IN THE SUPREME COURT OF MISSISSIPPI

JAMES AND LINDA FORTENBERRY **APPELLANT**

VS. **CAUSE NO. 2008 CA-00270**

CITY OF JACKSON, MISSISSIPPI **APPELLEE**

On Appeal From The Circuit Court
of Hinds County, Mississippi
Cause Number 251-05-939CIV
Honorable Bobby DeLaughter

Brief of Appellee City of Jackson

ORAL ARGUMENT REQUESTED

PIETER TEEUWISSEN
SPECIAL ASSISTANT TO THE CITY ATTORNEY
CLAIRE BARKER HAWKINS
DEPUTY CITY ATTORNEY

OFFICE OF THE CITY ATTORNEY
CITY OF JACKSON, MISSISSIPPI
455 East Capitol Street
Post Office Box 2779
Jackson, Mississippi 39207
Telephone: 601-960-1799

COUNSEL FOR APPELLEE

IN THE SUPREME COURT OF MISSISSIPPI

JAMES AND LINDA FORTENBERRY **APPELLANT**

VS. **CAUSE NO. 2008 CA-00270**

CITY OF JACKSON, MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Miss.R.App. 28(a)(1), 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 disqualification or recusal:

1. James and Linda Fortenberry
   Appellant

2. Ken R. Adcock
   Adcock and Morrison
   199 Charmant Drive, Suite 1
   Ridgeland, Mississippi 39158
   Counsel for Appellant

3. City of Jackson
   Appellee

4. Pieter Teeuwissen, Special Assistant to the City Attorney
   Claire Barker Hawkins, Deputy City Attorney
   455 East Capitol Street
   Jackson, Mississippi 39201
   Counsel for Appellee

5. Hon. Bobby DeLaughter, Presiding Judge
   Hinds County Circuit Court
   407 East Pascagoula Street
   Jackson, Mississippi 39201

Respectfully submitted,

CITY OF JACKSON

By: _____

PIETER TEEUWISSEN, MSB #[redacted]
Special Assistant to the City Attorney
CLAIRE BARKER HAWKINS, MSB #101312
Deputy City Attorney

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGES**

OTHER AUTHORITIES:

STATEMENT OF THE ISSUES

The issues that this Court should resolve on this appeal are:

1. Whether the manner in which a municipality maintains and repairs its sewage/storm water drainage is a discretionary function, affecting municipal immunity.

2. Whether, in the alternative, the specific incident complained of was foreseeable.

ORAL ARGUMENT REQUESTED

The issue of whether the manner in which a governmental entity maintains its sewage/storm water drainage systems is a discretionary function is a major question of first impression for this Court. There is not any post-Tort Claims Act caselaw in Mississippi that specifically addresses this issue. This issue is unique and separate from a comparison of maintaining roads or drainage ditches because Miss. Code Ann. § 21-27-189 specifically authorizes a governmental entity to maintain a sewage system in its discretion.

The ruling in this matter will address a fundamental issue of broad public importance, namely, the manner in which local governments maintain sewage/storm water drainage systems. This will, in turn, have far reaching effects on the taxpayers of municipalities because it is the taxpayers' funds that are used to budget the manner in which a municipality maintains a sewage/drain system.

Moreover, there is a "sister case" to the instant matter that is before this Court on appeal, as well. ***Wallace v. City of Jackson***, Cause No. 2008 CA-00270, was appealed from the Circuit Court of Hinds County in conjunction with the instant matter. Judge DeLaughter considered the same issues in each case and entered a judgment in favor of the City in each case. Thus, there are two matters before this Court addressing the same issue of whether the manner in which a municipality maintains its sewer system is a discretionary function. For these reasons, the City of Jackson respectfully requests an oral argument on this issue, pursuant to M.R.A.P. 34.

