IN THE SUPREME COURT OF MISSISSIPPI
CASE NO. 2010-TS-00117

JOHN FLETCHER **APPELLANTS**

VS.

DIAMONDHEAD INCORPORATORS **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following list of 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 disqualification or recusal.

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Respectfully submitted this the 22nd day of February, 2011.

John P. Scanlon

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The Appellants have raised the following issues:

1. Does the statute require that the Petition for Incorporation to be signed by two thirds of the registered voters as appearing on the Voter Roll, or by two thirds of the qualified electors residing in the area sought to be incorporated?
2. Did the newspaper publication give actual notice of the hearing, where the hearing was convened and continued?
3. Were the objectors denied the right to cross examine witnesses?
4. Did the special chancellor err by failing to hold a new trial, given the fact that a full transcript of the trial was available?

II. STATEMENT OF THE CASE

Nature of the Case

This matter involved a group of citizens seeking to organize themselves and their community into a new municipality. They retained experts in the field of urban and regional planning and counsel to assist them. They studied the matters involved and concluded to seek the approval of the residents of the area to create a new city. They drafted a widely-publicized petition in accordance with the provisions of Title 21, Chapter 1 of the Mississippi Code of 1972. The Petitioners for Incorporation ("Petitioners" or "Incorporators") then submitted the petition to the residents of the area for their consideration. More than the required two thirds of the qualified electors residing in the area signed the petitions requesting the creation of a new city.

Course of the Proceedings and Disposition in the Court Below

The matter was noticed in the manner required by law. All municipalities within three miles of the area were served with summons, in accordance with the controlling statute. Notice was posted in more than three public places. Publication was made in precisely the time and manner required by law.

At trial, the Objectors to the incorporation chose to represent themselves and were granted considerable latitude in doing so. The Petitioners put on proof that the incorporation was required by the public convenience and necessity and was reasonable. At the end of the day, the Special Chancellor took the matter under advisement. Unfortunately, that Special Chancellor died before a decision was rendered.

On the death of the Special Chancellor, this Court appointed a new Special Chancellor with extensive experience at all levels of the judiciary. He had available to him a transcript of the proceedings that had already been completed. Though he denied the Objectors' request to hold a new trial, he permitted the Objectors an opportunity to submit additional written materials. After review, he granted the incorporation petition, creating the new City of Diamondhead, Mississippi.

The Objectors now appeal from that decision, creating the new city of Diamondhead, sought by more than two thirds of the qualified electors residing in this area.

Statement of Facts Relevant to the Issues Presented for Review

At the trial of this matter, the petitioners offered evidence which established the proposed incorporation was both reasonable and required by the public convenience and necessity. The facts relied on are fully set out in the Special Chancellor's Findings of

Fact and Conclusion of Law. With the exception of the legal issues related to whether two thirds of the qualified electors residing in the area signed the petition for incorporation the facts found by the Chancellor are not contested on this appeal.

ISSUE 1

Does the statute require that the Petition for Incorporation to be signed by two thirds of the registered voters as listed on the Voter Roll, or by two thirds of the qualified electors residing in the area sought to be incorporated?

The issue as stated by the Objectors is: "[M]ust a proposed municipality garner two thirds of the signatures of those qualified electors on the Voter Roll at the time of filing, or may it use a self- calculated number?" Objectors erroneously conclude that the voter roll is conclusive. They are dead wrong.

The parties agree that the Petitioners had the burden of establishing the two thirds jurisdictional mandate. The Brief of Appellants asserts "Two-thirds means two-thirds." The Incorporators agree. The disagreement relates to two thirds of what number. The Appellants' claims contain numerous factual and legal errors.

The Mississippi Legislature has by statutory enactment prescribed a means by which persons may obtain annexation to municipalities adjacent to the areas in which they live. The statute requires that the Incorporation Petition "shall be signed by at least two-thirds of the qualified electors residing in the territory proposed to be incorporated . . . ." Miss. Code Ann. § 21-1-13 (Rev. 2007). In discussing similar municipal inclusion statutes (sections 21-1-45 and -47, under which residents outside a municipality may become annexed into that municipality), this Court set forth some of the policy reasons related to the two-thirds requirement:

In pertinent part Section 21-1-45 provides for the filing of a complaint

> which said petition [complaint] shall be signed by at least two-thirds (2/3) of the **qualified electors residing in the territory** proposed to be included in . . . such municipality.
>
> The matter of inclusion of one's home and surroundings into an adjacent municipality is of considerable importance. The municipality into whose corporate limits the petitioners seek to come, as well as other adjacent or nearby municipalities, have important and often conflicting interests at stake. **Our responsibility is to see that the mechanism the legislature has afforded be a viable one, fairly administered, not entailed by hypertechnical procedural niceties.** *See Enlargement of the Boundaries of Yazoo City v. City of Yazoo City*, 452 So. 2d 837, 843 (Miss. 1984); *see also Dotson v. City of Indianola*, 551 F.Supp. 515, 519 (N.D. Miss. 1982).

In re City of Ridgeland, 494 So. 2d 348, 349 (Miss. 1986) (quoting Miss. Code Ann. §§ 21-1-45, -47) (emphasis added).

