IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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| 1704 21st AVENUE, LTD.<br>*Appellant* | ) | |
| VERSUS | ) | CAUSE NO. 2007-CA-00228 |
| CITY OF GULFPORT, MISSISSIPPI<br>*Appellee* | ) | |

APPEAL FROM
THE CIRCUIT COURT OF HARRISON COUNTY
FIRST JUDICIAL DISTRICT

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# BRIEF OF CITY OF GULFPORT, MISSISSIPPI, APPELLEE

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme court and/or the judges of the court of Appeals may evaluate possible disqualification or recusal.

1. 1704 21st Avenue, Ltd. – Appellant
2. Thomas Crowson – Appellant
3. Harry M. Yoste, Jr. – Counsel for Appellants
4. City of Gulfport, Mississippi – Appellee
5. Jeffrey S. Bruni, Esq., and Margaret Murdock, Esq., of the City Attorney's Office of the City of Gulfport – Counsel for City of Gulfport, Appellee
6. Hon. Roger T. Clark – Circuit Judge of Harrison County, Mississippi
7. Hon. Robin Alfred Midcalf – County Court Judge of Harrison County, Mississippi

RESPECTFULLY SUBMITTED, this the 21 day of Sept, 2007.

CITY OF GULFPORT, MISSISSIPPI,
*Appellee*

BY: _____

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II. WHETHER THE ORDER OF THE COUNTY COURT OF HARRISON COUNTY, FIRST JUDICIAL DISTRICT, DATED OCTOBER 12, 2003, DISMISSING APPELLANTS' CLAIM FOR PRE-JUDGMENT INTEREST, WAS AN ABUSE OF DISCRETION?

## STATEMENT OF THE CASE

### A. Nature of the Case

The instant appeal arises out of Appellant, 1701 21st Avenue, Ltd. ("Appellant"), as the owner of residences within the City of Gulfport, being assessed fees for garbage service by the City of Gulfport, Mississippi's ("City" or "Gulfport") municipal garbage disposal system from March 1999 to May 2001, and the Appellant paying these fees to the City during these times. See Records Excerpt Volume (R.Vol. II, 202-204).[1] Appellant contended it was negligent in making such payments since it had independently contracted with a private entity to collect and dispose of personal waste from its residences and that it had paid for such private service during the times when the City assessed it for garbage service under the City's municipal disposal system from March 1999 to May 2001. Claiming the monies paid to Gulfport were "duplicate," Appellant sued the City for a refund of these assessments. See R.Vol. I, 11-12.

As part of its municipal disposal system, the City contracted with Browning-Ferris Industries, Inc. ("BFI") through the Harrison County Wastewater District ("Wastewater District") to provide curbside collection and disposal of household waste from residences within the City.[2] See R.Vol. II, 202-204. The monies that Appellant purportedly paid to the City from March 1999 to May 2001, however, were sent to BFI

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1All references to "Record Excerpts Volumes" (R.Vol.) in this Brief refer to one or more of the four (4) volumes of Clerk's papers on file with the Court Clerk for the County Court of Harrison County as compiled by this Clerk's Office through Deputy Clerk Ella Locke.

2The City further provided for the collection and disposal of vegetation and similar-type waste through its own resources (i.e., outside the contract it had with BFI/the Wastewater District. See R.Vol. II, 202-204.

and were no longer in the possession of the City when Appellant instituted suit against the City in late December 2001. See Transcript Volume (T.Vol. II, 147-148).[3] Such assessments to City residents and payments to BFI were compelled by City Ordinances. Instead of seeking the return of monies from BFI, Appellant sued the City demanding a refund of these assessments.

**B. Course of the Proceedings/Disposition Below.**

Appellant filed its Complaint against the City with the County Court of Harrison County, First Judicial District, Mississippi ("County Court") on December 19, 2001. See R.Vol. I, 11. Two (2) claims were asserted against the City therein: "money had and received" and unjust enrichment. See id., 11-12. The basis for such claims was that for two (2) and a half years prior to June 2001 Appellant paid monies in response to bills it had received from the City for garbage collection services purportedly provided for residences located at an apartment complex that Appellant claimed to own or manage. See id. Appellant asserted it also paid another entity (ironically, BFI) for similar services during that period of time and that Gulfport (not BFI) was required to refund such fees to Appellant. See id., 11.

Service of process on this Complaint was not attempted on the City until fifty-four (54) days after the Complaint was filed, on February 11, 2002. See R.Vol.III, 302-303. Even then, Appellant delivered a copy of the Complaint to one of the secretaries

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3All references to "Transcript Volumes" ("T.Vol.") in this Brief refer to either and/or both of two (2) volumes of the transcript of the September 22-23, 2003, trial proceeding compiled by the attending court reporter, Sandra W. Morgan.

for the City, which is clearly not proper service. See id. Appellant made no other attempt to serve process on Gulfport in this cause. Id. Moreover, Appellant failed to submit a notice of claim to the City prior to instituting the instant proceedings. See R.Vol. II, 199-200; R.Vol. II, 285. Accordingly, Appellant failed to properly serve process on the City and the County Court lacked personal jurisdiction over this Defendant. See Miss. R. Civ. P. 4 and 12(b)(2) and (5).

On September 27, 2002, Gulfport filed an Amended Answer and Affirmative Defenses to the Complaint. See id. In this Amended Answer, the City asserted numerous defenses to the Complaint, including, without limitation, the fact that Appellant was barred by sovereign immunity from pursuing its claims against the City, that Appellant had failed to join indispensable parties to this litigation, and that Appellant failed to mitigate its damages, lacked diligence in protecting its alleged rights, and/or was barred by the applicable statute of limitations or laches. See id., 64-73.

