IN THE SUPREME COURT OF MISSISSIPPI

HAZLEHURST LUMBER COMPANY, INC. — APPELLANT

V. — CASE NO. 2007-CA-00120

MISSISSIPPI FORESTRY COMMISSION — APPELLEE

APPEAL FROM THE FRANKLIN COUNTY CIRCUIT COURT

BRIEF OF APPELLANT

Oral Argument Requested

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MISSISSIPPI FORESTRY COMMISSION APPELLEE

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.

Hazlehurst Lumber Company
1077 Lilly Rd
Hazlehurst, MS 39083-9483- - The Plaintiff-Appellant Lumber company that lost over $100,000 in reliance upon the Forestry Commission tree count.

Starke Albritton- -
Chief operator of the Hazlehurst Lumber Company, who directed the cruise of the subject timber resulting in the mutual mistake.

The Mississippi Forestry Commission
301 North Lamar Street
Jackson, Mississippi39201- - The Defendant-Appellee charged by statute with the duty to manage and harvest Sixteenth Section land timber.

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- - the circuit court judge who tried the case below.

Hon. Heber Simmons
Simmons Law Group, P.A.
5 Old River Place, Suite 203
Jackson, MS 39202- - attorney for the Defendant-Appellee

Dennis L. Horn
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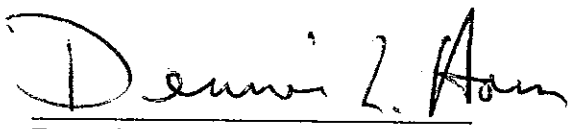
Respectfully submitted,



Dennis L. Horn
Attorney for Appellant

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STATEMENT REGARDING ORAL ARGUMENT

The Appellant Hazlehurst Lumber Company 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 Circuit Judge below improperly used "Assumption of the Risk" in dismissing the negligent misrepresentation claim and also erred in dismissing Plaintiff's claim for mutual mistake at the Rule 41 directed verdict stage. Oral argument will assist the Court in evaluating these interrelated causes of action.

STATEMENT OF THE ISSUES

1. Whether the court below erred when ruling that the relief Hazlehurst Lumber sought was barred by the assumption of the risk, a rule the Mississippi Supreme Court has abrogated?

2) Whether Defendant's failure to assert assumption of the risk as an affirmative defense constitutes a waiver of that defense?

3) Whether Hazlehurst Lumber's causes of action not grounded in misrepresentation mandate reversal?

4) Whether mutual mistake, as found by the trial court below, requires reformation of the contract?

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CASE NO. 2007-CA-00120

HAZLEHURST LUMBER COMPANY, INC. APPELLANT

V.

MISSISSIPPI FORESTRY COMMISSION APPELLEE

BRIEF OF APPELLANT

STATEMENT OF THE CASE

Nature of the case.

This is a case of misrepresentation or mutual mistake on a timber contract.

Course of Proceedings.

Hazlehurst Lumber Company began this action by filing suit in Hinds County against the Mississippi Forestry Commission, the Franklin County School System, and the Franklin County Board of Education. (Vol. IX Tr. 3) Hazlehurst Lumber Company sought damages of $104,339.36 for its losses on a Sixteenth Section school land tract of timber based on what the Circuit Court below correctly found to be a material misrepresentation. The Forestry Commission's invitation for bids stated, incorrectly, that it offered a "100% tree count." The tree count was wrong. There were fewer trees than represented in the tree count in the invitation for bids. The missing

trees, at then market value, caused the $104,339.36 in damages.

The Hinds County Circuit Court transferred the case to the Franklin County Circuit Court. (Vol. IX Tr. 5). After this transfer, the Hazlehurst Lumber Company agreed to dismiss the Franklin County School Defendants. *(Id.)*

The Forestry Commission presented summary judgment motions which the court below granted in part and denied in part. Particularly the circuit court dismissed any claims stemming from alleged fraud but denied summary judgment on the remaining causes of action, namely, negligent misrepresentation, mutual mistake, and breach of contract. (Vol. IX Tr. 5-6). The Forestry Commission filed an interlocutory appeal to the Mississippi Supreme Court alleging the court erred in not dismissing the entire action. The Supreme Court denied the interlocutory appeal and the case proceeded to be heard on the merits as a bench trial in accordance with the Mississippi Tort Claims Act. (Vol. IX Tr. 6).

Trial was held on October 9, 2006. At the close of Hazlehurst Lumber Company's case the Mississippi Forestry commission moved for a direct verdict. (Vol. IX Tr.135-138).

Disposition in the court below.