The arguments of Appellants would effectively abrogate the provisions of the statute granting citizens the right to seek incorporation. The statute granting a super majority of the residents of an unincorporated area the right to seek self-determination through the incorporation of a municipality is Section 21-1-13 of the Mississippi Code of 1972. That section, "Preparing and filing of petition [to incorporate]" states:

> Whenever the inhabitants of any unincorporated territory shall desire to incorporate such territory as a city or town, they shall prepare a petition and file same in the chancery court of the county in which such territory is located or, if the territory is located in more than one county, the chancery court of either county. Said petition shall meet the following requirements:
>
> (1) it shall describe accurately the metes and bounds of the territory proposed to be incorporated and there shall be attached to such petition a map or plat of the boundaries of the proposed municipality;
>
> (2) it shall set forth the corporate name which is desired;
>
> **(3) it shall be signed by at least two-thirds of the qualified electors residing in the territory proposed to be incorporated;**
>
> (4) it shall set forth the number of inhabitants of such territory;

(5) it shall set forth the assessed valuation of the real property in such territory according to the latest available assessments thereof;

(6) it shall state the aims of the petitioners in seeking said incorporation, and shall set forth the municipal and public services which said municipal corporation proposes to render and the reasons why the public convenience and necessity would be served by the creation of such municipal corporation;

(7) it shall contain a statement of the names of the persons the petitioners desire appointed as officers of such municipality; and

(8) it shall be sworn to by one or more of the petitioners.

Miss. Code Ann. 21-1-13 (emphasis added). Objectors ignore the requirement that the qualified electors be "residing in the territory proposed to be incorporated."

The record in this case reflects that the petition in this matter met each of the statutory requirements. The only one of these requirements which the Appellants contest on appeal is the requirement for two thirds of the signatures of the qualified electors residing the territory sought to be incorporated. The record clearly demonstrates Incorporators' Petition met this statutory requirement, despite the Objectors' erroneous arguments. The Incorporators seek to deal with the erroneous allegations of the Objectors, one by one, as follows:

a. The incorrect assertion that the two thirds requirement is measured against the voter roll.

To support the erroneous contention that the two thirds requirement is measured against the voter roll, the Appellants cite *In re City of Ridgeland*, 494 So. 2d 348, 352 (Miss. 1986). That case correctly sets forth how the two-thirds requirement is to be determined. The Court stated:

> for purposes of this action, the question of whether the two-thirds requirement of Section 21-1-45 has been **met must be determined by an ascertainment of the number of persons living in the area to be**

> **annexed** who on October 1, 1984, were registered voters in Madison County, Mississippi, and then determining whether two-thirds of that number have signed the complaint.

Id. (emphasis added). Thus, the number is not determined by the voter roll, but rather the number of persons living in the proposed incorporation area who were registered voters. This is exactly consistent with the proof offered in support of the incorporation in this matter. It is interesting to note that neither the term "voter roll," nor its equivalent is mentioned in ***Ridgeland***. One simply cannot ascertain through a voter roll whether the listed persons are living in the area. The ***Ridgeland*** case simply does not support the statement in the Appellants' brief: "However, the ***Ridgeland*** case is clear that the Voter Roll at the time the Petition is filed controls the two-thirds number." (Brief of Appellant, 9) (purportedly citing 494 So.2d at 352).[1] The number should instead be calculated from the number of persons living in the area who are registered voters.

It should be noted that the terms "registered voter" and "qualified elector" are not synonymous. All qualified electors are registered voters; the converse is not true. Objectors rely on *City of Pascagoula v. Scheffler*, 487 So. 2d 196, 200 (Miss. 1986) for the proposition that "the two-thirds number of qualified electors must be calculated from this number [the voter roll], for as the Court has said in the past, voter rolls and poll books 'alone constitute the most viable record by which to determine the number of qualified electors in a given area.'" (Brief of Appellants, 8.) This Court decided this issue long ago. The Court said:

> The circuit court erred in affirming the decision of the board of supervisors, which was clearly wrong, in holding that it would regard the

[1] In ***Ridgeland***, the issue was whether persons who registered to vote on the Friday before the filing of the petition were qualified electors. The issue involved the question of whether the 30 day requirement for registration before an election controlled. There was simply not an issue as to whether the newly registered voters resided in the area sought to be included.

> registration book of the county as conclusive evidence of the qualified electors of the county. So far from this being true, **the registration book is not even prima facie evidence of the number of qualified electors.** It is evidence of nothing, except of the list of persons registered, and who have complied with that requisite to the right to vote. It does not confer the right to vote. It is that without which one cannot be a qualified elector,-an essential prerequisite, and yet not conferring the right. There cannot be any qualified elector not registered, but there may be thousands registered, and not qualified electors. It may be determined from the registration book that the number of qualified electors does not exceed those shown by it. It may be seen by an inspection of it that certain persons are not qualified electors, because not registered, but **it cannot be determined from the registration book that there is a single qualified elector in the county.** The right to register, and being registered, and the right to vote, are distinct and different things. One may be registered, and not be entitled to vote.