On September 30, 2002, a hearing was held by the County Court whereupon it considered a "Motion for Summary Judgment" that had been filed by Appellant and Gulfport's Response thereto and received oral argument from the parties' attorneys. See id., 5. It was specifically brought to the Court's attention during this hearing that the City was immune from liability under Mississippi's Tort Claims Act, Miss. Code Ann. § 11-46-1, et seq. (Rev. 2002) ("Claims Act"). See R.Vol. III, 398-399. During this hearing, Appellant's counsel asked that he be allowed to submit a post-hearing brief in support of the arguments he was making that morning. See R.Vol. II, 181-182. The Court required that Appellant submit its brief by October 30, 2002, and that, to the extent the City desired to submit such a brief, it was due November 15, 2002. See id.

Appellant never submitted such a post-hearing brief. See id.

On January 30, 2003, Gulfport filed its Motion to Dismiss Complaint Pursuant to Miss. R. Civ. P. 12 and/or 56 Or Other Grounds with attached exhibits ("Motion for Summary Judgment"). See R.Vol. II, 180-300, R.Vol. III, 301-316. As set out therein, Appellant's claims against the City were governed by the Claims Act and thereby precluded due to Appellant's failure to submit a notice of claim prior to institution of the instant suit. See Miss. Code Ann. § 11-46-11 (2001); see also R.Vol. II, 182. In addition, these claims were barred by the applicable statute of limitations set out in Miss. Code Ann. § 11-46-11(3) (2001). Id. Moreover, the City was statutorily immune or exempt from liability under Miss. Code Ann. § 11-46-9(1)(b), (d), and (i) (Rev. 2002). Id. The City's Motion further sought dismissal on various other grounds. See id., 182-184. A hearing on this dispositive Motion was scheduled for February 14, 2003. See R.Vol. I, 6. During this February 14 hearing, Appellant's attorney tendered a response to the City's Motion with attached materials. See R.Vol. III, 389. In view of the last minute production of this response, the Court re-scheduled this hearing until March 14, 2003. See id.

On March 14, 2003, the County Court ultimately conducted a hearing on Gulfport's Motion to Dismiss and issued a ruling from the bench that this case was governed by the Claims Act. See R.Vol. III, 389-392. While so holding, the Court did not rule on any of the other dispositive issues asserted in Gulfport's Motion to Dismiss (filed on January 30, 2003), e.g., defenses under the Claims Act, or raised in Gulfport's earlier Response to Appellant's Motion for Summary Judgment and request for cross-dismissal, which were heard during a hearing before the County Court on September

30, 2002. See id. The reason for this was that Appellant's attorney claimed he was not prepared to address the substantive merits of Gulfport's Motion to Dismiss based on Claims Act defenses, although these arguments and issues were previously asserted in the City's January 2003 Motion for Summary Judgment. See id., 399-400. The Court nonetheless extended Appellant until April 13, 2003, to submit a response to the Claims Act defenses (e.g., statute of limitation, notice of claim, immunities, etc.). See id., 389-392. In view of this, the Court continued its bench trial until June 12, 2003. See id., 391.

The Court subsequently granted Appellant additional time to submit a response to the Claims Act defenses (as asserted in Gulfport's Motion for Summary Judgment). See id., 401-403. On April 17, 2003, Appellant served a "Motion for Reconsideration" asking the Court to reconsider whether the Claims Act governs this case. See R.Vol. I, 6-7. Gulfport filed a Motion to strike Appellant's "Motion for Reconsideration" since it was untimely pursued with the Court and was improper. See R.Vol. III, 392-397, 401-403. A hearing on this "Motion for Reconsideration" and on the City's Motion to Strike same was held on June 5, 2003. During this hearing, the Court acknowledged its uneasiness in attempting to rule on the issue of whether the Claims Act applied to this case and expressed its desire to have another Court review this matter.[4] See Transcript of June 5, 2003, Cnty. Crt. hearing, Ex. in Harrison Cnty. Cir. Ct., First Jud. Dist., Cause

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4The County Court's stated desire to permit an interlocutory appeal on this issue of law is contained in the official transcript from this June 5, 2003, hearing, a copy of which is on file with the Circuit Court in the proceeding pending before this Circuit Court in Civil Action No. A2401-2003-00275, which arose out of the attempt to transfer this cause from the County Court to the Circuit Court.

No.: A2401-2003-00275. In fact, the Court specifically stated that it desired to allow the City to seek interlocutory review of the County Court's ruling on the Claims Act issue. See id. At the conclusion of this hearing, the Court held from the bench that it was reversing its position and holding that this case was now outside of the Claims Act. See id. On July 8, 2003, the Court signed an Order prepared by Appellant's attorney which, inter alia, memorialized the Court's ruling that it was now concluding the case was "outside" of the Claims Act. See R.Vol. III, 439-40. The Court further denied the City's Motion to Strike and continued a trial of this matter (now by jury) until September 23, 2003. See id.

On July 9, 2003, an Order was entered which denied Appellant's Motion for Summary Judgment. See id., 441. As of that date, no ruling had issued yet on Gulfport's Motion to Dismiss (filed on January 30, 2003) and on several issues of which were asserted in its Response to Appellant's Motion for Summary Judgment (filed on September 27, 2002). Hearings on these issues had been held on September 30, 2003, February 14, 2003, March 14, 2003, and on June 5, 2003.

On September 18, 2003, the County Court entered an Order which fully denied the City's Motion for Summary Judgment on the basis that there were "matters in controversy with respect to the asserted theories of liability." See R.Vol. IV, 471. A jury trial was held before the County Court on September 22-23, 2003. Ultimately, a jury verdict against the City was entered on September 23, 2003, whereby the jury assessed Adamages at $18,342.72" in Appellant's favor. See id., 499. The County Court entered an Amended Judgment on October 17, 2003, therein assessing judgment against the City in the principal amount of $18,342.72 as well as post-judgment interest from the date immediately following trial, September 24, 2003, at 8% per annum. See

id., 512-13. The City timely filed a Notice of Appeal on November 6, 2003, asserting numerous grounds for appellate review. See id., 514-516.

