IN THE SUPREME COURT OF MISSISSIPPI

HAZELHURST LUMBER COMPANY, INC. **APPELLANT**

VS. **CASE NO.: 2007-CA-00120**

MISSISSIPPI FORESTRY COMMISSION **APPELLEE**

APPEAL FROM THE CIRCUIT COURT OF FRANKLIN COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

Heber S. Simmons, III (MB#[redacted]
SIMMONS LAW GROUP, P.A.
240 Trace Colony Park Dr.
Suite 200
Ridgeland, MS 39157
Telephone: (601) 914-2882
Facsimile : (601) 914-2887

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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 for possible disqualification or recusal.

Hazlehurst Lumber Company
1077 Lilly Road
Hazlehurst, MS 39083-9483 - Plaintiff-Appellant.

Starke Albritton
Chief operator of Hazelhurst Lumber Company.

The Mississippi Forestry Commission
301 North Lamar Street
Jackson, MS 39201 - Defendant-Appellee.

Franklin County School Board
P.O. Box 605
Meadville, MS 39653

Honorable Forrest A. Johnson, Jr.
Circuit Court Judge
P.O. Box 1372
Natchez, MS 39121 - Presiding Circuit Court Judge

Heber S. Simmons III
SIMMONS LAW GROUP, P.A.
240 Trace Colony Park Drive
Suite 200
Ridgeland, MS 39157 - Attorney for Defendant-Appellee

Dennis L. Horn
Horn & Payne, PLLC
P.O. Box 2754
Madison, MS 39130 - Attorney for the Plaintiff-Appellant

George C. Nicols
Attorney at Law, PLLC
P.O. Box 12282
Jackson, MS 39236 - Attorney for the Plaintiff- Appellant

This the 10th day of September, 2007.

Respectfully submitted,

Heber S. Simmons III (MS Bar No. 8523)
Attorney for Defendant-Appellee

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BRIEF OF APPELLEE

PART I

A. Statement of the Proceedings Below

Defendant (Appellee), Mississippi Forestry Commission (sometimes referred to as "MFC") finds that the statement of material facts presented by the Appellant in its Brief is inaccurate and/or incomplete, and therefore, pursuant to Rule 28 of the Mississippi Rules of Appellate Procedure, presents herein its own Statement, as follows:

Plaintiff (Appellant), Hazelhurst Lumber Company, Inc. (sometimes referred to as "HLC"), on December 21, 2001, filed its Complaint in the Circuit Court of Hinds County, Mississippi against the Franklin County School System, the Franklin County Board of Education, and MFC, seeking damages in the amount of $104,339.36, for its perceived losses in a timber purchase contract. (R 3-9; Vol. IX Tr. # 3).

The essence of the claim was that the Mississippi Forestry Commission, on behalf of the Franklin County School District, offered an Invitation for Bids for timber located on a tract of

sixteenth section land situated in Franklin County and owned by the Franklin County Board of Education. (RE 1-7). Pursuant to the aforementioned Invitation for Bids, Hazelhurst Lumber Company submitted a bid, which was accepted and memorialized by the Franklin County Board of Education in its Forest Products Sale Contract on January 2, 2001. (RE 8-19).

On July 19, 2002, the Hinds County Circuit Court entered its Order transferring the case to the Franklin County Circuit Court for purposes of venue (R 110-112). Thereafter, the Plaintiff lost its enthusiasm for continuing suit against the Franklin County School System and School Board, and same were voluntarily dismissed from the suit (Vol. IX Tr. # 5). Defendant MFC, however, was not dismissed.

Thereafter, MFC filed a summary judgment motion, which the lower court granted in part and denied in part, dismissing only those claims of Plaintiff stemming from any alleged fraud. (RE 121; Vol. IX Tr. # 5-6). Defendant sought interlocutory appeal of the lower court's denial of summary judgment as to all claims, but said appeal was denied.

Thereafter, on September 15, 2005, MFC filed its second Motion to Dismiss, Alternatively, Motion for Summary Judgment. (RE 20-89). On September 13, 2006, the lower court re-affirmed its previous ruling on Defendant's prior Motion for Summary Judgment, and additionally dismissed all contract claims then pending against MFC, finding that the Defendant's motion was granted as to any and all claims other than those that fell under the purview of the Mississippi Tort Claims Act. (RE 90; Vol. IX Tr. # 148-49). This left only Plaintiff's claim of negligent misrepresentation to be tried.

