

# 2007-CA-02106e

## IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2007-CA-02106

**STONE COUNTY PUBLISHING, INC.  
d/b/a The Times of Stone County  
and South Mississippi**

**APPELLANT**

**VERSUS**

**SC NO. 2007-TS-02106**

**BILL PROUT, DARRELL BERRY, DONNA  
ROUSE, MIKE CAIN, THOMAS E. HALL IN  
THEIR OFFICIAL CAPACITIES AS ALDERMEN  
FOR THE CITY OF WIGGINS, MISSISSIPPI**

**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 Justices of this Court may evaluate possible disqualifications or recusal.

1. City of Wiggins, Mississippi;
2. Bill Prout, Alderman, an Appellee;
3. Darrell Berry, Alderman, an Appellee;
4. Donna Rouse, Alderman, an Appellee;
5. Mike Cain, Alderman, an Appellee;
6. Thomas E. Hall, Alderman, an Appellee;
7. Jerry Alexander, Mayor;

8. Stone County Publishing, Inc., d/b/a The Times of Stone County and South Mississippi, the Appellant
9. Darren E. Gray, Esq., counsel for the Appellant;
10. Rebecca C. Taylor, Esq., counsel for the Appellee;
11. Honorable Lisa P. Dodson, Circuit Court Judge

Respectfully Submitted,

**BILL PROUT, DARRELL BERRY, DONNA  
ROUSE, MIKE CAIN, THOMAS E.  
HALL IN THEIR OFFICIAL  
CAPACITIES AS ALDERMEN FOR THE  
CITY OF WIGGINS, MISSISSIPPI**

BY: *Rebecca C. Taylor*  
**REBECCA CARTLEDGE TAYLOR**

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## **STATEMENT OF THE ISSUES**

COME NOW, Bill Prout, Darrell Berry, Donna Rouse, Mike Cain, and Thomas E. Hall, in their official capacities as Aldermen for the City of Wiggins, Mississippi (hereinafter the Aldermen), by and through their counsel, and file this their statement of the issues:

1.

The lower court was correct in finding the City of Wiggins could reach no determination as to whether or not Stone County Publishing, Inc., d/b/a The Times of Stone County and South Mississippi (hereinafter The Times) was a newspaper qualified to publish legal notices pursuant to Miss. Code Ann. §21-39-3 (1972) as set forth in Miss. Code Ann. §13-3-31 (1972).

2.

The lower court was correct in finding the City of Wiggins accepted the lowest and best bid, which was the only bid, and in dismissing the appeal.

3.

The City of Wiggins was a necessary party to this litigation.

## STATEMENT OF THE CASE

### *The Nature of the Case*

There are two newspapers in Stone County, Mississippi. R. E. 25. The *Stone County Enterprise* has been published for several years. At the time of oral argument, *The Times* had been in existence over two and one-half years. T 2.

*The Times* requested the City of Wiggins to solicit advertisements for the publication of its proceedings, ordinances and other notices pursuant to Miss. Code Ann. §21-39-3. The City of Wiggins informally requested both the *Stone County Enterprise* and *The Times* to provide circulation figures based upon Miss. Code Ann §13-3-31, which provides in pertinent part:

1. Whenever it is required by law that any summons, order, citations, 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...[t]he term "general circulation means numerically substantial, geographically widespread, demographically diversified circulation to bona fide paying subscribers...[t]he term "bona fide paying subscribers" means persons who have subscribed at a subscription rate which is not nominal, whether by mail subscriptions, purchase 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...

*Ibid.*

The *Stone County Enterprise* provided circulation figures to the City of Wiggins. *The Times*, for whatever reason, did not, although the Mayor and Board of Aldermen asked

informally and formally for circulation figures. R. E. 2, 9, 15

Out of an abundance of caution, bids were requested with the City of Wiggins reserving the right to reject bids should the City determine a newspaper is not qualified to publish legal notices or for any other appropriate reason. R. E. 21

When bids were received, the lowest and best bidder was the *Stone County Enterprise*. The City found *The Times* bid should not be considered since there was no information upon which the City could make a finding as to whether or not the newspaper was qualified to publish the City's proceedings pursuant to Miss. Code Ann. §13-3-31. R. E. 38

*The Times* appealed to the Circuit Court of Stone County, Mississippi, which Court found the City was not prohibited "from obtaining circulation figures and using those figures as a part of its decision as to whether a newspaper is qualified, in particular as being a newspaper of general circulation in the political subdivision." CP 220. However, the Circuit Court pointed out "the parties agree the *Enterprise* submitted the lowest bid. Contracts for publication 'shall be let to the lowest bidder among them...' according to Miss. Code Ann. §21-39-3." CP 220. Accordingly, the lower court found the appeal was without merit and affirmed the City of Wiggins award of the contract to the *Stone County Enterprise*. CP 221

