

IN THE SUPREME COURT OF MISSISSIPPI

SHAPPLEY HARRIS, ET AL.

APPELLANT

V.

CASE NO. 2006-CA-01106

HINDS COUNTY, MISSISSIPPI

APPELLEE

APPEAL FROM THE HINDS COUNTY CIRCUIT COURT
FIRST JUDICIAL DISTRICT

REPLY BRIEF OF APPELLANT
Oral Argument Requested

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HARRIS'S STATEMENT OF FACTS

Hinds County spends five pages of it's brief arguing about Harris's statement of facts. For example Hinds County objected to the sentence, "All insurance contracts for Hinds County under Harris's direction were procured through a licensed Mississippi insurance agent. (Vol. III Tr. 85)" (Appellee's Brief p. 6) If you read in the transcript the witness for Hinds County is asked a question concerning the insurance coverage Hinds County had with Legions, an insurance company. (Vol. III Tr. 85)

The witness established that the period in question was during Harris's consultant period by stating, "The advice came through Mr. Harris." Followed by the question "Right, but y'all had had insurance, actual insurance coverage through Legions?" The witness replied, "Yes." (Vol. III Tr. 85) Therefore the witness showed that insurance contracts were acquired during this period with direction from Harris by another insurance company and that company's agents.

Yet Hinds County's brief states, "There is nothing in the Record to support this assertion." (Appellee Brief p. 6) The witness clearly supported the quoted sentence.

ARGUMENT

- 1) Shappley Harris had no contract with Hinds County for the Payment of any "Commission."

Appellee's brief argues that "Harris had no contract with Hinds County" to compensate Harris for acquiring worker's compensation coverage. (Appellee's Brief at 12) However the Appellee contradicted this point earlier by arguing that the consultant contract should cover his duties for providing coverage. (*Id.* at 11) Appellee on one hand wants to argue that the consultant contract compensated Harris for his work acquiring workers compensation coverage but on the other hand argues that no contract existed for compensating Harris.

This confusion further proves that the consultant contract did not anticipate Harris acquiring Workers' Compensation Coverage for Hinds County. As it fell outside of the Consultant Contract the consultant contract did not compensate Harris for his work acquiring the Workers' Compensation Coverage. Harris rightfully deserved to be compensated for his work for the benefit of Hinds County. As in *Magnolia Federal Savings & Loan Assn. v. Craft Realty Company Inc*, 342 So.2d 1308 (Miss. 1977) involving a real estate agent the Court should find that Harris earned his commissions for services performed.

- 2) Whether there was sufficient evidence to support the jury's finding of fraud.

Hinds County contends, "there was obviously sufficient evidence of fraud to sustain this verdict. (Appellee's Brief P. 13) "In order to prove fraud in Mississippi: . . . The plaintiff must prove (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) its intent that it should be acted on by the hearer and in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) its reliance on its truth, (8) his right to rely thereon, and (9) his consequent and proximate injury. *Cherry v. Anthony, Gibbs, Sage*, 501 So. 2d 416, 419-20 (Miss. 1987). These are essentially the same elements required to prove a fraudulent misrepresentation.

However the Jury was not properly instructed on fraudulent misrepresentation as noted in section 4 of the Appellant's Brief and Appellant's Reply Brief. Since the Instruction was faulty the Jury could not effectively determine if Harris was guilty of fraud.

- 3) Hinds County's payments of Harris's Fraudulent invoices did constitute a Waiver.

Appellee argues that ignorance by the Board of Harris commission negates any waiver citing *Dixie Ins. Co. v. Mooneyham*, 684 So. 2d 574, 582 (Miss. 1996). *Dixie Ins.* involved a party at trial failing to object to an altered Exhibit going to the jury. This case is wholly different from the case at hand since the party at trial is under no duty statutorily to investigate the purported copy submitted to the jury.

The Board of Supervisors had the opportunity to review the claims. (Vol. III Tr. 76). Furthermore Miss. Code Ann. 19-13-31 specifically directs the Board to inspect whether the claims are legal or illegal. The statute places the duty on the Board of Supervisors to investigate each and every claim before they pay out on the specific claim.

The Board of Supervisors then had the opportunity to review the claims. (Vol. III Tr. 76). A member of the board actually testified that he instead choose to let the Chancery Clerk review the invoices. (Vol. III Tr. 109, 119)

The Board had an absolute duty to investigate each and every claim presented to the County. If the Board would have investigated the claim Hinds County would have discovered any so called fraud they now claim existed on the invoices.

