

IN THE SUPREME COURT OF MISSISSIPPI
NO. 2008-CA-00270-SCT

JAMES AND LINDA FORTENBERRY

APPELLANTS

VS.

CITY OF JACKSON, MISSISSIPPI

APPELLEE

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 Supreme Court and/or the Judges 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.

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III. STATEMENT OF ISSUES

The subject case presents an issue of great importance before this Court which shall have far reaching ramifications on the maintenance, repair and upkeep of public utilities such as water and sewer systems, which are controlled and operated by municipalities throughout the State of Mississippi. Homeowners, such as the Appellants herein, have no other choice but to obtain their water and sewer from the Appellee, City of Jackson. It is undisputed that the Appellee had notice of defects in the City sewer line servicing Appellants' property, that they made no repairs and that the defects caused Appellants damage. Appellants' house was flooded with raw sewage twice within three weeks and they were forced to move out of their home because they did not have the funds necessary to disinfect and repair the home. In a previous Order, the Trial Court granted summary judgment to Appellants' homeowners' insurer under an exclusion for sewage flooding, which is standard in most homeowners' policies. After providing notice of both floods to the City of Jackson, the City investigated their claim and denied it, as they have every other homeowner who sustained damages from flooding. The lower Court held that the City's maintenance and repair of the City sewage system is a "discretionary" function and, as such, the City of Jackson was immune from liability under Miss. Code Ann. § 11-46-9(1)(d) and granted summary judgment from which appeal was taken. As such, the sole issue to be decided by this Court is the following:

1. Whether or not a municipality, such as the City of Jackson, who controls and operates a sewage system has a ministerial duty to repair and maintain the sewage system which it solely provides to the citizens of the City or whether or not the City has discretion in deciding whether to repair and maintain the City's sewer system so

as to provide the City with immunity from liability under Miss. Code Ann. § 11-46-9(1)(d)?

IV. STATEMENT OF THE CASE

Appellants sustained a flooding of raw sewage throughout their property on April 6, 2003, (R-146, R-147) and again on April 24, 2003, (R-190) in a home they had owned since 1979 to approximately six inches throughout the home due to a blockage in the City sewer line running to their property and surface water entering the sewer lines through cracks, overloading the system (R-203). After giving Notice of Claim to the City of Jackson of each flood, the City fully investigated the claims, obtained an opinion from the City engineer and legal department, then denied each claim and suit was filed within one year on April 5, 2004, on behalf of Appellants and two other homeowners who had experienced the same flooding against the City and homeowners' insurers of the respective Plaintiffs (R-6) alleging the following causes of action: negligence, gross negligence, breach of contract to provide reasonable and adequate sewage lines to the citizens, breach of warranty, fraud, misrepresentation, negligence and product liability and failing to warn of health hazards.

At some unknown point in time, the City of Jackson, as a municipality defined in Miss. Code Ann. § 21-27-163, made the decision to exercise the authority granted under Miss. Code Ann. § 21-27-189(b) to construct, operate and maintain sewerage systems, sewage treatment facilities and sewage disposal systems in the matter and to the extent required by the Metropolitan Area Plan and to charge customers individually for providing sewer services. Alternatively, the City of Jackson could have contracted with private businesses to operate the City sewage systems (R-81) but instead,

made the decision to construct, operate and maintain the sewage systems, and was granted a monopoly and the City's citizens, such as Appellants, have no choice but to use the City's sewage systems and pay the City on a monthly basis. The City annexed Appellants' property in 1971 after the sewage system had been built by a developer (R-44). Appellants' house was built in the 1960s and a six inch drainage sewage pipe made of clay was used (R-54). In 1977, the City of Jackson passed an ordinance that all sewage pipe must be at least eight inches in diameter and made of PVC material (R-87, R-88; R-116). As such, the City sewer line to Appellants' home has not complied with the minimum City Code since 1977.

