

IN THE SUPREME COURT OF MISSISSIPPI

FLYNN AND KATHLEEN WALLACE

APPELLANTS

VS.

CAUSE NO. 2008 CA-00271

CITY OF JACKSON, MISSISSIPPI

APPELLEE

**On Appeal From The Circuit Court
of Hinds County, Mississippi
Cause Number 251-05-941CIV
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

FLYNN AND KATHLEEN WALLACE

APPELLANTS

VS.

CAUSE NO. 2008 CA-00271

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. Flynn and Kathleen Wallace
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:

A handwritten signature in cursive script that reads "Claire Barker Hawkins". The signature is written in black ink and is positioned above the printed name and title.

PIETER TEEUWISSEN, MSB [REDACTED]

Special Assistant to the City Attorney

CLAIRE BARKER HAWKINS, MSB [REDACTED]

Deputy City Attorney

TABLE OF CONTENTS

TITLE	PAGE
CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE ISSUES	1
ORAL ARGUMENT REQUESTED	2
STATEMENT OF THE CASE	3
A. PROCEEDINGS BELOW	3
B. STATEMENT OF THE FACTS	4
SUMMARY OF THE ARGUMENT	6
STANDARD OF REVIEW	8
ARGUMENT	9
A. Whether the manner in which a municipality maintains and repairs its sewage/storm water drainage is a discretionary function, affecting municipal immunity.	9
B. Whether, in the alternative, the specific incident complained of was foreseeable.	20
CONCLUSION	22
CERTIFICATE OF SERVICE	24

TABLE OF AUTHORITIES

CASES	PAGES
<i>Ambrosio v. Carter’s Shooting Ctr., Inc.</i> , 20 S.W.3d 262 (Tex.App. 2000)	20
<i>Busby v. Mazzeo</i> , 929 So.2d 369, 372 (Miss.Ct.App. 2006).....	8, 9
<i>City of Jackson, et al. v. City of Ridgeland</i> , 912 So. 2d 961 (Miss. 2005).....	13
<i>City of Jackson v. Internal Engine Parts Group</i> , 903 So.2d 60 (Miss. 2005).....	18, 19
<i>Collins v. Tallahatchie County</i> , 876 So.2d 284 (Miss. 2004).....	18
<i>Coplin v. Francis</i> , 631 So.2d 752 (Miss. 1994).....	14
<i>Drennan v. State</i> , 695 So.2d 581 (Miss. 1997).....	20
<i>Dotts v. Pat Harrison Waterway District</i> , 933 So.2d 322 (Miss. 2006).....	11, 14
<i>Grisham v. John Q. Long V.F.W. Post</i> , 519 So.2d 413 (Miss. 1998)...	8
<i>Hawkins v. City of Greenville</i> , 594 S.E.2d 557 (S.C.App. 2004)	15, 16
<i>Hoke v. Holcombe</i> , 186 So.2d 474 (Miss 1996)	21
<i>Hoops v. State</i> , 681 So.2d 521 (Miss. 1996)	19
<i>Jones v. Mississippi Dep’t of Transp.</i> , 744 So.2d 256 (Miss. 1999) ..	11
<i>Kelly v. State</i> , 553 so.2d 517 (Miss. 1989).....	19
<i>Lyle v. Mladinich</i> , 584 So.2d 397 (Miss. 1991)	9
<i>Morin v. Moore</i> , 309 F.3d 316, 326 (5 th Cir. 2002).....	20
<i>McQueen v. Williams</i> , 587 So. 2d 918 (Miss. 1991)	12, 13
<i>Mississippi City Lines, Inc. v. Bullock</i> , 13 So.2d 34 (Miss. 1943)....	22
<i>Mosby v. Moore</i> , 716 So.2d 551 (Miss. 1998)	11

