IN THE SUPREME COURT OF MISSISSIPPI

JOHN FLETCHER, et al.	**APPELLANTS**
v.	**No. 2010-AN-00117**
DIAMONDHEAD INCORPORATORS	**APPELLEES**

REPLY BRIEF OF APPELLANTS JOHN FLETCHER, *et al.*

On Appeal from the
Chancery Court of Hancock County, Miss.
No. C2301-08-618

ORAL ARGUMENT REQUESTED

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For three reasons the incorporation of Diamondhead must be reversed for a new hearing, as the Incorporators repeatedly failed to obey the jurisdictional requirements of the incorporation statutes.

First, the Incorporators failed to give proper statutory notice of the date of hearing, depriving the trial court of jurisdiction over this matter. This failure alone warrants reversal.

Secondly, the chancery court also lacked jurisdiction because the Incorporators failed to obtain the appropriate number of signatures on their petition for incorporation.

Last, the trial court erred in preventing the Objectors from participating in the hearing by not allowing them to cross examine any of the Incorporators' witnesses.

I. The Incorporators Failed to Re-Notice the Actual Hearing Date.

Because the Incorporators failed to provide notice to the citizenry of Diamondhead of the time when the actual hearing over incorporation would occur, this case must be reversed.

The plain language of Miss. Code Section 21-1-15 shows that the Incorporators have failed to meet its requirements:

> [T]he chancellor *shall* set *a day certain*, either in term time or in vacation, for the hearing of such petition and *notice shall be given* to all persons interested in, affected by, or having objections to the proposed incorporation, *that the hearing on the petition will be held on the day fixed by the chancellor* and that all such persons will have the right to appear and enter their objections, if any, to the proposed incorporation.

Miss. Code Ann. § 21-1-15 (emphasis added). Once the fixed day of hearing is set, the Incorporators are required to give notice by publication and by posting a copy of the notice in three or more public places. *Id.* The Incorporators failed to do this, and as a result the later hearing is a nullity. It never existed because it was not properly noticed as required by state law.

It is a long-standing principle that "when a law is plain and unambiguous . . . the Legislature must be deemed to have intended what they have plainly expressed." *Weeks*

Dredging & Contracting, Inc. v. Miss. State Tax Com'n, 521 So.2d 884, 886-87 (Miss. 1988). The purpose of notice statutes are "[t]o fulfill the requirements of due process." *Sperry Rand Corp. v. City of Jackson*, 245 So. 2d 574, 575 (Miss. 1971). Due process requires notice and the fundamental right to be heard. *Carl Ronnie Daricek Living Trust v. Hancock Cnty., Miss.*, 34 So. 3d 587, 595 (Miss. 2010) (citing cases).

The statute's plain language requires the chancellor to set a hearing date and then requires the Incorporators to give notice of that hearing date. The whole point of notice is to allow citizens who want to attend, listen, observe, or object the opportunity to do so. The Incorporators did not do this. Instead, as all parties concede they provided notice for the original hearing date on September 15, 2008. Yet the actual hearing took place nearly four months later, after two postponements, on January 9, 2009. The citizenry of Diamondhead were not given lawful notice when the hearing would *actually* take place. Without accurate published and posted notice, the statute's purpose to enable the citizenry to engage the process is destroyed.

The statute's requirements are not confusing or subject to interpretation. In a similar case, citizens who supported annexation were able to determine the appropriate procedure under the nearly identical sister statute. *In re Extension of Boundaries of City of Hattiesburg*, 840 So.2d 69 (Miss. 2003). The question in the *Hattiesburg* case was not whether the annexationists had complied with the statute, but whether the statute provided sufficient notice to pass constitutional muster. *Id.* at 98. In *Hattiesburg*, the chancellor required that "re-notice [occur] by re-posting [and re-publishing] notices of the pending . . . petition and impending trial date." *Id.* This Court determined the notice of the hearing was constitutional, relying in part on the conscientious re-noticing. *Id.*

Like the *Hattiesburg* case, the Incorporators should taken the time to re-notice the *four month* change in hearing dates from September 15, 2008 to January 9, 2009. The Incorporators

have provided no explanation why they failed to obey the notice statute and give the citizens of Diamondhead a meaningful opportunity to engage the incorporation process.

In contrast to their failure to re-notice and re-publish the actual date of the hearing—which the Incorporators vigorously defend—they do acknowledge that they spent eleven months and vast numbers of hours working to adapt the voter roll to their requirements.