Furthermore Appellee quotes *Dixie Ins.* to state, “Waiver presupposes a full knowledge of an existing right or privilege and something done designedly or knowingly to relinquish it.” (*Id.* at 582) The Board of Supervisors surely knew of their right and duty to investigate any invoice submitted before the Board. However it knowingly relinquished this right by failing to fulfill the statutory duty placed on the Board by Miss. Code Ann. 19-13-31. The Board knowingly chose not to follow through on this statutory requirement and failed to do the slightest investigation.

Union Planters Bank, N.A. v. Rogers, 912 So.2d 116, 119 (Miss. 2005) adds, “Waiver presupposes full knowledge of a right existing, and an intentional surrender or relinquishment of that right. It contemplates something done designedly or knowingly, . . . It is the voluntary surrender of a right. To establish a waiver, there must be shown an act or omission on the part of the one charged with the waiver fairly evidencing an intention permanently to surrender the right alleged to have been waived.” *Union Planters* involved arbitration agreement notices mailed out to bank customers. When the customers failed to mail back the cards the Court found they had not gone forward with a voluntary act to show they had waived their right. Here we have a voluntary act. Here the Board met to review all claims and consciously choose not to review Harris’s invoices. The

Board passed on them without any investigation. In fact one of the Board members testified to voting on the invoice with out performing his statutory charged investigation.

This case is also similar to *Union Planters* where the account holder failed to challenge fraudulent transactions within a reasonable period of time following Miss. Code Ann. *Section 75-4-406(a)*. *Union Planters* at 120. The Mississippi Code gave the account holder a duty to review the account holder's bank statements and notify the bank of any fraudulent charges. When the account holders failed to investigate the bank statements for fraud they waived the right to recover from the bank. *Id.* at 123. The Mississippi Code places a similar duty on the Board of Supervisors to review all claims before paying out on the claims. After the account holder claimed they did not receive the statements the Court held that whether or not the account holders receives the statements is not material as long as the bank places the statements in the mail. At that point it becomes the account holder's responsibility to inform the bank if he has not received a statement. *Id.* at 122.

The Hinds County Board of Supervisors had every opportunity to review the claims filed by Shappley Harris properly with the Chancery Clerk of Hinds County. The Board minutes show it voted and approved the invoices supplied by

Harris. (Vol. III Tr. 120) By failing to research the payments and object to them at the proper time, as the Board is statutorily charged to do, the Hinds County Board of Supervisors effectively waived any claim concerning whether Shappley Harris properly earned the commissions.

- 4) The Court erred in allowing a Jury Instruction on Fraudulent Misrepresentation without enumerating the elements of Fraudulent Misrepresentation

Hinds County argues that the jury instruction was meant to recover under a theory of fraudulent concealment. Hinds County argues that the elements in the jury instruction are correct since they concerned fraudulent concealment instead of fraudulent misrepresentation. However in Hinds County's Complaint the County clearly filed the complaint under the theory of "fraudulent misrepresentation." (Vol. I P.11)

Hinds County sued Harris on five counts; Conversion, Breach of Contract, Bad Faith Breach of Contract, Breach of the Duty of Good Faith and Fair Dealing, and Fraudulent Misrepresentation. Fraudulent Concealment was not listed among these counts and now the Defendant wants to separate it from Fraudulent Misrepresentation since the elements do not match the jury instruction given.

Therefore Hinds County recovered on a jury instruction based on a ground it did not specifically plead in the County's complaint. This Court should not allow Hinds County to switch grounds back and forth as its wants in order to make a jury instruction fit where the given instruction failed to state every required element of the tort for which the instruction was given under and which the County plead.

Failure to plead a ground for relief is similar to a defendant failing to plead an affirmative defense. In *Pass Termite & Pest Control, Inc. v. Walker*, 904 So. 2d 1030, 1033 P10 (Miss. 2004)(arbitration issue) the Mississippi Supreme Court barred a defendant from raising an affirmative defense, relying on Rule 8 (c). The Court there held: The general rule is that affirmative defenses must be raised in a party's answer," citing, e.g., *Canizaro v. Mobile Communications Corp. Of Am.*, 655 So.2d 25 (Miss. 1995)(statue of frauds) and *Wholey v. Cal-Maine Food, Inc.*, 530 So.2d 136 (res judicata) Similarly, Rule 8 (a) requires "a demand for judgment for the relief to which he deems himself entitled." *Hertz Commercial Leasing Div. v. Morrison*, 567 So. 2d 832, 834 (Miss. 1990)