The Circuit Court of Harrison County, Judge Roger T. Clark, presiding, considered the parties' briefs and oral arguments and, ultimately, entered an order, on January 5, 2007, wherein he found the City had acted wrongfully with respect to Appellant when it assessed and collected the garbage fees at issue herein and found that "Appellant's claims arose out of the 'assessment or collection of any tax or fee' and are therefore governed by the MTCA. Pursuant to the MTCA, the City is immune from liability." He reversed the decision of the County Court of Harrison County and entered judgment in favor of the City of Gulfport. Appellant appealed from that decision.

## STATEMENT OF FACTS

As set forth elsewhere, under Mississippi law and for matters related to the public health and safety, the City of Gulfport is empowered to operate and oversee a municipal waste disposal system. As part of the City's system, the City, as a member of the Harrison County Wastewater District ("Wastewater District"), was a participating municipality in the Wastewater District's contract with Browning-Ferris Industries, Inc. ("BFI") through which BFI was to provide curbside collection and disposal of householdwaste from residences in participating municipalities.[5] See R.Vol. II, 202-204. The monies that Appellant purportedly paid to the City from March 1999 to May 2001, however, were sent to BFI and were no longer in the possession of the City when Appellant instituted suit against the City in late December 2001. See T.Vol. II, 147-148.

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5The City further provided for the collection and disposal of vegetation and similar-type waste through its own resources (i.e., outside the contract it had with BFI/the Wastewater District.) See R.Vol. II, 202-204.

Such assessments to City residents and payments to BFI were compelled by City Ordinances. Instead of seeking the return of monies from BFI, Appellant sued the City demanding a refund of these assessments. Notwithstanding Appellant's failure to submit significant and probative evidence in response to the City's Motion for Summary Judgment and the Court's error in refusing to grant same, the only purported documents and testimony which Appellant put on it its case-in-chief at trial were that it entered into a contract with BFI in September 1999 for the pickup of household trash from its residences via dumpsters, it was assessed by the City for curbside trash collection from March 1999 to May 2001 and it paid the City various monies in response to these assessments. Without question, there was no admissible evidence that the City ever received these monies, that the City still had these monies at the time when Appellant demanded they be refunded, that Appellant took any action to attempt to seek such refunds prior to August 2001, and that the City would have been in the same position after refunding these monies that it would have been in had it never received them in the first place. In fact, the City later introduced un-refuted evidence that it had given the monies to BFI which Appellant had paid it in response to the subject assessments since the City had a contract with BFI to assist it in providing curbside garbage collection as part of the City' municipal disposal system. Un-refuted evidence was further admitted that the City did not possess the monies which Appellant had paid it and that the City's account where these monies were deposited merely was a go between with BFI and all funds were cleared out and paid to BFI either monthly, quarterly, or yearly and that the City would clearly, therefore, be in a different position if it had to refund monies which it did not realize any gain or profit from and that such effect would detrimentally affect the City and its finances.

## SUMMARY OF THE ARGUMENT

The plain language of the Mississippi Tort Claims Act, when read in its entirety, is conclusive of the fact that the equitable claims in the instant proceeding, one for "money had and received" and one for unjust enrichment, fall within Mississippi's Claims Act (i.e., Miss. Code Ann. §11-46-1, et seq. (Rev. 2002)). The Claims Act explicitly states that claims in equity are subject to its provisions. The Claims Act explicitly states that it covers wrongful acts. And, finally, the Claims Act explicitly states that, in claims related to the assessment and/or collection of fees, governmental entities are exempt from liability. The Order of the Circuit Court was right and proper on all points, including the complete failure of the Appellant to provide the required Notice of Claim, where, at a minimum substantial compliance is required.

Finally, although the City would assert that any decision regarding pre-judgment interest is premature at this time, the City would, alternatively, argue that the County Judge did not abuse her discretion in denying the Appellant's request for pre-judgment interest. It is well within her discretion to do so and the fact that liability therefore is not clear is best evidenced by the fact that two quite competent judges have reached completely different decisions on the issue of the applicability of the Claims Act to this case.

## ARGUMENT

## ISSUE 1.

WHETHER THE ORDER OF THE CIRCUIT COURT OF HARRISON COUNTY, FIRST JUDICIAL DISTRICT, DATED JANUARY 5, 2007, WHEREIN THE COURT FOUND THAT APPELLANTS' CLAIMS WERE GOVERNED BY THE MISSISSIPPI TORT CLAIMS ACT, WAS CORRECT AS A MATTER OF LAW AND FACT?

### STANDARD OF REVIEW

Mississippi's appellate courts employ a *de novo* standard when reviewing questions of law, including questions concerning the application of the Mississippi Tort Claims Act. Fairley v. George County, 871 So.2d 713,716 (Miss. 2004); City of Jackson v. Brister, 838 So.2d 274, 277-78 (Miss. 2003). As the central and prevailing issue in this appeal is whether the Mississippi Tort Claims Act applies to the claims asserted by Claimant, the application of the *de novo* standard of review is appropriate in this appeal.

### INTRODUCTION

Section 17-17-5 of the Mississippi Code requires ("shall") that cities provide for the "collection and disposal of garbage and the disposal of rubbish" for all its citizens. Section 21-19-1 of the Code similarly mandates ("shall") that cities oversee and "provide for the collection and disposal of garbage and the disposal of rubbish" and concomitantly empowers them to "establish, operate and maintain" such system and, significantly, to "[m]ake all necessary rules and regulations for the collection and disposal of garbage and/or rubbish." Section 21-27-23 Code provides cities with the authority to "establish, maintain, and collect rates for the facilities and services offered" by a municipal "garbage disposal system." The legislative intent behind such a statutory scheme obviously is to safeguard public health and sanitation.