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

This action was filed April 5, 2004 against the City of Jackson. R. at 3. Plaintiffs James Fortenberry and Linda Fortenberry alleged that the City of Jackson failed to properly design, maintain and operate its sewage and waste water disposal system. R. at 5-8. The City of Jackson filed its Answer and Affirmative Defenses on May 5, 2004. R. at 18. The normal course of discovery ensued, and on August 3, 2005, the Hinds County Circuit Court entered an Order Continuing the Trial and Severing Claims. R. at 28 - 32.[1]

On October 11, 2006, the City moved for Summary Judgment against Plaintiff. R. at 34. In the motion, the City pointed that on the date of the sewage backup into Plaintiffs' house, there was a torrential downpour, which accumulated 7.38 inches of rainfall. R. at 35. The City asserted that the manner in which the City maintains its sewage lines is discretionary in nature, and the Mississippi Tort Claims Act grants immunity to municipalities for any claim arising out of the discretion in determining whether or not to provide the resources necessary for the construction or maintenance of facilities. Id. Thus, pursuant to statutory and state law, the City is immune from liability.

On June 8, 2007, the trial court entered its Memorandum Opinion and Order granting the City's Motion for Summary Judgment. R. at 247. From

[1] Kathleen D. Wallace, Derrick T. Wallace, Bernadette Lawson and William Lawson, a minor, were originally named as additional Plaintiffs to this matter. However, the Court found that Joinder was improper pursuant to Miss.R.Civ.P. 20(a), thus severing the claims into three separate cases: ***Fortenberry***, the matter *sub judice*; the ***Wallace*** plaintiffs (also on appeal to this Court; and the ***Lawson*** plaintiffs (currently stayed in the Circuit Court of Hinds County).

there, Plaintiffs Fortenberry filed their Notice of Appeal on July 5, 2007. R. at 256.

B. STATEMENT OF THE FACTS

Because the Fortenberrys fail to include a clear Statement of the Facts in their brief pursuant to MRAP 28(a)(4), and instead cite to a myriad of issues not relevant to the issues on appeal, the City will give a resuscitation of the relevant facts to the case *sub judice,* which are relatively simple and straight-forward. In 1979 the Fortenberrys purchased their residence located at 1753 W. County Line Road, Jackson, Mississippi. R. at 44. Linda Fortenberry testified in her deposition that they never experienced water and sewage backing up into their residence until April 6, 2003. R. at 45. On April 6, 2003, the City received 7.38 inches of rainfall within a twenty-four hour period. R. at 43. Thus, in approximately 24 years, the only time that the Fortenberrys received water and sewage backing up into their residence was on a day where the City received 7.38 inches of rain within twenty-four hours.

On that date, water and sewage backed up into the Fortenberrys' residence. R. at 45. The Fortenberrys reported this incident to the City, and the City's Public Works Department responded to the scene. R. at 176. Upon investigation, City workers found the City's sewer main was overflowing with ***rainwater as a result of the torrential rainfall***. Id. (emphasis added).

As a result of the incident and investigation, the City forwarded a liability reporting claim form to the Fortenberrys, and the Fortenberrys completed it on April 28, 2003. R. at 147. The City received the Fortenberrys reporting claim on

May 2, and on May 7, 2003, the City sent a letter of the Fortenberrys acknowledging their claim and informing them that the City is a self-insured entity and adjusts its claims pursuant to the Mississippi Tort Claims Act. R. at 149. David Willis, an engineer with public works, investigated the incident and concluded that the extraordinary amount of rainfall that occurred within the 24 hour period overloaded the sewer system in the Fortenberrys area and caused the alleged backup. R. at 203. On July 15, 2003, the City sent a letter to the Fortenberrys notifying them that their claim could not be honored. R. at 212. The Fortenberrys then filed a lawsuit in the Circuit Court of Hinds County on April 5, 2004.

SUMMARY OF THE ARGUMENT

The circuit court was correct in awarding summary judgment in favor of the City, finding that the maintenance of a sewage system is wholly within the discretion of a municipality. Section 11-46-9(d) of the Mississippi Tort Claims Act (MTCA) states that a governmental entity shall not be liable for any acts that are based upon the exercise a discretionary function. Furthermore Section 21-27-189 of the Mississippi Code Annotated grants the City the authority to construct, operate and maintain sewerage systems and specifically states that this authority is "***in the discretion of its governmental authorities***." (emphasis added).

