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

BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED

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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 disqualifications or recusal.

1704 21st Avenue, Ltd., Appellant

Thomas Crowson, Principal in Appellant

Harry M. Yoste, Jr., Appellant's Counsel

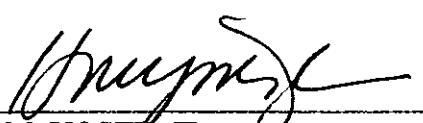
City of Gulfport, Mississippi, Appellee

Margaret Murdock, Appellee's Co-Counsel

Jeffrey S. Bruni, Appellee's Co-Counsel

Honorable Robin Alfred Midcalf, County Court Trial Judge

Honorable Roger T. Clark, Circuit Court Appeal Judge



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2. Did the County Court err at trial when it denied prejudgment interest?

STATEMENT OF THE CASE

NATURE OF THE CASE, COURSE OF THE PROCEEDINGS, AND DISPOSITION IN THE COURT BELOW

This is a suit against the City of Gulfport for return of moneys paid in error by 1701 21st Avenue, Ltd., a corporation owning an apartment complex known as "Waters Mark." (The corporate entity will also be referred to by the complex name.) Waters Mark paid for garbage pick-up service when the apartment complex had a separate contract with the city's garbage collector for those services. Waters Mark sued the city for $18,342.72 on the theories of money had and received and unjust enrichment and demanded prejudgment interest.

While the city originally defended on the theory that it was protected by an internal policy limiting refunds to six months, it later amended its answer asserting numerous defenses, but primarily that the claim was subject to the sovereign immunity the city enjoyed. After a lengthy period of motions and arguments to the county court, the defense of sovereign immunity was denied and the case was tried to a jury. The jury returned a verdict for the requested amount of $18,342.72. The court declined to award prejudgment interest to Waters Mark, but did authorize interest from the date of judgment at 8% per annum.

The city appealed to the Circuit Court and Waters Mark cross-appealed on the issue of prejudgment interest.

The Circuit Court ruled that the action was included within the bar of claims against public entities granted by the Mississippi Tort Claims Act.

FACTS

During the period from March 2, 1999, through May 2, 2001, the City of Gulfport charged garbage collection fees to 1701 21st Avenue, Ltd. ("Waters Mark), in the amount of $23,345.28 on two separate accounts for the Waters Mark Apartments located in Gulfport, Mississippi. During all that time, Waters Mark had an independent contract with BFI, the contractor who picked up all of the garbage at the apartment complex. Waters Mark paid that contractor for the garbage pickup directly. Transcript, pp. 74-84 and 90-91.[1]

While the city also used BFI to collect garbage, the city did not provide any services for the charges that it was making to Waters Mark. Transcript, p. 71. After Waters Mark realized that it was paying twice for the same services,[2] it made demand to the city for a refund. Transcript, p. 91. In response, the city issued a credit/refund of $5,002.56, representing six months of the duplicate collection. The city explained that it was municipal policy to adjust water/sewer/garbage fees for no more than six months. Transcript, p. 95. After that credit, Waters Mark was owed $18,342.72. Transcript, p. 96.

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[1] The trial transcript in County Court will be referred to simply as Transcript, with a reference to the pages. The County Court record of pleadings will be referred to as County Record, with a reference to the pages. The Circuit Court record of pleadings will be referred to as Circuit Record, with a reference to the pages. The first two documents have multiple volumes, but all of the pages are numbered in sequence. Therefore, the volume will not be given. Record Excerpts are cited by page.

[2] The Circuit Court, in its statement of facts, adopts the city's rendition of facts and says that Waters Mark "contends it was negligent" in overpaying the garbage fees. Circuit Record, p. 22; Record Excerpt, p. 12. Waters Mark has never said that and obviously prefers to believe the overpayment was simply a mistake or misunderstanding. In its opinion, the Circuit Court's language in reciting facts speaks in terms of claims and contentions. The court obviously ignored the fact that the County Court jury, by its verdict, decided all of those "contentious" matters to be facts.