The motion for rehearing filed by *The Times* was denied on October 29, 2007. CP 226. The instant appeal ensued. CP 228

*Statement of Relevant Facts*

On October 3, 2006, the minutes of the City of Wiggins reflect :

Next, Ted Cain appeared on behalf of *The Times*, requesting the City to take advertisements. Alderman Mike Cain advised she is recusing herself from participation or vote on this matter since she is related to Ted Cain. Mr. Cain was asked to provide circulation figures for *The Times* pursuant to state law. After a discussion, Mr. Cain announced he would provide those figures. The Mayor asked that it be noted in the minutes that he would not be responsible for anything done illegally by the City and that the matter was left up to the Board. The matter was tabled until the circulation from *The Times* is received.

R.E. 2

Thereafter, on October 17, 2006, the minutes of the City of Wiggins again address the issue:

Next, the Mayor advised that on October 4, 2006, Ted Cain, owner of *The Times of Stone County*, had advised him that he was not going to present the circulation figures of the newspaper to the Mayor and Board of Aldermen in written form. Accordingly, the Mayor at that time requested the City Attorney to request an official Attorney General's opinion addressing the issue. The City Attorney confirmed the request had been prepared and mailed on October 4, 2006.

R. E. 9

Subsequently, on November 7, 2006, the minutes of the City of Wiggins once more reflect the action taken on the issue:

Next, Ted Cain appeared before the Mayor and Board of Aldermen representing *The Times* to inquire as to whether a determination could be reached as to whether *The Times* is a newspaper qualified to publish legal notices pursuant to law. He was accompanied by Darren Gray, Esq. Bill Prout made a motion that *The Times* provide the City with sworn evidence of the circulation of *The Times* pursuant to the statutory requirement that a newspaper qualified to publish legal notices maintains a numerically substantial, geographically widespread, demographically diversified circulation to bond fide paying subscribers. Donna Rouse seconded the motion. After a discussion, the following vote was had:

Those voting yes:

Donna Rouse  
Bill Prout  
Thomas E. Hall



Those voting no: Darrell Berry

Those recused: Mike Cain

Those absent: None

The Mayor, having observed a quorum of the Board was present and a majority of the quorum had voted in favor of the motion, declared the motion to have carried.

R. E.15

In that same meeting, the City of Wiggins minutes reflect the following action having been taken:

Next, the City Attorney recommended the Board consider inviting the local newspapers to present proposals to the Mayor and Board of Aldermen for the publication of its proceedings, ordinances, resolutions and other notices required to be published, reserving the right to reject any and all bids should the board determine a newspaper is not qualified to publish legal notices pursuant to law or for any other appropriate reason. Thomas E. Hall made a motion that the clerk be authorized to invite such proposals as recommended. Bill Prout seconded the motion. After a discussion, the following vote was had:

Those voting yes: Darrell Berry  
Donna Rouse  
Bill Prout  
Thomas E. Hall

Those voting no: None

Those recused: Mike Cain

The Mayor having observed a quorum of the Board was present and that a majority of the quorum had voted in favor of the motion, declared the motion to have carried.

R. E.21

On December 5, 2006, the bids were opened. The minutes so reflect as follows:

Next, the City opened bids received pursuant to a notice given inviting the local newspapers to present proposals to the Mayor and Board of Aldermen for the publication of its proceedings, ordinances, resolutions and other notices required to be published, reserving the right to reject any and all bids should the board

determine a newspaper is not qualified to publish legal notices pursuant to law or for any other appropriate reason. Two bids were received from newspapers, the *Stone County Enterprise* and *The Times*. The bids were opened, although the opening thereof, pursuant to the notice, did not in any way affect the Mayor and Board's right to reject any and all bids should a newspaper not be qualified to publish legal notices pursuant to law or for any other appropriate reason. Thomas E. Hall made a motion the bids be taken under advisement. Bill Prout seconded the motion. After a discussion, the following vote was had:

|                   |                |
|-------------------|----------------|
| Those voting yes: | Darrell Berry  |
|                   | Donna Rouse    |
|                   | Bill Prout     |
|                   | Thomas E. Hall |

|                  |      |
|------------------|------|
| Those voting no: | None |
|------------------|------|

|               |      |
|---------------|------|
| Those absent: | None |
|---------------|------|

|                |           |
|----------------|-----------|
| Those recused: | Mike Cain |
|----------------|-----------|

Then, Mayor Jerry Alexander, having observed the vote and acknowledging that a quorum was present and that a majority of the quorum had voted in favor of the motion, declared the motion to have carried.