The Plaintiffs' argue *ipse dixit* that once the City chooses to maintain the sewage system, a statutory and common law obligation arises to inspect and maintain the systems, thus converting a discretionary duty to a ministerial duty. Although this is a very creative argument, the Fortenberrys cite no case law to support this theory. Instead, the Fortenberrys cite a litany of irrelevant cases, all of which were decided prior to the enactment of the two statutes central to the case *sub judice*: Miss. Code Ann. §§ 11-46-9(d) and 21-27-189. Throughout the Fortenberrys' brief, there are a myriad of arguments that only detract from the clear and concise issues on appeal: the maintenance of a sewage system is a discretionary function, thus a municipality is immune from liability based on the aforementioned statutes.

Furthermore, the Fortenberrys omit very important factual details from their argument. On April 6, 2003 (the day the appellants experienced water and sewage backup into their home), the City received 7.38 inches of rainfall within a 24 hour period. This torrential downpour subsequently caused the sewer main to

overflow with rainwater. This fact is important because the record clearly demonstrates that prior to this date, the Fortenberrys never experienced sewage backup ***into*** their home. Thus, prior to this torrential downpour, the City did not have notice that the main sewer line could fill with rainwater, causing an overflow into the Fortenberrys home. Once this backup occurred and the City was notified, the City timely responded to investigate the situation and take corrective action.

This fact leads to the second, alternative, portion of the City's argument: Whether the specific incident complained of (water and sewage backup as a result of a torrential downpour) was foreseeable. It is quite evident that 7.38 inches of rainfall within a twenty-four hour period is abnormal, to say the least. The question then becomes, under this circumstance, is it foreseeable that an abnormal amount of rainfall would fill the main sewer line, causing an overflow into the Fortenberrys' home? It is undisputed that the City did not have notice that the Fortenberrys ever received water and sewage backup into their home on any previous occasion. While the Fortenberrys have had complaints prior to the incident in question, the backing up of water and sewage into their home is a distinguishable event. Thus, because the City did not have notice of backup into the Fortenberrys' home and the cause of the sewage backup was an abnormal amount of rainfall within a twenty-four hour period, it was unforeseeable that this incident would occur.

STANDARD OF REVIEW

When reviewing a trial court's grant of summary judgment, the appellate court applies a *de novo* standard of review. ***Busby v. Mazzeo***, 929 So.2d 369, 372 (Miss.Ct.App. 2006). Rule 56(c) of the Mississippi Rules of Civil Procedure provides that summary judgment is proper where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." When considering a motion for summary judgment, the deciding court must view all evidence in a light most favorable to the non-moving party. ***Mazzeo***, 929 So.2d at 372. Only when the moving party has met its burden by demonstrating that there are no genuine issues of material fact in existence should summary judgment be granted. ***Tucker v. Hinds County,*** 558 So.2d 869, 872 (Miss. 1990).

Pertinent to the analysis in the case at bar, the Supreme Court has stated that a motion for summary judgment is the functional equivalent of the motion for directed verdict made at the close of all the evidence, the difference being that the motion for summary judgment occurs at an earlier stage. ***Grisham v. John Q. Long V.F.W. Post***, 519 So.2d 413, 415-16 (Miss. 1998). The Court further stated that where a party opposes summary judgment on a claim or defense as to which that party will bear the burden of proof at trial, and when the moving party can show a ***complete failure of proof*** of an essential element of the claim, then all other issues become immaterial, and the moving party is entitled to judgment ***as a matter of law***. ***Id.*** (emphasis added). Thus, "judgments as a

matter of law go to the very heart of the litigant's case and test the legal sufficiency of that litigant's case." ***White v. Stewman***, 932 So.2d 27, 32 (Miss. 2006). Thus as applied to the case *sub judice*, this Court must determine whether the City of Jackson adequately demonstrated that they are entitled to a judgment as a matter of law with regard to whether they are immune from liability under the MTCA. *See* ***Mazzeo***, 929 So.2d at 372 (citing ***Lyle v. Mladinich***, 584 So.2d 397, 398 (Miss. 1991)).

ARGUMENT

I. Whether the manner in which a municipality maintains and repairs its sewage/storm water drainage is a discretionary function, affecting municipal immunity.

The Fortenberrys cannot recover from the City as a matter of law. Statutory law clearly conveys authority to a municipality to maintain its sewage systems within its discretion. The Mississippi Tort Claims Act (MTCA) states that a governmental entity is immune from liability for duties based on the performance or failure to perform a discretionary function. Thus, as a matter of law, the City is immune from liability for the manner in which it maintains its sewage lines, due to the fact that such decisions are purely discretionary. In an effort to fully and comprehensively develop this argument, the City will first examine the legislative intent behind the MTCA, and then analyze the immunities that the MTCA affords governmental entities.

a. Brief History of the Mississippi Tort Claims Act.

