IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2008-CA-00270-COA

JAMES FORTENBERRY AND LINDA FORTENBERRY — APPELLANTS

V.

CITY OF JACKSON, MISSISSIPPI — APPELLEE

Consolidated with
2008-CA-0271-COA

FLYNN AND KATHLEEN WALLACE — APPELLANTS

V.

CITY OF JACKSON, MISSISSIPPI — APPELLEE

On Appeal from the Circuit Court
of Hinds County, Mississippi
Cause Number 251-05-941CIV
Honorable Bobby DeLaughter

Supplemental Briefing on Certiorari

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James and Linda Fortenberry
Flynn and Kathleen Wallace

INTRODUCTION

It has been well established for well over one hundred years of case law precedent both before and after the passing of the Mississippi Tort Claims Act that municipalities have a duty to its citizens to maintain and repair the sewage lines that it affirmatively assumes a monopolistic control over and collects fees. The City of Jackson now seeks this Court to vacate more than one hundred years of case precedent and find that it is acceptable behavior for the City to assert full dominion over the sewage system, bill the taxpayers approximately $20 million in annual fees, to reinvest very little of this money per year back into the sewage system (without making any repairs), and ignore the 1997 report of four engineering 3firms who pointed out the defective and deteriorated condition of the City's sewage system and immediate need for repair and maintenance, and hold it unaccountable to the public under the cloak of discretionary immunity.

ARGUMENT

I. The City of Jackson has no Metropolitan Area Plan as Required by Miss. Code Ann. § 21-27-161, *et seq.*

The City of Jackson has failed to and continues to refuse to adopt a metropolitan area plan specifically required by Miss. Code Ann. § 21-27-161, *et seq.* (which would provide for the maintenance and upkeep of the sewage system). Miss. Code Ann. § 21-27-163 defines a metropolitan area plan as a "comprehensive plan for water quality management and the control and abatement of pollution within the metropolitan area, consistent with applicable water quality standards established pursuant to the Federal Water Pollution Control Act." The City has failed to adopt a metropolitan area plan despite asserting full and total control over all aspects of the drainage and sewage systems within the city. This issue was briefed

and argued before the trial court and was properly ruled upon by the Court of Appeals in its reversal of the trial court's order.

The metropolitan area plan exists to ensure that municipalities are in compliance with all relevant state and federal regulations and statutes and to prevent the discharge of raw sewage and other pollutants into the public homes as is the situation in the present case. The City, along with and as a part of its duties under § 21-27-161, *et seq.*, have a ministerial duty to comply with these regulations as set by the Mississippi Department of Environmental Quality (Miss. Code Ann. § 49-17-1(c)), the Federal Water Pollution Control Act (33 U.S.C. 1251, *et seq.*), the Capacity Management Operation and Maintenance Guidelines established by the United States Environmental Protection Agency, and the National Pollution Discharge Elimination System also enforced by the United States Environmental Protection Agency. These regulations and statutes were a part of not only the deposition testimony of the City's engineer but were presented before the trial court in its Motion for Summary Judgment and thus preserved on appeal.

However, the City has instead refused to adopt a metropolitan area plan pursuant to the statute and is guilty of negligence per se before the Court even looks at any specific violations. It is illogical that the City can now argue for discretionary immunity under this statute when it has failed to comply with the requirements of the statute in the first place. Under Miss. Code Ann. § 21-27-161, *et seq.* the Appellee has a ministerial duty to properly manage, maintain, and repair the sewage systems in compliance with all federal and state statutes and as such, discretionary immunity is inapplicable.

