IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2008-CA-00270-COA

JAMES AND LINDA FORTENBERRY — APPELLANTS

VS.

CITY OF JACKSON, MISSISSIPPI — APPELLEE

REPLY BRIEF OF APPELLANTS

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I. CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the Justices of the Court of Appeals may evaluate possible disqualification or recusal:

1. Honorable Bobby B. Delaughter - Hinds County Circuit Judge;
2. James and Linda Fortenberry- Plaintiffs/Appellants;
3. City of Jackson - Defendant/Appellee;
4. Ken R. Adcock - counsel for Plaintiffs/Appellants; and,
5. Peter Teeuwissen - counsel for Defendant/Appellee.

JAMES AND LINDA FORTENBERRY,
APPELLANTS

BY: _____

KEN R. ADCOCK, MSB[redacted]

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I. SUMMARY OF THE ARGUMENT

The subject case is not a case of first impression before this Court, as the City of Jackson argues, as Mississippi court have held cities in this State accountable to taxpayers for failing to maintain and repair city sewage systems for over one-hundred twenty years. In Mississippi, municipalities are given a choice to privately contract to control, manage and maintain sewer systems or they have the authority to assume control, management , and maintenance of the sewage systems themselves. However, if the municipality chooses in its discretion to assume control of the sewage systems of the city, the city then assumes the duty, to maintain and repair the sewage system. The City is also then obligated to construct, operate and maintain the sewage systems with reasonable care and in the manner required by the Metropolitan Area Plan, and to comply with the statutes and regulations of the Mississippi Department of Environmental Quality and the Federal Environmental Protection Agency and as otherwise required by law.

The trial court in this cause erroneously construed *Miss. Code Ann.* §21-27-189 in holding that municipalities have no duty to maintain sewage systems that they operate and may do so solely at their discretion. It is the position of the Appellant herein that *Miss. Code Ann.* §21-27-189 allows the city discretion to decide whether or not it will assume control over the construction, operation and maintenance of sewer systems, sewage treatment facilities and sewage disposal system and once the city assumes control and begins charging taxpayers for sewer services, it has a ministerial duty to maintain the City sewer system.

It is undisputed that in 1997, the City of Jackson received a Metropolitan Area Plan from four (4) engineering companies which required smoke testing of all sewage lines, the rehabilitation or repair of the sewage system, the institution of a maintenance and

preventative maintenance program to prevent back flow of sewage over fifteen (15) years (R-116). David Willis, head engineer for the City of Jackson water/sewer department, and the City's engineering expert, King, testified in his deposition that the City has a duty to maintain and repair City sewage systems to prevent exposures of health hazards such as the back flow of raw sewage into tax payers' homes (R-93; 100-101).

At the time of the subject sewage flood in 2003, the City had no maintenance program, no preventative maintenance program and had not begun repairs pursuant to the Master Plan allegedly due to lack of funding (R-104). Willis stated that the Jackson sewage system had been neglected for twenty (20) years and is a massive problem in bad need of repair (R-107, 118-120). Although the City of Jackson conducted smoke testing (called SSES) pursuant to the Metropolitan Area Plan and found seven (7) holes in the City sewage line to Appellants' home which needed immediate attention in 2002 (R-132-3) in 2002, and had knowledge of over fifty (50) complaints of homeowners serviced on the same sewage line three (3) years before the flooding to Appellants' home, the City of Jackson took no action to attempt to repair the sewage line prior to the Fortenberry's home flooding with raw sewage on April 6, 2003. Despite the knowledge of the first flood, the City took no action to repair before the second flooding of the Fortenberry home on April 24, 2003. As a result, the Fortenberry's homeowners' coverage denied their claim under the exclusion which is contained in every homeowners' policy in this state and the City denied their claim, and they were forced to move out of their home in 2003 and pay for another place to live while attempting to keep up their mortgage payment, much like any other disaster victim.

The City of Jackson's sole basis for claiming discretionary immunity under §11-46-9 is that since there is no law telling them how much money to spend on sewage maintenance and repair, it has the discretion to spend City funds as it sees fit and should be immune.

