or false promises in order to induce, encourage or solicit such person to enter into any contract or agreement; misrepresents or conceals either his real name, the name of his business or his business address; or uses deception, coercion or force to obtain the victim's consent to modification of the terms of the original contract or agreement; (b) damages the property of a person with the intent to enter into an agreement or contract for home repair; or (c) misrepresents himself or another to be an employee or agent of any unit of the federal, state or municipal government or any other governmental unit, or an employee or agent of any public utility, with the intent to cause a person to enter into, with himself or another, any contract or agreement for home repair."

Mr. White did not commit home repair fraud. He neither misrepresented any material facts relating to the terms of the contract nor did he make any promises of performance which he did not intend to perform. A representation and promise was made in the contract for an addition onto the Buchanans' home, and that promise is exactly what Mr. White was in the process of fulfilling.

A total of \$53,050 was paid to Mr. White by Mr. Buchanan. (T.176). According to Mr. White's own voluntary statement introduced at trial, exhibit S-1, the following amounts totaling \$41,700 were paid out by Mr. White for materials and work: \$6,500 for labor of the dirt work, \$7,000 for the new septic unit, \$3,000 for the demolition work, \$4,000 for the plumbing/electrical/pesticide, \$8,000 for the foundation forming and finishing, \$5,000 for the materials for the concrete foundation, concrete, rebar, visqueen and limestone bed, \$400 for the dumpster fee, \$7,000 for the cost of project managers to oversee the renovation and \$800 for permit fees and soil samples.

Mr. White did actually perform work on the home and was in the process of carrying out the work as promised when Mr. Buchanan chose to stop payment on the contract. At the time payment was stopped, Mr. White had completed the following work: (1) removal of existing concrete driveway, (2) burial of existing concrete from driveway to other spot on the property, (3) grading of extension of new driveway, (4) removal of all interior walls (including storage room) from existing garage, (5) removal of bricking from exterior walls from entrance of old garage, (6) rough in of plumbing addition and (7) concrete foundation for new addition and new garage. (R. 7). While this work may not seem, to the average person, proportional to the amount of money paid by Mr. Buchanan, an expert in the field of residential building and remodeling, Bert Green, testified at trial that the work done and the charges for it were proportional to the amount paid.

Mr. Green provided his own estimation of the value of the work completed on the Buchanans' home. According to Mr. Green's estimations, the total cost of the work done on the project was approximately \$49,286.47 at the time the work stopped. This amount not only includes the actual cost of the building materials and labor, but also unscheduled expenses of 5% and a profit and overhead margin of 25%.

Having testified before both the United States House of Representatives and the United States Senate on the matter of profit and overhead margins, Mr. Green explained to the county court why a 25% profit margin and overhead are reasonable figures. (T. 334). Mr. Green explained that every contractor is due a profit margin, as no contractor would work on a job without receiving some sort of profit. (T. 334). Additionally, the contractor also has overhead costs associated with every job, including

insurance, clerical work, telephone, end of year accounting, etc. (T. 334). According to Mr. Green, the National Association of Home Builders has stated that a contractor in the business of remodeling must gross a 35-50% profit in order to stay in business. (T. 335). According to Mr. Green's estimates, the 25% overhead and profit margins were more than reasonable and equaled approximately \$22,000 of the total contract cost. (T. 336).

As Mr. Green testified at trial, contractors require an upfront working capital to begin a job. (T. 336). In other words, it is the responsibility of the owner, not the contractor, to finance a construction project. (T. 336). Mr. Green emphasized the importance of a contractor maintaining a working capital at all times in order to keep the project going. (T. 336). He explained why there was a \$3,763 disparity between his estimate and the money paid by Mr. Buchanan. He testified that the \$3,763 was simply leftover working capital at the time Mr. Buchanan stopped payment on the contract. (T. 336). Thus, the amount of money charged by Mr. White was clearly proportional to the amount of work completed under the contract. Further, because contractors require working capital to be paid upfront, it is natural for the owners to pay more on the front end of the contract than they would on the latter end. Thus, the \$53,050 paid by Mr. Buchanan was not disproportional to the work done and the upfront working capital required to perform it.