This case then proceeded to a bench trial on October 9, 2006. At the close of Plaintiff's case in chief, Defendant moved for a directed verdict. (RE 91-105; Vol. IX Tr. # 135-38). The lower court heard the arguments of counsel, and considered the written motion submitted by Defendant

MFC (RE 91-105). The trial court thereafter granted Defendant's Motion for Directed Verdict as to Plaintiff's remaining claims of negligent misrepresentation and reckless misrepresentation. (RE 106-07; Vol. IX Tr. # 149-155). Final judgement was entered by the trial court on December 18, 2006. (RE 106-07).

Thereafter, Plaintiff appealed the lower court's dismissal to this Court.

B. Statement of the Facts

On or about December 5, 2000, the Mississippi Forestry Commission, on behalf of the Franklin County School District, offered an Invitation for Bids for timber located on a tract of sixteenth section land situated in Franklin County and owned by the Franklin County Board of Education. (RE 1-7). Pursuant to the aforementioned Invitation for Bids, Hazelhurst Lumber Company submitted a bid which was accepted and memorialized by the Franklin County Board of Education in its Forest Products Sale Contract on January 2, 2001. (RE 8-19).

As part of the Invitation for Bids and the Forest Products Sale Contract, an **estimated** tree count was provided by the Mississippi Forestry Commission. (RE 1-7; 8-19). Both the Invitation for Bids and the Forest Products Sale Contract stated in clear, unambiguous language that the tree count was merely an estimation, and that the quantity and quality of trees should be determined by the Purchaser, and/or that an inspection should be performed by the Purchaser at their option. (RE 1-7; 8-19).

Specifically, the Invitation for Bids included the following language when referring to the estimated volume of wood from this tract of timber: "...**estimated to contain**...**more or less**...[t]he above figures are ***not to be construed to be the exact volume marked.*** Each bidder is ***expected to make his own cruise*** and to bid accordingly." Further, the Invitation for Bids stated that, "**The timber may be inspected at <u>any</u> time.**" (RE 1-7) (emphasis added).

Likewise, the Forest Products Sales Contract states: "All of the forest products covered by this contract, described and **estimated** below..." and "[t]he volume of products marked or designated is **estimated by the Seller to contain the following, *more or less*:**" Further, the Sales Contract states, "**The Buyer *represents that he has inspected* the sale area and familiarized himself with the *kind, amount and quality* of all timber marked or designated by the Seller, and covered by this contract, and understands that the estimated volume figures are furnished for information only, and are *not guaranteed by the Seller.***" (RE 8-19) (emphasis added). Said Sales Contract was formally signed and agreed to by both parties, including the Franklin County Board of Education and Hazelhurst Lumber Company, on January 2, 2001. (RE 16). Defendant MFC was not a party to the contract.

Despite the language in the Forest Products Sale Contract and Invitation for Bids, stating that the provided tree counts were estimated and that each bidder should confirm the "kind, amount and quality" of the timber, and despite the fact that HLC performed its own cruise of the timber to be sold, which produced numbers lower than that reflected in the Invitation and Contract documents, HLC claims that it did, in fact, rely on MFC's estimated numbers in preparing its bid, and that the value of the bid was based upon the MFC's estimation. (RE 108-112). According to HLC, after harvest of the subject timber, the market value of the harvest was $104,339.36 short of what it estimated in preparing its bid. (Vol. IX Tr. 124).

C. Summary of the Argument

The issues now raised by Plaintiff on appeal were never properly raised at the trial level, and therefore, those issues are procedurally barred from consideration on appeal. Alternatively, the trial court was not manifestly in error in its dismissal of Plaintiff's claims of breach of contract, mutual mistake and negligent misrepresentation, and the trial court's Rule 41(b) involuntary dismissal of

Plaintiff's claims, at the conclusion of Plaintiff's case in chief, should be affirmed.

PART II

PROCEDURAL BAR TO PLAINTIFF'S APPEAL

The Mississippi appellate courts have consistently held, "[w]e will not review on appeal that which was not raised at the trial level." *Shaw v. Shaw*, 603 So.2d 287, 292 (Miss. 1992); *Mimmitt v. Allstate*, 928 So.2d 203, 206 (¶ 18) (Miss.Ct.App. 2006). "This Court will not put a trial judge in error for issues not first presented to the trial court for resolution." *Mimmitt*, 928 So.2d at 206 (¶ 18); *New Bellum Homes Inc. v. Swain*, 806 So.2d 301, 305 (¶ 11) (Miss.Ct.App. 2001). "This Court can only review matters on appeal as were considered by the lower court." *Paracelcus Healthcare Corporation v. Willard*, 754 So.2d 437, 441 (¶ 16) (Miss. 1999); *Ditto v. Hinds County*, 665 So.2d 878, 879 (Miss. 1995). "The assertion on appeal of grounds for an objection which was not the assertion at trial is not an issue properly preserved on appeal." *Willard*, 754 So.2d at 441 (¶16); *Ballenger v. State*, 667 So.2d 1242, 1254 (Miss. 1995).

