

COPY

IN THE SUPREME COURT OF MISSISSIPPI

SHAPPLEY HARRIS, ET AL.

APPELLANT

V.

FILED

CASE NO. 2006-CA-01106

JUL 20 2007

HINDS COUNTY, MISSISSIPPI

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SUPREME COURT
COURT OF APPEALS

APPELLEE

APPEAL FROM THE HINDS COUNTY CIRCUIT COURT
FIRST JUDICIAL DISTRICT

BRIEF OF APPELLANT
Oral Argument Requested

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CERTIFICATE OF INTERESTED PERSONS

The undersigned hereby certifies that the following persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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George C. Nicols

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS ii-iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES.....v-vi

RECOMMENDATION FOR ORAL ARGUMENTvii

STATEMENT OF ISSUES1

STATEMENT OF THE CASE1-2

STATEMENT OF FACTS 3-6

SUMMARY OF ARGUMENT 6-7

ARGUMENT7-20

CONCLUSION20-21

CERTIFICATE OF SERVICE22

TABLE OF AUTHORITIES

CASES

City of Jackson v. Estate of Stewart, 908 So. 2d 703, 711 (Miss. 2005)..... 13

Delta Constr. Co. v. Jackson, 198 So. 2d 592, 600 (Miss. 1967)..... 14

Ferrer v. Jackson County Board of Supervisors, 741 So.2d 216, 219
(Miss. 1999)..... 15-16

Gatlin v. Sanderson Farms, Inc., 953 So. 2d 220 (Miss. 2007). 8-9

Hobbs Automotive Inc. v. Dorsey, 914 So. 2d. 148, 153 (Miss. 2005)..... 17

Magnolia Federal Savings & Loan Assn. v. Craft Realty Company Inc.,
342 So. 2d 1308 (Miss. 1977). 12

Moeller v. Am. Guar. & Liab. Ins. Co., 812 So. 2d 953, 958 (Miss. 2002)..... 7

Ortman v. Cain, 811 So.2d 457, 459 (Miss. Ct. App. 2002)..... 8

Russell v. Performance Toyota, Inc., 826 So. 2d 719 (Miss. 2002). 7

Spragins v. Sunburst Bank, 605 So. 2d 777 (Miss. 1992).....18

Terex Corp. v. Ingalls Shipbuilding, 671 So. 2d 1316, 1323 (Miss. 1996)..... 20

Thompson Machinery Commerce Corporation v. Wallace
687 So. 2d 149 (Miss. 1997).10, 19

STATUTES

Miss. Code Ann. § 11-46-3(1).....16

Miss. Code Ann. 19-13-27..... 15

Miss. Code Ann. 19-13-27.....15

Miss. Code Ann. 19-13-31 15

SECONDARY SOURCES

Kenneth S. Abraham, *Insurance Law And Regulation*, p. 6 (3d ed. 2000) 11

SUGGESTION REGARDING ORAL ARGUMENT

The Appellant Shappley Harris believes that Oral Argument would aid the resolution of the appeal before this Court and respectfully requests that the Court grant Appellant's request for Oral Argument. The rule of right to collect repayment of a debt

STATEMENT OF THE ISSUES

1) Shappley Harris went beyond the scope of the Consultant Contract with Hinds County when he procured workers' compensation coverage for Hinds County.

2) Since Shappley Harris went beyond the scope of the Consultant Contract he deserve compensation for these service.

3) The Hinds County Board of Supervisors waived the claim against Harris by voting to pay his bill.

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

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

STATEMENT OF THE CASE

The Hinds County Board of Supervisors brought legal action against Shappley Harris seeking to recoup what the Board alleged Harris fraudulently over billed the County for acquiring workers' compensation benefits for the County employees. (Vol. I 5-12) The County claimed that Harris was compensated enough for his services through the Consultant Contract he had with the County since 1985 and that Harris acted beyond the scope of the contract when he served as a broker to place Hinds County into a self funded pool. The County's sole

source of a fraudulent misrepresentation claim arose from the fact that the invoices Harris submitted to the Board did not have a breakdown showing the fee he charged the County. Harris acted as any other broker for the county would do; he added the standard fee to the bill sent to the County for the 2002 claims period. (Vol. III Tr. 91) Hinds County alleged that the Consultant Contract alone should compensate Harris for his actions as the a Broker. (Vol. III Tr. 78)

