

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
SOUTHERN DIVISION**

<b>WAYNE FORD</b>	§	<b>PLAINTIFF</b>
	§	
v.	§	<b>CAUSE NO. 1:08cv55 LG-RHW</b>
	§	
<b>ASHBRITT, INC.</b>	§	<b>DEFENDANT</b>

**MEMORANDUM OPINION AND ORDER  
GRANTING DEFENDANT'S MOTION TO DISMISS**

THE MATTER BEFORE THE COURT is Defendant, AshBritt, Inc.'s, Motion to Dismiss [8] for lack of subject matter jurisdiction pursuant to FED. R. CIV. P. 12(b)(1). Plaintiff has filed a response and AshBritt has replied. After due consideration of the submissions, pleadings and the relevant law, it is the Court's opinion that it lacks subject matter jurisdiction of this case. The Motion to Dismiss will therefore be granted.

**DISCUSSION**

Plaintiff, Wayne Ford, filed this lawsuit alleging negligence and gross negligence on the part of AshBritt in the course of removing storm debris from Ford's property following Hurricane Katrina. Ford alleges that he had stored valuable fishing equipment on his property prior to the storm. The storm moved Ford's house off of its foundation and placed it on the public right-of-way on Market Street in Pass Christian, Mississippi. Ct. R. 8-3 p. 3 ¶ 10. Ford alleges he was unable to remove the fishing equipment without the debris surrounding it being removed. He further alleges that although he authorized debris removal on his property, he also "delineate[d] certain items of personal property that [he] utilized in his commercial fishing business," so that those items would not be removed. Compl. 3. Nevertheless, AshBritt completely demolished and removed all structures and personal property from Ford's property.

AshBritt contends that it is immune from liability for its alleged negligence in removing Ford's fishing equipment, and therefore the Court lacks subject matter jurisdiction.

THE LEGAL STANDARD:

In examining a Rule 12(b)(1) motion to dismiss, the district court has the power to dismiss for lack of subject matter jurisdiction on any one of three separate bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *New Orleans & Gulf Coast Ry. Co. v. Barrois*, \_\_ F.3d \_\_, 2008 WL 2514645, \* 3 (5th Cir. June 25, 2008) (citation and quotation marks omitted). In this case, the Defendant has made a "factual attack" upon the court's subject matter jurisdiction over the lawsuit by submitting affidavits and other evidentiary materials with its motion. *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981). The Plaintiff is also required to submit facts through some evidentiary method and has the burden of proving by a preponderance of the evidence that the trial court does have subject matter jurisdiction. *Id.* Nevertheless, the motion should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (citing *Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir. 1998)).

GOVERNMENTAL IMMUNITY FROM SUIT:

AshBritt asserts that, as a contractor of the U.S. Army Corps of Engineers, it enjoys derivative governmental immunity from suit. Claims based upon "a discretionary function or duty" of a federal agency cannot be brought against the United States. *In re Supreme Beef Processors, Inc.*, 468 F.3d 248, 252 (5th Cir. 2006). Courts are to apply a two-prong test in

determining whether challenged conduct is the result of a discretionary function or duty. *Berkovitz ex rel. Berkovitz v. United States*, 486 U.S. 531, 536 (1988). The first prong is whether the nature of the challenged governmental conduct involves an element of judgment or choice. *Id.* at 536-37. The second prong is whether the judgment or choice exercised, if any, was grounded in social, economic, and political policy of the sort that Congress sought to shield or protect from second-guessing. *Id.*

In a case this Court recently found instructive,<sup>1</sup> *Sunrise Village Mobile Home Park v. Phillips & Jordan, Inc.*, 960 F. Supp. 283 (S.D. Fla. 1996), the court dismissed a claim under the FTCA for damage to the plaintiffs' property in removing debris following a hurricane. The court found that it lacked subject matter jurisdiction because the alleged governmental negligence in monitoring and supervising its contractor was within the FTCA's discretionary function exception to its waiver of sovereign immunity under 28 U.S.C.A. § 2680(a). The court found first, that federal agencies, at the direction of the President, were explicitly authorized by the Disaster Relief and Emergency Assistance Act, 42 U.S.C.A. § 5173, to remove debris following a hurricane. *Sunrise Village*, 960 F.Supp. at 286. The Army Corps of Engineers acted within this authority when contracting for debris removal. Further, the Act allowed for agency judgment on when, where, and how to remove debris. *Id.* Second, the court found that the government's decisions on when, where, and how to remove debris after a major disaster were exactly the sort of policy-imbued decisions falling within the second prong of the test. *Id.*

Thus, if Ford's claims in this case had been brought directly against the U.S. Army Corps of Engineers, he would be unable to show a waiver of immunity. AshBritt, as a contractor

---

<sup>1</sup> See *Weggeman v. Ashbritt, Inc.*, 2006 WL 2026820 (S.D. Miss. July 6, 2007).

carrying out the work of the U.S. Army Corps of Engineers, is entitled to this same immunity from suit.

Nevertheless, Ford argues that AshBritt cannot claim governmental immunity because it failed to follow government specifications. Specifically, although AshBritt was contracted to remove storm debris, the fishing equipment was not storm debris, and should not have been removed.<sup>2</sup> Furthermore, Ford states that he requested that he be notified when his property would be cleared, so that he could be present and secure his personal property. However, he was not notified and therefore was not present during the demolition.