SUMMARY OF THE ARGUMENT

The Circuit Court of Harrison County erred when it summarily held that the City of Gulfport's refusal to return money that it improperly withheld from Waters Mark was controlled by the Mississippi Tort Claims Act with almost no analysis.

The language of the Tort Claims Act is clear and resounding: it governs torts or, in the language of section 11-46-3(1), wrongful or tortious acts or omissions or breaches. Numerous sections in the act speak of the nature of the acts that the state is protected from. All of that language speaks to torts. There is no language that supports the Circuit Court's conclusion that the City of Gulfport was assessing or collecting taxes or fees or acting with proper discretion.

This Court has repeatedly interpreted the Tort Claims Act to allow claims against the state and its political entities and to bar only claims for tort damages.

Waters Mark's claim against Gulfport was based two common law theories: unjust enrichment and money had and received. Both are viable actions under current law and support a recovery from the city. Both require a showing that the city had money it did not have a right to and that it had no basis for not repaying the money. Those requirements were proven at trial and the jury awarded a verdict for the amount sought.

Finally, the County Court trial judge erred when refusing to award prejudgment interest. Prejudgment interest should be awarded where the claim is liquidated and included in the complaint, or if the denial of the demand is frivolous or in bad faith. The first two

elements are clearly present in this case and the last two are arguably present. While the decision to award prejudgment interest is discretionary with the trial judge, the discretion should not be unbridled. Where the requirements are clearly and objectively met, prejudgment interest should be awarded.

ARGUMENT

I.

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

The first issue raised by Waters Mark is legal in nature. As such, this Court applies a *de novo* standard of review. *Russell v. Performance Toyota, Inc.*, 826 So.2d 719, 721 (¶5) (Miss. 2002).

The Circuit Court decided this issue, on which over a ream of paper has been expended in this case alone (a four volume record in County Court alone), in two pages of analysis. Circuit Record, pp. 23-24. The court then cited the exemption provisions of the Mississippi Tort Claims Act (MTCA), section 11-46-9(1)(i), Mississippi Code Annotated (1972 as amended), denying liability for claims "arising out of the assessment or collection of any tax or fee," and section 11-46-9(1)(d) barring claims based on discretionary functions, apparently deciding that both applied. The court then noted Water Mark's argument in its brief that the MTCA applied only to wrongful acts and found that Gulfport's withholding Waters Mark's funds constituted an allegedly wrongful act and the city was therefore immune to liability. Finally the court noted that the claim was also barred because a notice of claim was necessary under the MTCA, section 11-46-11, and Waters Mark had never submitted such notice.[3]

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[3]Waters Mark clearly admitted never serving notice. The question presented here and below, however, is whether the claim is covered. While failure to serve notice is normally

The straightforward question, then, is whether the MTCA controls Waters Mark's claim against the city. The Circuit Court was right in noting that the answer is found in the statutes.

A. PROVISIONS OF THE ACT

The first item to be addressed, logically, is at the very beginning: the name of the act. Title 11, Chapter 46, of the Mississippi Code is entitled "Immunity of State and Political Subdivisions From Liability and Suit for Torts and Torts of Employees." The title does not refer to contract claims, equitable claims, or anything else of the sort. It refers only to torts of the entity and its employees. Indeed, as the Supreme Court has noted, the act is referred to, almost universally, as the Mississippi Tort Claims Act. *City of Jackson v. Stewart*, 908 So. 2d 703, ¶27 (Miss. 2005).