Ferguson v. Monroe County Sup'rs, 14 So. 81, 83 (Miss. 1893) (emphasis added). *Scheffler, supra* did not change this rule, contrary to the Objectors' arguments. The language relied on by the Objectors did not directly deal with the question of whether two-thirds of the qualified electors had signed. Instead the language relied on by the Objectors related to the issue of whether it was proper for the Gautier incorporators to aid the commissioners of election in removing the names of non-resident or deceased electors from the voting roll. 487 So. 2d at 200. This Court found no fault with the removal of such non-resident or deceased electors.[2]

Since one cannot be a qualified elector unless that person is registered, the voting rolls clearly establish the maximum number of qualified electors in an area. Clearly it is the most viable record to determine the number and identity of qualified electors in an area. Unless a person is listed on the voter rolls they are not a qualified elector. "It is that without which one cannot be a qualified elector." *Ferguson v. Monroe County Sup'rs*, 14

[2] In *City of Pascagoula v. Scheffler*, 487 So. 2d 196, 200 (Miss. 1986), the Court went on to sustain the finding of the Chancellor that the proof put on by the incorporators met the statutory requirements.

So. 81, 83 (Miss. 1893). As this Court stated, "the registration book is not even prima facie evidence of the number of qualified electors." *Id.*

The legislature of this state has by statutory enactment prescribed a means by which persons may obtain annexation to municipalities adjacent to the areas in which they live. Miss. Code Ann. §§ 21-1-45 and -47 (1972). In pertinent part Section 21-1-45 provides for the filing of a complaint which said petition [complaint] shall be signed by at least two-thirds (2/3) of the qualified electors **residing in the territory** proposed to be included in . . . such municipality. Miss. Code Ann. §§ 21-1-45 (emphasis added).

We note that the arguments of the Objectors appeal would ignore this fundamental requirement. This was not the case at trial. Exhibit 22 was prepared by Appellant Carolyn Sapio. It listed a number of people who have died or moved away from Diamondhead. (Ex. 22.) Under the Objectors' theory on appeal, any of these people who were listed on the voter roll as of July 22, 2008, the date of filing, should be counted in determining the two thirds requirement, in an effort to inflate the number of qualified electors. They make this argument only because the names appear on the voter roll. This makes no sense. Diamondhead now respectfully submits that a person who was dead on the date of filing does not meet the statutory requirement of "residing in the territory proposed" to be incorporated.

b. The incorrect assertion that the Incorporators never presented proof as to the number of signatures they had

The Objectors assert that the Incorporators never detailed proof of the number of signatures they had. This assertion is directly refuted by the record in this case. The record reflects that the Incorporators offered substantial proof on this jurisdictional element.

The Incorporators organized their proof regarding the issue of whether two thirds of the qualified electors had signed the petition to meet the concerns expressed by the Court in *Bridges v. City of Biloxi*, 250 Miss. 717, 168 So. 2d 40 (Miss. 1964) (a pre-rule case later superseded by rule in *Byram*). In *Bridges*, this Court was addressing the "essential question for determination" of whether there was competent evidence to support the Chancellor's finding that two thirds of the qualified electors had not signed the petition. 250 Miss. at 721-22, 168 So. 2d at 41. In dealing with the contention that the introduction en masse of the poll books of the two precincts involved was the best evidence as to who the qualified electors in the incorporation area were, the Court said:

> The introduction en masse of voluminous records, certificates, receipts, etc. would amount to no proof at all in the absence of specific reference to the volume and page or receipt by specific designation, as it is not the duty of the trial court or this court to search though volumes of such papers seeking that which should have been ascertained as a necessary adjunct to the filing of pleadings and the normal expedition of the trial of a cause. However, the respondent introduced a witness, an attorney familiar with the records of Harrison County, who had studied the official records thereof appropriate to the subject matter, and from these records, which were introduced into evidence and were available to counsel opposite, as was the witness for cross-examination, testified from his personal observation and study of these records, which included a comparison of the names of the original petitioners with the names of the qualified electors residing in the area as reflected by the official records, and from such comparison and study there were only 449 qualified electors residing within the area sought to be incorporated who had signed the petition, whereas there were 888 qualified electors residing in the area, thus signifying that less than two-thirds of the 888.
>
> . . .
>
> 'An elemental requirement in the production of evidence is that it shall be intelligible to the triers of the facts and to the person being tried; and the further requirement is that it shall be definite and that the right of cross-examination shall be preserved. Moreover, the production must be in such a state of preparation as to expedite the trial and prevent trespasses upon the time of courts and juries. It follows, therefore, that, **when intricate accounts and voluminous business records are to be inquired**

into and the facts upon particular issues said to be disclosed by said records are to be adduced in proof, it must be done by way of the previous preparation, by a competent person, of definite and pertinent schedules, tabulations, or other suitable and practical compilations, and the person who has made the compilations must be introduced as a witness, so that the records in evidence may be explained and the pertinent parts thereof definitely and cogently pointed out, and so that cross-examination may be permitted to search into the soundness of the compilations or schedules and of the conclusions sought to be established. In the absence of a reasonable compliance with the foregoing requirements, a pile of books of account will prove no more in law than, as a practical matter, they have disclosed in a concrete and definite form to the minds of those who are to determine the issue or issues, and this, save in rare cases, could reasonably be, in actual and dependable substance, but little more than nothing.' See also *Chas. Weaver & Co., Inc. v. Phares*, 185 Miss. 244, 188 So. 12, and *Gulf M. & O. R. Co. v. Luter Motor Express*, 190 Miss. 523, 1 So.2d 231. The requirements essential to the introduction of this evidence as outlined by the above cases were met by the respondent. The testimony of the attorney who made the study of the official records of Harrison County, Mississippi, required by statute to be kept by the public officials, was competent.[3] It follows that the lower court had ample evidence upon which to base its decree.