The issues in this proceeding arise out of the City of Gulfport's ("City") assessment of fees as part of such a system. Each month, for over two (2) years, the City assessed Appellant, the owner of an apartment complex, with fees for garbage collection services. These were evidenced in written assessments received by Appellant each month during this time period. Appellant filed suit when the City later (at the end of this two (2) plus year period) did not refund all of its assessments. Appellant claimed entitlement to refunds because it had hired an independent private entity (more than two (2) years previously) to provide its tenants with similar garbage collection services. Appellant complained the City's informal rule of only refunding assessments up to six (6) months from the time when an owner presented proof to demonstrate it had earlier retained a reputable private entity to perform garbage collection services (to opt out of the City's system) during that or a longer time period was unfair and inequitable. See T.Vol.I, 94-95. For obvious public health and sanitation concerns, the City could not release owners from their participation in the City's system or their obligation to pay the City's assessments for same until or unless they presented the City with proof that a reputable private company was in fact providing them with adequate services. There was no law requiring the City to allow residential owners the ability to do this in the first place. The evidence presented at trial showed that at no time prior to May 2001 did anyone on behalf of Appellant ever present such proof to the City or even legitimately object to being assessed for garbage collection by the City. See T.Vol.I, 124-125. Again, Appellant was suing for assessments paid from March 1999 to May 2001.

It is against this back drop that Appellant claimed some sort of right to the fees it paid the City for more than two (2) years for garbage collection service. Appellant's

theory at trial was that the City wrongfully assessed and collected such fees when the garbage collection service was not provided in return. Either Appellant was arguing the legislative scheme to safeguard public health and sanitation by creating municipal garbage disposal systems was improper or invalid and the City should not have been assessing Appellant for such service in the first place or Appellant was complaining about the quality of service it received (or lack thereof) within the City's garbage collection system. Either way, Appellant had no legal claim against the City.

THE CLAIMS ACT

As the threshold issue concerning Appellant's claims falls squarely on whether the Mississippi Tort Claims Act applies to those claims, a review of the Act and its provisions is in order. In Mississippi, claims seeking recovery for damages or injury against municipal corporations, such as the City of Gulfport, are governed by the "Tort Claims Act," enumerated at Miss. Code Ann. §11-46-1, et seq. (Rev. 2002) ("Claims Act"). In Section 11-46-3 (1), the Mississippi Legislature set out its legislative intent as respects the Act thusly:

> The Legislature of the State of Mississippi finds and determines as a matter of public policy and does hereby declare, provide, enact and reenact that the "state" and its "political subdivision," as such terms are defined in Section 11-46-1, are not now, have never been and shall not be liable, and are, always have been and shall continue to be **immune from suit at law or in equity** on account of any **wrongful or tortious act** or omission or breach of implied term or condition of any warranty or contract, including but not limited to libel, slander or defamation, by the state or its political subdivision, or any such act, omission or breach by any employee of the state or its political subdivision, notwithstanding that any such act, omission or breach constitutes or may be considered as the exercise or failure to exercise any duty, obligation or function of a governmental, proprietary discretionary or ministerial nature and **notwithstanding that such act, omission or breach may or may not arise out of any activity, transaction or service for which any fee, charge, cost or other consideration was received or expected to be received in exchange therefor**.

Miss. Code Ann. §11-46-3 (Rev. 200) (emphasis added). As Miss. Code Ann. § 11-46-7 (Rev. 2002) sets out:

> [t]he remedy provided by this chapter against a governmental entity or its employee ***is exclusive of any other civil action or civil proceeding by reason of the same subject matter against the governmental entity or its employee or the estate of the employee for the act or omission which gave rise to the claim or suit***; and any claim made or suit filed against a governmental entity or its employee to recover damages for any injury for which immunity has been waived under this chapter ***shall be brought only under the provisions of this chapter***, notwithstanding the provisions of any other law to the contrary.

Furthermore, "[c]laim" is defined by the Mississippi Legislature for purposes of the Tort Claims Act as being "***any demand*** to recover damages from a governmental entity as compensation ***for injuries***." Miss. Code Ann. §11-46-1(a) (Rev. 2002). "Injury" is defined under this Act to be "death, injury to a person, ***damage to or loss of property*** or any other injury that a person may suffer that is actionable at law or equity." Miss. Code Ann. § 11-46-1(h) (Rev. 2002). (Emphasis added).

Read together, these provisions of the Claims Act are most instructive and expressly support the Circuit Court's finding concerning the applicability of the Claims Act. Importantly, they tell us that the Claims Act is the exclusive remedy against a governmental entity for any and all civil actions and grants that governmental entity immunity from suit, no matter whether the claims made against it sound in law or in equity. As Appellant notes in its brief, the claims made by Appellant against the City were "for money had and received" and for "unjust enrichment" with both claims founded on the assertion that the City assessed fees it should not have and collected those fees when it should not have. As Appellant further notes in its brief, both of these are equitable claims. As such, these claims are just the type of claims envisioned

by the legislature to be under the purview of the Claims Act.

Appellant makes a great deal out of the fact that the Act under which these claims fall is entitled the "Mississippi Tort Claims Act". In fact, Appellant opens its discussion of the provisions of the act with reference to the name of the Claims Act. After a diligent search, the undersigned has not been able to locate any statute or case law that provides that the name or title of an act outweighs or supercedes provisions contained in that act. Appellant also attempts to "make hay" out of various and sundry other names or titles included in the act, such as the "Tort Claims Fund" established in Section 11-46-17 and the "Mississippi Tort Claims Board" that is established in Section 11-46-18 and out of various references in the Claims Act to the word "tort" or "tortious". Torts, per the Appellant, are "civil wrongs" and it is only "civil wrongs" that are contemplated by the Claims Act. Unfortunately, Appellant's argument files in the fact of the very language of the Claims Act which unequivocally states that pursuit of a claim under the Claims Act "against a governmental entity...is exclusive of **any other civil action or civil proceeding**...." Miss. Code Ann. § 11-46-7(1) (Rev. 2002) (emphasis added). The remedies provided by the Claims Act against a governmental entity are not exclusively tied to "civil wrongs", but rather to any "civil action" or "civil proceeding". There can be no doubt the Act applies to claims to recover loss of property actionable in **equity**, including Appellant's action for compensation for fees assessed and/or collected against it by the City. Appellant makes this argument because it has classified its claims as one for "money had and received" and one for unjust enrichment and such causes of action are in equity. In the end, no matter how Appellant construes it and as the County Court first held, the underlying nature of Appellant's claims, either at law or in equity, made them unmistakably governed by the

Claims Act.