The Mississippi Department of Environmental Quality issues annual NPDES permits to the City for numerous waste water areas within the City to discharge and transfer waste water in accordance with the National Pollutant Discharge Elimination System pursuant to Miss. Code Ann. § 49-17-1, *et seq.*, and authority granted pursuant to § 402(b) of the Federal Water Pollution Control Act and monitor the system with inspections and in accordance with the Commission on Environmental Quality Regulations. In addition, the City must comply with the Capacity Management Operation and Maintenance Guidelines (CMOM) which are enforced by the U.S. Environmental Protection Agency (R-90). The DEQ also requires certification for the operation of a sewage system under Miss. Code Ann. § 21-27-211 and other applicable statutes and the City is authorized to acquire, construct, improve, enlarge, extend, repair, operate and maintain one or more sewage disposal systems and to make contracts under Miss. Code Ann. § 21-27-165. The City is also required to maintain minimum levels of efficiency of the sewer system under the Federal Environmental Protection Act called the National Pollutant Discharge Elimination System and CMOM referenced above (R-90). As such, it is the position of the Appellants that once the City

decided to exercise its power to assume control, operation and maintenance of the City of Jackson's sewage system, it also assumed the duty to maintain and repair the sewage systems and is required by law to do so under Mississippi Department of Environmental Quality's certification permits, Commission of Environmental Quality Regulations and Environmental Protection Agency regulations as the backflow of raw sewage is a well recognized health hazard (R-87; R-94). According to David Willis, Head City Engineer for Water Sewer Division, the City of Jackson had a duty to maintain and operate its sewage systems so as to minimize health risks such as sewage backflow to all customers and should have regular inspections of City lines and a preventative maintenance program to assess and repair defective pipes to prevent sewage backflow (R-88).

The City of Jackson has never had a maintenance system or preventative maintenance system (R-98) and simply responds to calls of customers with complaints with City sewage lines and blows out the City line to unstop the blockage (R-104). According to the City Engineer, David Willis, the City of Jackson must adopt a regular maintenance and preventative maintenance program and make necessary repairs in order to avoid causing backflows of raw sewage to customers such as Appellants (R-98). According to Willis, the City's sewer lines have been neglected for over 20 years (R-111 through R-114).

In 1997, the City of Jackson hired four engineering firms to compile a review of the water sewer system in order to comply with new EPA regulations (National Pollutant Discharge Elimination and CMOM) (R-90). The 1997 Water and Waste System Master Plan found that the City of Jackson's sewer system had grossly excessive inflow and infiltration of surface and outside water into the City sewer lines which results from cracks in sewage pipes or disjoining of sewage pipes which causes regular sewage backups (R-116). This report noted defects throughout the City's

sewage system. The report recommended a fifteen year plan to replace pipes which were too small, pipes with cracks and pipes that were disjointed and recommended that the City begin a regular maintenance and preventative maintenance program to eliminate or prevent backflow and begin repairing and rehabilitating the sewer system. In 2001 and 2002, the City of Jackson began conducting what is referred to as a SSES Study with smoke testing done on sewage pipes to locate holes and cracks and portions that needed immediate repair (R-96). In 2002, the SSES Report done on the sewage line providing service to the Appellants' property located seven holes or defects which needed immediate attention and repair, being Class 2 and Class 3 claims (R-132, R-133). In the three years prior to the subject flooding to Appellants' property, over fifty complaints of sewage backflow and other problems with the City line servicing the Appellants' property were registered (R-162, R-163; R-167 to R-181; R-189, R-190). The Appellants' property had sustained backflow of raw sewage in tubs, sinks and toilets on many occasions prior to the flooding at issue on April 6, 2003, and April 24, 2003, which did not flow to the floor (R-45). Despite knowledge of the 1997 report of four engineering firms locating defects throughout the City's sewage system, the SSES Report locating seven holes needed immediate repair in the line feeding Appellants' home in 2002, and despite knowledge of over fifty complaints on the sewage line in the three year period before the subject flooding, the City took no action to repair the City sewage line feeding the Appellants' property prior to the April 6, 2003, flood before the April 24, 2003, flood (R-90). Although the City admitted this was a massive problem and the sewer system providing service to Appellants' house was defective, the City maintained that there was no money to make the repairs (R-101 through R-103). To the present date, the City has yet to begin a maintenance or preventative maintenance program and no repairs outlined in the 1997 report have begun (R-93).

