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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INTRODUCTION

With all due respect to the Court of Appeals, the ruling in this matter is outcome-determinative. That is, the Court of Appeals went outside of the record to create a decision that conforms with the majority determination of the Court.[1] This was in error. In essence, by requesting additional briefing on issues that were not raised in the lower court, the Court of Appeals attempted to remake a record that was not presented to it on appeal. The matter before this Court is a clear, concise issue and can be decided on the record before it, without requiring additional briefing on issues that were not raised by either party and were not developed in the lower court proceedings.

The issue on appeal is whether the maintenance of a municipal sewage system is a discretionary function. Mississippi statutory law clearly states that the way in which a municipality maintains its sewage systems is discretionary. While the City recognizes from both oral argument and the Court of Appeal's Order that the Court may consider the City's "discretion" limited by various permits and plans, ***this issue was not presented or adequately developed by Plaintiffs in the trial court.*** The City filed for summary judgment on the issue of discretionary function immunity. Importantly, Plaintiffs only relied upon pre-Mississippi Tort Claims Act caselaw and common law to support his assertion. At the trial court level, Plaintiffs did not raise any issues as to the Clean Water Act, National Pollutant Discharge Elimination System, Federal Water Pollution Control Act, Management, Operation, and Maintenance Program, federal or state environmental control laws applicable to the City's operation of the sewage system, or any requirements of the Mississippi Department of

[1] The majority decision consisted of five votes; the dissenting decision consisted of four votes; and one judge not participating.

Environmental Quality placed upon a municipality. Plaintiffs' response to the City's summary judgment motion focused solely on common law and pre-MTCA caselaw. Yet, the Court of Appeals considered multiple matters and arguments not raised on appeal and not considered in the record. Stated differently, the Court of Appeals placed the lower court in error by *sua sponte* expanding the record. As such, the City requests that this Court review the record and the arguments presented, and reverse the Court of Appeal's ruling. Alternatively, the City requests that this Court vacate the Court of Appeal's ruling and affirm the trial court's Order and Opinion *per curium*.

ARGUMENT

I. The Court of Appeals considered matters outside the record.

After the Court of Appeals heard oral arguments in this matter, the Court of Appeals entered an Order directing that each party provide supplemental briefing in this cause. The Court of Appeals further instructed the Mississippi Department of Environmental Quality (MDEQ), who was never a party in interest, to submit an *amicus curia* brief on additional issues. The Court of Appeals requested supplemental briefing from the parties, as well as MDEQ, on the following subjects:

- The requirements of the metropolitan area plans applicable to this case;
- The Federal Water Pollution Control Act;
- The National Pollutant Discharge Elimination System (NPDMS) the Capacity;
- Management, Operation, and Maintenance Program (CMOM);
- Federal and State environmental control laws applicable to the City's operation of the sewage system;

- The applicability of nuisance law and potential liability under Section 17 of the Mississippi Constitution;
- Any requirements of the Mississippi Department of Environmental Quality placed upon a municipality; and
- Any alterations to the subdivision at issue since its annexation and impact to the 1997 City Ordinance.

See July 15, 2009 Order.

Longstanding Mississippi appellate law holds that "[i]ssues not brought before the trial court are deemed waived and may not be raised for the first time on appeal." ***Cowan v. Mississippi Bureau of Narcotics***, 2 So. 3d 759, 766 (Miss. App., 2009) citing ***Tate v. State***, 912 So. 2d 919, 928 (Miss. 2005) (citing ***Wilcher v. State***, 479 So. 2d 710, 712 (Miss. 1985)). See also ***Allen v. National Railroad Passenger Corp.***, 934 So2d 1006, 1014 (Miss. 2006) Here, the Order and Opinion of the trial court, from which this appeal was taken, does not contain the aforementioned issues. *See* M.R.A.P. 3(c). ***Id.*** This is because the aforementioned issues were not the basis of the City's Motion for Summary Judgment. The lower court only addressed the issue of whether the manner in which a municipality maintains its sewage systems is a discretionary function under the Mississippi Tort Claims Act and Section 21-27-189 of the Mississippi Code Annotated. Indeed, ***the aforementioned issues were not raised by either party at any stage of this litigation***. Rather, they were raised by the Court of Appeals after oral arguments.