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a bar to a claim that is covered by the MTCA, the Supreme Court has said that substantial notice can suffice for the statutory notice. *Ferrer v. Jackson County Board of Supervisors*, 741 So. 2d 216 (Miss. 1999). In this case, there is no question that the defendant had notice of the claim due to the numerous correspondences between the parties, some of which are attached to the plaintiff's response to the defendant's motion to dismiss. *See* Exhibits F and H through L attached to the plaintiff's response to the defendant's motion to dismiss. They include letters between attorneys for the parties and also an acknowledgement from the Mayor of Gulfport that a conflict over the credit existed. Circuit Record, pp. 357-58; 363-68. Finally, the city acceded to a portion of the claim when it granted a substantial credit against the demand that was made. Circuit Record, pp. 357-58.Any argument by the city that it was prejudiced by lack of notice is without substance.

Section 11-46-1(a) defines "claim" as "any demand to recover damages[4] from a governmental entity as compensation for injuries." Subsection (h) defines "injury" as "death, injury to a person, damage to or loss of property or any other injury that a person may suffer[5] that is actionable at law or equity."

Section 11-46-3(1) establishes the legislative intent for the Mississippi Tort Claims Act:

> 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 subdivisions," 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 subdivisions, or any *such act, omission or breach* by any employee of the state or its political subdivisions, 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

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[4]Damages is not defined in the statute, but elsewhere as, "A pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another. A sum of money awarded to a person injured by the tort of another. Restatement, Second, Torts, §12A." BLACK'S LAW DICTIONARY 351-2 (5th ed. 1979).

[5]While the word "suffer" has a common usage, it is defined for legal purposes as "to have the feeling or sensation that arises from the action of something painful, distressing or the like; to feel or endure pain . . . . The customary use of the word indicates some experience of conscious pain." BLACK'S LEGAL DICTIONARY 1284 (5th ed. 1979).

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. *(Emphasis added)*

The operative language "on account of any wrongful or tortious act or omission or breach of implied term or condition of any warranty or contract" is the crux of the plaintiff's claim that there is no coverage under the MTCA for its claims. "Act, omission, and breach of implied term or condition of any warranty or contract" are three separate types of conduct all modified by the two characterizations of the conduct, "wrongful or tortious."

This statement is rendered graphically as follows:

CHARACTERIZATION OF CONDUCT		TYPE OF CONDUCT
wrongful	}	act
or	}	omission
tortious	}	breach of implied term or condition of any warranty or contract

The language of the statute requires a wrongful act, omission, or breach, tantamount to a tortious act, omission, or breach. Absent such conduct (act, omission, or breach) which falls within the statutory characterizations (wrongful or tortious), the provisions of the Tort Claims Act are not invoked.[6]

Section 11-46-5(1) speaks of immunity "from claims for money damages arising out of the *torts* of such governmental entities and the *torts* of their employees acting within the course and scope of their employment. . . ." Subsection (2) denies that an employee is acting

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[6]Appellant understands that the argument articulated here flies in the face of the holding announced in *City of Jackson v. Stewart*, 908 So. 2d 703, ¶¶ 27-42 (Miss. 2005). That opinion stated, as the crux of its reasoning, that acceptance of the this appellant's argument "would require [the conclusion] that, by specifically including a tortious breach of *implied* contract, the language of the statute intended to exclude breach of *express* contract. Otherwise, there would be have been no purpose in including the word 'implied.' " The Court concludes that "there is nothing in the language of the statute to lead us to conclude that 'a breach of an implied term or condition of any warranty or contract' must be tortious." ¶37.

To the contrary, however, is the fact that section 11-46-3(1) refers to the "type of conduct" *three* further times, lumping all three types of conduct together in these words: "such act, omission or breach." If the legislature had intended its language to be interpreted in the way the Supreme Court did in *Stewart*, the legislature would have said, in later references to the types of conduct, "such breach or wrongful act or omission." The language is highlighted in italics in the statement of the statute above.

Of significance to this minor point is the number of rulings that were abrogated or modified as a result of the later *Stewart* decision, including the earlier *Stewart* decision. In the end, however, all of the reasoning did not change the outcome of *Stewart*, and the claim was sustained.