In the trial court's Memorandum Opinion and Order, Judge DeLaughter examined the history of the MTCA in an effort to clarify the immunity that is granted to governmental entities for discretionary functions. R. at 249-50. This is entirely relevant to the case at bar due to the fact that the MTCA is a relatively new statute. In 1993, the Mississippi legislature waived sovereign immunity for the torts of governmental entities and their employees acting within the course and scope of their employment. Jeffrey Jackson & Mary Miller, ***Encyclopedia of Mississippi Law***, Vol. 8, § 67:7 (2006). "The waiver of immunity is not applied retroactively to acts occurring prior to the effective date of the statutory waiver of immunity." ***Id.***

The legislature, however, did retain the protection of sovereign immunity for employees and governmental bodies through the implementation of certain specific exceptions. ***Id.*** at § 67:26. One exemption listed is historically known as the discretionary function exemption. This exemption is the core of the City's argument. Mississippi Code Annotated § 11-46-9(d) states, in pertinent part:

> (1) A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:
>
> (d) Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused.

The analysis to determine whether or not something is "discretionary" predates the MTCA, and the "case law prior to the MTCA has been used to determine whither or not a specific act has historically been categorized as

discretionary or ministerial." Jeffrey Jackson & Mary Miller, ***Encyclopedia of Mississippi Law***, Vol. 8, § 67:34 (2006). Since the MTCA's Discretionary Function Exemption is modeled on the Federal Tort Claims Act, the Mississippi Supreme Court has adopted the federal court's public policy function test to determine if an act is discretionary. ***Jones v. Mississippi Dep't of Transp.***, 744 So.2d 256, 260 (Miss. 1999). The ***Jones*** Court described this two-prong test as (1), "it must first be determined whether the activity involves an element of choice or judgment." ***Id.*** at 744 So.2d at 260. If so, then (2) it must then be determined "whether the choices involved social, economic or political policy." ***Id.*** *See also* ***Dotts v. Pat Harrison Waterway District***, 933 So.2d 322 (Miss. 2006).

b. Element of Judgment.

Under Mississippi law, a plaintiff may overcome the first prong of the public policy test "if the duty is one that has been positively imposed by law and in a manner of upon conditions which are specifically designated, the duty to perform under these conditions is ***ministerial***." ***Mosby v. Moore***, 716 So.2d 551, 558 (Miss. 1998) (emphasis added). However, in the case at bar, the manner in which a municipality maintains its sewage systems is not one that has been positively imposed by law and is certainly not one upon which conditions are specifically designated. Conversely, the manner in which a municipality provides sewer service is a discretionary function, as clearly outlined in both statutory and case law.

The City of Jackson has the authority to construct, operate and maintain sewerage systems pursuant to a grant from the Mississippi Legislature, which states in pertinent part:

> A municipality, as defined in section 21-27-163, is authorized and empowered, in the ***discretion*** of its governmental authorities, to exercise the following powers and authority within the area and territories comprising the metropolitan area of which it is a part:
>
> (b) ***To construct, operate and maintain sewerage systems*** . . .

Miss. Code Ann. § 21-27-189(b) (emphasis added).

The plain language of this statute clearly gives the City the power to maintain its sewerage systems using its discretion. Thus, one cannot argue that the legislature has positively imposed any duty upon municipalities of this state to maintain their sewage systems. *See* ***Willingham v. Mississippi Trans. Comm.***, 944 So.2d 949 (Miss.Ct.App. 2006) (holding that the phrase "as is shall deem necessary" indicates that the Mississippi Tort Claim's employees must use their own "judgment or discretion" in choosing where and when to place warning signs).

Moreover, The Supreme Court of Mississippi has distinguished between duties which are ministerial in nature and discretionary. The Court in ***McQueen v. Williams***, 587 So. 2d 918 (Miss. 1991) states:

> The most important criterion, perhaps, is that (if) the duty is one which has been positively imposed by law and its performance required at a time and in a manner or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependant upon the officer's judgment or discretion, the act in discharge there of is ministerial.