In its Answer to the Complaint, the City raised immunity under Miss. Code Ann. § 11-46-1 and § 11-46-9 (R-18). On August 3, 2005, the Trial Court ordered the severing of the claims of each Plaintiff and ordered the Fortenberrys' and Wallaces' claims to be severed (R-28). On September 21, 2006, the City of Jackson filed its Motion For Summary Judgment alleging that Miss. Code Ann. § 21-27-189 granted the City discretion in determining whether to provide the resources necessary for construction, maintenance or repair of sewer lines and that as such, it was immune from liability under Miss. Code Ann. § 11-46-9(d) (R-34). Appellants herein filed their Response in opposition to the City's Motion on January 11, 2007, citing over one hundred years of Mississippi caselaw holding municipalities, such as the City of Jackson, liable under common law negligence for failing to maintain and repair sewage and drainage systems which caused flooding and maintained that the city had discretion in making the decision of whether to undertake and assume responsibility for the construction, operation and maintenance of the sewerage system, but once it did exercise its authority and assume this responsibility, it was under a legal duty (under common law and statutes) to use reasonable efforts to maintain and repair the sewage system and, as such, should be liable for failing to reasonably perform a ministerial act (R-46).

In a Memorandum Opinion and Order entered June 11, 2007, (RE-2) the Trial Court granted the City's Motion For Summary Judgment in finding that Miss. Code Ann. § 21-27-189 gave the City complete discretion as to whether or not to maintain and repair the sewage system which it chose to operate and, as such, the maintenance and repair of the sewage system is "discretionary" and the City was immune from liability pursuant to Miss. Code Ann. § 11-46-9. The Trial Court did not address Appellants' causes of action for gross negligence, breach of contract, breach of warranty, fraud, misrepresentation or failure to warn. The Trial Court considered this a case of first impression

and ignored all Mississippi caselaw holding municipalities liable prior to the enactment of the Mississippi Tort Claim Act because they did not address the issue of sovereign immunity (R-247). Further, the Trial Court ignored this Court's rejection of discretionary immunity under Miss. Code Ann. § 11-46-9 argued by the City of Jackson in City of Jackson v. Internal Engine Parts Group, 903 So. 2d 60 (Miss. 2005), where this Court affirmed a judgment against the City for faulty maintenance of a drainage ditch, stating that questions of faulty sewer maintenance and repair was different subject matter from faulty maintenance of a drainage ditch and analyzed differently under the public policy function test and sewage maintenance and repair is separately controlled by Miss. Code Ann. § 21-27-189.

It is the position of the Appellants herein that once the City decided to construct, operate and maintain sewage systems under Miss. Code Ann. § 21-27-189, it assumed responsibility under the common law and State and Federal statutes to reasonably maintain and repair the sewage system. Just as the construction of a sidewalk is within the discretion of the City as to where, when and how to build the sidewalk, once the City builds the sidewalk, it has a duty to reasonably maintain and repair the sidewalk and is not immune from liability for failing to do so. As such, once the City assumed control of the sewage system, it assumed the duty to maintain and repair it which goes along with collecting millions of dollars in sewage fees from its citizens, such as the Appellants.