Notwithstanding, Claims Act directly and pointedly addresses whether a party's characterization of a claim plays any role in whether an asserted claim falls under the dictates of the Claims Act. Indeed, the Claims Act expressly provides that its coverage is not encumbered by personal characterizations or labels. Instead, coverage of the Act applies

> notwithstanding the nature of the claim, the label or other characterization the claimant may use to describe it, or the provisions of any other statute of limitations which would otherwise govern the type of claim or legal theory if it were not subject to or brought under the provisions of this chapter.

Miss. Code Ann. § 11-46-11(3) (Rev. 2002). Such controlling language is similarly accepted by other jurisdictions in construction of other Claims Acts. See e.g., Hassan v. Louisiana DOT and Development, 923 F.Supp. 890, 894-95 (W.D.La. 1996); Karlen v. United States, 727 F.Supp. 544, 546 (D.S.D. 1989); Bosco v. U. S. Army Corps. of Engineers, 611 F.Supp. 449, 453 (D.C.Tex. 1985).

Having established that claims sounding in equity are covered by the Claims Act, we must next look to whether there was a "wrongful or tortious act or omission or breach of implied term or condition of any warranty or contract" giving rise to the equitable claims made by Appellant. Miss. Code Ann. § 11-46-3(1). The Circuit Court, in a concise, but direct opinion, notes that Appellant bases its claim on the propositions that the "City should not have assessed fees for Appellant's participation in the city's municipal garbage disposal system and that the City should not have collected such fees when it did not provide service in return." RE 12. Put another way, the lower court points out that the Appellant has alleged two wrongful acts on the part of the

City: wrongful assessment of fees for participation in the City's municipal garbage disposal system and wrongful collection of those fees when the City [allegedly] did not provide serve in return. Appellant certainly could not allege that the city's acts were right and proper. It is part and parcel of the Appellant's case that the City acted wrongfully.

Indeed, Appellant went to great lengths to offer testimony during trial to show the City did not provide any service in return for Appellant's payment of fees/assessments for this time period. See e.g., T.Vol.I, 97-98 ("I don't think they should bill for some service they never provided"), 115-116 (no curbside garbage collection provided by the City), 121-123 (id.), 126-130 (id.). This underscores the true nature of Appellant's claims: the City acted improperly toward Appellant by charging monies for which no service was provided in return. There can be but one conclusion on the characterization of such actions or omissions: they were "wrongful."

As demonstrated by uncontroverted evidence at trial, though, the City no longer had the monies paid to it by Appellant; that is, such monies had been "converted."[6] See id., 147-148 ("every penny that comes in [to the City from assessments] goes out [to pay an entity for curbside service]"). Moreover, there was no evidence the City unjustly enriched itself. Accordingly, and although Appellant fails to address this head on, Appellant's claims were for "wrongful" acts or omissions attributed to the City and under Appellant's own arguments were governed by the Claims Act. See First Nat. Bank of Jackson v. Huff, 441 So. 2d 1317, 1322 (Miss. 1983) (money judgment for

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6A claim for "conversion" is a tort action at law. See Georgia-Pacific Corp. v. Blakeney, 353 So. 2d 769, 772 (Miss. 1978); see also Bank of New Hamp. v. U. S., 115 F.Supp. 214, 221 (D.N.H. 2000) (holding conversion claim barred as being claim "arising in respect of the assessment or collection of any tax" under claims act immunity provision).

damages awarded in restitution case where trace of converted monies did not result in monies or any fruits of such monies being found).

*Interestingly, Appellant avoids labeling the acts or omissions it attributes to the* City as being "rightful" or "wrongful." By so doing, Appellant hopes to avoid having the Court realize that it must, under Appellant's own argument, make such a determination. Appellant contended at trial that the City had "improperly" assessed it fees for a governmental service that it did not provide (i.e., garbage collection). See T.Vol. II, 217-18. This certainly sounds like an indictment of "wrongful" acts or omissions.

The Circuit Court agreed with the Appellant's assertions, and found that the assessment and collection of the fees in question constituted a wrongful act, which further supports the Circuit Court's ultimate finding that the Claims Act applied to the claims asserted by Appellant. The Circuit Judge was most correct in finding that the provisions of the Claims Act applied to the allegations in the complaint filed by Appellant. As such, the City would assert that the Circuit Court's findings in that regard should not be disturbed on appeal and should be affirmed.

Notably, the Claims Act itself provides a waiver of immunity "from claims for money damages arising out of the torts of" governmental entities. Miss. Code Ann. § 11-46-5 (Rev. 2002). Of particular interest here is the fact that the waiver applies ONLY and SPECIFICALLY to "torts" and not to any other claim for which immunity is provided in Section 11-46-3 of the Mississippi Statutes. If you assume, *arguendo*, that the claims asserted herein sounded in tort rather than in equity and, therefore, came under the waiver of immunity, we must look to whether those claims fall under any of the many enumerated exemptions from liability set out in Miss. Code Ann. § 11-46-9 (Rev. 2002).