There is no obligation imposed by law stating when, where or how the City of Jackson must construct new and/or repair existing sewer lines. Furthermore, there is no obligation imposed by law stating the monetary amount the City of Jackson must budget and/or spend to construct, operate and maintain the sewage system. These are all matters of judgment and a discretionary function by the City of Jackson. "When a governmental actor is required to use his judgment or discretion in performing a duty, that duty is discretionary." ***Id.*** at 326.

The City of Jackson uses discretion in exercising its judgment as to the time, location, extent and necessary funding in the construction, operation and maintenance of the sewer system. In a recent annexation case, ***City of Jackson, et al. v. City of Ridgeland***, 912 So. 2d 961 (Miss. 2005), the Supreme Court recognized the discretion the City of Jackson has concerning the construction, management and maintenance of its sewer system when it stated:

> "The municipality is unable or unwilling to expend the necessary funds to provide the services and infrastructure promised within the area. This is clear in that no action has been taken toward providing sewer services in this area. It is clear from the projected cost of providing these services; the City is not likely to provide these services in the near future."

The Court further states, "the Stokes-Matthew road area in north Ridgeland was annexed by Ridgeland in 1980, but did not obtain sewer service until 1998." ***Id.*** at 969. This language demonstrates that the Mississippi Supreme Court considers construction and maintenance of sewer lines to involve an element of choice or judgment. Therefore, the first prong of the discretionary function test is satisfied.

c. Social, Economic or Political Policy.

Now, the analysis must turn to the second prong of the discretionary function test: whether the choice or judgment involves social, economic or political policy. It has been held that "[t]his prong of the discretionary exception test protects only those discretionary actions or decisions based on considerations of public policy." ***Dotts v. Pat Harrison Waterway Dist.***, 933 So.2d 322, 327 (Miss.Ct.App. 2006). In addressing the issue of "public policy," the Mississippi Court of Appeals states, "[a]pplication of the public policy prong of the discretionary function test does not require proof of the thought process of the pertinent decision makers . . . Rather, the focus is on the nature of the actions taken, and whether they are susceptible to policy analysis." ***Id.*** at 329.

The Mississippi Supreme Court case of ***Coplin v. Francis*** is persuasive to the City's position in the case at bar. 631 So.2d 752 (Miss. 1994). In ***Coplin***, the Court found that road maintenance and repair are discretionary rather than ministerial functions. This analysis is synonymous to whether the maintenance and repair of sewage systems are discretionary. The Court stated:

> Assuming *arguendo* that an individual member of the board of supervisors has a ministerial duty or function to maintain the roads of his district . . . at least some roads may be in a state of disrepair from time to time, ***particularly due to lack of funds***, which would, of course, require the main, heavily-traveled roads to receive the supervisor's immediate attention. Certainly, making the determination as to which roads should be the better maintained under such conditions would be a discretionary matter with the individual member of the board, absent some personal tort committed by him.

Id. at 754-55. (emphasis added).

The logic in ***Coplin*** is directly applicable to the case *sub judice*. Indeed, the record demonstrates that there are no federal or state standards that require inspections of the City's sewage system at a specific time intervals. R. at 88. Without such state or federal requirements, the City's inspection decisions are based on other discretionary factors. R. at 89 - 90. David Willis, the City's 30(b)(6) witness and an employee with the City's Public Works Department, testified that the City only has funds available to inspect 600,000 feet of sewage pipe a year. Incidentally, there is 4.7 million feet of sewage pipe within the City. R. at 38. Willis testified that even by doing this, it would only allow the entire system to be inspected once ever seven and a half years. Id. Furthermore, it is the engineers within the Public Works Department that prioritize the repair work. R. at 90. David Willis specifically testified that these were ***policy decisions***. Id. (emphasis added). Finally, when asked if the decision to repair was a budgeted decision, due to the fact that there are more repairs needed than there is money to make the, Mr. Willis answered "Yes." R. at 92. Thus, exactly as the Court found in ***Coplin,*** the determination as to which sewage lines should be the better maintained, while facing the issue that the City does not have appropriate funds to maintain all lines perfectly, is a discretionary matter that lies with the individual engineer within the Public Works Department.

