IN THE SUPREME COURT OF MISSISSIPPI

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

AMENDED PRINCIPAL 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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DIAMONDHEAD INCORPORATORS **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Miss. R. App. P. 28(a)(1), 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 the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. John and Sally Fletcher, *Appellants*
2. Clement and Brierley Acker, *Appellants*
3. Edward and Jo Anne Basanez, *Appellants*
4. Miles and Joyce Barnes, *Appellants*
5. Jerry Binninger, *Appellant*
6. Lazlo Bode, *Appellant*
7. Donald Bonnercarrere, *Appellant*
8. Loretta L. Calcaterra, *Appellant*
9. Luis Camero, *Appellant*
10. Lynn Cheramie, *Appellant*
11. Richard Curry, *Appellant*
12. Betty Cutler, *Appellant*
13. Barbara Davis, *Appellant*
14. Thomas Ender, *Appellant*
15. Neil Frisbie, *Appellant*
16. Pat Fuchs, *Appellant*
17. Ronald and Chih-Ying Glynn, *Appellants*
18. Jim Hourin, *Appellant*
19. W.D. Howell, Jr., *Appellant*
20. Nicholas and Molly Kooney, *Appellant*
21. Virginia Langen, *Appellant*
22. Gerald Laux, *Appellant*
23. Tom and Deannie Leader, *Appellants*
24. Robert Longacre, *Appellant*
25. Kimberely Lunde, *Appellant*
26. Channon Lytton, *Appellant*
27. John and Gail McConnon, *Appellants*
28. Richard and Irene Mills, *Appellants*
29. Maurice Moore, *Appellant*
30. Peter Morrill, *Appellant*
31. Carleton Pool, *Appellant*
32. Bob Ragsdale, *Appellant*
33. Thomas Rider, *Appellant*

34. Bridget C. Rodriguez, *Appellant*
35. Samuel and Carolyn Sapio, *Appellants*
36. John and Neva Sears, *Appellants*
37. Harold and Bobbie Sorgenfrei, *Appellants*
38. John and Norma Stevens, *Appellants*
39. Charles Stott, *Appellant*
40. Patricia A. Terry, *Appellant*
41. Leila Thissell, *Appellant*
42. Cary and Kathleen Troschesset, *Appellants*
43. Dick and Margaret Weber, *Appellants*
44. Folger Whicker, *Appellant*
45. Vernon Williams, *Appellant*
46. Diamondhead Incorporators, *Appellee*
47. Charles Henry Ingraham, Jr., *Diamondhead Incorporator and proposed Mayor of Diamondhead*
48. Dianne Cheryl Delaney Ackerman, *Diamondhead Incorporator and proposed Councilperson of Diamondhead*
49. Ronald Lee Rech, *Diamondhead Incorporator and proposed Councilperson of Diamondhead*
50. Henry Griffin Holcomb, *proposed Councilperson of Diamondhead*
51. Ernest John Knobloch, Jr., *proposed Councilperson of Diamondhead*
52. Dalton Anthony Roberson, *proposed Councilperson of Diamondhead*
53. City of Bay St. Louis, *Defendant below (not a party to this appeal)*
54. City of Pass Christian, *Defendant below (not a party to this appeal)*
55. City of Waveland, *Defendant below (not a party to this appeal)*
56. Oliver E. Diaz, Jr., Appellate Counsel for Appellants
57. David Neil McCarty, Appellate Counsel for Appellants
58. Will Bardwell, Former Appellate Counsel for Appellants, *now withdrawn*
59. William Kulick, Trial and Appellate Counsel for Appellants
60. Pyle, Mills, Dye & Pittman, *Attorneys for Appellees*
61. Jerry L. Mills, *Trial and Appellate Counsel for Appellee*
62. John Preston Scanlon, *Appellate Counsel for Appellee*
63. Hesse & Butterworth, PLLC, *Attorneys for City of Waveland (not a party to this appeal)*
64. Zach Butterworth, *Attorney for City of Waveland (not a party to this appeal)*
65. Chad P. Favre, *Attorney for City of Waveland (not a party to this appeal)*

So CERTIFIED, this the 18th day of January, 2011.