Furthermore, no attention was given to the point that wrongful or tortious breach of contract requires something more than a breach; it requires, "in addition, some intentional wrong, insult, abuse, or negligence so gross as to constitute an independent tort." *Southern Natural Gas Company v. Fritz*, 523 So.2d 12, 19-20 (Miss. 1987), *quoted in Braidfoot v. William Carey College,* 793 So.2d 642, 655 (Miss. 2000). That would equate to a wrongful or tortious act or omission and would be covered by the MTCA, just as in the *Stewart* case.

within the course and scope of employment if he or she is guilty of fraud, malice, libel, slander, defamation or any criminal act other than a traffic ticket.

Section 11-46-11(3) in establishing the statute of limitations for the MTCA requires that "all actions brought under the provisions of this chapter shall be commenced within one (1) year next after the *date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based . . . .*"

Section 11-46-17 establishes the "Tort Claims Fund," and provides for increased exposure for liability insurance that is purchased. Finally, section 11-46-18 establishes the "Mississippi Tort Claims Board."

The purpose of this exposition of the various statutes making up the Mississippi Tort Claims Act is to show that the actions contemplated by the act are specifically torts or "civil wrongs" as our civil justice system defines them. However, civil wrongs and torts make up only a small portion of all of the types of suits that can be brought. Those that are not "torts" are outside of the Mississippi Tort Claims Act.

B. THE ACT AS INTERPRETED BY THE SUPREME COURT

Given the definitions in section 11-46-1, one might for a moment argue that the definition of "injury" is so all-encompassing that it would include any suit in which a recovery was sought. That argument has been made and has not long survived.

In *Greyhound Welfare Foundation v. Mississippi State University*, 736 So. 2d 1048 (Miss. 1999), the plaintiff sought replevin of several greyhound dogs the university had

acquired. The chancellor dismissed the case holding that the MCTA barred the action. The Supreme Court reversed. It cited its holding in *Fordice v. Thomas*, 649 So. 2d 835, 839-840 (Miss. 1997), "that the Mississippi Tort Claims Act applies only to suits for torts for money damages."

> The question before us is whether via the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11- 46- 1 to - 23 (Supp. 1998), the State of Mississippi has lawfully proscribed actions against itself for the return of private property allegedly wrongfully acquired by the State or its agencies or institutions. The lower court found that the state was immune from this replevin action. Greyhound Welfare Foundation does not seek money damages in the instant action, but seeks the return of property which it claims is wrongfully held by the State, and a judgment of possession of the same. Greyhound Welfare Foundation is entitled to be heard on this cause of action against the State.
>
> The Chancellor's interpretation of the Mississippi Tort Claims Act was incorrect, and the order of dismissal entered in the lower court, which is based solely on sovereign immunity, was erroneous. The broad reading given by the lower court would unduly restrict the rights of citizens to challenge the allegedly improper acts of the State and extend the doctrine of sovereign immunity far beyond its traditional common law scope and beyond the intent of the Legislature.

736 So. 2d at 1049. *Accord, Fordice v. Thomas*, 649 So. 2d 835, 839-840 (Miss. 1997), (legislative intent expressed in section 11-46-3 renders MTCA inapplicable since plaintiff's claim against the governor was not based on tort damages); *USPCI of Mississippi, Inc. v. State of Mississippi ex rel. McGowan*, 688 So. 2d 783, 789 (Miss. 1997)(mandamus action; "sovereign immunity is limited to tort claims").

Because Waters Mark's claim is not one for contract, further discussion of the application of the language regarding contracts as tortious or wrongful acts is omitted.

C. ANALYSIS

The *Greyhound Welfare Foundation* case is especially pertinent to Waters Mark's claim in this matter. The Waters Mark complaint seeks return of an amount of money. While cash is certainly fungible, the claim is for an exact amount sought to be returned, and that is the same amount that was mistakenly delivered to the city. While a replevin action is not identical to an action for money had and received or for unjust enrichment, the similarities are obvious. Waters Mark might have brought this action as a replevin action seeking return of its property that the city holds without any justification.