The State Auditor's office investigated the matter and determined Hinds County paid Harris for the 2002 coverage period and then Hinds County paid Mississippi Municipal Group directly for the 2002 payroll audit which Harris had already invoiced, resulting in a double payment of the audit by roughly \$190,000.00. (Vol. III Tr. 94) Harris returned this overpayment promptly. However, the County was not satisfied and later brought suit. (Vol. III Tr. 95)

Hinds County's case proceeded to trial April 10, 2006 in Hinds County Circuit Court before Hinds County Circuit Judge Winston L. Kidd. Hinds County succeeded in acquiring a verdict from the Hinds County Jury against Shappley Harris in the amount of \$380,601.00. The Court further added prejudgment interest to the award in the amount of \$77,389 resulting in a total damage award of \$457,990. (Vol. II 227, 228) Shappley Harris timely appealed this verdict to this honorable Court. (Vol. II 230)

STATEMENT OF THE FACTS

Shappley Harris entered into an insurance advisory consulting contract with the Hinds County Board of Supervisors in 1985 with a monthly fee of \$1,800.00. (Vol. III Tr. 72) This contract has not been altered or changed since it was signed. (Vol. III Tr. 72) Harris was doing business as a sole proprietorship in the name of Fire Casualty & Benefit Consultants. (Vol. III Tr. 61) Several years later Harris incorporated the same business in the name The Shappley Company, Inc. but continued to do business in the name of Fire & Casualty Consultants. All billings under the matter in dispute were done in the name of Fire & Casualty Consultants. (Vol. III Tr. 61)

All insurance contracts for Hinds County under Harris's direction were procured through a licensed Mississippi insurance agent. (Vol. III Tr. 85) Harris did not bill the County for any service other than the agreed upon \$1,800 per month from inception of his contract in 1985 until December 2001 when Harris billed them for the self-funded workers' compensation program that is in dispute in this action. (Vol. III Tr. 131) Insurance agents submitted their invoices directly to the County. The workers' compensation prior to Harris taking it over in 2001 was placed through an agent and underwritten by Legion Insurance Company. (Vol. III Tr. 142)

Legion determined in December of 2001 that they would not be renewing Hinds County's workers' compensation coverage. (Vol. III Tr. 74, 130) Harris went to Mississippi Association of Supervisors who had the other 81 Mississippi Counties in a self-funded trust to get a quote. However, the Mississippi Public Entity Trust (Supervisors sponsored Trust) advised Harris that their actuary told them not to accept Hinds County for workers compensation coverage. (Vol. III Tr. 74)

At this point Harris had agents search the market for any provider interested in covering Hinds County and found that no one wanted to cover Hinds. This left Hinds County with only one option, the Mississippi Assigned Risk Pool. (Vol. III Tr. 74) The Pool premium is very expensive as it has to accept poor risks. (Vol. III Tr. 74) Harris did not want to see Hinds go into the Pool due to this expensive cost, and Harris thought he could fix the claim problems and get them back to an acceptable loss ratio. This meant trying to find an alternative market and Harris only had two weeks to get it done to avoid a gap in coverage. Harris advised the County Board of Supervisors of the problem and asked that they request the legislature for a local and private bill to self-fund, however the bill would fall too late to renew in 2002. (Vol. III Tr. 74)

Therefore, Harris asked Mississippi Municipal Service Co, (MMSC) if it would place the coverage in their self-funded trust. (Vol. IV Tr. 160) This trust is not insurance and is not regulated by Mississippi Insurance Department. (Vol. IV Tr. 160) The MMSC declined saying it did not counties for membership and Hinds County should go the Supervisors' Pool. When Harris told the MMSC the Supervisor's Pool turned Hinds County down the MMSC expressed a concern with providing coverage for something the Supervisors' Pool would not cover.

Harris indicated that he thought he could fix the claims problems that made Hinds County a bad risk. Harris had developed a reputation in the workers' compensation coverage business due to his work with the Mississippi Restaurant Association and Electric Power Associations of Mississippi self funded workers' compensation trusts. The Municipal Association still refused, so at this point the Assigned Risk Pool appeared to be the last option.