It is undisputed in this case that although the City of Jackson billed and collected from taxpayers between $17 million and $18 million dollars in 2003 for water/sewer service, the budget in 2003 for sewage maintenance was only $300,000 to $400,000, .02% of the money collected from taxpayers (See deposition of Willis, P-76; R-110-114). It is the position of Appellant herein that because City of Jackson assumed control of the City sewage system it had a ministerial, not discretionary, duty to use reasonable care to maintain the sewage system in compliance with the Master Plan, state and federal law, and to take actions to repair after notice of a defect to prevent severe damages and exposure to known health hazards to homeowners such as Appellants herein.

The City of Jackson had the money to repair sewer lines in need of immediate repair, such as Appellants', but has chose to spend it elsewhere in 2003, and up to the present date. The City has chosen to ignore the Master Plan and state and federal law and has not developed a maintenance program, preventative maintenance program or begin repairs. For over one-hundred twenty years, this Court has held municipalities accountable for failing to maintain sewage systems so as not to expose taxpayers to the loss of or damage to their biggest and most important investment in life, their home. For this Court to rule otherwise would encourage neglect and continued deterioration of the City of Jackson's sewage system and continue to damage taxpayers who are left without recourse. Appellants respectfully moves this Honorable Court to reverse the trial court's ruling of immunity and remand this case for trial on the merits.

~~II.~~ ARGUMENT

A. The City of Jackson has a ministerial duty to maintain its sewer systems and the trial court erroneously granted summary judgment to the City of Jackson based on discretionary immunity under *Miss. Code Ann.* §11-46-

9(d).

1. **Trial court misconstrued *Miss. Code Ann.* §21-27-189 in holding that the City of Jackson had "total discretion" in determining whether or not to maintain the City's sewage system.**

In Mississippi, the Legislature has set out in *Miss. Code Ann.* Sections 21-27-161 through 21-27-221 the terms on which a municipality, if it so chooses, may construct, operate, manage and maintain sewage systems, sewage treatment facility and sewage disposal systems. Specifically, §21-27-189 sets forth that a municipality is authorized and empowered, in the discretion of its governmental authorities, to exercise a number of powers and authorities within the city. Most pertinent to this discussion is number (b) "to construct, operate and maintain sewage systems, sewage treatment facilities and sewage disposal systems in the manner and to the extent required by the Metropolitan Area Plan." Alternatively, the City of Jackson could contract with private businesses to operate the city sewage system (R-81). The City also must obtain an annual permit and comply with the regulations of the Mississippi Department of Environmental Equality (§49-17-1 (c)), the Federal Water Pollution Control Act, the Capacity Management Operation and Maintenance Guidelines (hereinafter "CMOM") enforced by the United States Environmental Protection Agency (R-90), National Pollutant Discharge Elimination System (R-93 to R-95), and the Metropolitan Area Plan, §21-27-189(b). The Master Plan which was effective in 2003 and was first given to the City in a report by four (4) engineering firms in 1997 in order to comply with new Environmental Protection Agency regulations (National Pollutant Discharge Elimination and CMOM)(R-93 to R-95). This report found that the City of Jackson's sewer line had cracks and disjointed pipe throughout, that the pipes were too small in many places and therefore had defects throughout the City sewage system and

recommended a fifteen (15) year plan to test, repair and rehabilitate the City sewage system. As such, there is no question that the Master Plan and state and federal law required that the City construct, operate and maintain the sewage system, an opinion also held by the head engineer for the sewage department for the last twenty (20) years, David Willis (R-93; 100-101).

On page 5 of an Order and Opinion granting summary judgment to the City of Jackson in this case, the trial court erroneously found as follows:

> *Miss. Code Ann.* §21-27-189 gives governmental authorities the power to maintain their sewage systems using their discretion. Thus, this Court finds that the Legislature has not positively imposed any duty upon the cities of this State to maintain their sewage systems (emphasis added).

As such, the trial court erroneously ignored the clear language of *Miss. Code Ann.* §21-27-189(b), that the city must construct, operate and maintain the sewage system in a manner and to the extent required by the Metropolitan Area Plan (emphasis added), and the other state and federal laws referenced above. §21-27-189 simply allows the city to make a choice in deciding whether or not it will assume control and thereby construct, operate and maintain the sewage system and once control and operation is assumed, the duty to maintain arises without discretion.