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[3] See the testimony of Chris Watson, an expert witness in urban and regional planning (T. 45-130):

Q As a result of your examination of the petitions of the voter rolls and the supporting data with regard to persons who were no longer residents, for example, houses that were no longer there, did you reach any conclusion as to whether two-thirds of the qualified electors had signed?

A Yes, sir, I did.

Q Exhibit P-012, before you, is a tabulation of the number of qualified electors residing in Diamondhead as of the time the petition was filed. Have you had an opportunity to review that?

A Yes, sir, I have.

Q Can you tell me how that document and the numbers contained, therein, compare to your examination of the voter rolls, the data available, and the petitions?

A These numbers represent the result of our two-day workshop, those two days prior to filing the petition. We met with the incorporation group. We went over their methods and their determinations in terms of how they went about gathering data, how they managed the database. I, personally, took their working database and analyzed it to come up with the resulting numbers that wound up on P-012.

Q Based upon your experience in the field of Urban and Regional Planning, were sound principles applied to the determination of the number of qualified electors residing within the territory sought to be incorporated?

A Absolutely.

Q You say that those numbers are reflected on P-012?

A That is correct.

250 Miss. at 722-24, 168 So.2d at 41-42 (emphasis added). In this case, the Incorporators took precisely the course approved by this Court. First, the Incorporators introduced Exhibit 19, a certified copy of the voter rolls for the two precincts within which the proposed incorporation area lay. The Incorporators also offered the testimony of Audrey Ramirez. (T. 28-40.) Her testimony reflects that based on her examination of the voter rolls of Hancock County, based on her examination of each of the petitions which were before the court below, based her knowledge gained during this process with regard to what a qualified elector is, and based upon the request for removal on the day of trial, Ms. Ramirez had reached the conclusion that more than two thirds of the qualified electors residing in the territory signed the petition. (T. 39-40.)

In reaching the conclusions regarding the number of required signatures, she testified that the Incorporators did the following:

- Kept in touch with the circuit clerk to make sure that they added any newly registered voters to their database. (T. 30.)
- Determined which of the registered voters on the rolls lived outside the area sought to be incorporated (the geography of the precincts differs from the geography of the proposed incorporation area). (T. 32.)
- Reviewed obituary notices in the newspaper to determine who died and if the deceased had signed the petition. (T. 35.)
- Checked the United States Social Security Index to determine if persons had died for which they found no obituary. (T. 36.)
- Checked the tax records to identify property transfers by registered voters. (T. 36.)
- Used the Property Owner's Association membership list to aid in determining who was actually living in the area. (T. 37.)
- Utilized personal knowledge regarding persons who had moved or died. (T. 37.)

- In cases where voter rolls showed several families registered at the same address, conducted personal investigations to determine who was actually residing at an address. (T. 37.)

- Eliminated any signatures not personally signed by the voter. (T. 37.)

- Additionally removed the signature of any person making such a request and did not count it as a signature. (T. 34.)

- They recorded all the information in a database with regard to each voter. (T. 37-38; Exhibit 18).

In addition to the testimony of Mrs. Ramirez, the Incorporators offered the testimony of Chris Watson. Mr. Watson testified as to the geography of both the proposed incorporation area and the voter rolls maintained by Hancock County. He testified that all of the incorporation area is contained within two precincts – Diamondhead East and Diamondhead West. However, the two precincts are larger than the area sought to be incorporated. (T. 75). Because of the differing geography it was necessary to determine which registered voters on the roll lived within the area sought to be incorporated. He made a physical inspection of the area and came up with a list of the registered voters in the area sought to be incorporated.

To support his testimony, he reviewed the petitions, the voter rolls, and the database compiled by the Incorporators, and attended a two day conference reviewing the methods utilized by the group of incorporators and the data utilized by the group for input into the database. He testified that the methodology and documents relied on were consistent with sound principles of urban and regional planning. Based on this data, he compiled Exhibit 12, which is precisely the type tabulation required in *Bridges v. City of Biloxi, supra.* That tabulation reflects the total number of voters on the roll for the two precincts according to the initial list provided by circuit clerk, newly registered voters

during the 11 month period the petition drive was ongoing, and the names of voters who were removed by the election commission during this time (a total of 6,571 as set out on Exhibit 12). A comparison of Exhibit 18 (the database printout) to the voter roll as of the date of filing (Exhibit 19) is helpful. Exhibit 18 contains the names of all the registered voters within Diamondhead East and Diamondhead West precincts who lived in the proposed incorporation area.[4] Exhibit 18 (Petition Signature Database) shows precisely which persons were counted as qualified electors as of the date of signing of the petition. Before adjustment for geographic differences, there were 5,920 persons registered to vote in the two precincts.[5] (R.E. 3, page 396 of exhibit 19.) The printout identifies each person the Incorporators claimed not to reside in the territory sought to be incorporated on the date of filing. It shows whether the person was on the voter roll. Luther Magers was one example excluded from the registered voters list (Exhibit 19) based on an obituary in the Sun Herald dated 4/3/08. (See page 198 of Exhibit 18.) It also confirms that he had not signed the petition. Another example is Germaome Bellina.[6] This person

[4] It does not include the names of 35 voters who lived in one of the precincts but outside the proposed incorporation area. The argument of Objectors that the two-thirds number be based on the voter roll. There is no voter roll in existence for the precise territory of the incorporation area.