The claim might also have been made as one for *quantum meruit*. While that theory is usually reserved for cases involving fees or wages, *Estate of Fitzner v. Jurotich*, 881 So.2d 164, 173-4, ¶25 (Miss. 2003), seems to equate *quantum meruit* with unjust enrichment.

The claims Waters Mark made against the city were for money had and received and unjust enrichment.

The Mississippi Supreme Court has defined the concept of unjust enrichment and explained the application of that equitable doctrine as follows:

> Unjust enrichment is an equitable remedy closely associated with "implied contracts" and trusts. In *Hans v. Hans*, 482 So.2d 1117 (Miss. 1986), the Court said:
>
> "The doctrine of unjust enrichment or recovery in quasi-contract applies to situations where there is no legal contract but where

> the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain but should deliver to another, the courts imposing a duty to refund the money or the use value of the property to the person to whom in good conscience it ought to belong." 482 So.2d at 1122.

Koval v. Koval, 576 So. 2d 134, 136 (Miss. 1991)(quoting from *Estate of Johnson v. Adkins*, 513 So.2d 922 (Miss. 1987)). *See also Milliken & Michaels, Inc., v. Fred Netterville Lumber Company*, 676 So. 2d 266, 269-71 (Miss. 1996)(majority and concurring opinions)(unjust enrichment also likened to restitution; Justice Sullivan concurring).

The other basis on which Waters Mark sought recovery was money had and received. The common law action for money had and received is applicable to the plaintiff's claim for repayment of the money erroneously paid to the city and withheld by it.

> Money paid to another by mistake of fact, although such mistake may have been caused by the payer's negligence, may be recovered from the person to whom it was paid, in an action for money had and received. *Bank of Louisiana v. Ballard*, 7 How. 371; *Holden v. Davis*, 57 Miss. 769; 21 R. C. L. 167; 30 Cyc. 1321. The ground on which such recovery is allowed is that one receiving money paid to him by mistake should not be allowed to enrich himself at the expense of the party who paid the money to him by retaining it, but in equity and good conscience should refund it. In order that this rule may apply, the party to whom the payment by mistake was made must be left in the same situation after he refunds it as he would have been had the payment to him not been made.

Bessler Movable Stairway Co. v. Bank of Leakesville, 140 Miss. 537, 106 So. 445, 446 (1925); *accord, Bank of Belmont v. Judson Lumber Co.*, 143 Miss. 86, 108 So. 440 (1926).

The proof requirements for a case of money had and received are shockingly simple:

"All plaintiff need show is that defendant holds money which in equity and good conscience belongs to him." *Pascagoula Hardwood Co. v. Chisholm*, 164 Miss. 242, 144 So. 711 (1932)(citations omitted); *accord, Dorsey Mississippi Sales, Inc., v. Newell*, 251 Miss. 77, 108 So. 2d 645, 651 (1964).

Regardless how the claim is classified, there is no reason why it should fall into a category covered by the Tort Claims Act. To do so would enlarge the language of the statute and make virtually any claim against state entities impossible.

Furthermore, the idea of entities protecting citizens by the purchase of insurance in excess of the statutory liability is meaningless in the context of claims that are outside of the tort field. No city or other entity is able to purchase insurance to protect them from contractual defaults or from equitable claims that they hold someone else's money improperly.

II.

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

The trial court's determination of whether to grant prejudgment interest is reversed only for abuse of discretion. *Sentinel Industrial Contracting Corp. v Kimmins Industrial Service Corp.*, 743 So.2d 954, 970-71 (¶50) (Miss. 1999); *Preferred Risk Mut. Ins. Co. v. Johnson*, 730 So.2d 574, 577 (¶11) (Miss. 1998).