In Mississippi, the elements necessary to prove fraud are (1) a representation; (2) it's falsity; (3) it's materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that the representation should be acted upon by the hearer and in the manner reasonably contemplated; (6) the hearer's ignorance of its

falsity; (7) the hearer's reliance on the representation's truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *State v.*

Corp., 32 So.3d 496, 501 (Miss. 2010). These elements must be proven by clear and convincing evidence. *In re Estate of Law*, 869 So.2d 1027 (Miss. 2004)(citing *Levens v. Campbell*, 733 So.2d 753 (Miss. 1999)).

Mr. White made a representation: a representation to complete an addition onto the Buchanans' home for a total cost of \$86,247.45. However, there was no falsity in this representation. As home repair expert Bert Green testified, the amount of money charged by Mr. White for this project was completely reasonable and comparable with the work completed by Mr. White so far. Though the amount paid by Mr. Buchanan was approximately \$3,763 more than Mr. White had thus far spent on labor and materials, this difference can be explained by Mr. Green who testified that every contractor needs upfront working capital to finance a project. This extra money was simply that: upfront working capital.

In short, Mr. White was in the process of completing the work which he had contracted to do. He presented an accurate and truthful representation to the Buchanans regarding the cost and circumstances of the contract. He promised to perform work under the contract and that is exactly what he was in the process of doing when Mr. Buchanan stopped payments. Mr. White made a truthful and honest representation to the Buchanans. There was no falsity whatsoever in his representation to them. Absent any such falsity, Mr. White cannot be found guilty of any type of fraud as defined by the Mississippi Supreme Court. Because he made an accurate and truthful representation and was in the process of performing the work as he had

promised, Mr. White should not have been found guilty by the trial court of home repair fraud.

II. THE APPELLANT DID NOT COMMIT HOME REPAIR FRAUD BY STOPPING WORK ON THE HOME IN QUESTION, AS THE CONTRACT SPECIFICALLY PROVIDED THAT IF PAYMENTS ARE NOT MADE THE WORK SHALL CEASE

Mr. White did not commit home repair fraud when he stopped work on the Buchanans' home as a result of non-payment on the contract by Mr. Buchanan. Section Ten (10) of the General Provisions of the contract plainly states:

"(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."

This clause is a valid portion of the contract and Mr. White was justified in his decision to invoke this clause when Mr. Buchanan refused to submit further payments on the contract. The Mississippi Supreme Court has held that "where [a] clause in [a] contract does not violate any statute or public policy, and is unambiguous and certain in its provisions, it is enforced as written." *Am. Bankers' Ins. Co. v. White*, 158 So. 346 (Miss. 1935).

In determining whether a contract violates public policy, the Supreme Court has held that only in situations where the contract is "prohibited by the Constitution, a statute, or condemned by some decision of the Supreme Court" should it be deemed unenforceable on the grounds of public policy. *Heritage Cablevision v. New Albany Elec. Power Sys.*, 646 So.2d 1305, 1313 (Miss. 1994). The clause in this contract at issue does not violate public policy. There is no statute in this state which prevents a contractor from including a clause in a contract providing for the cessation of work

during a payment dispute with the other party. Further, there is no decision of the Supreme Court which has held such a clause to be invalid, nor is there any provision in the Constitution which would suggest that such clauses are invalid. Thus, absent any statutory, Constitutional or Supreme Court authority prohibiting such clauses, the clause in this contract is not against public policy.

Further, the clause in this contract is not ambiguous. An ambiguity has been defined as "a susceptibility to two reasonable interpretations." *Dalton v. Cellular South, Inc.*, 20 So.3d 1227, 1232 (Miss. 2009). The clause in this contract clearly and unambiguously states that if the owner fails to make a timely payment, the contractor may cease work under the contract until the dispute is resolved. Furthermore the terms of the clause at issue are certain. If the issue of non-payment arises, then the contractor has the authority cease working on the job until the dispute is resolved.