Respectfully submitted,

David Neil McCarty
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Statement of the Issues

This appeal presents four main issues.

First, must 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?

Second, is it a jurisdictional defect mandating dismissal when the published notice of the hearing did not feature the date of the actual hearing?

Third, did the trial court violate the incorporation opponents' guarantees of due process by failing to provide opportunities to cross-examine the petitioners' witnesses?

Last, did the chancellor who entered the final decree of incorporation err by failing to hold a new trial after the previous chancellor passed away?

Statement of the Case

This case involves the proposed incorporation of a city on the Mississippi Gulf Coast. The Diamondhead Incorporators sought to incorporate a section of land in Hancock County ("the Incorporators"). The proposed city would be named Diamondhead, after an existing private community. A group of taxpayers and citizens in the proposed incorporation area objected to the incorporation ("the Objectors").

By state law, any entity seeking to incorporate must meet certain jurisdictional requirements. At the bench trial over the incorporation, the Objectors argued that the Incorporators did not meet the jurisdictional requirements of obtaining the signature of two-thirds of the qualified electors. Further, the Objectors argued that the incorporation of the City was not reasonable, and was not required by public convenience and necessity. Despite these arguments, the Chancery Court of Hancock County issued a final decree establishing the City.

Aggrieved by that decision, the Objectors filed a timely appeal.

Statement Regarding Oral Argument

This appeal concerns the creation of a new municipality, a relatively rare occurrence in our legal system. Precise statutory requirements must be met to obtain jurisdiction in chancery court, and the trial court is faced with complex factual determinations. In this case, the Objectors argue that the precise legal requirements have not been met and that their constitutional rights to due process were violated. The intertwined issues of due process and judicial discretion would be clarified by oral argument by the parties.

Procedural History and Relevant Facts

The proposed City of Diamondhead began as a planned community for retirees in about 1970. Record Excerpts at tab 10, page 12 (referred to as "R.E. 10 at 12"). Around 1985, the management of the community was assumed by the Diamondhead Property Owners' Association ("POA"). ***Id.*** The community has two full golf courses, a country club, an airport, a marina, several swimming pools, tennis courts, and other recreational facilities. ***Id.*** The community of Diamondhead has about 96 businesses and represents that "[i]t is more than just a subdivision," but in total area occupies only about seven square miles of land. ***Id.*** at 13, R.E. 11 at 54. The population density of the proposed City is similar to that of Poplarville, Magnolia, Tylertown, or Purvis. R.E. 11 at 122.

Beginning in the 1980s, various attempts were made toward incorporating the community as a City under state law. R.E. 10 at 13. After Hurricane Katrina in 2005, certain members of the POA redoubled efforts toward incorporation, and in 2007 began formal efforts toward incorporation. R.E. 10 at14-18. To that end, they established a group called "Diamondhead Incorporators."

Mississippi law mandates that would-be incorporators must meet certain requirements before incorporation can proceed in the court system. First, two-thirds of the "qualified electors"

of the proposed incorporation area must sign a petition submitting to the incorporation. The Incorporators spent the next several months attempting to garner the required signatures and asserted by the time of trial that they had obtained the requisite number. R.E. 12 at 34, 39.

The Petition for Incorporation was filed on July 22, 2008. R.E. 2 at 1.[1] That same day, the Incorporators obtained a certified copy of the Voter Roll from Hancock County Circuit Court that set the number of qualified electors at 5,920 persons. R.E. 3 at 396.