V. SUMMARY OF THE ARGUMENT

For eighty years prior to the abrogation of sovereign immunity, the Mississippi Supreme Court consistently held that municipalities had a common law duty to inspect, maintain and repair drainage and sewage systems which caused damages to property owners. In Pruett v. City of

Rosedale, 421 So. 2d 1046 (Miss. 1982), this Honorable Court abrogated the antiquated doctrine of sovereign immunity and set forth a statement of sound public policy necessitating its decision that:

“If harm is wrongful inflicted upon an individual, he should have an opportunity to obtain reasonable and adequate remedy against the wrongdoer, either to undo the harm inflicted or to provide compensation therefore. If the State is properly to serve the public interest, it must strive, through its laws, to achieve the goals of protecting the people and of providing them with adequate remedies for injuries wrongfully inflicted upon them. So long as the State fails to do so, it will be functioning in conflict with the public interest and the public good...the immunity we abolish in this opinion is the immunity of the “sovereign”, which broadly speaking is the State, the county, the municipality or any other local subdivision of the sovereign.”

In 1993, the Mississippi Legislature partially abrogated sovereign immunity and one of the exceptions to the abrogation made by this Court was in certain limited situations, governmental employees would enjoy immunity if their employees acted within their discretion. *Miss. Code Ann. § 11-46-9*. Mississippi Courts have held that a duty is ministerial, and not discretionary, if it is imposed by law and its performance is not dependent upon the employee’s judgment. *Miss. Dept. of Mental Health v. Hall*, 936 So. 2d 917 (Miss. 2006). Mississippi law has set out a two part analysis in determining whether or not a governmental function is discretionary or ministerial:

1. Whether the activity involves an element of choice or judgment (whether the act is discretionary in nature); and if so,
2. Whether the choice or judgment involves social, economic or public policy or political policy alternatives (whether the act constitutes a discretionary function)?

It is the position of Appellants herein that once the City of Jackson chose to assume control of the City’s sewage systems operation and annexed the property owned by the Appellants in 1971,

it had a common law and statutory duty to inspect, maintain and repair. The Mississippi Department of Environmental Quality requires certification and permits for the City of Jackson and monitors its operation and the City must also comply with Federal EPA guidelines and CMOM. Simply put, the City of Jackson has assumed an obligation to operate, reasonably maintain and repair the City's sewage system and once assumed, there is no choice or judgment in choosing whether to maintain or repair the system, and, as such, this action is ministerial. If this Court chooses to grant immunity to municipalities for deciding if they will maintain and if they will repair the city sewage systems, there will be no avenue to hold municipalities accountable for failing to render adequate sewage or other services to the citizens of the State wherein a monopoly was been granted. What motivation will the municipality then have to make any attempt at maintaining or repairing any sewage system? No doubt, the result will be that the City will hide beneath the cloak of immunity and deny every claim, refuse to inspect, refuse to provide maintenance or preventative maintenance program and refuse to make needed repairs just as the Appellee has done and will continue to do unless held accountable. Public policy clearly mandates that the municipality must be held accountable if adequate City services on which a monopoly is granted are to survive. As such, no immunity should be granted under § 11-46-9 and this Court must reverse and remand this action for trial on the merits.

VI. ARGUMENT

The City of Jackson assumed the authority and responsibility for the construction, operation and maintenance of the City of Jackson sewage system under Miss. Code Ann. § 21-27-189 and, as such, owes a ministerial duty to the citizens of Jackson, Mississippi, such as the Appellants herein, to use reasonable care in maintaining and repairing the sewage system and is not protected with

immunity under Miss. Code Ann. § 11-46-9. The issue before this Honorable Court and the decision which this Court will make on “discretionary” immunity will have profound and far reaching effects in the operation of municipal governments across the State in a waning economy and a very short supply of Federal funding to supplement and maintain the infrastructure of municipalities. The monopoly granted to municipalities to operate sewage systems has been a revenue generator for cities, but in the subject case has been neglected as far as maintaining and repairing adequate sewage services to the public. If this Court should not decide to hold municipalities accountable for failure to maintain and repair, the infrastructure of cities across this State will continue to deteriorate, homeowners and the citizens of this State will continue to suffer disasters, such as the present, without redress from the provider of sewage services or their homeowners’ insurance. The subject case allows this Court to take a positive step towards upholding over 100 years of Mississippi caselaw and allow the Appellants herein access to the Court system to hold the wrongdoer accountable and to ensure accountability to the public for decades to come.