Ford's argument relies on the language of *Bynum v. FMC Corp.*, 770 F.2d 556 (5th Cir. 1985): "It has [ ] become well established that, at least with respect to public works projects, when contractors as agents or officers of the federal government or of individual states work according to government specifications, they are entitled to assert the government's sovereign immunity in suits arising from such activities." *Id.* at 564 (citations omitted). Contractors that fail to follow government specifications or otherwise mismanufacture a product are not entitled to raise the defense. *Id.*

AshBritt removed storm debris from Ford's property pursuant to a right of entry form executed by Ford. Ct. R. 8-3 p. 3 ¶ 10. Ford authorized AshBritt to enter the property "for the purpose of removing and clearing any and all storm-generated debris (and/or demolition and removal of unsafe structures). . . ." Ct. R. 11-3. The language of the form continues:

---

<sup>2</sup> Ford's evidence that the fishing equipment was still on his property after the storm and that it was not "storm-generated debris" is confined to a statement in his affidavit that: "Following Hurricane Katrina, I was unable to remove the commercial fishing equipment and other personal property until the storm-generated debris was removed from my property." Ct. R. 11-2 p. 1.

The undersigned further agrees and warrants an unconditional authorization for the City/County of Harrison, the United States of America and its assigns, including, but not limited to, the US Army Corps of Engineers, its contractors and subcontractors, to remove all debris and wreckage from the above-described property.

*Id.*<sup>3</sup>

Ford has submitted a copy of this form, dated December 30, 2005, which contains a remark: "Save skiffs, trawl winch, and gear for boat (clutch) rear winch." Ct. R. 11-3. AshBritt submitted a different version of this form dated almost three months earlier - October 7, 2005. Ct. R. 15-2 p. 4. There are significant differences between the two documents. The October 7, 2005 version submitted by AshBritt has no remark about saving boat equipment; the longitude and latitude of the property is noted; there is a City/County inspector signature and date; it is marked "Contractor's Copy" across the top, and "Completed" is stamped on the side. The December 30, 2005 version submitted by Ford, which includes the remark, has none of these details.

AshBritt supervisor Daniel Demidio provided an affidavit stating that AshBritt has no record of receiving the December 30, 2005 form. Ct. R. 15-2 p. 2. Further, "the form is incomplete as it does not include the signature of a city or county inspector finding the property to be an immediate health and safety hazard as required before any work was authorized. . . ." *Id.* The December 30, 2005 form clearly lacks any indicia that it was received by or acted upon by

---

<sup>3</sup> It should be noted that by signing the form, Ford also "release[d], discharge[d] and waive[d] any and all actions, either legal or equitable, which the undersigned has or ever might have by reason of any action of aforesaid city, county, United States of America and their successors and assigns, while removing storm-generated debris and/or unsafe structures from the above property." Ct. R. 11-3. The affirmative defense of waiver has been pled but not yet raised by AshBritt, undoubtedly because the Court's jurisdiction must be addressed first.

city or county officials or AshBritt. Thus, if the Court were required to resolve the factual dispute as to which form AshBritt had notice of and acted on, the Court would find in favor of the October 7, 2005 form, which has no indication that there were items on Ford's property that should not be cleared away. Ford can show no failure or error by AshBritt under these facts.

However, even taking the December 30, 2005 version of the form as true, Ford authorized AshBritt to enter his property to remove any and all debris and wreckage. AshBritt's evidence, including its contract with the Army Corps of Engineers and the affidavits of AshBritt supervisor Daniel Demidio, shows that there was no provision in the contract which would require AshBritt to distinguish "storm-generated debris" from non-debris. *See* Ct. R. 8-3; 8-4 p. 13; 15-2. Demidio's affidavit states that before any debris was picked up, a Corps quality assurance person would advise AshBritt whether the debris was eligible for collection under FEMA guidelines, and would also monitor and supervise the collection of the debris. Ct. R. 8-3 p. 4. Thus, AshBritt's evidence is that it was following government specifications when it cleared Ford's property. Ford has submitted no conflicting evidence. The Corps' failure to set aside the items noted by Ford while having debris and wreckage removed from his property gives rise only to a claim of negligence in the performance of its work; a claim that the Court has found is barred by the Federal Tort Claims Act. It does not lead to the conclusion that AshBritt failed to follow government specifications. *See Dolphin Gardens, Inc. v. U.S.*, 243 F. Supp. 824, 827 (D.C. Conn. 1965) (cited in *Bynum*, 770 F.2d at 564). The Court therefore finds that AshBritt is entitled to derivative governmental immunity from Ford's claims. Accordingly, the Court lacks subject matter jurisdiction, and this suit must be dismissed.

**IT IS THEREFORE ORDERED AND ADJUDGED** that the Motion to Dismiss [8] of

AshBritt, Inc. pursuant to Federal Rule of Civil Procedure 12(b)(1) is **GRANTED**. Plaintiff's claims against AshBritt, Inc. are barred by governmental immunity and are therefore **DISMISSED** with prejudice.

**SO ORDERED AND ADJUDGED** this the 7<sup>th</sup> day of August, 2008.

*s/ Louis Guirola, Jr.*  
\_\_\_\_\_  
LOUIS GUIROLA, JR.  
UNITED STATES DISTRICT JUDGE