The trial court granted a Rule 41(b) dismissal in favor of the Forestry

Commission finding that Hazlehurst Lumber company ***assumed the risk*** of relying upon the invitation for Bids' certified 100% tree count. (RE 20-35, Vol. IX-X, Tr 104-155).

Hazlehurst Lumber Company timely appealed this dismissal to this Court. (RE 38-9, Vol. VIII 1065) .

Statement of the Facts

On or about December 5, 2000 the Mississippi Forestry Commission, acting pursuant to its statutory duty, let for bid a tract of land in Franklin County, Mississippi. The Forestry Commission handled the bid for the Franklin County School Board because the tract of timber was located on sixteenth section school lands. §29-3-45 Miss. Code Ann. of 1972 (the Commission's duty is to enter into agreements to manage and harvest timber on sixteenth section lands owned by school districts). The invitation for bids contained a one hundred percent (100%) tree count. The only "estimate" in the invitation was as to "volume" by board feet. The tree count was held out as one hundred percent (100%) accurate.

John Coats, an expert procurement forester working for Hazlehurst Lumber Company, reviewed the bid by studying the standing stock tables and volume estimates. (Vol. IX Tr. 11) He also reviewed the invitation for bids that plainly stated the tree count was a 100% count of the harvestable

trees and that any trees that the Forestry Commission would allow to be cut down would be marked with blue paint. (*Id.*)

Mr. Coats testified, following his experience and education, that it was the custom and practice in the timber industry to rely on a guaranteed 100% tree count to calculate the volume in bidding for the timber. (Vol. IX Tr. 12). Hazlehurst Lumber Company also presented an expert William A. Jenkins, a retired Georgia Pacific forester, who also testified that the custom of the lumber industry is to rely upon a one hundred percent (100%) tree count as accurate. (Vol. IX Tr. 72).

The volume of board feet harvested ended up with a market value $104,339.36 short of what Hazlehurst Lumber Company reasonably thought it had bought. (Vol. IX Tr. 124). To verify the inaccurate count in the invitation for bids, Mr. Coats took a crew and counted the actual tree stumps. (Vol IX Tr. 29). The actual count was 1529 trees short of the trees guaranteed in the invitation for bids. (Vol. IX Tr. 112; Plaintiff's Exhibit 19) Hazlehurst Lumber Company's operations manager, Dan Starke Albritton, calculated Hazlehurst Lumber Company's damage caused by the inaccurate tree count to be the $104,339.36 (Vol. IX Tr. 125-6). As the court below found, the shortage was "...in excess of thirty percent of what was projected to be - - or what was set out as the tree count from what was

actually out there." (RE 23, Vol. IX Tr 143).

As stated supra, the tree count was wrong. The count was for four thousand eight hundred and fifty trees (4,850). The actual number of trees was three thousand three hundred and twenty one (3,321), a deficit to Hazlehurst Lumber Company of one thousand five hundred and twenty nine trees (1,529). This number of missing trees lead to a shortage of two hundred forty eight thousand nine hundred sixty two (248,962) board feet, causing the $104,339.36 in damages at the then current market value.

Furthermore, in its bench opinion granting the Forestry Commission's Rule 41 (b) dismissal, the Court ruled, "I find very clearly that there was - that the information that we're dealing with here, the tree count that was included in the invitation for bids was erroneous. It was in error. It was inaccurate. It was misleading because of the number involved. There is very strong, clear evidence from which the Court can find that element. There is strong evidence which the Court could find that there is negligence involved here." (RE 31, Vol. X 151). "There was some type of negligence involving this tree count because you cannot reconcile these figures that are set out in this invitation to bid and attached it with what was actually found out there and what was harvested." (RE 34, Vol. X 154).

This arrearage of board feet caused by the incorrect number of trees

directly and proximately caused damage to Hazlehurst Lumber Company in the amount of One Hundred Four Thousand Three Hundred Thirty Nine Dollars and 36 cents ($104,339.36). These damages were the result of the Forestry Commission failing to complete its statutory duty as dictated in Miss. Code Ann.§ 29-3-45.

SUMMARY OF THE ARGUMENT

The appellant lumber company successfully proved at trial that Hazlehurst Lumber reasonably relied on the misrepresentation of the Mississippi Forestry Commission. The court below found negligent misrepresentation caused Hazlehurst Lumber Company to overvalue a tract of timber causing damages for Hazlehurst Lumber Company. However the trial court determined that Hazlehurst Lumber Company "assumed the risk" and applied "assumption of the risk" as an absolute bar to Hazlehurst Lumber Company's recovery.