On December 16, 2005, Mr. White contacted Mr. Buchanan and requested his weekly draw. (R. 8). Up until this point, Mr. Buchanan had been consistent in his weekly, scheduled payments to Mr. White. During this telephone conversation, Mr. Buchanan informed Mr. White that he would not be sending his weekly draw because he was presently out of town and because he had no plans to advance any more funds until he saw more work being completed on his home. (R. 8). Thus, in accordance with Section 10 of the General Provisions in the contract, Mr. White ceased work on the project. Mr. White, in stopping work on the home, was simply following the terms in the contract which both parties had agreed to, in writing, in advance.

Additionally, the fact that Mr. Buchanan is an attorney should be taken into consideration when examining this clause. Because he is an attorney, Mr. Buchanan

should have understood the meaning of this clause and should have known of its consequences should a payment dispute have arisen. Mr. Buchanan is not simply an average attorney. Rather, he is a corporate attorney and account executive for McKesson Corporation. (T. 251). As he testified at trial, Mr. Buchanan deals with contracts on a regular basis and understands how they operate. (T. 251). Thus, because of Mr. Buchanan's legal qualifications and his position as a corporate attorney, he should have understood better than anyone that, due to the existence of this clause, work on his home would likely stop when he ceased paying Mr. White.

Because this clause is not against any public policy of the State of Mississippi or the United States and because nothing in this clause leads to any ambiguity regarding its meaning or its consequences, this clause is a valid and enforceable part of the contract and should be enforced as written. Thus, because this clause is valid and enforceable, Mr. White was by no means guilty of committing home repair fraud as a result of his suspension of work on the Buchanan's home due to their refusal to pay Mr. White the payment due at the time.

III. THE COUNTY COURT JUDGE ERRED IN REFUSING TO GRANT DEFENDANT'S JURY INSTRUCTION D-12

The Appellant submits that his jury instruction D-12 should have been given and the refusal to do so by the lower court denied the jury proper legal instruction.

Defendant's instruction D-12 reads as follows:

"The Court instructs the jury that if the jury believes that David and Joanne Buchanan materially breached the contract entered into for home repair fraud 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."

(R. 55)

The Mississippi Supreme Court has set a standard of review for granting or denying jury instructions, stating:

"[j]ury instructions are to be read together and taken as a whole with no one instruction taken out of context. A defendant is entitled to have jury instructions given which present his theory of the case; however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundations in the evidence."

Strickland v. State, 980 So.2d 908 (Miss. 2008)(citing *Chandler v. State*, 946 So.2d 355, 360 (Miss. 2006). The Court has gone on to provide that "[e]ven though based on meager evidence and highly unlikely, a defendant is entitled to have every legal defense he asserts to be submitted as a factual issue for determination by the jury upon proper instruction of the court. Where a defendant's proffered instruction has an evidentiary basis, properly states the law, and is the only instruction presenting his theory of the case, refusal to grant it constitutes reversible error." *Roberson v. State*, 838 So.2d 298 (Miss. App. 2002)(citing *Humphrey v. State*, 759 So.2d 368 (Miss. 2000)).

In the case at bar, the county court judge denied defendant's jury instruction D-12, an instruction which contained an absolute defense for Mr. White. The judge, in his denial, stated that because testimony was presented that some of Mr. White's subcontractors had not been paid, the issue of Mr. White's performance under the contract was in question and as such an instruction on whether or not the Buchanans breached the contract was improper. (T. 403 & 406).

Defendant's jury instruction D-12 should have been given, as it did not incorrectly state any law, nor was it reproductive of any other instruction offered by the defense.

One of the elements the State attempted to prove in order to convict Mr. White of home repair fraud dealt with false promises of performance. Miss. Code Ann. § 97-23-103 provides that if one promises performance which he does not intend to perform, he can be found guilty of home repair fraud. The State was attempting to prove that because Mr. White stopped work on the Buchanans' home, such action constituted home repair fraud. Defendant's jury instruction D-12 correctly represents and reflects Mississippi's home repair fraud statute. The statute only seeks to punish those who use misrepresentations or false promises of performance in securing a contract for home repair. When Mr. White stopped working on the Buchanans' home, it was not the result of a misrepresentation or false promise of performance, but rather a result of a breach of contract by the Buchanans. If the jury were to find that Mr. White only stopped work after Mr. Buchanan breached the contract, then they should not find Mr. White guilty of home repair fraud due to this breach. Further, this instruction was not replicated in any of the other jury instructions admitted by the judge. Nowhere in these other instructions did it present to the jury the option to consider the breach by Mr. Buchanan as evidence that Mr. White did not commit home repair fraud.