There is no case law which allows the Incorporators to fail to re-notice or re-publish. Instead, they rely on a case that considered whether parties who did not actually participate in annexation proceedings still had a right to appeal their outcome. *Sperry Rand Corp. v. City of Jackson*, 245 So. 2d 574 (Miss. 1971). That is not an issue in this case and has been settled law for years. The statute in that case provided for appeal by "any person interested in or aggrieved by the decree of the chancellor, *and* who was a party to the proceedings in the chancery court." *Id.* (emphasis added). The Court ultimately rejected the narrower reading proposed by those favoring annexation, which would limit the right to those "'who participated' or 'who appeared' or words of similar import." *Id.*

This Court drew heavily on due process in reaching its decision, observing that the purpose of notice statutes is to meet the demands of due process. *Id.* That notice made any interested party "a party to the proceedings," since the outcome of the chancery proceedings would be "binding upon appellants and will so remain until and unless reversed or modified on appeal." *Id.*

Notably, the Court's ruling makes *every* affected party who receives notice a party to the proceeding. *Sperry Rand* means that the notice statutes should be construed *broadly* to protect citizens' rights to intervene, object, or simply observe a critical change in their community. As we noted in our Principal Brief, the creation of a municipality is a rare thing in Mississippi, and the citizenry must be afforded due process regarding that unique genesis.

The plain language, statutory purpose, and case law demonstrate that Miss. Code Section 21-1-15 requires notice of the date of the hearing where citizens will actually have an opportunity to attend, listen, observe, and object if they so desire. The Incorporators failed to give notice for that actual date, and therefore the mandatory jurisdictional statute was not met. The order of the chancery court must be reversed and this case remanded for a new hearing on incorporation, coupled with a mandate that the Incorporators provide proper publication and notice to the citizenry of the proposed incorporation area.

II. The Incorporators Failed to Obtain the Required Number of Signatures.

Because the Incorporators failed to gain the statutorily-required number of signatures, the incorporation must be reversed.

For the Chancery Court to have had jurisdiction over this matter, the Incorporators must have garnered the requisite number of signatures required by Miss. Code Ann. §21-1-13. Otherwise, dismissal is mandatory. *City of Jackson v. Byram Incorporators*, 16 So. 3d 662, 673 (Miss. 2009). Second, the number of signatures must be "two-thirds of the qualified electors residing in the territory proposed to be incorporated." Miss. Code Ann. §21-1-13.

A. The Incorporators Did Not Follow State Law in Removing Voters from the Voter Roll.

The Incorporators did not obtain the jurisdictionally required number of signatures on their petition, and therefore the incorporation is flawed as a matter of law.

The Incorporators seek refuge in prior case law allowing incorporators to assist elections commissioners, but the facts at hand are dramatically different. See *City of Pascagoula v. Scheffler*, 487 So. 2d 196 (Miss. 1986). *Scheffler* involved incorporators aiding election commissioners in cleaning up the voter rolls to remove persons no longer residing in the area of incorporation. 487 So. 2d at 199. The Court allowed the *Scheffler* incorporators to take many of

the same actions done by the Incorporators here, such as contacting people they believe had moved out of the area. *Id.* at 200.

Yet the drastic difference between this case and *Scheffler* is that there the incorporators passed this information on to election commissioners, who then had those persons formally removed from the voter rolls. *Id.* In this case, the Incorporators attempted to change the voter rolls of their own accord. (R. at 30).

Scheffler does not authorize potential incorporators to remove those persons on the voting roll they deem to be no longer residing in the area on their own, nor is it even clear under Mississippi law if anyone *but* election commissioners can perform this action. Yet this is exactly what the Incorporators did. (R. at 30).

The undisputed testimony of Audrey Ramirez, the person in charge of determining which citizens qualified, stated that once she purchased the voter roll she began removing people that she determined had died, moved away, and, distressingly, for "*a few other reasons that **we felt*** some were no longer qualified voters." (R. at 30) (emphasis added). There is no discussion in the trial transcript of what these "other reasons" were. (R. at 30).

The Incorporators acted far beyond their powers in slashing citizens off the voter rolls. *Scheffler* does not grant the Incorporators *carte blanche* to remove voters at will. Nor does *Scheffler* allow the Incorporators to make a piecemeal, self-serving accounting of who should and should not be entitled to remain on the voter roll, thus producing an arbitrary number of qualified electors in the incorporation area. (Appellees' brief pg. 11-12). That duty remains with the election commissioners, not the Incorporators. At best, *Scheffler* only allows Incorporators to *assist* election commissioners, not perform that statutorily defined role.

Further, any determination of how many citizens were on the voter rolls must be done at the day of the filing for incorporation, not afterwards. *Id.* at 352.

The Incorporators have no lawful or legitimate basis for their calculations that the signatures they obtained constituted the required two-thirds mandated by statute. Accordingly, the chancery court did not have jurisdiction over the incorporation, and the case must be reversed and remanded for a determination of the *actual* number of persons on the voter rolls.

B. The Incorporators Failed to Present the Total Number of Signatures.

Because the Incorporators failed to offer the total number of signatures into evidence, the case must be reversed.

