

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

^{CA}
NO. 2007-~~TS~~-01381

DESOTO COUNTY, MISSISSIPPI (DESOTO TIMES)

APPELLANT

V.

MEMPHIS PUBLISHING COMPANY PUBLISHER
OF THE DESOTO APPEAL; PH PUBLISHING LLC,
PUBLISHER OF THE DESOTO TIMES TODAY; and
DAVID GRISHAM, PUBLISHER OF THE DESOTO
COUNTY TRIBUNE

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

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 Judges of this Court may evaluate possible disqualification or recusal:

1. PH Publishing LLC, The DeSoto Times, Appellant;
2. Mary Lynn Damaré, Attorney for Appellant;
3. Lanier Hurdle, Trial Attorney for Appellant;
4. Lucian Pera and John S. Hooks, Attorneys for Appellee;
5. Memphis Publishing Company Publisher of DeSoto Appeal, Appellee; and
6. Honorable Andrew C. Baker, Circuit Court Judge, Trial Judge.



Mary Lynn Damaré
Attorney for Appellant

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CERTIFICATE OF COMPLIANCE

COMES NOW, **Mary Lynn Damaré**, attorney of record for Appellant and certifies that this brief contains 4,356 words as determined by the word count of the word processing system.

SO CERTIFIED this the 11th day of January, 2008.



Mary Lynn Damaré
Attorney for Appellant

STATEMENT OF ISSUES

Whether the Court erred when it found that *The DeSoto Appeal*, published by Memphis Publishing Company, met the requirements under § 13-3-31 of Mississippi Code Annotated as a newspaper qualified to publish county advertising and official legal notices, such as summons, orders, citations, or other legal notices; and, Whether the Court erred in failing to consider whether *The DeSoto Appeal* qualifies as a newspaper separate and distinct from *The Commercial Appeal*.

STATEMENT OF THE CASE

A *Complaint For Declaratory Judgment Pursuant To M.R.C.P. 57* was filed September 20, 2002, by Plaintiff DeSoto County Mississippi against Memphis Publishing Company, publisher of *The DeSoto Appeal*; PH Publishing LLC, publisher of *The DeSoto Times Today*; and David Grisham, Publisher of *The DeSoto County Tribune*. C.P. p.7. All defendants claim to be newspapers within the meaning of §13-3-31 of the Mississippi Code Annotated and suit was filed to determine whether *The DeSoto Appeal* was a newspaper within the meaning of the statute. A bench trial was held on December 15, 2003, and the court's *Order* was filed on December 19, 2003, finding *The DeSoto Appeal* met the requirements of the statute. R.E., p.8. A *Motion for Reconsideration* was filed December 31, 2003, and the Court's *Order Denying Motion To Reconsider* was entered on July 13, 2007. R.E., p.6. It is from this *Order Denying Motion To Reconsider*, which appellant PH Publishing LLC appeals.

SUMMARY OF THE ARGUMENT

PH Publishing, publisher of *The DeSoto Times*, argues that *The DeSoto Appeal* is not a newspaper in and of itself, separate and distinct from *The Commercial Appeal*, as defined by the case law as found in *Gannett River States Publishing Corp. v. Jackson Advocate*, 856 So.2d 247(Miss.2003). *The DeSoto Appeal* is not, in and of itself, originated and published within DeSoto County for the dissemination of current news and intelligence of varied, broad and general public interest, announcements and notices, opinions as editorials on a regular or irregular basis, and advertising and miscellaneous reading matter. *The Commercial Appeal*, parent newspaper to *The DeSoto Appeal*, does not qualify under Miss. Code Ann. Section 13-3-31, as the principal public business office for *The Commercial Appeal* is on Union Avenue in Memphis, Tennessee. The trial court's failure to address whether or not *The DeSoto Appeal* is a separate newspaper from *The Commercial Appeal* misses the very essence of the dispute. *The DeSoto Appeal* is merely a section of *The Commercial Appeal*, a Memphis, Tennessee newspaper. *The DeSoto Appeal* is sold and subscribed to as *The Commercial Appeal*. It is delivered always and only with *The Commercial Appeal* attached to it, wrapped and unmistakably one part of a whole, of which *The Commercial Appeal* is the primary piece. Neither *The DeSoto Appeal* or *The Commercial Appeal* are qualified to publish legal notices for DeSoto County Mississippi.