A. Judicial history of municipalities’ liability for negligent maintenance/repair sewage and drainage systems before the passage of Mississippi Tort Claim Act in 1993

The principle of sovereign immunity was concisely expressed in the ancient maxim, “The King can do no wrong”. For a good many years now, virtually every State in the Union has decided that the principle that “the King [State]” can do no wrong” is not a legal principle that should receive a blanket application in modern times. In Pruett v. City of Rosedale, 421 So. 2d 1046 (Miss. 1982), the Court set out that the doctrine of sovereign immunity is a creature of the judiciary and as it was judicially created, it should necessarily be judicially abrogated. The Court overruled all previous

opinions of the Court upholding the immunity of the sovereign. The Mississippi Legislature enacted the Sovereign Immunity Act in 1983 but did not enact provisions that ended full immunity until after this Court declared the Legislature's stalling to be unconstitutional. Presley v. Miss. State Highway Commission, 608 So. 2d 1288, 1301 (Miss. 1992 *en banc*). The Legislature partially abrogated sovereign immunity in 1993 setting out the requirements of the Mississippi Tort Claim Act and discretionary immunity, which was modified somewhat in Miss. Code Ann. § 11-46-9 in 1997 upon which immunity is argued herein by Appellee

For at least ninety years prior to the passage of the Mississippi Tort Claim Act, this Court had consistently held municipalities accountable for negligent maintenance of drains and sewage systems to injured property owners whose property or houses were flooded as a proximate result. In Tyler v. City of Bay St. Louis, 34 So. 215 (Miss. 1903), this Court held that a landowner stated a cause of action against the City of Bay St. Louis for negligent construction and maintenance of a drainage system which allowed the discharge of great quantities of water on Plaintiff's land and damages. In Fewell v. City of Meridian, 43 So. 438 (Miss. 1907), this Court reversed a judgment in favor of the City, holding that the Plaintiffs stated a cause of action for negligent construction of sanitary sewer pipes so as to cause excessive water and sewer flowage onto Plaintiffs' property and held that,

“Where a city assumed and exercised control over a manhole and cross pipe of a sewage system, and dealt with it as part of their drainage and sewer system, it is liable for damages to Plaintiffs' premises due to wrongful construction of a cross pipe and manhole.”

In City of Vicksburg v. Porterfield, 145 So. 355 (Miss. 1933), the Court held that the City of Vicksburg was liable for blockage in its sewer drain which caused a sewer to back up and flood Plaintiff's property holding that,

“The City must maintain the efficiency of its drains and sewers. It is the common knowledge of all persons having experience in such matters that drains constructed on streets and highways have a tendency to become obstructed and to 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.”

As such, this Court placed a duty of reasonable care on the City to provide regular maintenance on the sewer systems so as to check for blockages and obstructions to prevent hazardous conditions such as sewage backflow, i.e., as in the present case. As in the present case, there was excessive rainfall which contributed to the backflow of sewage which the City claimed as a defense and the Court rejected this argument stating that the City must provide for such rainfall as experience shows will probably fall and take affirmative actions to prevent such flooding and hazardous conditions from occurring.