As the Supreme Court stated in *Craig v. State*, supra, the defense is allowed to present their theory of the case to the jury so long as there is some evidentiary basis for such theory. 660 So.2d 1298 (Miss. 1995). This breach of contract defense was indeed rooted in a solid evidentiary basis. Mr. Buchanan testified that he signed the contract, and that he did indeed stop payment to Mr. White on the contract. (T. 252 & 250). Thus, because the contract contained a provision providing for the cessation of work by Mr. White if a payment dispute arose, and because Mr. Buchanan's refusal to pay Mr.

White clearly constituted a payment dispute, sufficient evidence existed to support Mr. White's theory that the breach by Mr. Buchanan should not have subjected him to a conviction for home repair fraud.

This jury instruction should have been presented to the jury. The instruction was regarding a legal defense and, according to the Supreme Court in *Humphrey v. State*, supra, the defendant has the right to have every legal defense he asserts, so long as it have some evidentiary basis, to be submitted to the jury by way of jury instruction. 759 So.2d 368. It correctly stated the law under Miss. Code Ann. § 97-23-103, and no other such instruction was presented to the jury which dealt with the breach by Mr. Buchanan. Further, a sufficient evidentiary basis did exist for this defense, and in line with Supreme Court precedent, Mr. White was entitled to present this absolute defense to the jury for factual determination.

Because Mr. Buchanan's breach of this contract presented an absolute defense of Mr. White, the jury was entitled to hear this instruction before deciding on the issue of Mr. White's guilt. As this was the only jury instruction which related to this absolute defense of breach of contract by the Buchanans, the failure of the trial judge to admit this instruction to the jury was indeed reversible error.

IV. THE COUNTY COURT ERRED IN ADMITTING EVIDENCE THAT THE APPELLANT HAD FAILED TO PAY SOME OF HIS SUBCONTRACTORS TO BE BROUGHT INTO COURT AND USED TO CONVICT THE APPELLANT OF HOME REPAIR FRAUD

At trial, the State, over the defendant's objections, elicited testimony from Mr.

Buchanan regarding Mr. White's failure to pay some of his subcontractors for their work on Mr. Buchanan's home. Whether or not Mr. White paid these subcontractors is irrelevant as it cannot be used to prove that home repair fraud was committed.

Miss. Code Ann. § 97-23-103 defines home repair as "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." The statute goes further to provide that home repair includes "the construction, installation, replacement or improvement of driveways, swimming pools, porches, kitchens, chimneys, chimney liners, garages, fences, fallout shelters, central air conditioning, central heating, boilers, furnaces, hot water heaters, electrical wiring, sewers, plumbing fixtures, storm doors, storm windows, awnings, carpets and other improvements to structures within the residence or upon the land adjacent thereto." Miss. Code Ann. § 97-23-103.

Nowhere in the definition of home repair does it include paying one's subcontractors as a part of or element of home repair. Rather, the payment of the subcontractors by the contractor is not, by definition, home repair nor can his failure to pay the subcontractors subject him to criminal prosecution for home repair fraud. At trial, the State argued that, because the contract between Mr. White and Mr. Buchanan stated that Mr. White was responsible for paying the subcontractors for their work, Mr. White's failure to pay the subcontractors was a fraudulent failure to perform a portion of the contract. Miss. Code Ann. § 97-23-103 does provide that a person can be found guilty of home repair fraud when he "promises performance which he does not intend to perform or knows will not be performed." However, this promise of performance relates **only** to promises for the repair of the home and not to general provisions of the

contract. Paying the subcontractors was not a part of the physical repair of the home. It only dealt with the monetary compensation of certain parties in the contract. If the courts were adopt the State's argument, every contractor who failed to perform any provision of a contract, whether or not that provision was for the actual physical repair of the home, would be subjected to criminal prosecution.