[5] The database contains 6,571 names. This is because the election commission purged many of the names listed on the voter rolls initially provided to the Incorporators. Additionally, new voters registered. If a person was registered to vote at any time during the pendency of the petition drive, the name remains on the database list.

[6] Of the 37 people listed on Exhibit 22 as dead, only 10 signed the petition. (Those are Bobby Armstrong, John N. Stewart, Marie Bauer (shown as removing her signature in Ex 24 and dead on Ex. 22) Paul Moody Robert Baker, Harry Geauthreaux, William Swink, John Billings, Earl Brown, and Stephen L. Guice.) Assuming the accuracy of this exhibit, that would reduce the number of required signatures by 6 2/3's voters. This leaves the number of signatures well within the cushion of 422 extra signatures on the petitions. In addition 13 people requested that their names be removed from the petition on the day of the hearing. Of these, two were not counted as having signed because they had already requested the removal their names. (Those are Patricia A. Terry, page 234 of Exhibit 18 and Margaret J. Williamson, page 243.) This would have reduced the signatures counted by 11. Based on the evidence presented by the Incorporators, it is clear that the two-thirds requirement is met. The recalculation would be as follows:

Qualified Electors shown on Exhibit 12	4,645

is not on either the voter roll or the database. This is because she was not registered to vote at any time during the process. The documents in evidence allow one to recreate the numbers contained on Exhibit 12. The tabulation was done to comply with the dictates of *Bridges v. City of Biloxi, supra.* [7]

c. The incorrect assertion that the Petition should contain the number of qualified electors residing in the area.

Objectors find fault that the petition did not contain the number of "qualified electors on the voter roll" on the day the petition was filed. Such a requirement is not found in the statute. In order to comply with such a requirement, only two options would be available to citizens seeking self-determination by petition to incorporate:

1. The petition would have to be prepared and all signatures obtained in a single day. If anyone registered to vote during that day the process would have to be started over.
2. The objectors would have to exercise psychic power to predict the number of registered voters on the day when the petition would be filed, as petition drives of this nature take considerable time.

As a practical matter, gathering of signatures on a petition to incorporate is a lengthy and complex task. The testimony in this case shows that the process of obtaining and

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Less 10 dead shown on Exhibit 22	4,635
2/3's of reduced number	3,090
Number of signatures reduced by 10 who signed then died	3,510
Number of Surplus Signatures	420

Based on acceptance of the Objectors evidence it is clear that the petition contained hundreds of signatures more than were needed.

[7] Although no objection was made, Appellees respectfully suggest that Exhibit 12 constituted a summary of voluminous writings which is now admissible in evidence pursuant to Rule 1006 of the Mississippi Rules of Evidence.

verifying signatures took around eleven months.[8] Over that period of time, the evidence is undisputed that the voter rolls were constantly changing.

d. The incorrect assertion that the Appellees in this case did not make any effort to clean up the Voter Roll until after the Petition had been filed – an action clearly in violation of the Ridgeland case.

There is no basis for this allegation. The undisputed testimony of Audrey Rameriz reflects that as the Incorporators found persons who were registered but no longer lived in the area, they contacted the County. She testified:

> A. . . . We purchased the voter roll from Hancock County for our two particular voting districts. Of those, as we went through and the petitioners started contacting the individual voters, we found several of those that we are either moved, or some of them were deceased now. There were a few other reasons that we felt some were no longer qualified voters.
>
> Q. Did you make any contact with the County to bring these matters to their attention?
>
> A. We did. We, periodically, came and talked with the Clerk's office. We got updates as to who might have notified them that they were no longer living in the area.

(T. 30.) This issue is without merit.

ISSUE 2

Did the newspaper publication give actual notice of the hearing, where the hearing was convened and continued?

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[8] Q How long did your work, with regard to verification of signatures, take? Over how many months did you do that work?
A It was 11 months.
Q Eleven months. And over that 11 month period, did the voter rolls change?
A Constantly.
Q Did you, over that period, update, periodically, the voter rolls you were working?
A Yes, we did.
(Testimony of Audrey Ramirez, T. 31.)

The parties are in agreement that state law requires notice to persons affected by the proposed incorporation by publication. It is not disputed that the notice requirements must be strictly adhered to. The Appellants correctly cite *Wiley v. Extension of Boundaries of Iuka,* 441 So. 2d 116 (Miss. 1983) and *Myrick v. Incorporation of a Designated Area into a Municipal Corp. to be Named Stringer*, 336 So. 2d 209 (Miss. (1976) to support this statement.