Harris then inquired from the MMSC if it would provide coverage if Hinds County agreed to pay a large retention to attach to the excess coverage. After further negotiations the Municipal Association agreed to cover Hinds County. (Vol. III Tr. 75) This agreement was based on Harris's plan to correct Hinds County's claim problems and his reputation for controlling claim costs. The Board of Supervisors agreed to Harris's plan and he set out to fix the problems

with Workers Compensation with the help of the County Administrator. (Vol. III Tr. 75)

The Board instructed the County Administrator to work with Harris. Harris laid out the program with County Administrator, informed him in writing that he had placed the coverage, and brought an invoice for the first quarter and gave it to Hinds County Chancery Clerk. (Vol. III Tr. 74) The Clerk's office sent the invoice to the Budget & Finance Director who approved it and sent it to County Administrator who approved it. It was placed on claims the docket as a valid claim the County owed. The five Supervisors voted to pay the invoice under advisement of the County Administrator. The Supervisors could have questioned the invoice and rejected it if they had questions, but they paid it without discussion. (Vol. III Tr. 119) Harris never billed them before for any other service other than the \$1,800 per month. (Vol. III Tr. 118)

SUMMARY OF THE ARGUMENT

Harris went beyond the scope of his consultant contract for the benefit of Hinds County in order to secure Workers' compensation coverage for the County. Harris served as the broker for Hinds County and earned a commission for these services. To allow Hinds County to enjoy the benefit of Harris's work for the

benefit of the County would unjustly enrich the County at Harris's detriment. The County had the opportunity to refute any bills presented to the County properly through the County's claims docket before or during Board meetings. By failing to object at the proper time the County effectively waived this argument.

Furthermore, the jury instruction presented to the jury challenging the jury to determine if Shappley Harris fraudulently misrepresented Hinds County failed to include one of the necessary elements to prove in a fraudulent misrepresentation case, namely the County's right to rely on Harris as the Mississippi Statutes place the duty on the Board to review all payments. Finally, the Court improperly awarded prejudgment interest.

ARGUMENT

Standard of Review

The Court reviews all questions of law under a de novo standard of review.

Russell v. Performance Toyota, Inc., 826 So. 2d 719, 721 (Miss. 2002).

Additionally, "An award of prejudgment interest is reviewed for abuse of discretion." *Moeller v. Am. Guar. & Liab. Ins. Co.*, 812 So. 2d 953, 958 (Miss. 2002) An appellate Court is to review the jury instructions as a whole to determine whether the aggregate of the instructions, taken as a whole, fairly, though not

necessarily perfectly, express the applicable primary rules of law. *Ortman v. Cain*, 811 So.2d 457, 459 (Miss. Ct. App. 2002.)

1. Shappley Harris went beyond the scope of the Consultant Contract with Hinds County when he procured workers' compensation coverage for Hinds County.

The Contract entered between Shappley Harris and Hinds County on the first day of April 1985 defines Harris as the "Consultant." (Ex. 19) The Contract specifically calls for Harris to, "Serve as Advisor Hinds County with regard to Insurance Risk Management and shall advise Hinds County on the following matters related to insurance." Included in this agreement was Maintenance of Insurance Contracts, Preparations of Bid Specifications and Review of Bids. The Contract further states that the monthly fee provided by this contract will be the "sole compensation for the services provided" by the contract.

The Mississippi Supreme Court has implemented a three-tiered process for contract interpretation. *Gatlin v. Sanderson Farms, Inc.* 953 So. 2d 220, 222 (Miss 2007). "First we look to the 'four corners' of the contract and at the language the parties used in expressing their agreement." *Id.* Only when the Contract appears ambiguous within the four corners of the Contract will the Court look to the next two steps. *Id.* The Contract entered into between Shappley Harris

and Hinds County clearly states its intent within the four corners. The Contract called for Harris to act as a consultant only and did not create a duty for which it compensated Harris to act as a broker in order to secure coverage for Hinds County.

Doug Anderson, member of the Hinds County Board of Supervisors, testified that the contract calls for advice and consultation and did not require Harris to act as an agent for the County. (Vol. III Tr. 89) The contract also did not call on Harris to act as a broker. This further shows that the Contract was clear on its face and did not bind Harris to serve as a procurement agent for Hinds County. This contract left Harris with no responsibility for placing and providing direct management of any service other than rendering advice. Before Harris arranged for the coverage in question the County paid the commission that the Agent for Legions Insurance company who previously covered Hinds County received. (Vol. III Tr. 106) That agent provided service and support for the insurance policies he sold the County and he billed the County directly.