To allow Hinds County to add a claim for relief at the appeal stage just because it fits the County's jury instruction would be the same as allowing a Defendant to add an affirmative defense at the appeal stage. "Rule 8(c) saddles him with the burden of pleading as well, as a defense within that rule is waived if

not timely and adequately pleaded.. The reason for the rule is familiar and goes to the point of fairness.” *Id.* at 834 (Miss. 1990) citing *Bailey v. Georgia Cotton Goods Co.*, 543 So.2d 180, 182-83 (Miss. 1989); *Wholey v. Cal-Maine Foods, Inc.*, 530 So.2d 136, 138-39

Furthermore, Hinds County contends that it had an obvious right to rely on Harris as he was the County’s hired consultant. However this is not the issue. The issue is whether the jury instruction specifically included every element of the tort for which the Appellee sought relief.

Additionally, Hinds County contends that the issue is moot since Harris failed to adequately object to the instruction. Counsel at trial objected to the instruction at trial for being an incorrect mix of both law and facts. (Vol. IV Tr. 187) If this instruction meant to muddle between Fraudulent Misrepresentation which the County plead and Fraudulent Concealment that Hinds County now contends the instruction fell under it is clearly incorrectly mixing the law on these two grounds. Therefore the objection adequately identified the deficiency of in this instruction as it mixed between two theories of law.

However even if this objection fails to qualify as adequate, failure to list one of the elements is plain error on its face. Similarly in criminal actions when the jury instruction fails to include a necessary element of the crime charged the Court

will find plain error with the instruction and will reverse the verdict. "In this case, the granting of Instruction S-3 amounts to plain error, because the jury was not fully instructed on the elements of the crime." *Berry v. State*, 728 So. 2d 568, 571 (Miss. 1999) citing *Hunter v. State*, 684 So. 2d 625, 636 (Miss. 1996)

5) The Court erred by awarding Pre-Judgment interest.

Hinds County fails to refute that originally Hinds County claimed \$570,000.00 in the demand letter sent to Harris. (Vol III. Tr. 79, 95; Ex. 20) Furthermore, Hinds County's complaint filed against Harris on October 13, 2003, Hinds County alleged damages amounting to \$570,881.00. (Vol. I P. 11) *Terex Corp. v. Ingalls Shipbuilding*, 671 So. 2d 1316, 1323 (Miss. 1996) states that the "amount is liquidated when the claim is originally made." Hinds County sought \$570,000.00 in the complaint filed against Harris yet Hinds County argued for \$380,601.00 in closing argument at trial. (Vol. IV Tr. 237). Therefore a discrepancy existed in the amount claimed that Harris owed Hinds County. "Due to this uncertainty as to the amount of damages, the award for prejudgment interest could not be based upon a liquidated amount." *Terex Corp. at 1324*.

Hinds County sought to recover a different amount than Hinds County recovered at trial. Therefore the claim was not properly liquidated. "As to whether the claim is liquidated, interest has been denied where 'there is a bona

fide' dispute as to the amount of damages. *Thompson Machinery Commerce Corporation v. Wallace*, 687 So. 2d 149, 152 (Miss. 1997) Since Hinds County sought two different monetary amounts the claim was never liquidated.

Instead Hinds County intends to rely upon whether or not Harris objected to the award of pre-judgment interest. Harris denied the right to recover pre-judgment interest in his original answer to Hinds County's complaint. (Vol. I P. 51) Therefore it was plain error for the honorable Court below to grant pre-judgment interest.

CONCLUSION

The Hinds County Circuit Court Verdict against Shappley Harris must be reversed for a new trial due to the faulty jury instruction. Furthermore the County waived the right to question Harris' bills by not contending the bills at the proper time, further proving this Court should reverse and render the verdict entered against Harris. Alternatively this Court should reverse and render this verdict in light of the improper instruction the jury received on the elements of fraudulent misrepresentation. Additionally, or in the alternative, the Court should reverse and render the prejudgment interest charged against Harris as the amount was not liquidated.

Respectfully Submitted,

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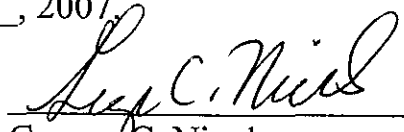
CERTIFICATE OF SERVICE

I, George C. Nicols, do hereby certify that I have this date forwarded
via U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing
to:

Honorable Winston Kidd
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Barry H. Powell
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This the 17th day of October, 2007.


George C. Nicols