Again, in Cain v. City of Jackson, 152 So. 295 (Miss. 1934), this Court reversed a judgment in favor of the City of Jackson and held that the City was under a duty to provide adequate drainage for surface waters under the street and to anticipate such rainfalls as might reasonably be expected from past experience. The Court also held that the City had a duty of ordinary care to keep the drains free from obstructions and such conditions to afford adequate drainage and protection for property owners. In City of Meridian v. Sullivan, 45 So. 2d 851 (Miss. 1950), this Court affirmed the judgment in favor of Plaintiff in the lower Court finding negligence against the City of Meridian for failing to reasonably maintain its culverts and drainage which flooded Plaintiff's house. The Court held that the City of Meridian had an affirmative duty of reasonable care to maintain the City drainage system and keep them free from obstructions. (See also Clements v. Town of Carrollton,

63 So. 2d 398 (Miss. 1953) holding that the City had a duty to maintain and repair City drainage system.)

In City of Meridian v. Bryant, 100 So. 2d 860 (Miss. 1958), this Court held that the City was liable for damages resulting from its failure to correct a defective condition in the sewer drain pipe and held that the City had a duty of reasonable care to regularly inspect its drainage system and commented that, "It is a natural tendency of drains to become obstructed and this must be kept in view considering the City's duty of care to maintain and repair adequate drainage in the sewer system". See also City of New Albany v. Barkley, 510 So. 2d 805 (Miss. 1987), wherein the Court reiterated its consistent position that the City of New Albany owed a duty to the Plaintiff to maintain adequate drainage in its culvert which was allegedly obstructed.

As such, throughout the judicial history of the liability of municipalities for maintenance and repair of sewage and drainage systems, this Court has placed an affirmative duty on the municipality to exercise reasonable care to inspect, maintain and repair sewage systems which it controls and operates. There is never any mention of "discretion" in any of the above referenced Court opinions and the duty is a legal duty, involving no judgment or discretion about if they should inspect, if they should maintain or if they should repair defective conditions in sewer and drainage systems. As such, the duty which Plaintiff contends is ministerial in the subject case, was consistently upheld as a common law duty for ninety years prior to passage of the Tort Claims Act.

- B. If a municipality chooses to control and operate a sewage system, it assumes the affirmative legal obligation, which is not discretionary, to maintain and repair the sewage system and public policy mandates holding the municipality accountable to members of the public who are injured as a result, such as Appellants herein.

This Court continued imposing common law duty on the City of Jackson to inspect and maintain drainage systems in City of Jackson v. Internal Engine Parts Group, Inc., 903 So. 2d 60 (Miss. 2005), after passage of the Mississippi Tort Claim Act and Miss. Code Ann. § 11-46-9. In this case, the Plaintiff sued the City of Jackson under the Mississippi Tort Claim Act for property damage resulting from flooding of its business which was the proximate result of the City's failure to remove certain obstructions to drainage ditch controlled and maintained by the City of Jackson after the City had been notified of an obstruction in the drainage ditch. The City defended the case by denying notification and asserting § 11-46-9 as a defense and arguing that the maintenance of the drainage systems which it controlled was a "discretionary" function. Circuit Judge Swan Yerger entered judgment in favor of the Plaintiff and denied the City's Motion For Directed Verdict based upon discretionary immunity under Miss. Code Ann. § 11-46-9. Judge Yerger concluded that the flooding of Engine Parts was caused by the City's negligence and failure to inspect and maintain the drainage ditch. Most importantly for this Court's consideration in the present case, Justice Randolph set out that:

"The City argues that the Trial Court's decision regarding immunity was based upon Miss. Code Ann. § 11-46-3 regarding immunity based upon a proprietary obligation or function which is no longer valid. The Trial Court was presented with arguments regarding Section 11-46-9 during the City of Jackson's Motion For Directed Verdict which was denied. Section 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. (Emphasis added.)

There is no distinction between the duty to maintain and repair a drainage ditch under the control of the City and the duty to maintain the sewer system and, as such, Internal Engine rejection of immunity under Miss. Code Ann. § 11-46-9 should control the subject decision.

In the recent case of Miss. Dept. Of Mental Health v. Hall, 936 So. 2d 917 (Miss. 2006), this Court affirmed a Lauderdale County judgment in favor of a mental patient who fell from a third story window during an escape attempt from a hospital operated by the State Department of Mental Health. The Mississippi State Department of Mental Health argued that whether to lock doors and windows was discretionary and, as such, they were immune from liability under Miss. Code Ann. § 11-46-9. The Court noted that Mississippi caselaw sets out a two part analysis in determining whether or not a governmental function is discretionary or ministerial:

1. Whether the activity involves an element of choice or judgment (whether the act is discretionary in nature); and, if so,
2. Whether the choice or judgment involves social, economic or political party alternatives (whether the act constituted a discretionary function)?