Further, Miss. Code Ann. § 97-23-103 deals only with a contract between the contractor and the homeowner. The statute clearly begins by saying that home repair fraud only occurs when one "enters into an agreement or contract, written or oral, **with a person for home repair.**" (emphasis added). This phrase, "with a person for home repair" indicates that the only contract which falls under this statute is the contract between the contractor and the home owner who seeks to have work completed on his home. Thus, the only type of person a contractor would enter into a contract for home repair with would be the homeowner himself. The subcontractors would only be hired for the limited purpose of completing work on that original contract between the contractor and the homeowner. Additionally, this statute deals with any knowing misrepresentations, false promises, deceptions, coercion or force displayed by the contractor in order to induce the contracting home owner to agree to a contract. Again, these actions relate only to the contract between the contractor and the home owner. The contractor is not using any misrepresentations, false promises, deception, coercion or force toward the subcontractors in order to induce the homeowner into a fraudulent contract. Rather, it is only misrepresentations, false promises, deception, coercion or force toward the *homeowner* that is of relevance under this statute.

Whether or not these subcontractors were paid by Mr. White had no relation to the charges against him of home repair fraud, as this evidence had no bearing on his guilt or innocence of the same. Any evidence of Mr. White's failure to pay the subcontractors was thus irrelevant and subsequently inadmissible under M.R.E. 402. Further, such evidence, being irrelevant, was more prejudicial than probative. It had no legal value in relation to the charge of home repair fraud and did nothing more than give the jury a negative view of Mr. White. Thus, because of its irrelevancy to the charge at hand and its prejudicial effect upon the jury, this inadmissible evidence should not have been allowed in by the trial judge.

V. THE COUNTY COURT JUDGE ERRED IN REFUSING TO CONSIDER THE TESTIMONY OF THE DEFENSE'S EXPERT WHEN DETERMINING THE AMOUNT OF RESTITUTION OWED BY THE APPELLANT

The county court judge's determination of the amount of restitution owed by Mr. White was fundamentally flawed in that the judge refused to take into consideration the estimates presented by the defense's expert witness.

During the sentencing phase, the judge relied solely on the estimates provided to him by the prosecution's expert witness, Mr. Randy Robertson. (T. 468-474). When defense counsel made the argument that the estimates of their expert, Mr. Bert Green, should be taken into consideration, the judge responded by stating his belief that Mr. Green's estimate was "apparently rejected by the jury." (T. 467). While adding up the total restitution to be paid by Mr. White, the judge used Mr. Robertson's estimates to calculate the following:

Plumbing rough-in at \$2,000 (T. 291 & 473)

Form Materials at \$1,600 (T. 291 & 473)

Labor to remove brick, sheetrock and stud walls at \$950 (T. 291 & 473)

Demolition at \$3,250 (T. 291 & 473)
Plans at \$1,500 (293 & 473)

Thus, in his entire judgment on the amount of Mr. White's owed restitution, the trial judge at no time took into consideration the estimates and testimony of the defense's expert, Mr. Green.

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).

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 not 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, having quite an accomplished resume and experience in the area of residential home construction, as can be seen on his curriculum vitae entered into trial as defense exhibit D-12, provided a detailed and precise estimate on the value of the work completed by Mr. White. The judge should have considered this expert opinion in his determination of the restitution owed by Mr. White. His failure to do so prejudiced Mr. White severely in that he now must pay a greater amount of restitution than he would if Mr. Green's estimates had been taken into account.

**VI. SUBJECTING THE APPELLANT TO CRIMINAL PROSECUTION
WOULD OPERATE TO SUBJECT TO CRIMINAL PROSECUTION
ENORMOUS NUMBERS OF CONTRACTORS OPERATING IN THIS STATE**

Allowing Mr. White's conviction to stand would not only be contrary to the law, but it would also set a dangerous precedent in that many other contractors in this state who enter into contracts for the repair of a home could be subjected to criminal prosecution for home repair fraud.