ARGUMENT

- I. The Court Erred In Finding *The DeSoto Appeal* Qualified Under Miss. Code Ann. §13-3-31 To Publish County Advertising And Official Legal Notices.

Two statutes must be considered by government entities in Mississippi when deliberating where to publish their advertisements and legal notices, Mississippi Code Annotated, § 13-3-31 and §21-39-3. In *City of Jackson v. Capital Reporter Publishing Company, Inc.*, 373 So.2d 802, 807 (Miss.1979), the Court found that Sections 13-3-31 and 21-39-3 are interrelated and must be read together, stating that authorities can not contract to publish legal notices to a newspaper not qualified under the law whether or not it is the lowest bidder. Mississippi Code Annotated § 13-3-31 outlines the publication requirements for a newspaper as follows:

“(1) Whenever it is required by law that any summons, order, citation, advertisement or other legal notice shall be published in a newspaper in this state, it shall mean, in addition to any other requirements imposed by law, publication in some newspaper which:

(a) Maintains a general circulation predominantly to bona fide paying subscribers within the political subdivision within which publication of such legal notice is required. The term "general circulation" means numerically substantial, geographically widespread, demographically diversified circulation to bona fide paying subscribers. In no event shall the term "general circulation" be interpreted to require that legal notices be published in a newspaper having the greatest circulation. The term "bona fide paying subscribers" means persons who have subscribed at a subscription rate which is not nominal, whether by mail subscriptions, purchases through dealers and carriers, street vendors and counter sellers, or any combination thereof, but shall not include free circulation, sales at a token or nominal subscription price and sales in bulk for purposes other than for resale for individual subscribers.

(b) Maintains a legitimate list of its bona fide paying subscribers by the following categories where applicable:

(i) Mail subscribers;

(ii) Dealers and carriers; and

(iii) Street vendors and counter sellers.

(c) Is not published primarily for advertising purposes and has not contained more than seventy-five percent (75%) advertising in more than one-half (1/2) of its issues during the period of twelve (12) months next prior to the first publication of any legal notice therein, excluding separate advertising supplements inserted into but separately identifiable from any regular issue or issues.

(d) Has been established and published continuously for at least twelve (12) months next prior to the first publication of such matter to be published, is regularly issued at stated intervals no less frequently than once a week, bears a date of issue, and is numbered consecutively; provided, however, that publication on legal holidays of this state or of the United States and on Saturdays and Sundays shall not be required, and failure to publish not more than two (2) regular issues in any calendar year shall not disqualify a paper otherwise qualified.

(e) Is issued from a known office of publication, which shall be the principal public business office of the newspaper and need not be the place at which the newspaper's printing presses are physically located. A newspaper shall be deemed to be "published" at the place where its known office of publication is located.

(f) Is formed of printed sheets. However, the word "printed" does not include reproduction by the stencil, mimeograph or hectograph process.

(g) Is originated and published for the dissemination of current news and intelligence of varied, broad and general public interest, announcements and notices, opinions as editorials on a regular or irregular basis, and advertising and miscellaneous reading matter.

(h) Is not designed primarily for free circulation or for circulation at nominal rates.