<i>Nicholson ex rel. Gollott v. State</i> , 672 So.2d 744 (Miss. 1996)	19
<i>Ogburn v. City of Wiggins</i> , 919 So.2d 85 (Miss.Ct.App. 2005)	20
<i>Pritchard v. Von Houten</i> , 960 So.2d 568 (Miss.Ct.App. 2007)	18
<i>Ramseur v. State</i> , 368 So.2d 842 (Miss. 1979)	19
<i>Robison v. McDowell</i> , 247 So.2d 686, 688 (Miss. 1971)	21
<i>Smith v. State</i> , 430 So.2d 406 (Miss. 1983)	19
<i>Thibodeaux v. State</i> , 652 So.2d 153 (Miss. 1995)	19
<i>Tucker v. Hinds County</i> , 558 So.2d 869 (Miss. 1990)	8
<i>White v. Stewman</i> , 932 So.2d 27 (Miss. 2006)	9
<i>Willing v. Benz</i> , No. 2005-CA-00470-COA, November 2006	20
<i>Willingham v. Mississippi Trans. Comm.</i> , 944 So.2d 949 (Miss.Ct.App. 2006)	12

OTHER AUTHORITIES:

Mississippi Code Annotated § 11-46-9(d)	10
Mississippi Code Annotated § 21-27-189(b)	12
Jeffrey Jackson & Mary Miller, <i>Encyclopedia of Mississippi Law</i> , Vol. 8, § 67:7 (2006)	10, 11

STATEMENT OF THE ISSUES

The issue that this Court should resolve on this appeal is:

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. ***Fortenberry v. City of Jackson***, Cause No. 2008 CA-00271, 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 6. Plaintiffs Flynn and Kathleen Wallace alleged that the City of Jackson failed to properly design, maintain and operate its sewage and waste water disposal system. R. at 11 - 13. The City of Jackson filed its Answer and Affirmative Defenses on May 5, 2004. R. at 21. 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 31 - 34.¹

On September 21, 2006, the City moved for Summary Judgment against Plaintiff. R. at 37. In the motion, the City pointed that on the date of the sewage backup into Plaintiffs' house, there was a torrential downpour, which accumulated 3.24 inches of rainfall. R. at 38. 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.

¹ James and Linda Fortenberry, 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: **Wallace**, the matter *sub judice*; the **Fortenberry** plaintiffs (also on appeal to this Court; and the **Lawson** plaintiffs (currently stayed in the Circuit Court of Hinds County).

On June 11, 2007, the trial court entered its Memorandum Opinion and Order granting the City's Motion for Summary Judgment. R. at 228. From there, the Wallaces filed their Notice of Appeal on July 5, 2007. R. at 237.

B. STATEMENT OF THE FACTS

Because the Wallaces 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. On April 24, 2003, the City received 3.24 inches of rainfall within a twenty-four hour period. R. at 46. On that date, water and sewage backed up into the Wallace residence located at 1750 Northwood Circle, Jackson Mississippi. The City of Jackson Public Works department was notified and responded to the scene. R. at 167. Upon investigation, City workers found that the Wallace service line and the City main sewer line were both choked. *Id.* The City promptly cleaned both the Wallace service line and the City's main sewer line. *Id.* This helped alleviate the problem. R. at 47.

The City did not have notice before the torrential rainfall that the City's main sewer line was choked. Mr. Wallace testified in his deposition that in the past 19 years, he had experienced only one other backup, and it was the result of a clog on his service line, not the City's main line. R. at 48 – 52. After the incident, Mr. and Mrs. Wallace filled out a City of Jackson Liability Reporting Claim on April 24, 2003. R. at 138. David Willis, an engineer with public works, investigated the incident and concluded that both the Wallace's sewer line and

the City's sewer line was choked and that the Sewer Maintenance Section responded appropriately when notified of the incident at the Wallace residence on April 24, 2003. R. at 188. On July 15, 2003, the City sent a letter to the Wallaces notifying them that their claim could not be honored. R. at 199. The Wallaces 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 Wallaces 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 Wallaces cite no case law to support this theory. Instead, the Wallaces 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 Wallaces' 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 Wallaces omit a very important factual detail from their argument. On April 24, 2003 (the day the appellants experienced water and sewage backup into their home), the City received 3.24 inches of rainfall within a 24 hour period. On the day of this downpour, the Wallaces service line was