In this case there is no question that proper notice was given. Originally, the Appellants had argued that there was no proof of publication in the record in this case. However, this Court permitted supplementation of the record to allow the truth related to the issue to be shown.[9] The record reflects that all posting, summons and publication were done in accordance with the controlling statutes. The record shows that notice of

[9] In their initial Brief of Appellant to this Court, the Objectors initially argued that "the hearing was fatally flawed for lack of newspaper publication," based on the lack of the proof of publication in the appellate record, although the original trial record did contain the proof of publication and the appellate record did contain many references to the fact that the proof of publication had been filed with the trial court. In an attempt to correct the appellate record, the Diamondhead Incorporators filed their Motion to Correct and Supplement the Record on July 20, 2010, asking this Court to allow the record to be supplemented to reflect what truly occurred in the trial court, requesting the record be corrected to include the proof of publication filed in the proceedings. The Objectors filed their response in opposition on July 23, 2010, arguing that the Incorporators' Motion was untimely under Rule 10(b)(5). This Court initially ruled in favor of the Objectors, but did so before seeing the Incorporators' Reply to the Objectors' Response. The Incorporators filed their Motion to Reconsider, applying for a suspension of the rule generally not allowing motions to reconsider, in this extraordinary case, and for good cause shown to have the record reflect the truth. Miss. R. App. P. 27(h) (2010). This Court granted the Incorporators' request to suspend the rules, allowing the Motion to Reconsider, in which the Incorporators argued that the Objectors were actually in breach of Rule 10(b)(5), notwithstanding their "strict compliance" arguments against the Incorporators. This Court granted the Motion to Reconsider, remanding the matter back to the trial court for a hearing to determine if the proof of publication was in fact in the original trial record and to determine why Rule 10(b)(5) was not followed. After an evidentiary hearing, the trial court entered an order directing that the proof of publication was in the file at the time of the trial and was properly filed in accordance with the docket sheet. Following that remand hearing, this Court entered an order directing all counsel for the Objectors to submit individual briefs explaining why Rule 10(b)(5) was not followed, and why they should not be sanctioned for failing to follow Rule 10(b)(5). After reviewing the five briefs, this Court ordered that the violations of Rule 10(b)(5) by four of the Objectors' attorneys in the context of this case were minor and required no further action, and further ordered, that the other Objectors' attorney's violation the Rule by failure to deliver timely the transcript to counsel opposite, and failure to append to the record a certificate as required by the rule, required sanctions.

the hearing was published in the Sea Coast Echo on August 13, 20, and 27, and on Sept. 3, 2008. The hearing was set for September 15, 2008.

The Objectors argue that "very precise notice" was not provided by publication as required by law, because, as their argument goes, trial was ultimately held on a day other than the initial date of the hearing contained in the notice. This argument fails to acknowledge what is clear from the record – that the hearing noticed and set for September 15, 2008, was convened on that date and continued until November 3, 2008 (and later continued once more by the newly-appointed special chancellor to January 9, 2009). (R. 0313). Prior to the Nov. 3, 2008, date and following the recusal of all local chancellors, this Court appointed Hon. Kennie Middleton as special chancellor to hear the matter. On October 31, 2008, Judge Middleton entered an order continuing the hearing until January 9, 2009. (R. 03813). The findings of fact and conclusions of law set out the facts concerning notice as follows:

> The hearing set for September 15, 2008, was convened by Judge Steckler. The matter was continued until November 3, 2008. Prior to that hearing, the Supreme Court appointed Judge Kennie Middleton as a special chancellor. He had a conflict on the date originally set for hearing and continued the matter to January 9, 2009. This Order was entered on October 31, 2008.

(R. 03813). The Objectors argued that the proof of publication advertised the wrong date. They stated Petitioners acknowledged that the hearing was January 9, 2009, and they did not comply with requirements of Title 21 of the Mississippi Code. The Objectors further argued that because the proof of publication from the Sea Coast Echo advertised a hearing date of September15, 2008, the same date on the notices posted in the Diamondhead Territory, the advertised hearing date was wrong. (R. 03818).

The Objectors stated:

> [P]etitioner acknowledges that the hearing was January 9, 2009, and they did not comply with Code 21 requirements. Their proof of publication from Seacoast Echo states that the hearing date will be 15th September 2008 this is the same date on the notices posted in the Diamondhead Territory. (sic)

(R. 03818.) There was no question or dispute that posting, publication and summons were issued notifying the parties of the hearing set for September 15, 2008. The Objectors' contention was then and still is that the Incorporators had to re-post, re-publish and re-summons to the actual trial date, notwithstanding the continuances by court order. As the court below noted, process was complete at the time the matter was tried. No new posting, publication or process was required.

In the recent *Byram* case, this Court restated well established standards for review of a Chancellor's findings with regard to incorporation matters:

> This Court reviews the chancellor's findings for manifest error as to whether a petition for incorporation is legally sufficient. *City of Pascagoula v. Scheffler,* 487 So. 2d 196, 199 (Miss. 1986). In explaining the standard of review, this Court has stated that it "cannot overturn the decree of a chancellor unless it finds with reasonable certainty that the decree is manifestly wrong on a question of law or interpretation of facts pertaining to legal questions." *Id.* at 200. As to questions of law, this Court applies a de novo review. *In re Extension & Enlarging of the Boundaries of Laurel,* 863 So. 2d 968, 971 (Miss. 2004).

City of Jackson v. Byram Incorporators, 16 So. 3d 662, 670-71 (Miss. 2009)[10].

In this case, the Objectors are asking this Court find that Judge Bridges' findings that proper publication was had are manifestly wrong as a matter of law. In fact his conclusion is fully supported by the case law in this state. In this court in *Sperry Rand*

[10] Though the issue is not critical to this case, the Objectors misstate one of the key *Byram* holdings on page 7 of their Brief, which in actuality is that a petition for incorporation appearing to be deficient under the two-thirds requirement can in fact be amended when the deficiency is a result of clerical error. 16 So. 3d at 673.