2. Duty to maintain the City sewage system is ministerial and not discretionary.

Much like a city drainage ditch on which the City exercises its powers of easement or a sidewalk which the City acquired through annexation or which it constructs, once the sole control is assumed, a duty to maintain and repair then arise by operation of law. In the ancient case of *Semple v. Mayor and Alderman of Vicksburg* 62 Miss. 63 Miss. 1884) this court allowed a taxpayer to sue the City of Vicksburg for defective maintenance

of the City's sewer pipe, which caused sewage back flow into the house of Mary Semple. In this opinion, which has been followed up to the present date, the Court set out that the work of constructing gutters, drains and sewers is ministerial, and the municipality was accountable for damages caused by the careless or unskillful manner of performing or not performing the work. During the days of sovereign immunity, this Court considered construction and maintenance of sewage system as "proprietary or corporate" and held municipalities accountable pursuant to negligence standards under common law. *Doss v. Jackson Municipal Airport Authority* 419 So.2d 10, 10 (Miss. 1982); *Morgan v. City of Ruleville* 627, 275 (Miss. 1993). The key thread throughout this case law is that the municipality exercises its power to assume control over the property or improvement, and thereby assumes sole control it assumes the duty to maintain. The public policy thread underlying these cases is that public policy to not expose the public to hazardous conditions or health hazards such as raw sewage which contains many forms of toxic bacteria and resulting mold too numerous to describe within the limitations of this Brief. This reasoning and public policy behind holding cities accountable to maintain its sewer systems in *City of Vicksburg v. Porterfield*, 145 So.2d 355 (Miss. 1933) as follows:

> "The city must maintain the efficiency of its drainage and sewer. It is the common knowledge of all persons having experience in such matters that drains constructed on such streets and highways have a tendency to become obstructed and fill-in so as to obstruct the full capacity of drainage provided. This situation must be kept in view and remedied from time to time so as to maintain adequate drainage in each case. The city must exercise reasonable care in such cases to eliminate hazardous conditions." In the above referenced cases, this Court applied a negligent standard.

At least since the turn of the century, this Court has applied the same logic to drainage areas in which the city has exercised its easement powers and assumed control of the drainage ditches and held the city liable under the negligence standard. *Tyler v. City*

of Bay St. Louis, 34 So.2d, 215 (Miss. 1903); *Cain v. City of Jackson*, 152 So.2d 295 (Miss. 1934); *City of Meridian v. Sullivan*, 45 So.2d 851 (Miss. 1950); *Clements v. Town of Carrollton*, 63 So.2d, 398 (Miss. 1953); *City of New Albany v. Barkley*, 510 So.2d, 805 (Miss. 1987).

Since the passage of *Miss. Code Ann.* §11-46-9(d), this Court has utilized a two part test in determining whether discretionary immunity applies:

(1) Whether the activity involved an element of choice, and if so,

(2) If the choice involved social, economic or political alternatives.

Mississippi Dept. of Mental Health v. Hall, 936 So.2d 917 (Miss. 2006)

Since the passage of the Mississippi Tort Claim Act and in *Miss. Code Ann.* §11-46-9, the Court has applied the same logic and reasoning in holding municipalities accountable for failing to maintain public improvements which they solely control. In *The City of Jackson v. Internal Engine Parts Group, Inc.*, 903 So.2d 60 (Miss. 2005), the Mississippi Supreme Court affirmed a judgment for the plaintiff against the City of Jackson for failing to repair an obstructed drainage ditch which it controlled and rejected the City of Jackson's defense, which it asserts herein, that there was no duty to maintain the drainage area and it was entitled to "discretionary" immunity under §11-46-9. The Supreme Court stated specifically in the Opinion that the trial court was presented with arguments regarding §11-46-9 during the City of Jackson's Motion for Directed Verdict which was denied. This Court stated specifically that "§11-46-9 is the applicable statute to determine the immunity of the City and §11-46-9 fails to establish such immunity. This issue is without merit." The trial court attempted to distinguish *Internal Engine* from the subject case and stated in page 8 of its Order granting summary judgment to the City of Jackson in this case that:

"This case does not mention which sections of §11-46-9 were argued at trial.