(2) "Newspaper," as used in this section, shall not include a newspaper, publication, or periodical which is published, sponsored by, is directly supported financially by, or is published to further the interests of, or is directed to, or has a circulation restricted in whole or in part to any particular sect, denomination, labor or fraternal organization or other special group or class of citizens, or which primarily contains information of a specialized nature rather than information of varied, broad and general interest to the general public, or which is directed to any particular geographical portion of any given political subdivision within which publication of such legal notice is required, rather than to such political subdivision as a whole. No newspaper otherwise qualified under this section shall be disqualified from publishing legal notices for the sole reason that such newspaper does not have as great a circulation as some other newspaper publishing in the same political subdivision.

(3) In the event of the discontinuance of the publication of all newspapers in any county qualified under this section to publish legal notices, any other such newspaper published in the same county, regardless of the length of time it has been published, shall be deemed qualified to publish such legal notices, provided such newspaper meets all requirements of this section other than the requirements of subsection (1)(d) of this section.

(4) A newspaper otherwise qualified under this section which is published in a municipality whose corporate limits encompass territory in more than one (1) county shall

be qualified to publish legal notices, including foreclosure sale notices as described in Section 89-1-55, for any county a portion of whose territory is included within the municipality, irrespective of the actual physical location within the municipality of the principal public business office of the newspaper.”

Mississippi Code Annotated §21-39-3 provides in relevant part:

“In municipalities in which there is more than one newspaper qualified to publish legal notices, the governing authorities of such municipality shall enter into a contract for the publication of its proceedings, ordinances, resolutions, and other notices required to be published only after inviting competitive bids from such newspapers. Such contracts shall be let to the lowest bidder among them for a period of not more than twelve months from the date of such contract.”

In the case at bar, DeSoto County government and several municipalities located within DeSoto county questioned whether legal publication in *The DeSoto Appeal* was prudent, being uncertain whether the newspaper, as sold, published and distributed, met the requirements of the statutes. DeSoto County attorney, Bobby Chamberlain, addressed the issue with the Attorney General’s (AG) office several times and received responses from the AG via letters dated January 10, 2002, February 19, 2002, and July 26, 2002. R.E., pp.13-23; T. Ex.17, A, B, C. The February 19, 2002 letter from the AG’s office and John Runnels, Special Assistant Attorney General, opines as follows, “This office is of the opinion that a newspaper with a principal public business office in DeSoto County, Mississippi is deemed to be published in Mississippi regardless of the fact it can be purchased only as part of a Tennessee newspaper.” *Op. Miss. Att’y Gen.* No. 2002-0033, 2002 WL 321993 (Miss.A.G.). R.E., p.17; T. Ex.17, B. Attached to the January 10, 2002 AG opinion letter to Mr. Chamberlain was another AG Opinion dated December 15, 2000. *Op. Miss. Att’y Gen.* No. 2000-0731, 2000 WL 1918854 (Miss.A.G.). R.E., p.15; T.Ex.17, A. The December 15, 2000 AG letter states in relevant part that, “A newspaper may have a principal public business office in more

than one location . . .". *Id.* These opinions have been relied upon by the DeSoto County Attorney, DeSoto County government, *The DeSoto Appeal*, and even the Honorable Judge in the case subjudice. R.E., p.11; T. Ex.,17, A, B, C. The AG Opinion dated December 15, 2000 was a departure from the logic espoused by the AG office's 1999 Opinion regarding two Rankin County newspapers. *Op. Miss. Att'y Gen.* No.1999-0289, 1999 WL 791715 (Miss.A.G.). The City of Flowood Mississippi requested an opinion whether they could use their usual publisher for city notices which had a principal office in Rankin county but not within the city limits of Flowood, after *The Rankin Record* opened its principal public business office within city limits of Flowood. *Id.* The AG's office stated that the notices were required to be placed in a newspaper "published in the municipality", and must be awarded to a qualifying newspaper with a known office of publication **in the city** unless none existed. (Emphasis added.) *Id.*