II. The Court of Appeals decision is in accordance with both pre- and post-Mississippi Tort Claim Act case law.

For the ninety years prior to the passing of the Mississippi Tort Claims Act, the Mississippi courts have long held that municipalities are to be accountable for the negligent maintenance of drains and sewage systems that cause damages to property owners as a proximate result and owed a duty to its citizens to maintain and repair these systems. *See* Tyler v. City of Bay St. Louis, 34 So.215 (Miss. 1903); Fewell v. City of Meridian, 43 So. 438 (Miss. 1907); City of Vicksburg v. Porterfield, 145 So. 355 (Miss. 1933); Cain v. City of Jackson, 152 So. 295 (Miss. 1934); City of Meridian v. Sullivan, 45 So.2d 851 (Miss. 1950); Clements v. Town of Carrollton, 63 So.2d 860 (Miss. 1958); City of Meridian v. Bryant, 100 So.2d 860 (Miss. 1958); City of New Albany v. Barkley, 510 So.2d 805 (Miss. 1987).

More importantly, the Mississippi Supreme Court found that a municipality has a ministerial duty under § 11-46-9 to maintain and repair drainage systems well after the passing of the Mississippi Tort Claims Act in City of Jackson v. Internal Engine Parts Group, Inc., 903 So.2d 60 (Miss. 2005). The facts in Internal Engine are the similar to that of the instant case where the City of Jackson obtained a drainage easement then refused to properly maintain the drainage ditch which resulted in the flooding of Internal Engine's business. Just like the drainage easement ditch, the City also has an easement for the location of its sewer lines. However, unlike the drainage easement, the City of Jackson charges its citizens more than $20 million per year to collect and dispose of sewage which contains all sorts of pollutants harmful to the health of the public.

The City of Jackson was well aware of all the problems that affected the Appellants and their neighbors well before the accident that gave rise to this cause of action occurred. The City had received more than fifty complaints on the sewer line servicing the Appellants' homes from the citizens in the neighborhood in the year before the subject sewage flooding.

When the City finally began to test its sewer lines in 2001 pursuant to the report of four engineering firms in 1997, the SSES smoke test on the service line leading to the Appellants' homes revealed seven holes that needed "immediate attention." Rather than repair this line, the City did nothing for the next year, and the result was the flooding of Appellants' homes with raw sewage and a forced evacuation from their homes of 20 years, which to this day, they have never returned to.

The City now represents to this Court that it has no duty to maintain or repair its sewer lines, except when it decides to do so. Although it represents to this Court that it has no money to maintain and repair its sewer system, the City collects more than $20 million in fees and elects to spend nearly all of these funds elsewhere. Obviously, this reckless and irresponsible conduct has lead to the complete and uniform deterioration of the City's sewer system, which endangers its citizens' health. This Court's well-reasoned ruling in Internal Engine, one hundred years of case law, and the Court of Appeals' decision herein must be followed to declare that the City of Jackson is accountable for the failure to maintain and repair its sewer system, and discretionary immunity is not applicable.

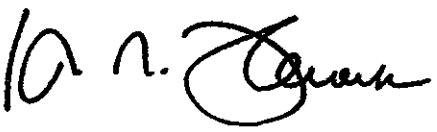
CONCLUSION

The issue before the Court now is whether the City of Jackson will be allowed to skirt more than a hundred years of both pre- and post-MTCA case law holding that municipalities have a ministerial duty to maintain and repair its sewage systems thus ensuring the well-being of its citizens. The City now seeks to have such a duty declared discretionary under a statute that it has refused to follow since its inception. The Court of Appeals was fully briefed, on the record from the trial court, on all pertinent state and federal regulations and statutes, including § 11-46-9 and § 21-27-161, *et seq.*, which further

impose a ministerial duty of compliance on the City relating to maintenance and repair of the sewer system. To allow the City to escape liability under the cloak of discretionary immunity will surely lead to the ultimate collapse of the City of Jackson's sewer system and other related infrastructures.

Respectfully submitted, this the 1st day of October, 2010.

JAMES AND LINDA FORTENBERRY
FLYNN AND KATHLEEN WALLACE

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 Response in Opposition to Petition for Writ of Certiorari to:

Pieter Teeuwissen, Esq.
Office of the City Attorney
P. O. Box 17
Jackson, MS 39205

Honorable Swan Yerger
Hinds County Circuit Court Judge
407 East Pascagoula Street
Jackson, MS 39201

SO CERTIFIED, this the 1st day of October, 2010.

KEN R. ADCOCK