Furthermore, the maintenance of a clogged drainage ditch and the repair of an entire sewage system are two different subjects, which are analyzed differently under the Public Policy Function Test because sewage maintenance is controlled by *Miss. Code Ann.* §21-27-189."

From a fair reading of §11-46-9, the only section which could be applicable to the City's defense in *Internal Engine* would be section (d) which sets forth the "discretionary immunity" which is argued herein. The fallacy in the trial Court's reasoning is that it wrongly found that §21-27-189 provided specifically that the City has discretion to maintain the City sewage systems and has no legal duty to do so. As set forth previously, this section merely provides the City the discretion to enter into a private contract to operate and maintain its sewage system or to exercise its discretion and assume control of the sewage system. Once it assumes control, it thereby assumes the duty, which is not discretionary to maintain the sewage system just like a drainage ditch. This error in interpreting §21-27-189 also caused the trial court to err in ruling that failure to maintain a drainage area should be analyzed differently than sewage.

The City of Jackson's reliance on *Hawkins v. City of Greenville*, 594 So.2d 557 (Miss. 2004) is misplaced. In *Hawkins*, the City settled Hawkins' first claim for damage from the City's "failure to maintain surface water drainage system" in 1994. The City made repairs to the drainage system after the settlement but the property flooded again in 1997 as a result of surface water overflowing a city drainage creek. Unlike Mississippi, South Carolina has thirty-seven (37) exceptions to sovereign immunity. A finding of immunity under the discretion exception "is contingent on proof the government entity, faced with alternatives, actually weighed competing considerations and made a conscious choice using accepted professional standards." Mississippi has a different standard and the trial court erred in finding that this case controlled (See P 6-7 of Opinion; R-228). The trial court

found that *Internal Engine* did not control the subject case because maintenance of a drainage ditch was analyzed differently under Mississippi law than sewers (emphasis added), but to the contrary, held that *Hawkins*, a case dealing only with alleged failure to maintain a drainage ditch was persuasive and controlling. The obvious error in the trial court's Opinion is that the maintenance of drainage ditches controlled by the City have always been analyzed by this Court exactly the same as maintenance of sewers and *Internal Engine* controls the subject case.

B. Because the City of Jackson did not argue lack of foreseeability in the lower court in its Motion for Summary Judgment and the trial judge did not base its ruling in any way on lack of foreseeability, this issue may not be raised on this appeal.

The City of Jackson did not raise in its Motion for Summary Judgment lack of foreseeability as a ground for summary judgment. Further, the trial court did not base its ruling in granting the City's Motion for Summary Judgment on lack of foreseeability. As such, under a long line of Mississippi cases, this issue may not be raised on appeal if not asserted in the trial court. *Perry v. State of Mississippi*, 904, 1122 (Miss. 2004).

1. Alternatively, if the Court considers foreseeability, specific acts of negligence by the City of Jackson made it foreseeable that some damage would occur to Appellants' property if not repaired.

In this case, the City of Jackson argues that because a great deal of rainfall occurred on April 6, 2003 (first Fortenberry flood), and on April 24, 2003 (second Fortenberry flood), a sewage overload and backup was not a foreseeable event and as such, Appellants are precluded from recovery for resulting damage and flooding of the Fortenberry house. According to the head engineer for the City of Jackson, David Willis, the sewage system

servicing the Fortenberry property should be airtight except for the manhole, so as to prevent infiltration of surface and rainwater into the sewage system, and overload it (R-106). Prior to the two sewage floods in issue on April 6, 2003, and April 24, 2003, the Fortenberrys had sustained sewage back flow in the tubs, sinks and toilets of their home and reported to the City, but no repairs were made (R-45). Contrary to the way the sewer system is supposed to operate, the sewage line servicing the Fortenberry property was found in 2002 to contain seven (7) large holes as reflected in the SSCS report (smoke test) which needed "immediate attention (R-132-3)." This was known to the City in 2002, but the City took no action to repair before the date of either Fortenberry flood (R-93-5). The City knew about the excessive infiltration of surface and rainwater into the sewage system and above the seven (7) holes in the sewer line servicing Appellants' property but failed to repair and the excessive rainwater entering the holes in the sewage line through the holes and had nowhere to go except into Appellants' house (R-82-3). Further, the City knew about and investigated the sewage flooding the Fortenberry property on April 3, 2003, and again failed to take any action before the second sewage flood occurred on April 24, 2003, which also flooded their neighbor, Wallace, who has also appealed to this Court for relief (See: CA-0027). The City of Jackson received over fifty (50) complaints on the same sewer line servicing the Fortenberry property in the three (3) years prior to the flood in question and failed to act (R-162-3; 167-181; 189-190). The City of Jackson has never had a maintenance or preventative maintenance program and has not made repairs in the last twenty (20) years (R-104-105) allegedly because of "lack of funding R-104)." There is no question that "lack of funding" will be the excuse for the next twenty (20) years if the City is granted immunity herein.