The Court of Appeals of South Carolina has addressed the issue of whether the maintenance of a sewage line is a discretionary function. In ***Hawkins v. City of Greenville***, 594 S.E.2d 557 (S.C.App. 2004), a business owner "blamed the City for the damage [to his business], arguing the flooding was caused by the City's neglect in designing and maintaining its drainage system. ***Id.*** at 560. After

analyzing its state's tort claims act,[2] the South Carolina Court found that the City was immune from liability for negligence claims arising out of the ***design and maintenance*** of the drainage system. ***Id.*** at 564 (emphasis added). Specifically, the court found that "A comparable degree of discretion was granted to the City . . . to exercise the measured policy judgments required to build and maintain an adequate municipal sewer and drainage system." ***Id.*** Such is the exact scenario in the present matter, which is clearly reflected in the testimony of City engineer, David Willis. R. at 80 – 114.

Here, the trial court was entirely correct when it held: "This Court will not mandate which particular sewage pipes the City should fix, and what amount of monies it should expend on its sewage repair. Such decisions are completely within the realm of public policy, which should be left to the City government." R. at 256. Indeed, weighing the costs and practicality of replacing and/or repairing 4.7 million feet of sewer line are grounded in public policy and economic concerns. A mandate to immediately replace and/or repair all sewer lines in the City of Jackson would create a substantial increase in water/sewer fees assessed against the citizens of Jackson. Such repairs would require the City to purchase additional equipment and increase hiring, thereby necessitating the issuance of bonds and creating an increase in taxes. All of these choices or judgments affect economic and public policy concerns.

Furthermore, the decisions made in respect to the manner of constructing, managing and maintaining sewer lines are clearly discretionary. Do you start at the northern City boundary and work south? Start at the western City boundary

[2] The discretionary function exception of South Carolina's tort claims act is identical to that of the MTCA.

and work east? At each intersection of two or more sewer lines, which direction do you follow? Or, do you begin with the oldest sewer lines and work towards the newer lines? Of the older lines, do you start in the north or south? Regardless of what category one chooses, all decisions are still discretionary. Thus, the second prong of the discretionary function test is met, and the City is immune from liability for claims arising out of the maintenance of its sewage system.

d. The Fortenberrys fail to cite any relevant statutes or caselaw to support their proposition.

As mentioned previously, the Fortenberrys argue *ipse dixit* that the maintenance of a sewage system is a ministerial function. According to the Fortenberrys, all 4.7 million feet of City sewage line should be maintained perfectly at all times, and if not, the City should be liable, regardless of manpower within the City, regardless of funding within the City, and regardless of priorities set by the City's engineers and the City's elected officials. The Fortenberrys cite numerous cases where citizens were allowed to sue municipalities for negligence in the maintenance of drains, the construction of water drainage systems, and negligence concerning sewers. However, all of these cases are irrelevant to the case at bar because they pre-date the MTCA,[3] and all of the cases cited by the Fortenberrys, except one, predate the passage of Miss. Code Ann. § 21-27-189, which allows the City to maintain their sewage systems within its discretion.

---

[3] *See* ***City of New Albany v. Barkely***, 510 So.2d 805 (Miss. 1987); ***Miller Oil Purchasing v. City of Vicksburg***, 305 So.2d 362 (Miss. 1974); ***City of Meridian v. Bryant***, 100 So.2d 860 (Miss. 1958); ***Clements v. Town of Carrolton***, 63 So.2d 398 (Miss. 1953); ***City of Meridian v. Sullivan***, 45 So.2d 851 (Miss. 1950); ***Cain v. City of Jackson***, 152 So. 295 (Miss. 1934); ***City of Vicksburg v. Porterfield***, 145 So. 355 (Miss. 1933); ***Fewell v. City of Meridian***, 43 So. 438 (Miss. 1907).

Furthermore, none of these cases specifically address the issue of sovereign immunity. The Mississippi Court of Appeals has recently held that "the failure to exercise ordinary care does not remove a governmental act from the protection of discretionary function immunity." ***Pritchard v. Von Houten***, 960 So.2d 568, 582 (Miss.Ct.App. 2007); *See also,* ***Collins v. Tallahatchie County***, 876 So.2d 284, 289 (Miss. 2004). As such, even if there is some question as to whether the City was negligent in its actions or inactions, a Court cannot waive sovereign immunity under the discretionary function test, and the Fortenberrys' arguments that the City had a duty to exercise reasonable care to maintain the sewage system is without merit.