The metropolitan area plan, which is Miss. Code Ann. § 21-27-161, *et seq.*, is the ***only subject*** out of the above referenced matters that was referenced by the parties before the lower court. With respect to issues (b) through (h) of the Court of Appeals'

Order, these matters are not contained in the record and were not raised on appeal. As such, an appellate court may not consider any information that is not contained the record and was not a designated issue on appeal. If a party believes that the record does not accurately reflect what occurred in the trial court, the party must follow the procedure outlined in the appellate rule for correcting or modifying the record. Rules App.Proc., Rule 10(e). This was not done by either party in this matter. Because the Plaintiffs failed to raise those issues before the trial court and preserve those issues on appeal, Plaintiff is procedurally barred from arguing said issues for the first time on appeal. ***Corey v. Skelton***, 834 So.2d 681, 686 (Miss.2003); ***Barnes v. Singing River Hosp. Sys.***, 733 So.2d 199, 202 (Miss.1999); ***Educational Placement Servs. v. Wilson***, 487 So.2d 1316, 1320 (Miss.1986).

However, the issue presented to this Court on appeal ***can*** be decided based upon the record before it. The issue is clear and concise: Whether the manner in which a municipality maintains its sewage system is discretionary? This is the issue presented to the trial court and this is the issue on which the trial court ruled. As previously asserted, Mississippi statutory law and the metropolitan area plan clearly state that a municipality has the authority to operate and maintain a sewage system, and the statute clearly states that a municipality has the authority to so ***in its discretion***. 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. Importantly Section 21-27-189 of the Mississippi Code Annotated (the metropolitan area plan) 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). In other words, the metropolitan area plan does not

impose an affirmative duty on a municipality as to ***how*** it should maintain its sewage lines. This statute makes sense considering that operation of a municipal sewage system includes (1) "an element of choice or judgment" and (2) "economic or political policy." *See generally* ***Jones v. Mississippi Dep't of Transp.***, 744 So.2d 256, 260 (Miss. 1999). Therefore, it is a discretionary function from which the City is immune from liability.[2]

Plaintiff's argued in their Supplemental Brief that because the City's engineer was asked about NPDES, CMOM and MDEQ, then it is "contained in the record" for purposes of appellate review. This argument is misplaced. Simply asking a question or questions in a discovery deposition regarding a policy does not place this issue before the trial court, let alone adequately preserve this issue for the Court to consider on appeal. It was the Plaintiff's duty at the lower court level to place evidence in the record pertaining to the applicability of NPDES, CMOM, and MDEQ to the City's discretionary function in maintaining its sewage system. The Plaintiffs failed to do so. The record does not indicate that these issues were considered by the lower court or that the Plaintiffs intended on preserving and raising these issues on appeal. The Plaintiffs cannot now take a second bite at the apple and formulate an argument on appeal based upon a few discovery questions posed to the City's engineer. Therefore, these arguments are procedurally barred.

Finally, the Plaintiffs urged the Court of Appeals to take judicial notice as to the Clean Water Act in their Supplemental Brief. The Court of Appeals seemed to do so in its Opinion and Order. This was in error. Judicial notice is applied when the ***trial***

[2] While the City recognizes from both oral argument and the Court of Appeal's Order that the Court may consider the City's "discretion" limited by various permits and plans, this issue was not presented or adequately developed by Plaintiffs in the trial court.