The DeSoto County Board of Supervisors, apparently still uncomfortable with *The DeSoto Appeal*, had County Attorney Chamberlain write to the AG again. The AG's July 26, 2002 letter was a response to DeSoto County Attorney Chamberlain's questions posed generally as, 1. Whether *The DeSoto Appeal* is a separate newspaper or whether it is simply a section of *The Commercial Appeal*; 2. Whether the package enclosed as the *DeSoto Appeal/Commercial Appeal* was one newspaper or two newspapers; and, 3. What is the principal place of business of the enclosed newspaper or newspapers?. R.E., p. 20; T. Ex.17, C. The AG responded in this way, "Our office cannot render opinions on questions of fact, and therefore we must decline to respond to these three questions." *Id.*

DeSoto County Mississippi, still uncertain and uncomfortable with whether or not *The DeSoto Appeal* qualified under the statutes, filed this suit under Mississippi Rule of Civil Procedure 57 for a declaratory judgment, seeking a court of record to determine, in the language of the rule, "a question

of construction or validity arising under the statute and obtain a declaration of rights, status or other legal relations thereunder.” C.P., p. 7.

PH Publishing argues that these AG opinions contradict the plain language of Section 13-3-31(1) (e), which provides that a newspaper is deemed to be published from the principal public business office of the newspaper. In *Sykes v. State*, 757 So.2d 997,1000 (Miss. 2000), the court stated, “If a statute is not ambiguous, the court should apply the plain meaning of the statute.” Memphis Publishing Company, publisher of *The Commercial Appeal*, parent newspaper to *The DeSoto Appeal*, has the principal public business office of the newspaper at Union Avenue, Memphis, Tennessee. R.E., pp.33, 34; R.,pp.62, 63. *The DeSoto Appeal* first must be specifically found to be a newspaper separate and distinct from *The Commercial Appeal*, and only then may *The DeSoto Appeal* qualify to publish legal notices for government entities in DeSoto County under Section 13-3-31(1)(e). PH Publishing, publisher of *DeSoto Times*, asserts that County Attorney Chamberlain’s three questions, which went unanswered by the AG, were right on target. To determine whether *The DeSoto Appeal* can qualify to publish under the statute, it must first be determined whether it is simply a section of *The Commercial Appeal*.

II. The Court Erred In Failing To Consider Whether *The DeSoto Appeal* Qualified As A Newspaper Separate From *The Commercial Appeal*.

In *Gannett River States Publishing Corp. v. Jackson Advocate*, 856 So.2d 247, 251 (Miss. 2003), one question before the court below was whether a section called “Focus” was part of *The Clarion Ledger* for purposes of the legal notice statute. Reversing the lower court’s decision, the Supreme Court found that Miss. Code Ann. Section 13-3-31 defines a newspaper and provides the

criteria which must be satisfied in order to publish legal notices. *Id.* The *Gannett River States Publishing* court stated that Section 13-3-31 does not speak to the law for determining when a section of a newspaper is treated as a separate and independent newspaper, and therefore found that Section 13-3-31 was **not** the law in determining whether “Focus” is part of *The Clarion Ledger*. *Id.* Since *The DeSoto Appeal*’s qualification to publish legal notices has been evaluated to date solely on the criteria of Section 13-3-31, the finding of *Gannett River States Publishing* mandates that the case at bar be reversed.

With no Mississippi law directly on point to determine when or with what criteria a newspaper section may be determined a separate newspaper, our court turned to a decision by the Alabama Supreme Court in *Gulf Coast Media, Inc. v. The Mobile Press Register, Inc.*, 470 So.2d 1211(Ala.1985). In *Gulf Coast Media*, the Alabama court was faced with the question whether *Baldwin People*, as inserted into *The Mobile Register* in the Thursday editions, was qualified to publish legal notices. 470 So.2d at 1213. *The Mobile Register* argued that *Baldwin People* was a separate paper within the mandates of the Alabama statute. *Id.* *Baldwin People* was in the English language, and had a general circulation in Baldwin County, but the court determined the legal issue to be whether *Baldwin People* qualifies as a newspaper as it is presented, with or inside *The Mobile Register*. *Id.* The court held that *Baldwin People* lost its status as a newspaper as to the legal notice statute when it was inserted into and distributed with a parent newspaper. 470 So.2d at 1214. The court noted that *Baldwin People*, when inserted into, and distributed along with, another publication, was in fact an **integral part** of a newspaper and **not** a separate newspaper in and of itself. *Id.* The court further noted that customers could not subscribe to or purchase separately *Baldwin People*, and that *Baldwin People* had no circulation independent and apart from *The Mobile Register*. *Id.* The