The Fortenberrys rely on ***City of Jackson v. Internal Engine Parts Group***, 903 So.2d 60 (Miss. 2005) to support their proposition that the City has a common law duty to inspect and maintain drainage systems. However, this case is factually and procedurally distinguishable from the case at bar. In ***Internal Engine***, the Supreme Court decided whether or not the City was "negligent for failing to inspect and maintain the drainage ditch, and consequently allowing a dangerous condition to exist." ***Id.*** at 64. The Supreme Court found, "The trial court was presented with arguments regarding §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." ***Id.*** Importantly, this case does not mention which sections of §11-46-9 were argued

at trial.[4] Further, the maintenance of a clogged drainage ditch and the repair of an entire 4.7 million feet of the City's sewage system are two different subjects, which are analyzed differently under the public policy function test because sewage maintenance is specifically controlled by Miss. Code. Ann. § 21-27-189. Thus, the Fortenberrys' reliance on ***Internal Engine*** is misplaced

Finally, the Fortenberrys state in their brief that "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." Brief of the Appellants, p. 6. However, the Fortenberrys did not submit these issues to the Court on appeal, and the Fortenberrys did not cite any caselaw to support their cause of action for each of the aforementioned causes of action.

The Supreme Court has repeatedly held that "We have continually considered issues of error not supported by citation or authority as abandoned. ***Thibodeaux v. State***, 652 So.2d 153 (Miss. 1995). Further, it is the duty of an appellant to provide authority in support of an assignment of error. ***Hoops v. State***, 681 So.2d 521, 526 (Miss. 1996); ***Kelly v. State***, 553 so.2d 517, 521 (Miss. 1989); ***Smith v. State***, 430 So.2d 406, 407 (Miss. 1983); ***Ramseur v. State***, 368 So.2d 842, 844 (Miss. 1979). Stated differently, we are "not bound to address assertions or error where a party fails to cite caselaw in support of their argument." ***Nicholson ex rel. Gollott v. State***, 672 So.2d 744, 751 (Miss. 1996). Thus, because the Fortenberrys have failed to meet the burden of

[4] Procedurally, the case at bar is on appeal from a grant of summary judgment in the City's favor. ***Internal Engine*** was on appeal from a directed verdict in Plaintiff's favor. Different evidence was presented and a different standard of review was employed in ***Internal Engine.*** The different procedural posture of ***Internal Engine*** means any similarity to the case *sub judice* is misplaced.

providing authority to support the aforementioned assignments of error, these arguments are procedurally barred. ***Drennan v. State***, 695 So.2d 581, 585-86 (Miss. 1997).

Additionally, the Court of Appeals in ***Willing v. Benz***, No. 2005-CA-00470-COA, November 2006, held where any of the immunities enumerated in section 11-46-9(1) applies, the government is completely immune from any claims arising from the act or omission complained of. Thus, if this Court finds that the City is immune from liability because the maintenance of sewage systems is a discretionary function, the Court does not need to consider any other claim.

II. In the alternative, the specific incident complained of was not foreseeable.

If this Court does not find that the City is protected by discretionary function immunity in this matter, the City alternatively asserts that due to the abnormal amount of rainfall on the day in question, the incident complained of was not foreseeable. Proximate cause requires: (1) cause in fact; and (2) foreseeability. ***Morin v. Moore***, 309 F.3d 316, 326 (5th Cir. 2002) (citing ***Ambrosio v. Carter's Shooting Ctr., Inc.***, 20 S.W.3d 262, 265 (Tex.App. 2000)). "Cause in fact" means that the act or omission was a substantial factor in bringing about the injury, and without it the harm would not have occurred. ***Ogburn v. City of Wiggins***, 919 So.2d 85, 91 (Miss.Ct.App. 2005). "Foreseeability" means that a person of ordinary intelligence should have anticipated the dangers that his negligent act created for others. ***Id.*** (citing ***Morin***, 309 F.3d at 326). Foreseeability does not require that a person

anticipate the precise manner in which injury will occur once he has created a dangerous situation through his negligence. ***Id.***