Harris subsequently replaced this agent by serving as a broker for Hinds County to arrange for coverage, the same service that was being provided by an insurance agent, and billed the County directly for that service. The Hinds County Board of Supervisors paid the invoices properly submitted to the Hinds County

Chancery Clerk's office. The Board voted to pay the invoices as any other bill submitted to the County. Later the County decided that Harris's Consultant Contract should cover activities clearly beyond the duties of a consultant. The State Audit Department took the position that Harris acted legally and did not owe the County anything beyond what the County overpaid by paying for the same period twice, the \$190,000.00 that Harris refunded. (Vol. Tr. 95).

In *Thompson Machinery Commerce Corporation v. Wallace*, 687 So. 2d 149 (Miss. 1997), a former employee signed an agreement with his former company to serve as a consultant. After he accepted a job with the competitor the former employer sued the former employee for breach of this consultant contract. The Court ruled that the former employee was free to use his experience and skill to secure other duties without violating this consultant agreement as long as he did not disclose any company secrets in the process. *Id.*, at 151. The Court expressly ruled that he was free to pursue other endeavors in the same field beyond this consultant contract without a non-compete provision. *Id.*

Similarly Shappley Harris used his knowledge and skill of the insurance business outside, but without violating, his consultant agreement to procure coverage for Hinds County. Accordingly the Court should rule that Harris had the

right to act outside of the consultant contract as long as he did not violate said contract to the detriment of Hinds County.

2. Since Shappley Harris went beyond the scope of the Consultant Contract he deserve compensation for these services.

Most insurance policies are arranged through intermediaries who coordinate between the insurance company and the purchaser. “The two major types of insurance intermediaries are agents and brokers. A broker is not the general purpose legal agent of an insurance company. Rather, brokers place orders for insurance with companies designated by their policyholder clients or with companies of their own choice. . . In contrast, insurance agents are the representatives of insurance companies.” Kenneth S. Abraham, *Insurance Law And Regulation*, p. 6 (3d ed. 2000).

The Municipal Risk Pool does not pay agent commissions because the MMSC do not have agents. Instead the MMSC require Brokers to arrange the coverage with the Broker’s client. Brokers then must add their fees to the premium. Gil Israel of the Mississippi Municipal Service Company’s Municipal Liability Plan testified that the Municipal does not give out commissions so a broker adding his fee to the insurance bill and passing it along to the client was the

common practice. (Vol. III Tr. 57-58) This information was reasonably available to the Board of Supervisors. In fact, they relied upon the custom and usage in the trade when they paid Harris's invoices.

Since the Municipal Company did not pay commissions, adding the fee to the bill was the only manner to compensate the broker for the service of acquiring and maintaining the coverage. (Vol. III Tr. 57) Harris was clearly acting as a Broker for Hinds County to secure the County with Worker's Compensation Coverage. To allow Hinds County the benefit of Shappley Harris work to secure this coverage would unjustly enrich the County to Harris's detriment. Due to the delicate situation Legions put Hinds County into giving little time to locate coverage and having to get coverage with a risk pool as opposed to insurance coverage required special negotiating abilities that only a few brokers could manage.

In, *Magnolia Federal Savings & Loan Assn. v. Craft Realty Company Inc*, 342 So.2d 1308 (Miss. 1977) the Court awarded a commission to a real estate agent who facilitated a land purchase based upon an unjust enrichment. "A person shall not be allowed to enrich himself unjustly at the expense of another. In this respect the terms 'unjust enrichment' and 'restitution' are a modern designation for the doctrine of 'Quasi-Contracts' and the basis for an action for 'unjust

enrichment' lies in a promise, which is implied by law, that one will pay to the person entitled thereto which in equity and good conscience is his." *Id.*, at 1311.

As previously shown Harris only had a contract to act as the consultant for Hinds County on insurance matters. This contract did not establish a duty for Harris to act as a broker for Hinds County to procure Workers' Compensation coverage. Accordingly, Harris deserves to be compensated for his services as a broker for Hinds County just as any other individual would be compensated for performing the same service. A member of the Municipal group testified that adding the commission to the bill submitted to the Client was the regular method of compensation for brokers who arranged coverage with the Municipal trust. (Vol III. Tr. 57-58).