The Mississippi Supreme Court has abrogated "assumption of the risk" as a complete bar in a tort claim action. Therefore the trial court erred as a matter of law when it involuntary dismissed the Hazlehurst Lumber Company's case under Rule 41(b). The trial court also erred by using the "assumption of the risk" where the Defendant, the Forestry Commission,

failed to affirmatively plead "assumption of the risk" as required by Mississippi Rule of Civil Procedure 8 (c) and had failed to raise assumption of the risk at any point, including its motion for directed verdict at the close of the plaintiff's case.

The trial court also erred by dismissing Hazlehurst Lumber Company's breach of contract and mutual mistake claims. The court below found every element necessary for a ruling in favor of Hazlehurst Lumber Company on either negligent misrepresentation or mutual mistake. This Court must reverse this dismissal on all grounds and remand this case to the Trial Court to resume with the Defendant's case in chief.

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 P5 (Miss. 2002).

At the close of the Plaintiff's case, "The proper motion was not one for a directed verdict. Instead, in a bench trial, the proper motion to make at the close of plaintiff's case-in-chief is a motion for involuntary dismissal under Rule 41(b) of the Mississippi Rules of Civil Procedure. Rule 50(a)

directed verdicts are reserved only for jury trials." *Ladner v. Stone County*, 938 So. 2d 270, 273 P9(Miss. Ct. App. 2006) (citing *Partlow v. McDonald*, 877 So.2d 414, 416 (P7) (Miss. Ct. App. 2003)). "In considering a motion for involuntary dismissal under Rule 41(b), the trial court 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. *Id.* (citing *Century 21 Deep S. Props., Ltd. v. Corson*, 612 So.2d 359, 369 (Miss. 1992)). "We must apply the substantial evidence/manifest error standard to an appeal of a grant or denial of a motion to dismiss pursuant to M.R.C.P. 41(b). Where there arguably is evidence that a party might be entitled to a judgment, the court errs in dismissing the case." *Id.*

I

The Court erred in utilizing the assumption of the risk doctrine long abrogated by the Mississippi Supreme Court by granting a Rule 41 (b) dismissal at the end of Hazlehurst Lumber Company's case.

The case revolved around a one hundred percent (100%) tree count prepared by the Mississippi Forestry Commission in a request for bids for land owned by the Franklin County School Board as sixteenth section land. Hazlehurst Lumber was awarded the contract based upon its bid. Their bid

relied upon the tree count which was materially low, as found by the circuit court below, at trial. (RE 23, Vol. IX Tr. 143). The court found that Hazlehurst Lumber Company harvested fewer trees than had been represented by the Forestry Commission, resulting in a dramatic loss of profits for Hazlehurst Lumber Company. (*Id.*)

In the bench opinion, the Honorable Judge Forrest A. Johnson, Jr., made findings of fact according to Mississippi Rule of Civil Procedure 52 including that, "there's very clear evidence of a significant deficiency or understatement of the actual trees there or overstatement as to the 100 percent tree count." (RE 27, Vol. IX Tr. 147).

Additionally, "I find very clearly that there was - that the information that we're dealing with here, the tree count that was included in the invitation for bids was erroneous. It was in error. It was inaccurate. It was misleading because of the number involved. There is very strong, clear evidence from which the Court can find that element. There is strong evidence which the Court could find that there is negligence involved here." (RE 31, Vol. X Tr. 151). "There was some type of negligence involving this tree count because you cannot reconcile these figures that are set out in this invitation to bid and attached it with what was actually found out there and what was harvested." (RE 34, Vol. X Tr. 154).

However, Judge Johnson ruled that the Plaintiff can not succeed on this matter. "The Plaintiff would appear to have **assumed the risk**." (RE 35, Vol. X Tr. 155 *emphasis added*) "One of the clear defenses to a tort is **assumption of the risk**." (RE 33, Vol. X Tr. 153 *emphasis added*).

This Rule 41 (b) dismissal is contrary to established Mississippi case law which has repealed the assumption of the risk doctrine. *Churchill v. Pearl River Basin Development Dist.*, 757 So.2d 940, 943 P10 and P12 (Miss. 1999). The trial court dismissed the Plaintiff's case as completely barred by the assumption of the risk doctrine. (RE 33-35, Vol. X Tr. 153-155). This ruling is error.