In the case subjudice, none of the issues now argued by Plaintiff on appeal were raised and argued before the trial court, and the trial court had no opportunity to consider said issues for resolution. For that very reason alone, Plaintiff's appeal herein is procedurally barred from consideration by this Court.

STANDARD OF REVIEW

Because this case was tried by the lower court as a bench trial, Appellant, HLC, has properly argued, and Defendant agrees, that Defendant MFC's motion for dismissal at the end of Plaintiff's case in chief was a *Miss. R. Civ. Proc 41(b)* Motion for Involuntary Dismissal rather than a *Miss. R. Civ. Proc 50(a)* Motion for Directed Verdict.

The Mississippi Court of Appeals has held that the standard of review for a motion to dismiss under Mississippi Rules of Civil Procedure 41(b) is as follows:

> [i]n considering a motion to dismiss, the judge should consider "the evidence fairly, as distinguished from in the light most favorable to the Plaintiff," and the judge should dismiss the case if it would find for the defendant. "The court must deny a motion to dismiss only if the judge would be obliged to find for the plaintiff if the plaintiff's evidence were all the evidence offered in the case." "This Court applies the substantial evidence/manifest error standards to an appeal of a grant or denial of a motion to dismiss pursuant to M.R.C.P. 41(b)."

Gallegos v. Mid-South Mortgage and Investment, Inc., 956 So.2d 1055, 1059 (¶ 14) (Miss.Ct.App. 2007) (*citing Alexander v. Brown* 793 So.2d 601, 601 (¶ 6) (Miss. 2001)). The *Gallegos* court went on to find:

> [t]his Court will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused his or her discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied.

956 So.2d at 1059 (¶ 15) (citing *Sanderson v. Sanderson*, 824 So.2d 623, 625-26 (¶ 8) (Miss.2002)).

In *Milligan v. Milligan*, the Mississippi Court of Appeals found:

> [w]hen considering a motion to dismiss, the chancellor should review the evidence fairly, and not in the light most favorable to the plaintiff, which is the applicable standard for a motion for a directed verdict. *Century 21 Deep South Properties, Ltd. v. Corson*, 612 So.2d 359, 369 (Miss.1992). "The result is that the ruling [for an involuntary dismissal] is practically equivalent to a finding of fact." *Ainsworth v. Callon Petroleum Co.*, 521 So.2d 1272, 1274 (Miss.1987). Therefore, the standard of review for a motion to dismiss under Rule 41(b) is one of substantial evidence and manifest error. *Stewart v. Merchants Nat'l Bank*, 700 So.2d 255, 259 (Miss.1997).

956 So.2d 1066, 1072 (¶ 14) (2007). See also, *Gulfport-Biloxi Regional Airport Authority v. Montclair Travel Agency, Inc.*, 937 So.2d 1000, 1004-05 (¶ 13) (Miss.App. 2006) (citations omitted) ("The standard of review for a motion for involuntary dismissal is different than that for a motion for directed verdict...[i]n reviewing a trial court's grant or denial of a Rule 41(b) motion for involuntary dismissal, we apply the substantial evidence/manifest error standards").

ARGUMENT

I.

The lower court did not err in granting a Rule 41(b) dismissal in favor of Defendant.

As previously argued hereinabove, the Plaintiff filed no post-trial Motion for Reconsideration, Motion for New Trial or JNOV or any other objection to the trial court's ruling, which is at issue herein. Therefore, Plaintiff has never presented this issue to the lower court for reconsideration or other resolution, and therefore said issue is not properly before this Court and argument of same is procedurally barred. However, if the Court does not agree with Defendant, Defendant alternatively submits its response to Plaintiff's argument as to this issue.

Again, as part of the Invitation for Bids and Forest Products Sale Contract which are at issue in this case, an **estimated** tree count was provided by the Mississippi Forestry Commission. Both the Invitation for Bids (RE 1-7) and the Forest Products Sale Contract (RE 8-19) state, in clear, unambiguous language, that the tree count was merely an estimation, and that the **kind, quantity and quality** of trees should be determined by the Purchaser, and/or that a inspection should be performed by the Purchaser at their option.