It is significant that Appellant has chosen not to address the fact that the Act **expressly** holds that governmental entities are absolutely immune from liability for **any claim** "[a]rising out of the assessment or collection of any tax or fee." Miss. Code Ann. § 11-46-9(1)(i) (Rev. 2002). Such a clear statement demonstrates the Legislature's intent to immunize municipalities from actions seeking recovery for acts or omissions arising out of the assessment or collection of fees, which was precisely the basis for Appellant's claims against the City. Such immunity is construed in favor of the City. See Perkins v. U. S., 55 F.3d 910, 913 (4th Cir. 1995) (holding similar federal immunity provision construed in favor of "the sovereign"). Hence, the claims asserted by Appellant were the type precluded by this immunity.[7]

Appellant's actions against the City sounded either in tort or in equity. Appellant contended at trial that the City had "improperly" assessed it fees for a governmental service that it did not provide (i.e., garbage collection). See T.Vol. II, 217-18. The legislative intent behind the Tort Claims Act is clearly expressed in Miss. Code Ann. § 11-46-9(1)(i) wherein the Mississippi Legislature chose to confer sovereign immunity on governmental entities arising out of the "assessment or collection of any tax or fee."[8] Again, Appellant's claims were pursued on the basis that the City negligently assessed it

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7Moreover, it is well-established that the plain meaning of language in a statute, such as the one in the proceedings at bar, controls "absent a clearly expressed legislative intention to the contrary." Escondido Mutual Water Co. v. La Jolla Indians, 466 U.S. 765, 772 (1984). Again, Appellant sued the City over assessments charged as part of the City's garbage disposal system. After more than two (2) years of paying such fees to the City, Appellant sought their return despite the fact that the City had used them to pay another entity for services in connection with this system and no longer possessed these monies. The language contained in § 11-46-9(1)(i) is unambiguous and unquestionably controlled the outcome of Appellant's claims.

8"A municipal corporation is sovereignly immune from suits arising out of the "assessment or collection of any tax or fee," which precisely formed the basis of Appellant's claims in the case at hand. See Miss. Code Ann. §11-46-9(1)(i) (Rev. 2002).

fees for garbage collection services which were not provided by the municipality or which amounted to mere duplication of services which Appellant had retained by employment of a private contractor. Without a doubt, the claims asserted by Appellant were precisely the ones envisioned to be covered by the Tort Claims Act and the Circuit Court was correct in concluding that they were covered by the Act and, therefore was correct in granting a judgment to the City of Gulfport. [9]

CASE LAW ANALYSIS

In a bid to by-pass the obstacles thrown in its way by the plain language of the Claims Act, Appellant tries to cite to cases it contends are factually similar.[10] Appellant primarily relies on the decision of Greyhound Welfare Foundation v. Miss. State Univ., et al., 736 So. 2d 1048 (Miss. 1999). In this case, a racing facility donated dogs to Mississippi State University. In an attempt to save the dogs from being victims of experimentation and research by students and faculty at the University, the "Greyhound Welfare Foundation" filed an action for **injunctive relief** to prevent the University or any of its agents from doing anything with these animals. The Foundation further sought to have the dogs handed over to it for care. Of course, it is clearly self-evident

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9Also, providing garbage collection services and the billing and collection of fees with respect to same are discretionary acts or functions. Since Appellant's suit arises out of such acts or functions, it is similarly barred under Miss. Code Ann. §11-46-9(1)(b) and (d) (Rev. 2002).

10If the Court were to believe Appellant's characterization of its claims as seeking the "refund" of monies that were still in the possession of the City (which evidence at trial proved to the contrary), cases under the similar Federal Tort Claims Act are contrary to Appellant's position. See Broadway Open Air Theatre v. U. S., 208 F.2d 257, 258-59 (4th Cir. 1953) (no refund under claim of conversion for tax monies paid); see also City of Charlottesville v. Marks' Shows, Inc., 18 S.E.2d 890, 896 (Va. 1942) (recognizing "every man is supposed to know the law, and if he voluntarily makes a payment which the law would not compel him to make, he cannot afterwards assign his ignorance of the law as a reason why the state should furnish him with legal remedies to recover it").

that the facts in Greyhound Welfare Foundation are no where similar to those herein. Again, the facts in the case at bar arose out of a governmental entity's assessment of fees against a private entity for operation of a municipal garbage and refuse disposal system. The parties in Greyhound Welfare Foundation had no such connection. Moreover, Appellant neither claimed nor pursued any action for **injunctive relief** herein.[11] In addition, a "replevin" action, which was also pursued by the Appellant in Greyhound Welfare Foundation, is "purely a possessory action under the laws of this State." Robinson v. Friendly Finance Co., 131 So. 2d 256, 257 (Miss. 1961). (Citation omitted). It is an action to recover **specific goods** wrongfully taken by another and not one to recover sums for actionable losses at law or in equity. Even still, the City did not keep or possess the assessments paid by Appellant.[12] See T.Vol.I, 147-148.

Despite this, Appellant argues that a replevin action is similar to the relief it sought herein. Notably, no cause of action for **replevin** appeared in the Complaint, was pursued at trial, or appeared in any of Appellant's proposed Jury Instructions. Instead, the theories espoused by Appellant at trial were that while the City never assessed large apartment complexes such as Appellant's for garbage collection services, it wrongfully charged Appellant for over two (2) years and although it assessed Appellant such fees, it never provided the claimed garbage collection services in return. See T.Vol.I, 97-98, 115-116, 121-123, 126-130. Such theories can not be stretched to fit an action for **replevin**. Again, evidence adduced at trial showed the City did not

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11It is further self-evident that an action for injunctive relief is not one seeking recovery of compensation for an actionable loss at law or in equity.

12This is one of the reasons the City asserted as a defense in its Amended Answer to the Complaint that Appellant failed to join an indispensable party to this litigation in the entity that was paid the monies which the City collected from Appellant.

possess the fees paid to it by Appellant but had paid them to a private entity that purportedly provided Appellant curbside garbage collection under the City's system. See T.Vol.I, 147-148.