The Court stated the elements of negligent misrepresentation as, "a misrepresentation being negligence involved, and that there is detrimental reliance upon this." (RE 31, Vol. IX Tr. 151). "The final and essential element is that the party suing, if you will, for damages must have relied upon to their detriment in a reasonable manner this negligent misrepresentation or this negligent or inaccurate or misleading statement." (RE 32, Vol. X Tr. 152). The trial court had previously found that Hazlehurst Lumber had suffered an injury or damages of $104,339.36, finding that "...given the full benefit of the doubt to defendant and using conservative figures, it resulted in their claim for damages of some

$104,000." (RE 23 Vol. IX Tr 143). The trial court had correctly followed the test this Court laid out in *Clark v. St. Dominic-Jackson Memorial Hosp.*, 660 So. 2d 970, 974 (Miss. 1995) that: "The elements of a negligent misrepresentation claim are: 1) a misrepresentation or omission of fact; 2) materiality; 3) the failure to exercise ordinary care; 4) reasonable reliance; and 5) injury." *Clark,* at 974.

The stem count, stump count, and measurement of board feet all showed that the tree count provided by the Mississippi Forestry Commission was in error. The court below ruled itself that, "It was in error. It was inaccurate." (RE 31, Vol. X Tr. 151). The court itself noted "strong evidence" and "clear evidence" that the tree count was in error and the Forestry Commission benefitted from its own error. (RE 31, Vol. X Tr. 151). Thus the first element, that a misrepresentation was made, is met. Additionally the court noted the, "strong evidence which the Court could find that there is negligence involved here." (RE 32,Vol. X Tr. 152) Therefore the Forestry Commission's actions were negligent.

Established case law in this State has uniformly enforced an obligation to be accurate in a one hundred percent (100%) tree count. See for example *Reed v. Charping*, 207 Miss 1, 41 So. 2d 11 (1949) where an exact count given by the seller, a member of the board of supervisors of the

county who was under a duty to give a correct count, controlled a contract action and required that the buyer be given the benefit of the number agreed to in the contract.

Finally, the court below correctly found that: "Hazlehurst Lumber Company, it appears, reacted in a reasonable manner." (RE 32, Vol. X Tr. 152). Therefore the element of reasonable reliance is met. Therefore every element of negligent misrepresentation has been met by the trier of fact, the trial judge in a tort claims action. (Id.). The trial court made correct findings of fact and correctly stated the law on negligent misrepresentation; it erred by negating its own ruling by resorting to assumption of the risk.

II

The Trial Court erred when it dismissed this case using the assumption of the risk doctrine because the defendant failed to affirmatively plead the defensive of assumption of the risk.

Rule 8 (c) of the Mississippi Rules of Civil Procedure states, "*Affirmative Defenses*. In a pleading to a preceding pleading, a party shall set forth affirmatively . . . assumption of the risk." The Forestry Commission failed to raise assumption of the risk either in the Commission's answer or in its motion for directed verdict. (Vol. I 57-63; Vol. VII 1031-1045). Therefore this Court should find that the trial court erred in granting a dismissal on the affirmative defense of assumption of the

risk.

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 *Whaley v. Cal-Maine Food, Inc.*, 530 So.2d 136 (Miss. 1988)(res judicata).

Therefore this Court should reverse the judgment against Hazlehurst Lumber Company for the trial court's violation of Rule 8 (c).

III

The negligent misrepresentation and mutual mistake, as found by the trial court, also require reversal of the Rule 41 (b) dismissal.

The Court determined that the primary issue in this case was the tort of reckless or negligent misrepresentation. (RE 30, Vol. IX Tr. 150). After finding that negligent misrepresentation applied to the case at hand, the Trial Court therefore also dismissed Hazlehurst Lumber Company's other causes of action namely, breach of contract and mutual mistake. (RE 29,

Vol. IX Tr. 149) "Assumption of the Risk" does not serve as a bar to these additional claims for recovery.

Hazlehurst Lumber Company adduced a valid case of mutual mistake. In an action to reform a deed based on a mistake theory, the petitioner must demonstrate a mutual mistake among the parties or a unilateral mistake in combination with fraud or inequitable conduct on the part of the benefitting party. *Perrien v. Mapp*, 374 So.2d 794 (Miss. 1979); *McCoy v. McCoy*, 611 So.2d 957 (Miss. 1992). In *Koonce v. Board of Supervisors of Grenada County*, 202 Miss. 473, 32 So.2d 264 (Miss. 1947), the Mississippi Supreme Court reformed a timber deed entered into by a board of supervisors for school land where there had been a mutual mistake as to the range number in the legal description of the property. The Court reformed the deed to provide for the reasonable value of the timber that had in fact been cut. The Court stated: "under Mississippi law, the failure of a written contract to accurately reflect the agreement of the parties constitutes a mutual mistake and the mistaken provision of the contract can be reformed . . ." *Crosby Mississippi Resources, Ltd. v. Prosper Entergy Corp.*, __ F.Supp. __ 1991 U.S. Dist. LEXIS 20788 (S.D. Miss. 1991), aff'd 974 F.2d 612 (5th Cir. 1992), citing *Consolidated American Life Ins. Co.*, 244 So.2d 400, 402 (Miss. 1971).