Specifically, the Invitation for Bids included the following language when referring to the estimated volume of wood from this tract of timber: "...estimated to contain...more or less. The above figures are ***not to be construed to be the exact volume marked.*** Each bidder is ***expected to make his own cruise*** and to bid accordingly." Further, the Invitation for Bids stated that, "**The timber may be inspected at any time.**" (RE 1-7) (emphasis added).

Likewise, the Forest Products Sales Contract states: "All of the forest products covered by this contract, described and **estimated** below..." and "The volume of products marked or designated is

estimated by the Seller to contain the following, *more or less*:" Further, the Sales Contract states, "**The Buyer *represents that he has inspected* the sale area and familiarized himself with the *kind, amount and quality* of all timber marked or designated by the Seller, and covered by this contract, and understands that the estimated volume figures are furnished for information only, and are *not guaranteed by the Seller.***" (RE 8-19) (emphasis added).

In its opinion on Defendant's Motion for Directed Verdict, the lower court made it very clear that its findings were based upon the disclaimer found in the MFC's Invitation for Bids (Vol. IX Tr. 141) and the "very strong contract provisions" regarding the subject tree count and volume estimations. (Vol. IX Tr. 147). The lower court used the terms "assumption of the risk", "buyer beware" (Vol. IX Tr. 148), and "you take it as you find it" (Vol. IX Tr. 148). The lower court went on to find that based upon these contract provisions, there was a "very clearly a meeting of the minds there"(Vol. IX Tr. 148), and that the contract provisions "clearly overrides the other figures that were incorporated in the contract because this paragraph makes it clear that there were no guarantees, and that the buyer was to familiarize himself with it, and these were estimates only and furnished for information only". (Vol. IX Tr. 148).

The lower court went on to discuss Plaintiff's remaining viable claim in this case, negligent misrepresentation. The lower court discussed that there are "four or five" elements of negligent misrepresentation (Vol. IX Tr. 151). According to Mississippi precedent, in order to establish a prima facie case of negligent misrepresentation, the Plaintiff must show the following elements: (1) a misrepresentation or omission of fact; (2) that the representation or omission is material or significant; (3) that the defendant failed to exercise that degree of diligence and expertise the public is entitled to expect of it; (4) that the Plaintiff reasonably relied on the Defendant's representations; and (5) that the Plaintiff suffered damages as a direct and proximate result of his reasonable reliance. *Horace*

Mann Life Insurance Company v. Nunaley, 960 So.2d 455, 461 (¶ 4) (Miss. 2007). *See also Moran v. Fairley*, 919 So.2d 969, 973, (¶12-13) (Miss.Ct.App. 2005) and *Skrmetta v. Bayview Yacht Club,* 806 So.2d 1120, 1124 (Miss. 2002). The burden of proof in a negligent misrepresentation case falls on the **plaintiff** to prove each element by a **preponderance of the evidence**. *Fairley*, 919 So.2d at 973 (¶ 12) (emphasis added) (citing *Bank of Shaw v. Posey*, 573 So.2d 1355, 1360 (Miss. 1990)).

Based upon its findings as to the Defendant's disclaimers and contract provisions as set forth hereinabove, the lower court in the present case clearly found that the Plaintiff could not meet its burden as to two critical elements of negligent misrepresentation.

First, the lower court found that Defendant could not have made a misrepresentation or omission of fact. The Invitation for Bids clearly stated that the numbers given therein were estimates and were not to be relied upon by the Plaintiff in formulating its bid and that the Plaintiff was expected to make its own cruise in formulating it bid. (RE 1-7). Likewise, the Forest Products Sales Contract states: "All of the forest products covered by this contract, described and estimated below..." and "The volume of products marked or designated is estimated by the Seller to contain the following, *more or less*:" Further, the Sales Contract states, "The Buyer *represents that he has inspected* the sale area and familiarized himself with the *kind*, *amount and quality* of all timber marked or designated by the Seller, and covered by this contract, and understands that the estimated volume figures are furnished for information only, and are *not guaranteed by the Seller.*" (RE 8-19) (emphasis added).

These two documents did not make any sort of representation as to the kind, amount or quality of the timber contained therein, and that the buyer was to make those types of determinations, based upon its own, independent cruise of the subject timber. Therefore, the Plaintiff has failed to prove the first element in proving its case of negligent misrepresentation.

The Plaintiff, in its case in chief, likewise failed to prove a second element, that it reasonably relied upon the Defendant's alleged representations. Based upon the language found in the Invitation for Bids and the Sales Contract, set forth herein, the Defendant exercised more than adequate diligence in its express and unambiguous wording of the aforementioned documents and the Plaintiff, given said language, could not have acted reasonably when relying on "estimated" counts that were "not guaranteed". Further, such reliance was unreasonable when the Invitation for Bids expressly stated that the bidders were "expected to make his own cruise and to bid accordingly."

