IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 2007-CA-00228

1704 21ST AVENUE, LTD. — APPELLANT

VERSUS

CITY OF GULFPORT, MISSISSIPPI — APPELLEE

APPEAL FROM
THE CIRCUIT COURT OF HARRISON COUNTY

REPLY BRIEF OF APPELLANT

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I.

THE CIRCUIT COURT ERRED ON APPEAL WHEN IT RULED THAT WATERS MARK'S CLAIM WAS GOVERNED BY THE TORT CLAIMS ACT.

Gulfport introduces its legal argument by asserting factually that it provided services to Waters Mark. Appellee's Brief, pp. 11-13. It begins by noting the statutory requirements for a city to provide garbage collection for its citizens. Gulfport says that it "could not release owners from their participation in the City's system" without evidence of other means of disposing of garbage. "There was no law requiring the City to allow residential owners the ability to do this in the first place." Appellee's Brief, p. 12.

Waters Mark, the apartment complex, has 72 units. Transcript, p. 64. It is managed by the corporate plaintiff/appellant, 1704 21st Avenue, Ltd. Tenants placed their garbage in collective dumpsters which were picked up by a contractor. Transcript, pp. 65 and 126. Waters Mark's owners continued the contract that had been in place with the previous owner. Transcript, p. 77. The contract the city had to pick up garbage did not cover apartment complexes the size of Waters Mark. Transcript, p. 161. Furthermore, records of the entity charged with determining the number of residences for garbage pickup do not show nearly enough residences to include the high number of apartments in the complex. Transcript, exhibit 9. This was verified by Waters Marks' manager own count of residences in the area, Transcript, exhibit 10, and pp. 169-73.

The city never provided any garbage pickup services to the apartments. Therefore, the city's argument that it had a statutory, or any other, right to the money it was paid is incorrect. Of course, the city needs to make that argument because it convinced the Harrison County Circuit Court that the demand for return of the monies paid the city "arose from the City's assessment and charge of fees for garbage collection," which constituted the assessment or collection of any tax or fee[1] covered by Section 11-46-9(1)(i).[2] Alternatively, the Circuit Court held that the collection of the fees was a discretionary act covered by 11-46-9(1)(d). If the city provided no such service to Waters Mark, the city could not rely on a non-existent discretionary act as a basis for denying the claim and the Circuit Court should not have so held.

Of course, the city also argues, and the Circuit Court apparently held, that if Gulfport had no right to collect garbage fees from Waters Mark, then the city's receipt of the money, and its refusal to return it, is wrongful act or omission covered by section 11-46-(3)(1). The

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[1]Gulfport cites *Perkins v. U.S.*, 55 F. 3d 910 (4th Cir. 1995) as supporting its position that assessment and collection of fees or taxes is not allowed under either federal or state tort claims acts. Brief at p. 19. It does not point out, however, that the claim in *Perkins* is for a wrongful death resulting from an attempt by an IRS agent to collect taxes. The allegation by the plaintiff is negligence on the part of the government resulting in death, not the withholding of improperly collected monies.

[2]It takes little if any thought to arrive at the most likely reason for allowing such an exemption. The legislature would hardly want a public entity to be liable for making decisions establishing the collection of a tax or fee or determining the amount of such tax or fee. That type of activity, inherent in functions of a public body, is a far stretch from the collection of fees for services that were never provided.

problem with that argument is that virtually every suit involves an act by a defendant that can be characterized as wrongful.

The Court of Appeals has spoken directly to this point. In *Alexander v. Taylor,* 928 So.2d 992 (Miss. Ct. App. 2006), the court was considering a claim for the execution of tax deeds and for damages from a chancery clerk and his bonding company. In discussing the various claims that had been brought and the defenses to those claims, the court acknowledged that the Tort Claims Act's statute of limitations, section11-46-11(3), was applicable to one of the claims.

The court noted that the language of the statute provided that the limitation announced in the act applied "notwithstanding the nature of the claim, the label or other characterization the claimant may use to describe it . . . ." The court pointed out, however:

> It is self-evident that only those suits "subject to" the Tort Claims Act are controlled by that Act's statute of limitations. Efforts to re-label tort suits as something else in order to avoid some part of the Act are ineffective, as this quoted language indicates. Yet that is not the same thing as a statutory assertion that there are no suits other than in tort that can be brought against governmental offices and officials.

Id. at 995-96. So clearly there are suits that can be brought against public entities other than in tort. And, just as plaintiffs may not characterize their claims to avoid the Torts Claim Act, governmental units may not characterize plaintiff's claims in a particular manner simply to justify invoking the act.

At every opportunity, Gulfport reiterates its position that it did not possess the money that Waters Mark had paid it. Brief at pp. 17, 20 (note 10), and 22. If it were proven at trial that Gulfport did not provide any services to Waters Mark, and the jury certainly believed that none were provided, then whatever Gulfport may have paid to its garbage collector was not paid for any services Waters Mark received. The city may have paid some money to the collector, but Waters Mark should not have to prove where Gulfport's money went. If Gulfport had the benefit of Waters Mark's money, it should simply pay the money back as the jury decided.

Finally, if Gulfport contends that there was another necessary party, why did Gulfport not seek to bring that necessary party in or attempt to bar the suit if Waters Mark did not? The answer is Gulfport's contention is simply an appellate argument; the city did not employ these measures as litigation or trial tactics. The true mark of the insincerity of Gulfport's argument about missing parties is that no objection was made in the trial court and no appeal was taken on the grounds that other parties were not brought into court.

II.

THE COUNTY COURT ERRED AT TRIAL
WHEN IT DENIED PREJUDGMENT INTEREST.

Waters Mark argued this matter to this Court to preserve its cross appeal from the County Court. That may not have been necessary, but it appeared to Waters Mark that if this matter is concluded by a reversal of the Circuit Court, all of the issues needed to be present at this level to allow for a complete decision.

Regardless, if this Court agrees with Gulfport that the Tort Claims Act applies, there is no judgment for Waters Mark and it is not necessary to argue, as Gulfport does, that prejudgment interest is precluded by the Tort Claims Act, section 11-46-15(2).

Furthermore, Gulfport argues that the decision in *City of Jackson v. Williamson*, 740 So. 2d 818 (Miss. 1999), is limited to the facts of that case which involved a claim against a municipality for post-judgment interest only. The point Waters Mark attempted to make in its brief is that *City of Jackson v. Williamson* reversed a long line of cases in Mississippi saying that political subdivisions were exempt from any interest on judgments. *Id.* at ¶17. The Tort Claims Act specifically precludes prejudgment interest, but only if there is a tort claim involved. If not, as Waters Mark alleges in this and its previous brief, then the city has no defense to any claim for interest, prejudgment or post-judgment.

CONCLUSION

Without repeating the statement in appellant's original brief, Waters Mark respectfully suggests that this Court should reverse the decision of the Circuit Court of Harrison County

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CERTIFICATE OF FILING AND SERVICE

I certify that I have, on the date below, mailed by U. S. Mail, the original and three copies of the foregoing Reply Brief of Appellant to:

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I further certify that I have, on the date below, either mailed or delivered one copy of the foregoing Brief of Appellees to the following counsel, the trial judge, and the original appellate judge:

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DATED: October 16, 2007.

H. M. YOSTE, JR.