At the conclusion of the trial, Waters Mark made an oral motion for prejudgment interest from the date of the last payment stated in the complaint, May 22, 2001. Transcript, p. 227. A claim for such interest had been included in the complaint. County Record, p. 12. Ultimately, the trial court granted post-judgment interest, but denied the request for prejudgment interest. County Record, p. 512; Record Excerpt, p. 15. Waters Mark cross-appealed on that sole issue to the Circuit Court, alleging that denial of the prejudgment interest was error, County Record, p. 518, and continues that claim in this appeal. The Circuit Court did not rule on this issue in light of its determination that the MTCA applied to Waters Mark's claim.

Interest on judgments is governed by statute. Section 75-17-7, Mississippi Code Annotated (1972 as amended) provides that, for cases other than sales or contract, judgments shall "bear interest at a per annum rate set by the judge hearing the complaint from a date determined by such judge to be fair but in no event prior to the filing of the complaint."

The decision on this issue rests within the discretion of the trial judge. *Aetna Casualty & Surety Company v. Doleac Electric Company, Inc.*, 471 So. 2d 325, 331 (Miss. 1985); *Jacob Hartz Seed Company, Inc. v. Simrall and Simrall*, 807 So. 2d 1271, 1275 (Miss. Ct. App. 2001).

Prejudgment interest can only be awarded if the amount is liquidated and included in the complaint, or if the denial of the claim by the defendant is made frivolously or in bad faith. *Preferred Risk Mutual Insurance Company v. Johnson,* 730 So. 2d 574 (Miss. 1998); *Aetna Casualty & Surety Company v. Doleac Electric Company, Inc.*, 471 So. 2d at 331.

Waters Mark's claim for prejudgment interest is stated in the complaint, County Record, p. 12, and the amount is, and always has been, liquidated. One amount was sued for based on the computations of payments less credits. The same amount was asked for and discussed in correspondence with the city. Trial Exhibits 6, Transcript p. 91, and 7, Transcript, p. 92. Exhibit 6 is also located at County Record, p. 363, and Exhibit 7 is also located at County Record, pp. 357-58. The exact same amount was awarded by the jury. County Record, p. 512; Record Excerpt, p. 15.

There is also a claim to be made that the denial of the demand was frivolous or in bad faith. The city originally answered saying that Waters Mark's money would not be refunded based on a city policy limiting refunds to six months prior to the request for the refund. See the original answer filed by the city at County Record, p. 15. Of course, when the city defended at trial, city comptroller Mr. Mike Necaise had no knowledge of such a policy

(Transcript, p. 154). Only after Waters Mark filed for summary judgment did the city amend its answer, alleging a plethora of new legal defenses (County Record, p. 64), none of which have been sustained, except the immunity defense on appeal to the Circuit Court.

A review of the record in this matter will reveal the length to which the city has gone to avoid payment of this valid claim.

Prejudgment interest is available against a municipality as well as any other political subdivision of the state. Regarding interest in general, at a time when no interest could be awarded against a city, *City of Jackson v. Williamson*, 740 So. 2d 818 (Miss. 1999), held:

> Therefore, we specifically overrule *City of Jackson v. Reed*, 233 Miss. 280, 103 So. 2d 6 (1958) and *City of Mound Bayou v. Roy Collins Constr. Co.*, 457 So. 2d 337 (Miss. 1984), as well as *any of their predecessors or progeny*, to the extent that they hold that the State and its political subdivisions are not liable for interest on a judgment unless specifically imposed by statute.

Id. at ¶18 (emphasis in original). Nothing in that case spoke to limitations on that holding to prejudgment or post-judgment interest.

Another case, citing a later hearing on one of the cases cited above says this about prejudgment interest:

> Mississippi recognizes judicial authority to award prejudgment interest to a prevailing party in a breach of contract suit. *City of Mound Bayou v. Roy Collins Construction Company, Inc.*, 499 So. 2d 1354, 1361 (Miss. 1986).