Appellant also cites to the case of Fordice v. Thomas, 649 So. 2d 839 (Miss. 1995) for support. In Fordice, the Appellant pursued a **declaratory judgment** against the Governor of Mississippi and others regarding actions taken by the Governor in alleged violation of the State's Administrative Procedures Law (AAPL). Fordice, 649 So. 2d at 840. The Governor pointed to the "legislative intent" of the State's Claims Act found in § 11-46-3(1) and contended that this language demonstrated the Circuit Court was deprived of having any jurisdiction over him. Noting that the state and its political subdivisions were immune from suits that sought compensation for actionable losses "at law or in equity," the Court held that a **declaratory judgment** action was not such a suit. Id. Of course, Appellant did not assert any entitlement to a **declaratory judgment** in the proceedings at hand. Notwithstanding, Appellant attempts to recite a single quote out of context from this opinion about the Act being an effort to immunize governmental entities only from suits for money damages. See id. Here again, though, this 1995 case must be read in conjunction with the cases that have been decided since as well as the clear and plain language spoken by the Legislature in the Act. Again, the Act clearly applies to actions at law and in equity. Also, the unrebutted proof at trial showed the City did not possess Appellant's monies and had paid (converted) them to another entity.[13]

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13Appellant additionally cites to USPCI of Mississippi, Inc. v. State of Mississippi ex rel. McGowan, 688 So. 2d 783 (Miss. 1997), a case that arose out of Fordice v. Thomas. The Appellant in USPCI of Mississippi, Inc. was claiming Mississippi's Governor was required to perform a duty pursuant to Mississippi's APL and therefore sought a **writ of mandamus** to

Any argument by Appellant that the Claims Act applies only to tort claims took a significant hit in the relatively recent decision of City of Jackson v. Estate of Stewart ex rel. Womack, 908 So.2d 703 (Miss. 2005). In Stewart, the Supreme Court followed the plain wording of the statute and held that the Claims Act granted immunity to governmental entities for breach of an implied term or condition of a warranty or contract. City of Jackson, 908 So.2d at 711. For the Claims Act to apply to the breach, notably the Court determined that the breach need not be wrongful or tortious. Id. Here the Court distinguished an "implied contract" (covered under the Act) from a "pure contract" (not covered under the Act). See City of Grenada v. Whitten Aviation, Inc., 755 So. 2d 1208 (Miss. 1999). The Court in Whitten Aviation, Inc. only held that "pure" breaches of contract actions do not fall within the scope of the Claims Act. Whitten Aviation, Inc., 755 So. 2d at 1213 (the Claims Act "ha[s] no application to a **pure** breach of contract action." (Emphasis added). Appellant unequivocally admits it is not pursuing a **breach of contract** action herein. See Pl.'s Brief, p. 14. Moreover, Appellant intimates that it is not even suing on an "implied contract." See Pl.'s Brief, pp. 12, 14. Consequently, Whitten Aviation, Inc. and all of the other breach of contract cases cited by Appellant are equally inapposite to the issues at hand.[14]

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compel the Governor to discharge such duty. The Supreme Court, however, held the Governor "did not have to comply with the requirements of the APL." USPCI of Mississippi, Inc., 688 So. 2d at 787. As a consequence, the Appellant had no action. Id. In passing, the Court referred in dicta to its decision in Fordice v. Thomas by stating that an action for a **mandamus**, which sought to "mandate the performance of an action," was not covered by the State's Claims Act. Id., at 789. Of course, Appellant's Complaint does not assert an action for **mandamus**. Nonetheless, the Act is concerned with recoupment for "injury," which is defined as being a loss "that is actionable at law or in equity." See Miss. Code Ann. § 11-46-1(h) (Rev. 2002). It is not difficult to see how the Court was willing to state in dicta that a **mandamus** action does not concern itself with the recoupment for any "injury."

Further, Appellant's claims were either "in equity" (e.g., "money had and received") or "at law" (e.g., "conversion"). See Thorn & Maginnis v. Wallace, 113 Miss. 649, 74 So. 610, 1917 Miss. LEXIS 140, at *6-7 (Miss. 1917); Philips v. Hines, 33 Miss. 163, 1857 Miss. LEXIS 27, at *7-8 (Miss. 1857) (noting that action for "money had and received" seeks equitable relief); O.C. Tiffany & Co. v. Johnson & Robinson, 27 Miss. 227, 1854 Miss. LEXIS 35, at *9-10 (Miss. 1854). Again, the Act specifically holds that it governs such actions.

## APPELLANT'S CLAIMS WERE PRECLUDED BY A FAILURE TO SUBMIT A NOTICE OF CLAIM

The Claims Act (Miss. Code Ann. § 11-46-11 (Rev. 2002)) requires that a person intending on suing a municipal corporation submit a "notice of claim" prior to the institution of such a suit. The City's Motion for Summary Judgment sought dismissal on the alternate basis that Appellant failed to comply with this "notice of claim" procedure. The Circuit Court found that Appellant did not comply with the Notice of Claims provisions of the Claims Act. That the Appellant did not comply with the notice provisions was well documented in the record. As demonstrated in the Affidavit of Harry P. Hewes, Esq., Gulfport's City Attorney, (Exhibit "C" to the Motion for Summary Judgment), no notice of claim in compliance with the Claims Act was ever provided by Appellant prior to the instant lawsuit being filed (or at any time since). See R.Vol II. 199-200. In fact, Appellant similarly admitted in response to a Request for Admission that it failed to submit any notice of claim prior to filing its Complaint. See R.Vol.II 282-286. Considering the foregoing, the Circuit Court was correct as a matter of law and fact in determining that the Appellant's failure to file the statutorily required Notice of Claim would, otherwise, bar Appellant's claims.

## ISSUE 2.

WHETHER THE ORDER OF THE COUNTY COURT OF HARRISON COUNTY, FIRST JUDICIAL DISTRICT, DATED OCTOBER 12, 2003, WHEREIN THE COURT DISMISSED APPELLANTS' CLAIM FOR PRE-JUDGMENT INTEREST, WAS AN ABUSE OF DISCRETION?

### STANDARD OF REVIEW

Except where the Claims Act applies, the standard of review governing a determination of whether to grant prejudgment interest is reversed only for an abuse of discretion. Sentinel Industrial Contracting Corp. v. Kimmins Industrial Service Corp., 743 So. 2d 954, 970-71(Miss. 1999); Preferred Risk Mut. Ins. Co v. Johnson, 730 So. 2d 574, 577 (Miss. 1998). Where the Claims Act applies, there is no discretion; prejudgment interest is precluded.