R.E. 25

On December 19, 2006, the City of Wiggins addressed the matter once more:

Next, the Mayor and Board of Aldermen considered the bids received pursuant to a notice given inviting the local newspapers to present proposals to the Mayor and Board of Aldermen for the publication of its proceedings, ordinances, resolutions and other notices required to be published, reserving the right to reject any and all bids should the board determine a newspaper is not qualified to publish legal notices pursuant to law or for any other appropriate reason. Two bids were received at the meeting held December 5, 2006, one from the *Stone County Enterprise* and one from *The Times of Stone County and South Mississippi*, at which time the bids were taken under advisement.

For this meeting, the City Clerk had prepared an example of an advertisement with a price comparison based on the two bids. The cost for publication in the *Stone County Enterprise* would be \$0.10. The cost for publication in *The Times of Stone County and South Mississippi* would be \$1.78 or more. The City Clerk recommended the *Stone County Enterprise* publish the proceedings, ordinances, resolutions and other notices required to be published for the City of Wiggins. It was noted by the City Attorney that the *Stone County Enterprise* has provided the

Mayor and Board of Aldermen with its circulation figures, which were 3,286 nearest the filing date of September 15, 2006. Additionally, although *The Times of Stone County and South Mississippi* has on at least two occasions, one informally and one by Board order, been requested to provide its general circulation to bona fide paying subscribers, no such figures have ever been produced. Bill Prout made a motion the *Stone County Enterprise* publish the proceedings, ordinances, resolutions and other notices required to be published for the City of Wiggins and that since *The Times of Stone County and South Mississippi* has not provided any circulation information whatsoever to the Mayor and Board of Aldermen for consideration, its bid not be considered since no determination can be made as to whether or not the newspaper complies with Section 13-3-31 or whether it is qualified to publish legal notices of the City of Wiggins. Donna Rouse seconded the motion. After a discussion, the following vote was had:

|                   |  |
|-------------------|--|
| Those voting yes: | Darrell Berry<br>Donna Rouse<br>Bill Prout<br>Thomas E. Hall |
|-------------------|--|

|                  |      |
|------------------|------|
| Those voting no: | None |
|------------------|------|

|               |      |
|---------------|------|
| Those absent: | None |
|---------------|------|

|                |           |
|----------------|-----------|
| Those recused: | Mike Cain |
|----------------|-----------|

Then, Mayor Jerry Alexander, having observed the vote and acknowledging that a quorum was present and that a majority of the quorum had voted in favor of the motion, declared the motion to have carried.

R. E. 38

On December 28, 2006, *The Times* filed a Bill of Exceptions to the Circuit Court of Stone County, naming only the five aldermen as defendants, not filing the Bill of Exceptions against the City of Wiggins, requesting "the Court review and reverse the decision of the City of Wiggins Board of Aldermen made on December 19, 2006, which set forth that only one qualified newspaper exists and render such judgment as the Board of Aldermen ought to have rendered and certify the same to the Board of Aldermen of the City of Wiggins, Mississippi." CP 11-18

The Circuit Court found the City of Wiggins was well within its rights to request

circulation figures from *The Times*; the minutes reflect the *Stone County Enterprise* had provided circulation figures. During oral argument, the Court inquired as to why the circulations figures were not given to City and never succeeded in getting an answer to her question. T 11-12

The Circuit Court further found the appeal moot and denied the relief requested. CP 221

## SUMMARY OF THE ARGUMENT

Miss. Code Ann. §21-39-3 provides, in pertinent part, “[I]n 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.” (emphasis added)

*The Times* requested the City to invite such competitive bids with the other newspaper in Stone County being the *Stone County Enterprise*. As shown by board order, *supra*, the City on two separate occasions, one informally and one formally, requested *The Times* to provide its circulation information as the *Stone County Enterprise* had at the City’s request. This request was made in order that the City might consider that as one factor in making a determination as to whether the *Times* is a newspaper qualified to publish legal notices pursuant to Miss. Code Ann. §21-39-3 as set forth in Miss. Code Ann. §13-3-31 which provides, in pertinent part:

- (1) Whenever it is required by law that any summons, order, citations, 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.....[t]he term “general circulation means numerically substantial, geographically widespread, demographically diversified circulation to bona fide paying subscribers.....[t]he term “bona fide paying subscribers” means persons who have subscribed at a subscription rate which is not nominal, whether by mail subscriptions, purchase 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 ...