Corp. v. City of Jackson 245 So.2d 574 (Miss. 1971) considered the impact of notice in annexation case. The Court said:

> To fulfill the requirements of due process, the statute provides for publication of notice to all owners of property within the area proposed to be annexed. The statutory notice having been given, appellants and others within that classification became 'parties to the proceedings' in the chancery court. This status continued through final decree, which became conclusive and binding upon appellants and will so remain until and unless reversed or modified on appeal.

Id. at 575. Once notice was properly given for hearing on September 15, 2008, the parties to these proceeding became fixed. This status continued through the final decree. In fact, it is the status of a party that gives those who did not participate in the hearing the right to appeal this matter, e.g. John Fletcher.

The Incorporators respectfully submit that the **undisputed** truth should prevail over the procedural nicety. The Incorporators ask that the reason behind the rule be kept firmly in mind. Was the notice given? The answer is yes. This issue is without merit.

ISSUE 3

Were the objectors denied the right to cross examine witnesses?

The Objectors finally argue that they were denied the right to cross examine witnesses, resulting in reversible error. At the outset it is important to note that the Objectors chose to proceed pro se in this matter. It is undisputed that they had every right to do so.[11] Regardless of the wisdom of doing so, Objectors had every right to proceed

[11] Rather than heed the advice of the Chancellors hearing this matter, objectors claim the Court was prejudiced against them. They assert that his prejudice was illustrated by "The use of the phrase 'A person who represents himself has a fool for a client.'" (R. 3816). He only did so in urging them to utilize trained counsel. It appears that they thought this to be some new insult conjured up by Judge Bridges. We note that this sentiment has been expressed a number of times by the United States Supreme Court "It has often been said that "one who is his own lawyer has a fool for a client." *Faretta v. California,* 422 U.S. 806, 852, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (Blackmun, J., dissenting). *Kay v. Ehrler* 499 U.S. 432, 438, 111 S.Ct. 1435, 1438 (U.S. Ky. 1991) The United States Circuit Court of appeals for the 5th Circuit - Every first year law student is familiar with the maxim that "a lawyer who represents himself has a fool for a client."

without a lawyer. While proceeding pro se takes away none off their rights, it likewise confers no special privilege. In *Bailey v. Wheatley Estates Corp.*, 829 So. 2d 1278, 1281 (Miss. Ct. App. 2002), the Court held, "A pro se litigant shall be held to the same standard as an attorney." *Dethlefs v. Beau Maison Dev. Corp.,* 511 So. 2d 112, 118 (Miss. 1987). "This Court will not give deference to a person who chooses to represent himself." *Id.* See also: *Perry v. Andy,* 858 So. 2d 143, (Miss. 2003)

In another case, the Court noted: "The ritualized combat of the courtroom demands that favorable outcomes may be obtained only after meeting clearly established legal and procedural standards. The Mississippi Supreme Court has held that "'[p]ro se parties should be held to the same rules of procedure and substantive law as represented parties.'" *Jacox v. Circus Circus Mississippi, Inc.* 908 So. 2d 181, 184 (Miss. Ct. App. 2005) (quoting *Dethlefs v. Beau Maison Development Corp.,* 511 So. 2d 112, 118 (Miss. 1987)).

The pro se parties had exactly the same rights and obligations an attorney would in representing them. When the witness was tendered[12] an attorney could have conducted cross examination – as could have any of the pro se litigants. Neither, though, could sit idly by, say nothing, and then complain on appeal that they were denied the right to cross examine.[13] The text writer notes "A failure to exercise the right of cross-examination is deemed a waiver thereof." AMJUR WITN § 774.

Washington Mutual Bank FA v. McZeal 265 Fed.Appx. 173, 174, 2008 WL 341585, 1 (C.A.5 (Tex. (C.A.5 (Tex.),2008) and repeatedly by this Court - The adage that "a lawyer who represents himself has a fool for a client" is the product of years of experience by seasoned litigators. *Knox v. State,* 502 So. 2d 672, 675 (Miss. 1987) See also *W.H. Hopper and Associates, Inc. v. DeSoto County,* 475 So. 2d 1149, 1153 (Miss. 1985).

[12] As the brief of the Objectors point out counsel for the Petitioners tendered each witness for cross.
[13] Somehow the Objectors

The Appellant objectors concede that in a similar case, the Mississippi Supreme Court held in an annexation matter that it was not abuse of discretion by a chancellor to limit objectors from cross-examining witnesses. *Prestridge v. City of Petal*, 841 So. 2d 1048, 1060 (Miss. 2003). In *Petal*, the city annexed two portions of land, a western area and an eastern area, resulting in two sets of objectors; however, the objectors to the western area were not parties to that appeal, and only the eastern objectors appealed the trial court's decision that the annexation was reasonable in favor of the city. *Id.* at 1050. Like the Objectors here, the eastern objectors in *Petal* cried that the right to cross-examine cannot be denied, and that the chancellor's limitation of cross-examining witnesses was reversible error. *Id.* at 1058-59. Disagreeing with that argument, the Supreme Court found that the chancellor properly exercised his discretion in limiting the cross-examination. *Id.* at 1060. The Court relied on an earlier case, stating: "'The scope of cross-examination though ordinarily broad, is within the sound discretion of the trial court and the trial court possesses inherent power to limit cross-examination to relevant matters.'" *Id.* at 1059 (quoting *Heflin v. State*, 643 So. 2d 512, 518 (Miss. 1994)). In *Petal*, the objectors whose cross examination was limited had interests in this matter diverse to the other objectors, and "in some instances totally different proof," as the two sides were representing different areas in that annexation endeavor. *Id.* at 1059. The case is directly analogous to the one before this Court today – and neither contains trial court error.