court, if asked, takes notice of proffered evidence. ***Peden v. City of Gautier***, 870 So.2d 1185, 1187 (Miss. 2004) ("The trial court may take judicial notice of available evidence in its own court files." ***Gulf City Fisheries, Inc. v. Bobby Kitchens, Inc.***, 518 So.2d 661, 664 (Miss.1988) (citing ***Johnson v. Ford Motor Co.***, 354 F.Supp. 645, 647 (N.D.Miss.1973)); 29 Am.Jur.2d *Evidence* § 57, at 89-90 (1967); 31 C.J.S. *Evidence* § 50(1), at 1018 & § 50(2), at 1022). *See also* Miss. R. Evid. 201. This principle does not apply to the appellate courts. Mississippi appellate courts may not consider information that is outside the record. ***Dew v. Langford,*** 666 So.2d 739, 746 (Miss. 1995). The aforementioned issues were not considered by the lower court, are not contained in the record designated by the Plaintiffs, and were not raised by either party on appeal. Therefore, the Plaintiffs are procedurally barred from asking this Court to take judicial notice of evidence not in the record.

II. The Court of Appeals decision is contrary to recent relevant caselaw.

The Court of Appeals decision in this matter is contrary to the recent opinion in ***Fisher v. Lauderdale County Bd. of Supervisors***, 7 So.3d 968 (Miss.Ct.App. 2009), which is directly applicable to the case at bar. In ***Fisher,*** the Court of Appeals found that installing culverts of a certain size was a discretionary function, thus the Board of Supervisors was immune from liability under the MTCA. Importantly, Section 65-21-1 of the Mississippi Code addressed only the length of the culvert, and the Court of Appeals found that "while Section 65-21-1 sets the minimum length for a culvert, the statute does not make the sizing and installation of a culvert ministerial; therefore, these functions are entitled to immunity under section 11-46-9(1)(d) as a discretionary

function." This holding should be directly applied to the case *sub judice*. While the metropolitan area plan outlines the actions in which a municipality is authorized to undertake, the statue does not make the maintenance of a sewage system ministerial.

Further, the instant decision is contrary to ***Lee v. Mississippi Dept. of Transportation,*** 2008-CA-0065-COA, which was handed down by the Court of Appeals on September 15, 2009. The ***Lee*** Court found that the maintenance of roads and highways are a discretionary. ***Id.*** at ¶ 8. Importantly, the Court of Appeals recognized that "MDOT has a limited number of funds to disperse in the maintenance and upkeep of the State's highways. Therefore, MDOT ***must*** use in its discretion and judgment when determining the order in which roads will be resurfaced and repaired." (emphasis in the original) ***Id.*** at ¶ 9. This is the ***exact*** argument the City asserted in its original brief and in oral argument and is supported in the record by the City's engineer, David Willis. R. at 95 – 98.

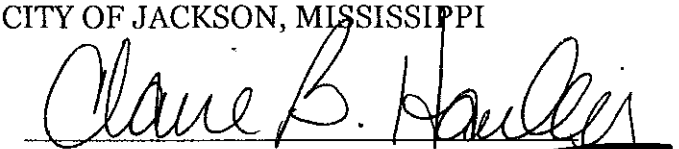
Indeed, weighing the costs and practicality of replacing and/or repairing 4.7 million feet of sewer line are grounded in public policy and economic concerns. A mandate to immediately replace and/or repair all sewer lines in the City of Jackson would create a substantial increase in water/sewer fees assessed 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, thereby qualifying the decision to maintain sewage systems as a discretionary function.

CONCLUSION

The narrow issue before this Court involving discretionary function immunity can be decided based on the record before it. To go beyond this record, even "in the interest of justice," is procedurally improper and contrary to *stare decisis*. As such, the City of Jackson respectfully submits that the Court of Appeals committed error when evaluating arguments and issues, such as whether the City was in compliance with the Clean Water Act. These issues were not raised on appeal and were not presented to the lower court. Therefore, it was improper for the Court of Appeals to consider Plaintiff's arguments on said issues, and the Court of Appeals' decision must be reversed, or alternatively, vacated and affirm the lower court's ruling *per curium*.

Respectfully submitted this the 27th day of September, 2010.

THE CITY OF JACKSON, MISSISSIPPI

By: 
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CERTIFICATE OF SERVICE

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

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Honorable Swan Yerger,
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So certified, this the 27th day of September, 2010.

CLAIRE BARKER HAWKINS