Mr. White began work on the Buchanans' home and was in the process of completing that work when Mr. Buchanan abruptly stopped sending in the required

weekly payments for the work. In accordance with the provisions of the contract, Mr. White stopped work on the project until the payment dispute could be resolved.

Following the trial court's decision finding Mr. White guilty of home repair fraud would set a dangerous precedent for the many other contractors who conduct business within the State of Mississippi. A contractor who began work on a project could be held criminally liable for home repair fraud simply because he charged more on the front end of the contract in order to generate upfront working capital. As Mr. Green testified, it is common practice among contractors to obtain this upfront working capital in order to purchase the equipment, materials and pay the workers. (T. 336). It is inconceivable to believe that such a common, generally accepted way of doing business could subject one to criminal prosecution and penalties.

Further, following this precedent, any contractor who stopped work on a project when the other contracting party breached their obligation to pay for the services would be subject to criminal prosecution for home repair fraud. The contract signed by both Mr. White and Mr. Buchanan contained a clause which specifically provided that work on the project would stop if a payment dispute arose. Common sense would dictate that if one party stopped payment on the contract, the other party should not be expected to continue their performance absent such compensation.

Additionally, this judgment would subject any contractor who may have failed to pay a subcontractor to criminal prosecution for home repair fraud. Miss. Code Ann. § 97-23-103 deals only with the contract between the contractor and the homeowner and any attempts by the contractor to fraudulently induce the homeowner into signing a contract. This statute was never intended to cover any disputes relating to

subcontractors. Thus, imposing a conviction of home repair fraud on any contractor who may have failed to pay a subcontractor is far beyond the scope and intent of this statute.

Subjecting a contractor to criminal prosecution for including and enforcing such a clause in a contract, for charging more on the front end of the contract or for failing to pay some of his subcontractors would indeed fall outside the bounds of what Miss. Code Ann. § 97-23-103 was designed to prevent. This Court should adopt a more narrow interpretation of this statute and enforce it the manner it was intended to be enforced: to prevent someone from making fraudulent representations for home repair and false promises of performance which they do not intend to fulfill. A contractor such as Mr. White, who actually performs work upon a home and only ceases the work when the other party stops payment on the contract, is not the type of person this statute seeks to punish.

CONCLUSION

Mr. White did not commit home repair fraud. The work he completed was clearly proportional to the amount of money he had been paid. He made no misrepresentations relating to the terms or cost of the contract and was in the process of performance on the contract, as promised, at the time Mr. Buchanan stopped payment.

Mr. White was justified to stop work on the contract when Mr. Buchanan refused to submit any more payments for the work. The clause in the contract which provided that work would stop when payment disputes arose was a valid and enforceable clause. Because it was valid and enforceable, the fact that Mr. White enforced the clause and stopped work when the payment dispute arose between the parties by no means constituted home repair fraud. Because this breach of contract by Mr. Buchanan

represented an absolute defense for Mr. White, the judge was required to give the jury an instruction on this defense. His failure to do so was reversible error.

Further, the trial court erred when it allowed evidence to be presented to the jury that Mr. White had failed to pay some of his subcontractors. Whether or not Mr. White paid these subcontractors is irrelevant as it cannot be used to prove any element of home repair fraud. Because this evidence was irrelevant, it was error for the trial judge to allow it to come in.

Additionally, the judge should have used the estimations of the defense's expert witness, Mr. Bert Green, when calculating the amount of restoration due. The judge erroneously believed that the jury entirely rejected Mr. Green's estimates. His reliance solely on the prosecution's expert witnesses' estimations resulted in an inflated and unreasonable amount of restitution to be paid by Mr. White.

Finally, because of the dangerous and overreaching precedent that would be set if Mr. White's conviction were to be affirmed, this Court should apply this statute in the way it was intended to be applied: to prevent a person from making fraudulent and false representations and/or false promises of performance. Mr. White did neither. He provided an accurate and truthful representation to Mr. Buchanan and performed on that representation just as he promised. If his conviction were to be affirmed, many other contractors doing business in the State of Mississippi could be subjected to criminal prosecution simply for doing business according to industry standards.

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

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

This service effective this the 12th day of January, 2011.



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