Moreover, when the Plaintiff did conduct its own, independent 9.25 percent cruise of the subject timber, its own cruise revealed that the total tree count and volume was less that what was set out in the Invitation for Bids (Vol. IX Tr. 22-23 and 142). However, the Plaintiff chose to ignore its own lower numbers, and **unreasonably** relied on the estimated numbers provided by the Defendant to formulate its bid. Plaintiff's reliance upon the Defendant's tree count figures, used in the Invitation for Bids, was unreasonable, given the language of the Invitation for Bids and of the Sale Contract. The terms of the Invitation for Bids and the Contract are clear and unambiguous. The Defendant could not and did not breach the contract at issue herein, nor can the Defendant be held liable for negligent misrepresentation, when the Plaintiff's reliance was unreasonable. Accordingly, Plaintiff can not meet it burden to sustain its claim of negligent misrepresentation against Defendant MFC and the lower court's grant of a Rule 41(b) dismissal in favor of Defendant should be affirmed.

II.

The Defendant adequately pled affirmative defenses to sustain the lower court's grant of Rule 41(b) dismissal.

As previously argued hereinabove, the Plaintiff filed no post-trial motions or other objections to the trial court's ruling, which is at issue herein. Therefore, Plaintiff has never presented this issue

to the lower court for reconsideration or other resolution, and therefore said issue is not properly before this Cout and argument of same is procedurally barred. However, Defendant alternatively present's its responses to Plaintiff's argument as to this issue.

Again, in arguing this issue, the Plaintiff improperly focuses and relies upon the lower court's usage of the term "assumption of the risk". As previously argued, the court also used the terms "buyer beware" (Vol. IX Tr. 148), and "you take it as you find it" (Vol. IX Tr. 148). All three of these terms were simply used by the trial court in finding that Plaintiff could not meet its burden in establishing a *prima facie* case for negligent misrepresentation. The trial court did not use the doctrine of assumption of the risk as a complete defense to Plaintiff's claims. A careful review of Defendant's Motion for Directed Verdict (RE 91-105; Vol. IX Tr. 135-38) and the trial court's Order granting same (Vol. # IX Tr. 140-Vol. # X Tr. 155) makes it clear that Defendant was arguing, and the trial court agreed, that based upon Plaintiff's case in chief, Plaintiff could not meet its burden in establishing a *prima facie* case, in that it could not establish that its reliance upon the estimated tree counts and volumes was reasonable, based upon the clear language of the Invitation for Bids and Forest Products Sales Contract. Therefore, Plaintiff's argument is misplaced, and there are no grounds for reversal or remand herein.

Alternatively, on or about July 19, 2002, Defendant MFC filed its Separate Answer and Affirmative Defenses of the Mississippi Forestry Commission. (RE 113-120). In that Answer, Defendant's Sixth Affirmative Defense states: "[p]laintiff's damages, if any, were caused or contributed to, in whole or in part, by the comparative fault of Plaintiff's employees or agents and any such fault shall reduce any recovery in this matter, pursuant to Miss. Code Ann. § 11-7-15 (1972).

In *Churchill v. Pearl River Basin Development District*, 757 So.2d 940, 943 (¶ 11) (Miss. 1999), the Court held that the doctrine of "assumption of the risk" on the part of the plaintiff merely

goes to the percentage of fault attributable to the plaintiff; it no longer affords a complete defense to the defendant unless the jury finds that the plaintiff's assumption of the risk proportionately reduces damages to zero. This Defendant did indeed affirmatively plead comparative negligence, and according to the trial court's ruling, it is clear that the trial court determined that the Plaintiff's comparative fault proportionately reduced its damages to zero.

Again, Plaintiff's argument is misplaced. The lower court's ruling was proper and there are no grounds for reversal or remand herein, and the lower court's grant dismissal should be affirmed.

III.

The lower court's rulings dismissing Plaintiff's breach of contract and mutual mistake causes of action do not require reversal or remand.

As previously argued hereinabove, the Plaintiff filed no post-trial motions or other objection to the trial court's ruling, which is at issue herein. Therefore, Plaintiff has never presented this issue to the lower court for reconsideration, new trial or other resolution, and therefore said issue is not properly before this Court and argument of same is procedurally barred. However, Defendant alternatively submits its responses to Plaintiff's argument as to this issue.