### ANALYSIS

It has long been held by the Mississippi Supreme Court that the interest statutes of the State of Mississippi "have reference to the contracts of and judgments against individuals, *and not to the contracts of and judgments against the state and it's political subdivisions."* City of Jackson v. Reed, 103 So. 2d 6,7 (Miss. 1958) citing Board of Sup'rs of Clay County v. Board of Sup'rs of Chichasaw County, 1 So. 753 (Miss. 1997) (emphasis in original). See also, City of Mound Bayou v. Roy Collins Construction Co., Inc., 499 So. 2d 1354 (Miss. 1986). As such, the Judge's decision to deny the Plaintiff pre-judgment interest was in order and was proper.

In the recent case of City of Jackson v. Williamson, 740 So. 2d 818 (Miss. 1999), overturned City of Jackson v. Reed and City of Mound Bayou v. Roy Collins Construction Co., Inc., with respect to an award of post judgment interest and held that post judgment interest could be awarded to a plaintiff against a political subdivision of the

state of Mississippi. Of particular note, however, the Court's decision in Williamson was limited to the issue before it: "[t]the question to now be addressed is whether the *Legislature intended, by silence or otherwise, to allow post-judgment interest, costs,* and statutory damages to be assessed against governmental entities." City of Jackson v. Williamson, 740 So. 2d at 820. The Court specifically found that post-judgment interest could be awarded. However, at no time did the Court find that pre-judgment interest could be awarded.

Of note, Miss. Code Ann. § 11-46-15(2) is applicable if the Claims Act is applicable to this case. The statute provides, in relevant part, that [n]o judgment against a governmental entity or its employee for any act or omission for which immunity is waived under this chapter shall include an award for...interest prior to judgment...." Miss. Code Ann § 11-46-15(2). Contrary to Appellant's assertion that the Williamson Court did not limit its holding to prejudgment or post-judgment interest, the did indeed limit it's holding to post-judgment interest when it noted that governmental entities were specifically exempted from liability for pre-judgment interest under § 11-46-15(2) and proceeded to find that post-judgment interest ONLY was proper against a governmental entities. Williamson may have overruled a number of cases on the issue of post-judgment interest, but it did NOT overrule the statute that prohibits pre-judgment interest being charged against governmental entities.

There was no abuse of discretion by the County Court judge in her decision to deny the Appellant's request for pre-judgment interest. The presiding judge must exercise discretion in determining whether prejudgment interest will be awarded or not. As noted by Appellant in its brief, "[i]nterest may be denied if 'there is a bona fide dispute as to the amount of damages as well as the responsibility for the liability

therefore.' Thompson Mach Commerce Corp. v. Wallace, 687 So.2d 149, 152 (Miss. 1997)." Estate of Baxter v. Shaw Associates, Inc., 797 So.2d 396, 403 (Miss. App. 2001). As has been set forth in the foregoing pages, the County Court judge had a very difficult time reaching a decision as to the responsibility of the City for the claims of Appellant. From the bench, she found that the City was not liable as the claims fell under the Claims Act. She later issued an order finding that the claims did not fall under the Claims Act. The judge had a genuine and very hard time with the issue of whether the City could potentially be liable for these claims. Her serious grappling with that single issue demonstrates that there was, indeed, a bona fide dispute as to the "responsibility for the liability therefore." It was not a cut and dried issue. As such, the judge did not abuse her discretion in denying the request for pre-judgment interest.

Notwithstanding the foregoing, the City would assert that it is premature to consider whether the County Court's decision with respect to interest is correct. If you assume, *arguendo*, that this Court reverses the decision of the Circuit Court, it would be most proper for this court to remand the case back to the Circuit Court for consideration of those issues raised on appeal that were not reached when the Circuit Court decided this case on a threshold issue.

## CONCLUSION

In sum, the Circuit Court of Harrison County was correct in finding that the Mississippi Tort Claims Act governed the claims made by Claimant against the City of Gulfport. Correct as a matter of law and fact, the Circuit Court's decision to reverse and render and grant a judgment to the City of Gulfport in this proceeding should be affirmed by this honorable court. Further, the City would respectfully assert that it is premature to consider any issues related to interest as it is the order of the Circuit Court that has been appealed; not the order of the County Court. As the Circuit Court made no decisions concerning interest or any other of the issues raised on appeal to that Court by the City, any reversal of the Circuit Court's order on the issue of the Claims Act would require a remand for consideration of the other issues raised by the City, up to and including the issue of interest.

Respectfully submitted,

CITY OF GULFPORT, MISSISSIPPI,
DEFENDANT/APPELLANT

BY: _____

MARGARET E. MURDOCK, ESQ.
MS BAR NO. 9824
JEFFREY S. BRUNI, ESQ.
MS BAR NO. 9573

## ***CERTIFICATE OF SERVICE***

I, Margaret E. Murdock, Assistant City Attorney for the City of Gulfport, Mississippi, do hereby certify that I have this day sent via U. S. Mail, First Class, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant to Harry M. Yoste, Jr., Esq., Post Office Box 353, Gulfport, Mississippi 39502.

This the 21st day of September, 2007.

MARGARET E. MURDOCK

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Respectfully submitted,

CITY OF GULFPORT, MISSISSIPPI,
DEFENDANT/APPELLEE

BY: _____

MARGARET E. MURDOCK, ESQ.
MS BAR NO. [redacted]
JEFFREY S. BRUNI, ESQ.
MS BAR NO. [redacted]

## ***CERTIFICATE OF SERVICE***

I, Margaret E. Murdock, Assistant City Attorney for the City of Gulfport, Mississippi, do hereby certify that I have this day sent via U. S. Mail, First Class, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee to Harry M. Yoste, Jr., Esq., Post Office Box 353, Gulfport, Mississippi 39502; and Hon. Roger T. Clark, Circuit Court Judge, P.O. Box 1461, Gulfport, MS 39502; and Hon. Robin Alfred Midcalf, County Court Judge, P.O. Box 1889, Gulfport, MS 39502.

This the 21st day of September, 2007.

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