court further noted that it recognized the distinction between an advertising supplement or a comic section, and a news publication covering a myriad of topics, such as *Baldwin People*. *Id.*

Applying the logic of *Gulf Coast Media*, the Mississippi court in *Gannett River States Publishing* found that “Focus” was an integral part of *The Clarion Ledger* as it was not sold or distributed independently, bore *The Clarion Ledger's* masthead. *Gannett River States Publishing Corp. v. Jackson Advocate*, 856 So.2d 247, 251(Miss.2003). The court additionally noted that although “Focus” was only inserted inside copies of *The Clarion Ledger* sold in Jackson, that Section 13-3-31 does not require that notice be contained in all copies, even if outside the relevant political subdivisions. *Id.*

Further, in *Gulf Coast Media*, the court found that since *Baldwin People* was not a separate paper, the principal editorial office of the newspaper was that of *The Mobile Register*, in Mobile, not in Baldwin County. *Gulf Coast Media Inc. v. Mobile Press Register*, 470 So.2d 1211,1214 (Ala.1985). The court further stated, “the term ‘principal’ as used in the statute clearly allows for only one main, primary, chief office where the major editorial functions occur for the entire newspaper.” *Id.*

Applying the applicable case law with the facts presented at trial in the case *sub judice*, *The DeSoto Appeal* states on its face that it is a special edition of *The Commercial Appeal* produced seven days a week for the residents of DeSoto County. R.E., pp. 34, 35;R., pp. 63, 64. It further states on its face that it is an **edition** of *The Commercial Appeal*. T. Ex. 4; R.E., pp.26, 34;R., pp.33, 63. *The Commercial Appeal* is inserted into every copy of *The DeSoto Appeal*, at no extra cost. R.E., pp. 29,32;R., pp. 38, 60. Chris Ratliff, General Manager of *The DeSoto Appeal*, testified at trial that *The DeSoto Appeal* section is approximately **10 % of the whole package**. R.E., p. 33; R., p.61. Mr.

Ratliff further stated that the work performed at the office of *the DeSoto Appeal* located on Goodman Road in Southaven, DeSoto County Mississippi, is **limited to the first section** labeled, *The DeSoto Appeal*, R.E., p.33; R., p.61. Mr. Ratliff also stated that the six page section labeled *The DeSoto Appeal* can not be obtained by itself - without obtaining *The Commercial Appeal* in the same package. R.E., pp. 36, 37; R., pp. 65, 66. *The DeSoto Appeal* has no independent circulation apart from *The Commercial Appeal* and no one can purchase a subscription to *The DeSoto Appeal* apart from a subscription to *The Commercial Appeal*. R.E., pp. 24, 25, 27, 28, 32 ;R, pp. 27, 32, 34, 35, 60. Bills such as rent and paychecks for *The DeSoto Appeal* are paid by Memphis Publishing from their office located at 495 Union Avenue, Memphis, TN. R.E., pp. 29, 30; R. pp. 38, 39.