At trial, Hazlehurst Lumber presented evidence to show the incorrect tree count that the parties relied upon to enter the contract. John Coats testified that he relied upon the tree count to compute the bid Hazlehurst Lumber submitted. (Vol. IX Tr. 12). Ron Howard, one of crew chiefs for the Defendant Forestry Commission's crew, which performed the tree count testified that the tree count had to be 100% accurate. (Vol. IX Tr. 62).

The parties intended for the 100% tree count to be 100% accurate. Both parties mutually relied on the accuracy of the tree count. (RE 29, Vol. IX Tr. 149). However, the trial court refused a remedy based on mutual mistake because the contract contained language that the volume to be realized from the trees was an estimate. (RE 29, Vol. IX Tr. 149).

If the parties intended for the contract to include the tree count in the contract, language as to the volume of board feet does not prevent reformation of the contract as a mutual mistake. In *Birchett v. Anderson et al.*, 160 Miss. 144, 133 So. 129 (Miss. 1931) the Mississippi Supreme Court reviewed the deed in a land conveyance where the exact land description was not what the parties intended to convey. After the fact, the parties disputed exactly what land they conveyed. "The vendee relied upon the representations, which representations constituted one of the inducing causes of the consummation of the sale of the land, and representations were

false in a material respect, the falsity of which was not discoverable by an inspection of the land, and as the purchaser was actually misled by such representations, he was entitled to a recession and cancellation of the conveyance of land." *Id.* at 131.

As proven in this case, the tree count was inaccurate and constituted a misrepresentation that the court found Hazlehurst Lumber Company reasonably relied upon. (RE 28, Vol. IX Tr. 148) This tree count was one of the inducing causes for Hazlehurst Lumber to purchase the right to harvest the timber. Furthermore, Hazlehurst Lumber Company performed its own cruise on the property to review the number and quality of trees. John Coats performed this ten percent cruise of the property to review the timber. (Vol. IX Tr. 12-23).

Applying the law to these facts, Hazlehurst Lumber Company relied on a misrepresentation of the Forestry Commission which Hazlehurst Lumber company could not discover with a mere inspection of the property. This misrepresentation and the corresponding mutual mistake convinced Hazlehurst Lumber Company to purchase the timber and gives Hazlehurst Lumber Company the option to either rescind or reform the contract. Since the timber has already been harvested, the contract should be reformed to show the actual number of trees and refund to Hazlehurst Lumber Company

the amounts it lost.

Under well-established contract law, a mistaken party's fault in failing to know or discover the facts before making the contract does not bar him from avoidance or reformation of the contract. *Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co., Inc. And Copiah Board of Education,* 584 So.2d 1254, 1258 (Miss. 1991).

The trial court found all elements of mutual mistake. Therefore, the proper remedy for Hazlehurst Lumber Company is reformation of the contract.

IV.
The Remedy for an erroneous Rule 41 (b) Dismissal is a Remand for Completion of the Trial.

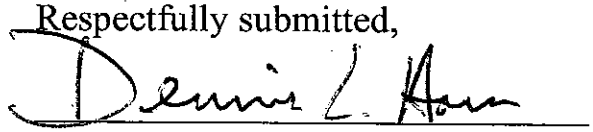
This matter was dismissed by the trial court under Rule 41 (b). In a Rule 41(b) dismissal the "proper remedy is to remand the case so the trial may continue, and [the defendant] may have the opportunity to present its defense." *Ladner v. Stone County*, 938 So. 2d 270, 277 P31(Miss. Ct. App. 2006).

CONCLUSION

The Court entered a Rule 41(b) dismissal against Hazlehurst Lumber Company using assumption of the risk law that the Mississippi Supreme

Court has expressly overruled. As this assumption of the risk law is no longer good law the Court was in error to dismiss Hazlehurst Lumber on that theory. Hazlehurst Lumber Company also proved all the elements of mutual mistake, which mutual mistake allows a reformation of the contract. This Court should reverse the judgment against Hazlehurst Lumber Company on the grounds that the trial Court applied invalid law and remand this case to the Franklin County Circuit Court for completion of the trial.

Respectfully submitted,



DENNIS L. HORN (MSB[redacted]

CERTIFICATE OF SERVICE

I, Dennis L. Horn, hereby certify that I have this day forwarded via United States Mail, postage prepaid, a copy of the foregoing pleading to the following:

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Hon. Forrest A. Johnson
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THIS, the 6th day of August, 2007.

Dennis L. Horn