The Court ruled in *City of Jackson v. Estate of Stewart*, 908 So. 2d 703, 711 (Miss. 2005), that the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-3(1), declares that the State of Mississippi and its political subdivisions have sovereign immunity from the breach of an implied term or condition of any contract. This case dealt specifically with an implied contractual term to the detriment of a third party beneficiary. Harris's conduct did not create an implied condition to the consultant contract as he was acting beyond that contract. Therefore while Harris's actions did not create an implied contract his actions certainly enriched

Hinds County by acquiring the Workers' compensation coverage that Hinds County needed. To give Hinds County the benefit of Harris's labor would be unjustly enriching to Harris's detriment.

The Court has noted before that generally recovery can not occur on the theory of a quasi contract, implied in fact contract, or quantum meruit for extra work where the claim is based upon an expressed contract. *Delta Constr. Co. v. Jackson*, 198 So. 2d 592, 600 (Miss. 1967). However that particular case involved a contractor working on a government project that had to excavate more land than initially believed. This case differs substantially because the expressed contract dealt with the exact actions the Plaintiff claimed went beyond the contract. In this case, as proven above, the expressed contract did not cover the procurement of Workers' compensation coverage.

Therefore if Hinds County was allowed to get Workers' compensation coverage without paying any sort of commission, than the County would have unjustly enriched itself from the hard labor incurred on its part by Shapple Harris. Accordingly this Court should rule that Harris rightfully earned the commission he charged Hinds County and overturn the verdict against him.

3) Did the Hinds County Board of Supervisors waive the claim against Harris by voting to pay his bill.

Miss. Code Ann. 19-13-27 presents the procedure for a County's Clerk to upkeep the claims docket for official payment claims from the County.

Furthermore, Miss. Code Ann. 19-13-27 directs a clerk how to file and pay on these same claims. Harris properly submitted the bills with his commission attached to the Hinds County Clerks office. (Vol. III Tr. 62- 65). The Board of Supervisors then had the opportunity to review the claims. (Vol. III Tr. 76). The Mississippi code requires the Board have authority to pay out contracts before they make any payments.

Specifically, Miss. Code Ann. 19-13-31 directs the Board to inspect whether the claims are legal or illegal, which can be made legal by amendment, reject the claim in whole or in part and that, "All other claims shall be audited, and all those found proper upon due proof shall be allowed." The statute even further allows for the Board to continue a bill and make further inquiries. However the board failed to follow any of these options and then filed this suit to cover its mistake. In fact, Board Member Ronnie Chappell, testified that he instead choose to let the Chancery Clerk review the invoices instead. (Vol. III Tr. 109, 119)

In *Ferrer v. Jackson County Board of Supervisors*, 741 So.2d 216 (Miss. 1999) the claimant was hit by an automobile owned and in the course of business for the County. The Board initially offered a settlement of ten thousand dollars

(\$10,000) for the property damages part of the claim and the claimant accepted. Afterwards the parties swapped settlement offers for the claimant's medical damages. The Board denied the claimant's offer and filed an answer asking for summary judgment because the claimant failed to provide ninety (90) days notice of a claim following Miss. Code Ann. § 11-46-11. The Court held that the Board waived further notice of the claim by paying the property damage settlement because the Board, by its acts, caused the claimant to believe that the notice requirement was waived. *Id.*, at 219.

The Hinds County Board of Supervisors had every opportunity to review the claims filed by Shapple Harris properly with the Chancery Clerk of Hinds County. The Board minutes show were they 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 Shapple Harris properly earned commissions.

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

Jury Instruction ten, presented to the jury, instructed the jury on finding that Shapple Harris fraudulently misrepresented Hinds County. However the instruction failed to provide for all the elements required to find Fraudulent Misrepresentation. This Court in *Hobbs Automotive Inc. v. Dorsey*, 914 So. 2d. 148, 153 (Miss. 2005) laid out the seven step test for granting recovery based on a fraudulent misrepresentation as, “(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of the truth; (5) his 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) his reliance on its truth; (8) his right to rely thereon; and (9) his consequent and proximate injury. *Id.*, at 153.

The Jury Instruction read as a whole states,

“If you find from clear and convincing evidence that Shapple Harris obtained commissions from Hinds County without the knowledge of consent of the Hinds County Board of Supervisors and that Shapple Harris took some action, affirmative in nature, which was designed or intended to prevent and which did prevent the discovery that he was obtaining commissions, and you further find that if the Hinds County Board of Supervisors had known about the commissions being charged by Shapple Harris, the Board of Supervisors would not have paid the Commissions, then Shapple Harris is guilty of fraud and it is your duty to return a verdict for Hinds County against the Defendants.