§13-3-31 (1) (a) and (b)

The City requested the information but was refused. Accordingly, the City was unable to reach a determination as to whether *The Times* was a newspaper qualified to publish legal notices in the City of Wiggins and so found. The City accepted the only bid before it. R.E. 38

Further, the City of Wiggins was not made a party to the Bill of Exceptions, which is highly unusual at best. Miss. Code Ann. §11-51-75. Pursuant to law, the five individuals named as defendants are the five members of the Board of Aldermen of the City of Wiggins. Although they are named as defendants in their official capacities, the City of Wiggins would be the proper party. These five individuals, acting alone, can do nothing. Without the Mayor and without sitting in an official board meeting of the code charter municipality of the City of Wiggins, they are powerless.

## ARGUMENT

As this Court is aware, the standard of review is whether or not the decision of the City was supported by substantial evidence or was arbitrary and capricious. In *Mathis v. City of Greenville*, 724 So. 2d 1109 (Miss. Ct. App. 1998), the Court held:

The party challenging the governing body bears the burden of proof showing that the decision rendered is “arbitrary, capricious, discriminatory, or beyond the legal authority of the city board, or unsupported by substantial evidence.” *McWaters v. City of Biloxi*, 591 So. 2d 824, 827 (Miss. 1991) (quoting *Ridgewood Land Co. V. Moore*, 222 So. 2d 378, 379 (Miss. 1969); See also *Faircloth v. Lyles*, 591 So.2d 941, 943 (Miss. 1991); *Barnes v. Board of Sup'rs., Desoto County*, 53 So.2d 508, 510 (Miss. 1989). In addition, our standard of review prevents the substitution of our judgment in place of the council's wisdom and soundness used in reaching their decision. *Faircloth*, 592 So.2d at 943; *Curie v. Ryan*, 243 So.2d 48, 52 (Miss. 1970). The governing body is free to use “their own common knowledge and familiarity “ of the area in making its decision, in addition to the testimony and debate provided at the hearing. *Faircloth*, 592 So.2d at 943. So long as the governing body's decision is “fairly debatable,” we are without authority to supplant the municipality's legislative action. *McWaters*, 591 So.2d at 827.

*Id.* at 1112, ¶7. See also, e.g., *Sunland Publishing Company, Inc. v. City of Jackson*, 710 So.2d 879, 882 ¶9 (Miss. 1998).

Although the City of Wiggins could certainly not base its decision on the circulation of *The Times*, as pointed out by the lower court, nothing prohibited the City from requesting circulation figures and using those figures in order to reach a decision as to whether *The Times* was qualified as a newspaper of general circulation in the City of Wiggins. CP 220 The City made no determination *The Times* was not qualified. R.E.38 The City requested bids in hopes *The Times* would finally release its circulation figures and the matter could be properly concluded, but had to reserve the right to reject bids as previously stated. It was not to be.

The City was required by law to consider whether the newspaper which publishes its proceedings, ordinances, resolutions, notices of zoning hearings, notices of all public hearings concerning such matters as the public hearings for the budget for the City, the adoption and

setting of appropriate millage and all other important and necessary notices are qualified to publish legal notices. *See* Miss. Code Ann. §21-29-3. Such a newspaper must meet the requirements as set forth in Miss. Code Ann. §13-3-31, which includes a newspaper which “maintains a general circulation predominantly to bona fide paying subscribers...[t]he term ‘general circulation means numerically substantial, geographically widespread, demographically diversified circulation to bona fide paying subscribers’”. *Id.*

The circulation of the *Stone County Enterprise* was 3,286 nearest the filing date of September 15, 2006. R.E. 38. The City asked *The Times* to provide circulation figures at the same time it requested the figures from the *Enterprise*. For whatever reason, *The Times* categorically refused to provide those figures. Thus, the City could make no informed determination as to whether *The Times* met the requirements of the applicable statutes.

*The Times* relies upon the Court’s ruling in *Sunland Publishing Co., Inc. v. The City of Jackson*, 710 So.2d 879, 882 (Miss. 1998). In *Sunland*, the *Sun* newspaper did not submit information **broken down by zip code**. *Id.* at 282 ¶11. Failure to break down information by zip code would certainly not be enough to disqualify a newspaper. However, the City of Wiggins did not request the information by zip code. It merely requested circulation information. Clearly in *Sunland* the City of Jackson was afforded circulation information. The case is not on point.