The *Petal* Court also held that "[w]hether evidence is relevant and/or admissible is left to the discretion of the chancellor, and reversal occurs only where that discretion has been abused." *Id.* at 1059 (quoting *Century 21 Deep S. Props., Ltd. v. Corson*, 612

So. 2d 359, 369 (Miss.1992)). Additionally, the *Petal* Court pointed out that Rule 611 of the Mississippi Rules of Evidence, ignored by the Objectors here, gives the chancellor discretion directing the mode and order of interrogation of witnesses:

> **(a) Control by Court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Id. at 1059 (quoting Miss. R. Ev. 611). Because the Chancellor had broad discretion, and exercised reasonable control over the witnesses to serve the purpose of Rule 611, there was no abuse of discretion.

Further, and perhaps most importantly, the record reflects that not one of the objectors made the slightest effort to cross examine any witness, or voice an objection, but instead only sat there in silence. Yet they conclude they were denied the right of cross examination. Nothing in the record gives the slightest indication that the Court below would have denied any attempt by the objectors to cross examine any of the witnesses. This is precisely the type procedural matter that should have been raised at trial. The law is clear that in order to preserve point for appeal, a party has a duty to state contemporaneous objection in specific terms so that trial court has opportunity to correct any mistake; failing to do so is a procedural bar and waives the argument on appeal. *Haggerty v. Foster*, 838 So. 2d 948 (Miss. 2002); *Young v. Robinson*, 538 So. 2d 781 (Miss. 1989); *Queen v. Queen*, 551 So. 2d 197 (Miss. 1989) (party must show that he timely objected at trial); *Mitchell v. Glimm*, 819 So. 2d 548 (Miss. Ct. App. 2002).

Under the circumstances of this case, the Objectors cannot escape the procedural bar imposed when a matter is not brought to the attention of the trial judge. Truth be told,

they chose to represent themselves and did not take advantage of the opportunity to cross examine when the witnesses were tendered. This issue is without merit.

ISSUE 4

Did the special chancellor err by failing to hold a new trial, given the fact that a full transcript of the trial was available?

The Objectors contend that Judge Bridges should have ordered a new trial since he did not smell "the smoke of battle." In reality there was no smoke to smell. The Incorporators called a number of witness, none of whom Objectors chose to cross examine. Also, the only sworn witness on behalf of the objectors was not cross examined by counsel for the Incorporators.

This case is little different from the recent Clinton annexation case where pro se objectors requested a new trial on remand. This Court said:

> This Court did not require the chancellor to conduct a new annexation hearing. Weeks complains that the objectors had no representation of legal counsel at the hearing. This hearing was noticed, and we find that Weeks and the other objectors had the opportunity to have counsel with them at this hearing. A person who is proceeding pro se should be "held to the same substantive requirements as a represented person pursuing this cause of action." *Ivy v. Merchant,* 666 So.2d 445, 449-450 (Miss.1995); *see also Young v. Benson,* 828 So.2d 821, 824 (Miss.Ct.App.2002); *Routt v. Mississippi Empl. Sec. Comm'n,* 753 So.2d 486, 487 (Miss.Ct.App.1999)("This Court holds pro se parties to the same rules of procedure and substantive law as represented parties.") Further, the objectors could have retained counsel to represent them at the hearing had they chosen to do so. Accordingly, we find that this issue is without merit.

In re Enlargement and Extension of Municipal Boundaries of City of Clinton, 955 So. 2d 307, 330-31 (Miss. 2007). Here it is important to note that the Objectors have not questioned the weight of the evidence. Mississippi has adopted Rule 63 of the

Mississippi Rules of Civil Procedure to allow a replacement judge to rule under these circumstances. The applicable portion states:

> **(b) After Verdict or Findings.** If for any reason the judge before whom an action has been tried is unable to perform the duties to be performed by the court after a verdict is returned, or after the hearing of a non-jury action, then any other judge regularly sitting in or assigned under law to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties, he may in his discretion grant a new trial.

Miss. R. Civ. P. 63. Judge Bridges had the discretion to grant a new trial or to proceed on the record of the case as tried. The brief of the Objectors makes no allegation of an abuse of discretion. The record certainly would not support any such claim. This issue is without merit.

CONCLUSION

The Objectors' arguments are wholly without merit. The controlling statute requires that the Petition for Incorporation to be signed by two thirds of the qualified electors residing in the area sought to be incorporated, a burden the Incorporators easily met. The newspaper publication provided actual notice of the hearing, making all the objectors parties, because the hearing was convened on then published date and then continued. The objectors were not denied the right to cross examine witnesses where they did not attempt to do so at trial or voice an objection. Finally, the special chancellor did not err by determining no a new trial was necessary, given the fact that a full transcript of the trial was available. For these reasons, the Incorporators respectfully submit that the arguments of the Objectors fail and request this Court affirm the lower court in whole.

CERTIFICATE OF SERVICE

I, John P. Scanlon, attorney for Diamondhead Incorporators certify that I have served a copy of this pleading by United States mail with postage prepaid on the following:

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Dated this the 22nd day of February, 2011.

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