The Court found that because East Mississippi Mental Health Center was required to provide patients with mental health care and treatment in accordance with contemporary professional standards, the treatment was not discretionary and was, therefore, ministerial. Just as East Mississippi Mental Health Center undertook to control and operate its mental health center and had the ministerial duty to render appropriate mental health care and treatment, the City of Jackson undertook the control and operation of the City of Jackson's sewer systems and thereby had a ministerial duty to maintain and repair the system as needed. Public policy mandates that the City be held accountable for failing to maintain and repair a sewage system upon which the City has a monopoly.

In Miss. Dept. of Human Services v. S.W., 974 So. 2d 253 (Miss. 2007), a juvenile male filed a negligence complaint against the Department of Human Services that the DHS had breached its

statutory duties to the juvenile while he was in their care and custody by allowing him to be sexually abused by employees of child care facilities in which he was placed. The Department of Human Services claimed that the rendering of care and protection of the Plaintiff was discretionary and, as such, they should be immune from liability under Miss. Code Ann. § 11-46-9(1)(d). In examining this issue, the Court, in an Opinion written by Justice Carlton, noted that DHS had developed guidelines and procedures for the provision of social services in the areas of personal protection, prevention of abuse and neglect and placement of children in out-of-home settings as outlined in a manual. Once the DHS determines that a child needs its services, DHS is required to make referrals for the child to receive appropriate services. In finding that the DHS did not have discretionary immunity for the claim, the Court set out that:

“DHS employees are required to call upon their own policy-based judgment to determine whether the child needs a particular service - in the instant case, mental health treatment. However, once the determination is made, DHS is ultimately required to ensure that the child receives the service. (Emphasis added). The duty to ensure that the child receives the needed services involves no policy-based judgment or discretion. As discussed below, DHS determined that S.W. needed counseling and made an appointment with Clayton Hodge but failed to ensure that he actually received the counseling for quite some time. We find that the discretionary function exemption does not bar S.W.’s claim for DHS’ failure to ensure that his medical needs were being met.”

In the present case, the City of Jackson had a discretion as to whether or not to assume control of the City of Jackson sewage system. However, as in the case of DHS, once it made in its discretion this determination and assumed the responsibility for the City’s sewage system, a statutory and common law obligation arose to inspect, maintain and repair the City’s sewage system, just as DHS had a duty to ensure that the child received the appropriate services. Like the Mississippi Department of Human

Services, this duty once assumed is not discretionary, but is ministerial and the discretionary function exemption does not apply.

An analogy could be drawn between the City's obligation in the subject case and the City's obligation for maintenance and repair of a sidewalk. As in the present case, the City of Jackson has no legal obligation to construct a sidewalk, just as it has no obligation to undertake control of the City's sewage system. However, once the City decides to construct a sidewalk and constructs the same, it has a non-delegable duty to exercise ordinary care to keep and maintain its sidewalks and other public ways in a reasonably safe condition for the use of persons exercising ordinary care and caution. Howard v. City of Biloxi, 943 So. 2d 751 (Miss. 2006). Just as its obligation arises when it has built a sidewalk, the City has the same obligation to exercise reasonable care to inspect, repair and maintain its sewage system.