As previously mentioned, on April 6, 2003, the City sustained 7.38 inches of rainfall within a twenty-four hour period. R. at 43. It is quite evident that this unusually large amount of rainfall within such a short time period is abnormal, to say the least. The question then becomes, under this circumstance, is it foreseeable that an abnormal amount of rainfall would fill the main sewer line, causing an overflow into the Fortenberrys' home? It is undisputed that the City did not have notice that the Fortenberrys ever received water and sewage backup into their home on previous occasions. Indeed, Ms. Fortenberry testified that from the time she purchased her home in 1979, until April 6, 2003, she never experienced water and sewage backing up into her home, escaping the toilet and bathtub. R. at 44 – 45. While the Fortenberrys have had complaints prior to the incident in question, the backing up of water and sewage into their home is a distinguishable event. On the previous occasions, the service lines were choked, and City employees responded to the scene and cleared the service line. R. at 168. Thus, because (1) the City did not have notice prior backups into the Fortenberrys' home, and (2) the cause of the sewage backup was an abnormal amount of rainfall within a twenty-four hour period, it was unforeseeable that this incident would occur.

Negligence which merely furnishes the condition or occasion upon which injuries are received, but does not put in motion the way in which the injuries are inflicted is not the proximate cause. ***Robison v. McDowell***, 247 So.2d 686, 688 (Miss. 1971). *See also,* ***Hoke v. Holcombe***, 186 So.2d 474, 477 (Miss

1996); ***Mississippi City Lines, Inc. v. Bullock***, 194 Miss 630, 640, 13 So.2d 34, 36 (1943). Here, it was not the actions or inactions of the City of Jackson that put in motion the incidents that caused the alleged injuries, rather it was the abnormal amount of rainfall that occurred on the day in question. There is no evidence before this Court that demonstrates that any City worker or any person of ordinary intelligence could anticipate that seven inches of rain would fall within twenty-four hours causing the sewage lines to fill with rainwater and subsequently causing water and sewage to back up into the Fortenberrys' home. For these reasons, the incident in question was not foreseeable, thus the Fortenberrys' claim against the City is without merit. As such, the City is entitled to judgment as a matter of law.

CONCLUSION

For the above reasons, the City of Jackson requests that this Court affirm the lower Court's judgment in this action. Specifically, the City respectfully submits that affirming the judgment is proper because Mississippi statutory law clearly states that a municipality cannot be liable for those functions performed within their discretion, and that it is within a municipality's discretion as to how a sewage system is maintained. The Fortenberrys offer no case law or statutory law that supports their proposition that this is a ministerial function. Thus, the City is immune from liability under the MTCA.

Furthermore, it was not foreseeable that the City would receive 7.38 inches of rainfall within a twenty-four hour period and that this torrential downpour would fill the sewage lines causing a back up into the Fortenberrys' home. Thus, the City respectfully submits that if this Court does not find that the City is

entitled to immunity under the MTCA, the City is not liable for the incident herein because its negligence was not the proximate cause of the Fortenberrys' injuries. And the City of Jackson prays for such other relief as this Court deems appropriate.

Respectfully submitted this the 12th day of September, 2008.

THE CITY OF JACKSON, MISSISSIPPI
SARAH O'REILLY-EVANS, CITY ATTORNEY

By: _____
PIETER TEEUWISSEN, MSB[redacted]
Special Assistant to the City Attorney

By: _____
CLAIRE BARKER HAWKINS, MSB[redacted]
Deputy City Attorney

OF COUNSEL:
Office of the City Attorney
455 East Capitol Street
Post Office Box 2779
Jackson, Mississippi 39207-2779
Telephone: 601-960-1799
Facsimile: 601-960-1756

CERTIFICATE OF SERVICE

The undersigned does certify that he has this date mailed, via United States mail, postage pre-paid, a true and correct copy of the above and foregoing Appellee's Brief to the following:

Ken R. Adcock, Esq.
Adcock and Morrison
Post Office Box 3308
Ridgeland, Mississippi 39158
Counsel for Plaintiff

Honorable Bobby DeLaughter,
Hinds County Circuit Court Judge
407 East Pascagoula Street
Jackson, Mississippi 39201

So certified, this the 12th day of September, 2008.

CLAIRE BARKER HAWKINS