A. BREACH OF CONTRACT

1. *Whether a contract exists between Defendant MFC and Plaintiff*

Plaintiff's claim for breach of contract is predicated upon a Forest Products Sale Contract, entered into between the Franklin County Board of Education and Plaintiff, Hazelhurst Lumber. The Contract was signed by both parties on January 2, 2001. (RE 16). Defendant MFC was never a party to, nor did they derive any benefit from, said Contract.

In an action for breach of contract, the claimant must either be a party to the contract or be in privity of contract with the breaching party. In order for there to be a valid contract, the following

elements must be met: (1) two or more contracting parties; (2) consideration; (3) an agreement that is sufficiently definite; (4) parties with the legal capacity to make a contract; (5) mutual assent; (6) no legal prohibition precluding contract formation. *Rottenberry v. Hooker,* 864 So.2d 266, 270 (Miss. 2003). "An instrument that is clear, definite, explicit, harmonious in all its provisions, and is free from ambiguity will be enforced. *Pursue Energy Corp. v. Perkins,* 558 So.2d 349, 352 (Miss. 1990). In *IP Timberlands Operating Co. Ltd. v. Denmiss Corp.,* 726 So.2d 96, 108 (Miss. 1998), the Court held that the agreement must be construed as made by the parties and the words of the document must be given their commonly accepted meaning.

A general rule of contract construction is that 'no person is bound by a contract except the parties thereto and that no person is entitled to any rights thereunder or may have any liability cast upon him thereby unless as a party he has agreed thereto.' *Mitchell v. Atlas Roofing Manufacturing Co.,* 149 So.2d 298, 303 (Miss. 1963). The parties to the contract in the present matter are the Franklin County Board of Education and Hazelhurst Lumber Co. (RE 8-19). Defendant MFC cannot breach a contract to which it is not a party. Plaintiff could not meet its burden in proving that a contract existed between it and Defendant MFC, and the lower court's dismissal was proper and should be affirmed.

2. ***Whether Plaintiff can claim to be a third party beneficiary to an agreement between the Franklin County School Board and Defendant MFC***

Very late in the litigation process, in response to Defendant's second Motion for Summary Judgment, Plaintiff claimed, for the first time, that it was a third party beneficiary to some contract between MFC and the Franklin County School District to manage and market 16th section timber land, and that MFC damaged Plaintiff by its failure to complete its statutory duty.

M.C.A. § 29-3-45 provides, in pertinent part:

> (1)(a) The board of education shall by order placed upon its minutes, enter into an agreement with the State Forestry Commission for the general supervision and management of all lands classified as forest lands, as hereinabove provided, and of all timber or other forest products under the control of the board on sixteenth section lands...When such agreement has been entered into, no timber or other forest products shall be sold from any of said sixteenth section lands or lieu lands except such as have been marked for cutting by the State Forestry Commission's employees, and the said Forestry Commission, or its designated employee, shall fix the minimum total cash price or minimum price per unit, one thousand (1,000) feet or other measure, at which said marked timber or other forest products shall be sold. Said sales may be made for a lump sum or upon a unit price as in the opinion of the board may be calculated to bring the greatest return. Sales shall be made upon such other terms and conditions as to manner of cutting, damages for cutting or unmarked trees, damages to trees not cut and other pertinent matters as the board of education shall approve.
>
> (b) The State Forestry Commission shall have the sole authority and control in prescribing the forestry management practices and scheduling of all cutting and harvesting of timber or other forest products when such timber stands or other forest products are determined by the State Forestry Commission to be economically ready for cutting and harvesting....

It is recognized by the Mississippi courts that in order for the third party beneficiary to have a cause of action, the contracts between the original parties must have been entered into for his benefit, or at least such benefit must be the direct result of the performance within the contemplation of the parties as shown by its terms. There must have been a legal obligation or duty on the part of the promisee to such third person beneficiary. This obligation must have a legal duty which connects the beneficiary with the contract. In other words, the right of action of the third party beneficiary, to maintain an action on the contract, must spring from the terms of the contract itself. *Womack v. City of Jackson*, 804 So.2d 1041, 1050 (Miss. 2002); *Hanberry Corp. v. State Building Commission*, 390 So.2d 277, 279 (1980) (*citing Burns v. Washington Savings*, 171 So.2d 322 (Miss. 1965)).

The first consideration is the fact that there is no such contract to which Plaintiff can point to to show that it was a third party beneficiary. Plaintiff can only point to the statute hereinabove.