The Supreme Court requires that "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.*" *Bridges v. City of Biloxi*, 168 So.2d 40, 42 (Miss. 1964) (emphasis added). The purpose of putting on such testimony is 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." *Id.*

While the Incorporators quote at length from *Bridges*, that case highlights that the Incorporators never actually provided the trial court with any testimony regarding the *specific number* of signatures they received. Although the Incorporators rely on *Bridges* to support their contention that the chart they created purporting to list the number of qualified electors was correctly entered into the record, there was no testimony by *any* of the Incorporators' witnesses, including their expert Chris Watson, on what exact numbers were contained in this chart. (R. 45-130). As such, while there was testimony at length on how names were removed from the voter roll, there was no testimony that definitely and cogently pointed out *what number remained.*

One reason for this may be the huge difference in the number of possible potential electors identified by the Incorporators, the persons on the official voter rolls, and those finally

determined to be qualified electors by Ms. Ramirez and the Incorporators. There were 5,920 persons registered to vote within Diamondhead East and Diamondhead West on the day the petition was filed, July 22, 2008. The Incorporators' own petition signature database contained 6,571 names of persons who they identified as potential qualified electors. Yet the chart they entered into evidence only showed 4,635 people the Incorporators thought were true qualified electors.

As no actual number was ever presented to the trial court, and was not authenticated in any case, the Objectors were never given the opportunity to question the Incorporators' compilations or conclusions as required by *Bridges*. 168 So.2d at 42. The difference between the estimate of 6,571 persons, the official number of 5,920 persons, and the Incorporators' final number of 4,635 persons is cause for alarm .

Bridges requires that the Incorporators present a definite explanation of not only how the numbers were arrived at, but also, more importantly, what these numbers were. Without this information, the conclusions were erroneously adopted by the court. Accordingly, the Court must reverse and remand this for a new hearing.

III. The Trial Court Violated the Appellants' Rights to Due Process By Failing to Afford Them the Opportunity to Cross-Examine Witnesses.

Because the Objectors were not afforded due process during the hearing, the case must be reversed and remanded for a new incorporation hearing.

As discussed in the Objectors' initial brief, the trial court violated the Objectors' due process rights by not allowing them the opportunity to cross-examine the Incorporators' witnesses. Instead of addressing this contention, the Incorporators appear to argue in their response that this violation is acceptable because the Objectors proceeded *pro se*. This is not the law in Mississippi.

At the trial, the Incorporators presented four witnesses. Each time the witness finished, the Incorporators tendered their witness, and the trial court ordered the witness to step down. (R. at 28, 40, 44, 130)

Although the Objectors lodged no timely objections to the chancery court's denial, the error remains appropriate for appellate review because due process is a fundamental constitutional right immune from procedural bar. *See Luckett v. State*, 582 So. 2d 428, 430 (Miss. 1991) (cited favorably by *Jackson v. State*, No. 2008-CT-00074-SCT at ¶34 (Miss. April 1, 2010) (mandate not yet issued)).

The Incorporators miss the true nature of this proceeding. This is not a criminal case; this is not a civil case; this is a *fundamental change in society.* The requirements of the incorporation notice statutes do not speak of "pro se" or retained counsel; they are to provide a service to the public, so that the citizenry will be afforded the opportunity to listen, challenge, and understand the creation of a new municipality around them. A procedural bar used against litigants in civil and criminal cases has no place when we are constructing new societies and new cities.

As due process is fundamental to incorporation, the Court should acknowledge that the Objectors were deprived of a basic right to question whether in a time of mass economic difficulty and expansive government whether a new bureaucracy should be created. This is their lawful and constitutional right, and the trial court erred by failing to allow them the opportunity to cross examine witnesses.

The Incorporators cite to numerous examples of criminal and civil trials where pro se litigants were held to the same status as people with attorneys, but this was not that type of hearing. The creation of a new municipality is different. In accord with the statutory requirements to notice the citizenry through publication and physical posting, the Court should

determine that the Objectors have a right to cross-examine the witnesses of those seeking to incorporate.

Because the Objectors were unconstitutionally deprived of the right to cross-examine the witnesses for incorporation, this case must be reversed and remanded for a new hearing.

Conclusion

For three reasons the incorporation of Diamondhead must be reversed. First, because the Incorporators failed to give proper statutory notice of the date of hearing, depriving the trial court of jurisdiction over this matter. Secondly, because the Incorporators failed to obtain the appropriate number of signatures on their petition for incorporation. Last, because the Objectors were unconstitutionally deprived the right to cross-examine the witnesses for incorporation.

Accordingly, the order decreeing incorporation must be reversed.

Filed this the 11th day of April, 2011.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that I have served by United States mail, postage prepaid, or via hand delivery, a true and correct copy of the above and foregoing document, to the following persons at these addresses:

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