VII. CONCLUSION

In the present case, it is undisputed that Appellee knew its entire sewer system was defective in 1997 on account of age, faulty materials, pipes that were too small and cracking throughout the system and that grossly excessive groundwater was entering the sewer system through cracks, causing backflow of sewage with regularity to its residents who had no choice but to pay monthly fees for sewage to the City. In 2002, the City had knowledge of seven cracks or holes in the City sewage pipe leading to Appellants' house by means of the SSES Report (smoke test) but did nothing to repair or alleviate the problem. The City of Jackson had notice of the flooding with raw sewage of the home of Appellants on April 6, 2003, three weeks before flooding of Appellants' house again on April 24, 2003, and did nothing to repair it. The City of Jackson had notice of over fifty

complaints of defects in the City sewage system on the line servicing Appellants' property within three years prior to the flooding of Appellants' home. The City has never had a maintenance or inspection program or ever attempted repairs. Without question, the City of Jackson had notice of widespread defects in the sewage system, the specific problems with the City line running to Appellants' property which needed "immediate attention" in 2002, but refused to make the repairs. According to the City's Engineer, Willis, the defects in the sewage system are massive and have been ignored for 20 years. (R-107, R-118, R-120) Willis testified that he has never recommended that the City pay a claim for sewage backup. (R-95) This is consistent with the City of Jackson's history before this Honorable Court as stated in City of Jackson v. City of Ridgeland, 912 So. 2d 961 (Miss. 2005), "...[t]he City of Jackson has a history of decline and poor past performance. In fact, Jackson is the only municipality in this State to have property (including property at issue here) de-annexed by this Court." (See In Re: Exclusion of Certain Territory from the City of Jackson, 698 So. 2d 490 (Miss. 1997); Matter of Enlargement and Extension of the Municipal Boundaries of the City of Jackson, 691 So. 2d 978 (Miss. 1997); Matter of the Boundaries of the City of Jackson, 551 So. 2d 861 (Miss. 1989).

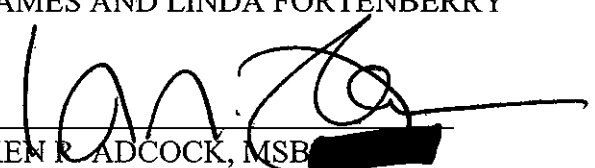
The Trial Court herein failed to even consider the City of Jackson's breach of the duty to maintain or repair the City's sewage system servicing Appellants' property as immunity was granted and over 100 years of Mississippi caselaw totally ignored and disregarded. Appellants urge this Court to review this Court's history of placing a common law duty on municipalities to inspect, maintain and repair sewage and drainage systems and the additional statutory requirements of complying with Mississippi Department of Environmental Quality statutes and regulations, EPA CMOM regulations and uphold its previous rulings that Appellee had a duty to inspect, maintain and

repair the sewer system which is ministerial, and not discretionary, and reverse and remand this case for trial. The public policy of Mississippi mandates that the City be held accountable for disasters such as the present caused by its wrongful conduct. A contrary opinion in affirming the Trial Court's opinion will reverse 100 years of Mississippi caselaw, encourage flagrant disregard of maintenance of City services and allow the decline of the infrastructures of cities throughout this State, all of which will have continued devastating consequences for the citizens of this State, such as Appellants herein. Appellants respectfully request this Honorable Court to reverse the decision of the Trial Court and remand for trial on the merits.

Respectfully submitted,

JAMES AND LINDA FORTENBERRY

BY:


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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 Brief Of Appellants to:

Honorable Bobby B. DeLaughter
Hinds County Circuit Judge
Post Office Box 27
Raymond, Mississippi 39154

Peter Teeuwissen, Esq.
Office of the City Attorney
Post Office Box 17
Jackson, Mississippi 39205


SO CERTIFIED, this the 11th day of July, 2008.



Ken R. Adcock

CERTIFICATE OF FILING

I, KEN R. ADCOCK, do hereby certify that I have the day hand-delivered the original and three copies of the Brief of Appellant and an electronic diskette containing the same on July 11th, 2008, addressed to Ms. Betty W. Sephton, Clerk of the Mississippi Supreme Court, 450 High Street, Gartin Justice Building, Jackson, Mississippi 39201.


KEN R. ADCOCK