A review of the applicable statute in this matter clearly shows that any agreement that existed between MFC and the school board, and any statutory duty MFC may have had in this matter was simply general supervision and management of the designated forest lands. The Commission's statutory supervisory and management authority includes the authority to determine when such forest lands are economically ready for cutting and harvesting, to mark which timber on those lands are to be harvested, and to determine a minimum value of the timber so designated. There is no other duty(ies) imposed upon the Commission, and certainly no duty to which the Plaintiff can claim it was a third party beneficiary. In fact, the only third party beneficiaries to any agreement between Defendant MFC and the School Board would be the tax-payers of the district, or the school children of Franklin County.

The Commission could not have breached any contract between it and Plaintiff, because no such contract existed; nor did the Commission breach any agreement with the school board, to which Plaintiff can claim to have been injured as a third party beneficiary. Plaintiff has not and cannot prove its claim that it was injured as a third party beneficiary herein, and dismissal of this claim by the trial court was proper and is not grounds for reversal or remand.

3. ***Whether legal precedent on contracts for the sale of timber requires dismissal of this civil action***

Even if Defendant MFC could be construed to be a party to the Forest Products Sale Contract herein, Plaintiff's claims for breach of contract and negligent misrepresentation equally without merit. The Invitation for Bids, proposed by the Mississippi Forestry Commission and allegedly relied upon by Hazelhurst Lumber Company, included the following language when referring to the estimated volume of wood from this tract of timber: "...estimated to contain...more or less. The above figures are ***not to be construed to be the exact volume marked.*** (emphasis added). Each bidder is ***expected***

to make his own cruise and to bid accordingly." Further, the Invitation for Bids stated that, "The timber may be inspected at any time." (RE 1-7) (emphasis added).

The Sales Contract, which was awarded and executed as a result of the acceptance of the Plaintiff's bid, between Hazelhurst Lumber Company and the Seller, Franklin County School Board, also included the following language: **"All of the forest products** covered by this contract, **described** and **estimated** below..." and "[t]he volume of products marked or designated is **estimated** by the Seller to contain the following, ***more or less***." Further, the Sales Contract states, "The Buyer ***represents that he has inspected*** the sale area and familiarized himself with the kind, ***amount and quality*** of all timber marked or designated by the Seller, and covered by this contract, and understands that the **estimated** volume figures are furnished for information **only,** and are ***not guaranteed by the Seller.***" (RE 8-19) (emphasis added). Such language has been held to be dispositive in favor of dismissal of any claim for breach of contract and/or negligent misrepresentation. *See Patridge v. McAtee,* 82 So.2d 711 (Miss. 1955) and *Crawford v. Smith Brothers Lumber Co.*, 274 So.2d 675 (Miss. 1973).

The subject Forest Products Sales Contract (RE 8-19), as well as the Invitation for Bids (RE 1-7), contained specific language disclaiming any estimated tree counts or volume figures and stating that same were provided for information only and were not to be relied upon by the buyer when formulating his bid. Moreover, the contract required the buyer to specifically represent that it had inspected the sale area and familiarized itself with the kind, amount and quality of all timber marked or designated by the seller, and covered by the subject contract. (RE 8-19).

Despite the above mentioned language, as illustrated hereinabove, Hazlehurst, the buyer, claims that it did, in fact, rely on MFC's estimations in preparing its bid, despite the fact that Hazlehurst performed its own cruise of the proposed timber and came up with its own lower

estimations, and that the value of the bid was calculated relying on MFC's estimated numbers.

The language of the Sales Contract and the Invitation for Bids is repetitively clear. The estimated tree counts and volume figures provided in the subject documents were for informational purposes only and were not to be relied upon by the bidders in calculating their bids.

Plaintiff's arguments and assertions, as set forth in its Complaint, for breach of contract and negligent misrepresentation, fly in the face of the express, clear, and unambiguous language of the Invitation for Bids and the Contract between the parties. Further, the Plaintiff's interpretation of said contract is not only factually inaccurate, but also clearly inconsistent with established Mississippi case law. See e.g. *Crawford*, 274 So.2d at 678; *Patridge,* 81 So.2d at 714.

B. MUTUAL MISTAKE

Even if the Court were to find that a contract somehow existed between Defendant MFC and Plaintiff, the terms of said contract were clear, and this is simply not a case of mutual mistake. When one claims mutual mistake in the drafting of an agreement, the trial court assumes the role of the fact finder, evaluating contrasting testimony and other forms of evidence, and the standard of review on appeal becomes that of manifest error, clear error, or application of an erroneous legal standard. *Martin v. Fly Timber Company, Inc.*, 825 So.2d 691, 695 (¶ 10) (Miss.Ct.App. 2002). The burden or proof is on the party trying to establish mutual mistake and the proof must establish such a mistake **beyond a reasonable doubt**. *Milligan*, 956 So.2d at 1076 (¶ 32) (citations omitted) (emphasis added).