Preferred Risk Mutual Insurance Company v. Johnson, No. 97-CA-00712-SCT, 730 So. 2d 574, ¶12 (Miss. 1998) (referencing a suit against the municipality of Mound Bayou).

All of the criteria having been met, and there being no impediment to the award of prejudgment interest, the question is whether the trial judge abused her discretion when she awarded only post-judgment interest.

Discretion is not a wide-ranging authority to decide freely one way or another. A judge having discretion means that the judge may decide appropriately in areas where there is latitude to decide. If something should or should not be done based on standards or criteria that are set out in statutes or decisions, then the decision is mandated by those principles.

> When [the Supreme] Court reviews a decision that is within the trial court's discretion, it first asks if the court below applied the correct legal standard. If the trial court applied the correct legal standard, then this Court will affirm a trial court's decision unless there is a "definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of relevant factors."

Wood v. Biloxi Public School District, 757 So. 2d 190, 192, ¶8 (Miss. 2000) *citing Scoggins v. Ellzey Beverages, Inc.*, 743 So. 2d 990, 996 (Miss.).

A judge must exercise discretion in determining whether the criteria for prejudgment interest exists. Thus, "[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 therefor.' *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. Ct. App. 2001).

But, where all of the criteria for prejudgment interest are clearly and objectively met, then the request should be granted. *LaFayette Steel Erectors, Inc., v. Roy Anderson*

Corporation, 71 F. Supp. 582, 591 (S.D. Miss. 1997)(where court "determined that the sole responsibility is and always has been that of the defendant to pay the plaintiff within a reasonable time . . . it is appropriate that the plaintiff be awarded prejudgment interest"). Failure to grant prejudgment interest under circumstances where the criteria are met is an abuse of the limited discretion available in an interest question.

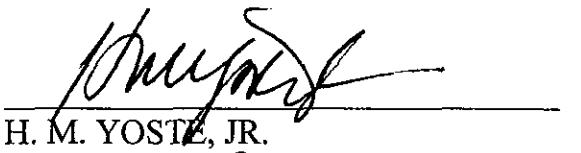
Because all of the alternative criteria for the award of prejudgment interest are objectively met in this case, prejudgment interest should have been awarded at the rate set by the trial judge for post-judgment interest. Waters Mark now asserts that the failure to do so constituted abuse of discretion. The denial of prejudgment interest should be reversed.

CONCLUSION

As is often the case, matters in litigation take on a life of their own. Waters Mark and its counsel never imagined this case would go through the process that it has, especially in light of the relatively small amount at issue. It appears that the policy involved is much greater than the amount, and obviously both litigants feel that way. And, in the end, the principle actually is important enough to justify their efforts to prevail on the primary legal issue involved here.

The appellant believes that, if public policy is the basis on which this case must be decided, then the larger picture must be the focus of the discussion. That is why a lengthy restatement of the prefatory statutes and the language of the law was given the attention that the subject received. This is not a tort claim against the City of Gulfport. It is a wholly appropriate and reasonable request for repayment of money that is improperly held by the city. There is no sound reason, other than the Tort Claims Act, for the city not to respond in a honest manner and refund the money it holds, just as it did when it made a prompt partial refund before the litigation began.

If the public policy of the state is determined to shield every public entity and employee from the obligation to act in good faith, responsibly, and equitably in every contact with the citizens of this state, corporate and individual alike, then the purpose of the legislature in enacting the Mississippi Tort Claims Act has been grossly subverted.



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CERTIFICATE OF SERVICE

I certify that I have mailed the original and three copies of the foregoing Brief of Appellees to the following:

Mrs. Betty W. Sephton
Supreme Court Clerk
Post Office Box 249
Jackson, Mississippi 39205-0249

I further certify that I have 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: June 20, 2007.

H. M. YOSTE, JR.