The Board's instruction included Harris making a representation, that it was false, material, that Harris knew of the falsity, his intent that it be acted upon, that the Board was ignorant of the statement's falsity, and that it would injure Hinds County. However the instruction clearly failed to cite if Hinds County had a right to rely upon Harris. Counsel at trial objected to the instruction arguing that it was an incorrect mix of both law and facts. (Vol. IV Tr. 187)

Counsel specifically argued whether or not Hinds County had a right to rely on Harris by pointing out that, "They had five days before they voted on [the bills] to look into it." (Vol. IV Tr. 187)

In *Spragins v. Sunburst Bank*, 605 So. 2d 777 (Miss. 1992) the Court noted that if the claimant, "Failed to put on sufficient evidence to create an issue of fact for the jury as to any of the above elements, then the issue of fraudulent misrepresentation was correctly excluded from the jury." *Id.*, at 781. Hence every single element is equally important and without proof of all elements then the jury can not properly return a verdict on the issue.

In this case, the jury failed to receive instruction on a fundamental element of fraudulent misrepresentation leaving the jury incapable of correctly deciding the claim. The instruction as a whole failed to capture the whole of a fraudulent

misrepresentation claim by failing to include all the necessary elements the jury is required to determine to prove this claim.

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

“Prejudgment interest arises only where the amount owed is liquidated, or denial of the amount owed is in bad faith. As to whether the claim is liquidated, interest has been denied where ‘there is a bona fide’ dispute as to the amount of damages as well as the responsibility for the liability therefor.” *Thompson Machinery Commerce Corporation v. Wallace*, 687 So. 2d 149, 152 (Miss. 1997).

In the case at hand Shappley Harris clearly had a bona fide dispute as to the amount owed and the responsibility for it. Harris did not dispute the amount returned to Hinds County that the County accidentally double paid identified by the State Auditor. However, Harris contended throughout the dispute of this matter that the amount in controversy was a lawful and proper commission the County owed to him. Up and until the ruling of this Court Harris has and will, with good faith, disputed his responsibility to repay his commission to Hinds County. Therefore the award of pre-judgment interest was clearly in error as a matter of law and as such this Court should overturn this ruling.

Additionally the amount in controversy was disputed when the Claim against Harris was originally made. Originally Hinds County claimed

\$570,000.00 in the demand letter sent to Harris. (Vol III. Tr. 79, 95; Ex. 20) Additionally, in 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." 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." *Id.*, at 1324.

In fact Harris acted in good faith by invoking the ruling of the State Auditor's office and refunding the amount directed by the State Auditor's office. By agreeing to do this Harris clearly was acting in good faith in an attempt to resolve the dispute with Hinds County. This points out in fact that Harris made a reasonable inquiry into the situation in order to act in good faith. Thus the honorable Court below clearly abused its discretion by allowing pre-judgment interest.

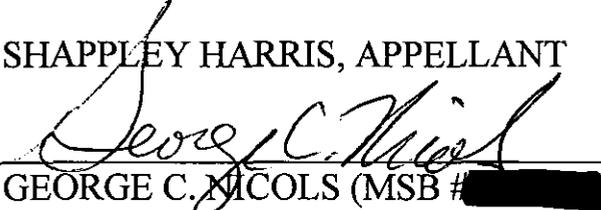
CONCLUSION

This Court should rule that Harris performed valuable services for the benefit of Hinds County outside of and without violating the consultant agreement entered into. Shappley Harris rightfully earned the commission he charged Hinds

County for these valuable services. Hinds County will be unjustly enriched by allowing the County to receive the benefit of Harris's skill and negotiating Workers' Compensation Coverage on behalf of the County without paying the justly earned commission for such. In the alternative, due to the faulty misrepresentation jury instruction the case must be reversed for a new trial. Furthermore the County waived the right to question Harris' bills by not contending the bills at the proper time. Accordingly this Court should reverse and render the verdict entered against Harris. Alternatively this Court should return 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 who at no time operated in bad faith in denying the responsibility of Hinds Counties claims.

Respectfully Submitted,

SHAPPLEY HARRIS, APPELLANT


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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, and via electronic means, a true and correct copy of the above and foregoing to:

Honorable Winston Kidd
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Barry H. Powell
Owens Moss, PLLC
P.O. Box 808
Jackson, MS 39205

This the 20 day of July, 2007.


George C. Nicols