Mutual mistake only occurs where the parties to a contract are mistaken on the same issue/element/clause and their individual interpretations of the mistaken issue/element/clause are the same. However, one party cannot be consciously ignorant and claim that a mutual mistake exists.

In the present case, as stated previously herein, the provisions of the Invitation for Bids and the Forest Products Sales Contract were clear that the information regarding the timber to be sold was estimated, not guaranteed and not to be relied upon. (RE 1-7; 8-19). Moreover, as part of the Forest Products Sales Contract, the Plaintiff affirmed that it had "***inspected* the sale area and familiarized himself with the kind, *amount and quality* of all timber marked or designated by the Seller, and covered by this contract, and understands that the estimated volume figures are furnished for information only, and are *not guaranteed by the Seller*.**" (RE 8-19) (emphasis added). Further, Plaintiff's agent, John Thomas Coates, testified in his deposition and at trial that the Plaintiff did, in fact, conduct its own, independent cruise of the subject timber, and that Plaintiff's own cruise revealed that the total tree count and volume was less that what was set out in the Invitation for Bids (Vol. IX Tr. 22-23 and 142). However, the Plaintiff chose to ignore its own lower numbers, and, despite the warnings and disclaimers in the subject Invitation for Bids and Forest Products Sales Contract, used the MFC's estimated numbers in calculating its bid.

In evaluating Plaintiff's case in chief in its ruling, the trial court held, regarding the subject contract provisions:

> [t]his provision could not be clearer in what it states, and **very clearly there was a meeting of the minds there**. This is the contract provision and because of that, because of that, that very clearly overrides the other figures that were incorporated in the contract because this paragraph makes it clear that there were not guarantees, and that the buyer was to familiarize himself with it, and these were estimates only, and furnished for information only. So with that being the situation, it cannot be enforced or the Plaintiff cannot prevail on a contractual basis. And let me say this at this point. Even given what the court said previously...[i]t's understandable see (sic) him take this action, but again, it cannot prevail as far as damage on a contractual basis because of this very clear provision in the contract...this cannot prevail on a mutual mistake...under a contract because, again, of this very clear language that seems to totally discount the intent of the parties to do that in the event that that's the situation. This paragraph could not be clearer as far as a disclaimer.

(Vol. IX Tr. 148-49) (emphasis added).

Plaintiff consciously ignored all disclaimers and its own evidence to the contrary. There is no mutual mistake here, and the trial court's dismissal of Plaintiff's claim of mutual mistake was proper, and reversal and/or remand is unwarranted and the lower court's ruling should be affirmed.

CONCLUSION

For the reasons set forth hereinabove, the Court should find that Plaintiff's assignments of error in this matter are procedurally barred, or alternatively without merit. Plaintiff cannot meets its burden in showing that the trial court was manifestly in error in dismissing Plaintiff's claims for breach of contract and mutual mistake, or in granting a Rule 41(b) involuntary dismissal in favor of Defendant at the conclusion of Plaintiff's case in chief. Therefore, remand of this matter back to the trial court for further litigation is unwarranted and would not be proper. The trial court's dismissal should be affirmed.

This, the 10th day of September, 2007.

Respectfully submitted,

MISSISSIPPI FORESTRY COMMISSION

By Its Attorneys,

SIMMONS LAW GROUP, P.A.

By: 

HEBER S. SIMMONS III
MB No. [redacted]

Heber S. Simmons III
SIMMONS LAW GROUP, P.A.
240 Trace Colony Park Drive
Suite 200
Ridgeland, Mississippi 39157
Telephone: (601) 914-2882
Facsimile : (601) 914-2887
heber@simmonslawgroup.com
chenderson@simmonslawgroup.com

CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed by United States mail, postage prepaid, a true and correct copy of the foregoing to the following:

Dennis L. Horn, Esq.
Horn & Payne, PLLC
P.O. Box 2754
Madison, MS 39130

George C. Nichols
Attorney at Law, PLLC
P.O. Box 12282
Jackson, MS 39236

ATTORNEYS FOR APPELLANT

Honorable Forrest A. Johnson, Jr.
Circuit Court Judge
P.O. Box 1372
Natchez, MS 39121

PRESIDING CIRCUIT COURT JUDGE

This, the 10th day of September, 2007.

HEBER S. SIMMONS III