choked, as well as the City's main line. This fact is important because the record clearly demonstrates that prior to this date, the Wallaces never experienced sewage backup into their home as a result of a choked City sewer line. Thus, prior to this torrential downpour, the City did not have notice that the main sewer line or the Wallaces' sewer line was choked, causing an overflow into the Wallaces' home. Once this backup occurred, 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 (that the service line and the City line would choke after a downpour) was foreseeable. It is quite evident that 3.24 inches of rainfall within a twenty-four hour period a large amount of rainfall. The question then becomes, under this circumstance, is it foreseeable that an large amount of rainfall would choke both the City's sewer line and the Wallaces' sewer line, causing an overflow into the Wallaces' home? It is undisputed that the City did not have notice that the Wallaces ever received water and sewage backup into their home on any previous occasion due to a choke in the City sewer line. While the Wallaces have had complaints prior to the incident in question, the backing up of water and sewage into their home is a distinguishable event because on the previous occasion, the choke was on the service line, which the Wallaces are responsible for. Thus, because the City did not have notice of backup into the Wallaces' home due to a choke in the City main line, 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. The Trial Court was correct in finding that the maintenance of a sewage system is a discretionary function, thus the City is immune from liability under the MTCA.

The Wallaces 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 230 - 231. 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 whether 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 94. Without such state or federal requirements, the City's inspection decisions are based on other discretionary factors. R. at 95 - 96. 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 41. Willis testified that even by doing this, it would only allow the entire system to be inspected once every seven and a half years. R. at 95. Furthermore, it is the engineers within the Public Works Department that prioritize the repair work. R. at 96. 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 98. Thus, exactly as the Court found in **Coplin**, the determination as to which sewage lines should be 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 234. 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

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

the northern City boundary and work south? Start at the western City boundary 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 Wallaces fail to cite any relevant statutes or caselaw to support their proposition.

As mentioned previously, the Wallaces argue *ipse dixit* that the maintenance of a sewage system is a ministerial function. According to the Wallaces, 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 Wallaces 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

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 Carrollton*, 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).

Wallaces, except one, predate the passage of Miss. Code Ann. § 21-27-189, which allows the City to maintain their sewage systems within its discretion.

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 Wallaces’ arguments that the City had a duty to exercise reasonable care to maintain the sewage system is without merit.

The Wallaces 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 Wallaces 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 Wallaces did not submit these issues to the Court on appeal, and the Wallaces 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 Wallaces have failed to meet the burden of providing

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.

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*, 919 So.2d at 91. "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

6" pipe
v.
8" pipe
p.v.

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 24, 2003, the City sustained 3.34 inches of rainfall within a twenty-four hour period. R. at 46. This is a very large amount of rainfall that fell within a short period of time. The question then becomes, under this circumstance, is it foreseeable that after a torrential downpour, the service line on the Wallaces' property and the City main line could become choked? It is undisputed that the City did not have notice that the Wallaces ever received water and sewage backup into their home on any previous occasion due to a choke in the City main line.

While the Wallaces have had one complaint prior to the incident in question, the backing up of water and sewage into their home due to both the City's main line and the service line being choked is a distinguishable event. On the previous occasion, the Wallaces' service line was down, and City employees responded to the scene. R. at 167. The City employees noted that the main line was running, but the Wallaces' line was down, and that they would need to obtain a plumber. *Id.* Therefore, the only other time that the Wallaces experienced problems with their sewage line, it was due to a choke in the service line, which was located on the Wallaces' property. Thus, because the City did not have notice that both the City's main line and service line could choke and cause a backup into the Wallaces' home, 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. In fact, the Wallaces never experienced a backup in their sewage system due to any problems with the City sewer line. There is no evidence before this Court that demonstrates that any City worker or any person of ordinary intelligence could anticipate that the main sewage line and the service line would choke after a torrential downpour, subsequently causing water and sewage to back up into the Wallaces' home. For these reasons, the incident in question was not foreseeable, thus the Wallaces' 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 Wallaces 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 experience a torrential rainfall and the City's main sewage line and service line could choke, thus causing a back up into the Wallaces' home. The City did not have notice

prior to the torrential rainfall that the City main line was choked. 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 the incident in question was not foreseeable. 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 
Special Assistant to the City Attorney

By: 
CLAIRE BARKER HAWKINS, MSB 
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