The Mississippi Supreme Court has addressed at least one of the qualifying requirements of a newspaper in *Sunland Publishing Company Inc. v. City of Jackson*, 710 So.2d 879, 883 (Miss.1998). The Court, while reviewing a question of eligibility of local newspapers to publish legal notices under Miss. Code Section 13-3-31, held that, “. . . although a newspaper may be directed towards one particular area, locality or group within a relevant area, as long as that newspaper **publishes news, human interest, advice columns, sports, arts, etc., which are of interest to the general public, its distribution is not entirely limited to one geographic area, is available to anyone who wishes to subscribe, and there exists paid subscribers, the newspaper is one of general circulation.**” *Id.* (Emphasis added.) Conversely, we must presume that if these requirements are not met, the newspaper would not be considered of general circulation. *The Desoto Appeal* is an integral part of *The Commercial Appeal* and not a separate and distinct newspaper with its own circulation. The primary editorial office **and the principal public business office** of *The Commercial Appeal*, meaning the only one, main, primary, chief office, is on Union Avenue in Memphis, Tennessee.

In *Sykes v. State*, 757 So.2d 997,1000 (Miss. 2000), the court stated, “If a statute is not ambiguous, the court should apply the plain meaning of the statute.” Miss. Code Ann. § 13-3-31(1)(e) provides that a newspaper is published where its “known office of publication” is located, and, “Known office of publication” is then defined as “**the principal public business office** of the newspaper.” (Emphasis added.) The statute is unambiguous that a newspaper is published where **the** principal public business office is located. Based on the plain language of the statute, if *The DeSoto Appeal* is an integral part of *The Commercial Appeal*, and *The Commercial Appeal* has **the** principal public business office in Memphis, then *The DeSoto Appeal* does not qualify under Section 13-3-31, which requires notice be provided in locally published newspapers. The legal opinion of the Mississippi Attorney General dated December 15, 2000, that a newspaper may have a principal public business office in more than one location is legally inconsistent with the ruling in *Gannett River States Publishing Inc.* and should be retracted, certainly not followed. Failing to submit the question of whether *The DeSoto Appeal* is a newspaper separate and distinct from *The Commercial Appeal*, to complete and full legal review, has prevented the proper legal issues from surfacing for deliberation and thus has produced the improper and wrong result.


CONCLUSION

PH Publishing asserts that *The DeSoto Appeal* is not qualified under Miss. Code Ann. §13-3-31 to publish legal notices for DeSoto County Mississippi. *The DeSoto Appeal* is an integral part of *The Commercial Appeal*, and as such, is not a separate newspaper eligible for consideration under the statute. The principal public business office of *The Commercial Appeal*, parent newspaper to *The DeSoto Appeal*, is located in Memphis, Tennessee, therefore preventing lawful publication under Miss. Code Ann. 13-3-31.

PH Publishing appeals to this Court to review the correct legal issues required by this case and then reverse the decision of the Circuit Court of DeSoto County Mississippi and find, based on the record, that neither *The DeSoto Appeal* or its parent newspaper *The Commercial Appeal* are qualified to publish legal notices for DeSoto County Mississippi.

Respectfully Submitted,

PH PUBLISHING, THE DESOTO TIMES

By: 

**Mary Lynn Damaré, Esq.
Chatham Damare Pittman, PLLC
291 Losher Street
Hernando, MS 38632
Telephone (662)429-9871**



CERTIFICATE OF SERVICE

I, **MARY LYNN DAMARÉ**, Attorney for Appellant, do hereby certify that I have this day mailed, via Federal Express Overnight Mail to the Supreme Court of Mississippi, Carroll Gartin Justice Building, 450 High Street, Jackson, Mississippi 39201 and via First Class Mail, postage pre-paid to: Lucian Pera, Esq. and John Hooks, Esq., Brinkley Plaza, 80 Monroe Avenue, Suite 700 Memphis, TN 38103, Honorable Andrew C. Baker, P.O. Drawer 368, Charleston, MS 38921, Mr. Lanier Hurdle, Northcreek Incorporated, 8770 Northcreek Boulevard, Southaven, MS 38671 a true and correct copy along with electronic disk to the Court of the above and foregoing **APPELLANT'S BRIEF**.

SO CERTIFIED this the 11TH day of January, 2008.



Mary Lynn Damaré
Attorney for Appellant