*The Times* further argues the City of Wiggins “voted not to consider the bid for publication of legal notices submitted by The Times of Stone County and South Mississippi.” Appellant’s Brief at 11. This is incorrect. The City of Wiggins could not reach a decision as to whether or not the newspaper met the statute because of insufficient information. R. E. 38 *The Times* also brings up its “Motion for Mandamus,” in some apparent effort to convince this Court *The Times* forced some action. However, *The Times* fails to mention the suit was filed



after the City had already requested bids, reserving the right to reject bids which were not from appropriately qualified newspapers. Appellant's Brief at 11. This portion of the argument is specious since the Complaint for Mandamus should never have been filed, i.e., the action it sought had already been taken.

*The Times* refers repeatedly to Starann Lamier's self-serving affidavit which states the newspaper meets the requirements of Miss. Code Ann. §13-3-31. That affidavit, standing alone, is insufficient to actually prove the facts it purports to bolster. The City of Wiggins sought circulation information; that information was denied by *The Times*. The City could not reach a decision and so found.

Miss. Code Ann. §13-3-31(2) certainly provides a newspaper may not be disqualified because its circulation is less than that of another paper. However, the City was free to request circulation from *The Times*, did so request, and was told that information would not be released. There is no evidence anywhere in this record *The Times* has any circulation at all, other than the affidavit of Ms. Lamier, which was merely a recitation of the applicable law. The City of Wiggins is still asking the question the Circuit Judge asked of *The Times*: Why not just inform the City of the circulation? No response. T 11-12.

The City requested the information in order that the totality of the circumstances might be considered. There was no disqualification of *The Times*. The City did not determine *The Times* was not qualified. There was not sufficient information for the City to make such a determination. R. E. 38.

Since the City of Wiggins is not a party to this action, the relief sought by the *Times* requesting the Court "review and reverse the decision of the City of Wiggins Board of Aldermen made on December 19, 2006 which set forth that only one qualified newspaper exists" cannot be

granted since the City is not a party as required by Miss. Code Ann. §11-51-75 and since that is not at all the action taken by the City on December 19, 2006. R.E. 38.

Finally, the lower court found the City obtained bids, reserving consideration of qualifications of bidders. Bids were received and all parties to this action agree the *Stone County Enterprise* submitted the low bid. CP 220. Pursuant to §21-39-3, even if the City had considered *The Times* bid, *The Times* would not have been the successful bidder. As the lower court stated, “Whether or not the *Times* was qualified under the statute to publish legal notices, the contract was required to be awarded to the *Enterprise*, as was done by the Board.” CP 221.

### CONCLUSION

It appears this entire matter is much ado about nothing. The City requested *The Times* to provide circulation figures so those figures could be considered with other information. *The Times* refused to provide the figures. The City lacked sufficient information to determine whether or not *The Times* was qualified under the statute, although it had solicited bids in hopes *The Times* would retreat from its recalcitrant decision to withhold its figures. Even had *The Times* bid been considered, it would not have received the contract.

*The Times* had failed to name the proper party defendant, the City of Wiggins. The Aldermen, in their official capacities can do nothing without the Mayor and without sitting in an official board meeting. As individuals, even in their official capacities, they are prohibited from taking action outside the scope of a meeting of the Mayor and Board of Aldermen of the City of Wiggins. See, e.g. *Hinds Co. Bd. Of Sup'rs v. Common Cause of Mississippi*, 551 So.2d 107 (Miss. 1989); Miss. Code Ann. §21-3-19.

This matter should be finally dismissed with costs and attorney's fees assessed against *The Times*.

Respectfully Submitted,

**BILL PROUT, DARRELL BERRY,  
DONNA ROUSE, MIKE CAIN,  
THOMAS E. HALL IN THEIR  
OFFICIAL CAPACITIES AS  
ALDERMEN FOR THE CITY OF  
WIGGINS, MISSISSIPPI**

BY: Rebecca C. Taylor  
**REBECCA C. TAYLOR**, Counsel for  
Appellee

**CERTIFICATE**

I, Rebecca C. Taylor, of the law firm of Taylor and Taylor, PC, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above and Brief on Behalf of Appellant to the following:

**Darren E. Gray, Esq.**  
**P.O. Box 115**  
**Wiggins, MS 39577**

**Honorable Lisa P. Dodson**  
**Circuit Court Judge**  
**P.O. Box 1461**  
**Gulfport, MS 39502**

THIS, the 16 day of September, 2008.

  
\_\_\_\_\_  
**REBECCA C. TAYLOR**

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