III. CONCLUSION

For over one-hundred twenty years, this Court has consistently held municipalities accountable for failing to maintain their sewers which caused damages to taxpayers in this State. In the present case, the City of Jackson moves this Court to overrule its prior decisions and provide the City of Jackson immunity under the "discretionary immunity" function set forth in *Miss. Code Ann.* §11-46-9(d), and affirm the trial court's ruling that "there is no legally imposed duty upon cities of this state to maintain their sewage system." If this Court affirms the ruling, it will place each and every user of a municipalities sewer system at their peril. All homeowners' or renter's policies issued in accordance with the form approved by the Insurance Commissioner exclude damages from sewage black flow and if the cities or counties are not held accountable, there is no recovery available to them. Municipalities across the state will be encouraged to collect millions of dollars from users of sewer services and spend the money for other purposes and disregard any duty to maintain or repair the sewage system as the City of Jackson has done in the present case. If this Court does not continue to hold municipalities such as the City of Jackson accountable, there will never be any motivation to maintain or repair sewage systems and more and more homeowners such as the Appellants will continue to lose their homes and be subjected to severe health hazards.

Although its head engineer, Willis, and along with the Risk Management Department testified that the City has a duty to maintain and repair its sewage systems in order to prevent exposure of health hazards to the public, such as Appellants herein, the City of Jackson argues herein that it did not have the money allocated to maintain or to make the necessary repairs prior to the subject flood and was justified in ignoring its duty to maintain and repair. Although the City of Jackson admittedly collected $17 million to $18 million dollars from residents of the City in 2003 from sewer and water services, it only budgeted

$300,000 to $400,000 for sewage maintenance in 2003 and as such, chose not to properly fund the sewer maintenance division from the money collected to maintain sewer systems and make the necessary repairs. If this Court grants "discretionary immunity" and does not hold the City accountable to the citizens who pay a monthly fee for sewage services, funds for reasonable sewage maintenance and repair will not be allocated, the sewer systems will continue to deteriorate and homeowners will continue to suffer without recourse.

In summary, the City of Jackson had a ministerial duty to follow its Metropolitan Area Plan outlined in 1997, to follow the Mississippi Department of Environmental Equality and Environmental Protection Agency rules, regulations and other statutes and properly maintain, repair and keep its sewage systems in reasonable functioning order. Although it had notice of the problem with Appellants' sewer line, it failed to take the appropriate action and prevent this disaster from occurring. Appellants respectfully move this Honorable Court to reverse the trial court's error in granting summary judgment to the City of Jackson and remand the subject case to the trial court for a trial on the merits.

Respectfully submitted,

JAMES AND LINDA FORTENBERRY

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CERTIFICATE OF SERVICE

I, KEN R. ADCOCK, do hereby certify that I have this day delivered by United States mail, properly addressed and postage pre-paid, a true and correct copy of the above and foregoing Appellants' Reply Brief to:

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SO CERTIFIED, this the 10th day of November, 2008.

Ken R. Adcock

CERTIFICATE OF FILING

I, Ken R. Adcock, do hereby certify that I have the day delivered, via United States mail, postage prepaid, the original and four (4) copies of the Reply of the Appellants to Appellees' Brief and an electronic diskette containing the same on November 10, 2008, addressed to Ms. Betty W. Sephton, Clerk of the Mississippi Supreme Court, Post Office Box 249, Jackson, Mississippi 39205-0249.

KEN R. ADCOCK