Because the local chancellors recused from the case, the Supreme Court appointed a replacement, the Honorable Kennie E. Middleton. R.E. 8. Although several members of the Diamondhead community opposed incorporation, they did not retain an attorney. These Objectors nonetheless tendered to the trial court their objections to the incorporation, some of which were quite detailed and lengthy. *See, e.g.*, R.E. 4; R.E. 5; R.E. 15 at 3678; R.E. 16 at 3685; R.E. 17.

State law requires that the Incorporators provide notice of the trial to those affected in two ways — by posting notice in three public places and by publication in a newspaper. There was evidence that the Incorporators posted notice of the hearing as required by statute: a "Return and Affidavit of Posting" placed on that docket showed posting in six places, double the required three. R.E. 6. The Incorporators also provided proof that they advertised a hearing over the proposed incorporation in the *Sea Coast Echo*, a small local newspaper, from August 13, 2008 through September 3, 2008. *See* "Proof of Publication," attached as an Appendix to this Brief. However, the advertisement in the *Echo* stated that the hearing would be held on September 15, 2008. Appendix.

[1] Because the signatures of the petitioners must be attached to the Petition, volumes 1-24 of the Record are solely reproductions of the Petition and the attached signatures. Portions of volume 25 and all of volume 26 make up the remainder of the court file.

In actuality, the chancery court did not hold the hearing over the incorporation until several months later, on January 9, 2009. The Incorporators called four witnesses: proposed mayor Charles Henry Ingraham, Jr.; Audrey Ramirez, co-chairperson of the Petition Subcommittee; Dalton Roberson, called to testify whether the proposed community was attempting to exclude persons based on race; and Chris Watson, a planning expert. Because none of the Objectors was represented by counsel, the Incorporators' witnesses were allowed to testify without objection and without cross-examination. Five Objectors spoke at the hearing to express their problems with the proposed incorporation: Gerald Benninger, Tom Leader, Mrs. Miles Barnes, Molly Kooney, and Lael Butler.[2] The hearing was completed that day.

After the hearing, Chancellor Middleton passed away on September 17, 2009, before tendering a finding of fact, conclusion of law, or final decree. The Honorable Billy G. Bridges was appointed by the Supreme Court on October 15, 2009. R.E. 14.

The docket is wholly devoid of any entries between the appointment of Judge Middleton in 2008 and the appointment of Judge Bridges in 2009.

The trial court then tendered findings of fact and conclusion of law on January 5, 2010. R.E. 18. The trial court noted that a status conference was held on Thursday, December 3, 2009. ***Id.*** at 3777. While the court noted that it "allowed the objectors to voice additional comments . . . no sworn testimony was taken, nor was the case reopened." ***Id.*** Likewise, no transcript was taken of the conference.

The trial court also addressed the number of qualified electors supporting the Petition. ***Id.*** at 3783-86. However, the trial court stated neither the actual number of signatories nor the number of qualified electors comprising two-thirds of the proposed incorporation area. The trial

[2] While state law requires the notification of all municipalities within three miles of the proposed incorporation area, only the City of Waveland filed an answer to the Petition. R. 25 at 3664. It did not appear at trial to contest the incorporation.

court relied on an exhibit introduced at trial that purported to show that the actual number of qualified electors was 4,645. R.E. 9. However, the certified Voter Roll introduced by the Incorporators at trial set the number of registered voters (and thus qualified electors) at 5,920, or more than one thousand people than the Incorporators estimated. ***Id.*** The Voter Roll came under seal from the Hancock Circuit County, verified on July 22, 2008, the day the Petition was filed. R.E. 3.

The Incorporators' Exhibit alleged that their effort needed 3,096 signatures to constitute two-thirds and that they exceeded this amount by 422 people, garnering 3,518 signatures. R.E. 9. These numbers were not referenced in pleadings or at trial – only on one summary exhibit, which directly contradicted the verified Voter Roll.

At trial, the Incorporators admitted that they changed the number of persons reflected on the Voter Roll at their own discretion, conceding that they "update[d], periodically, the voter rolls . . . ." R.E. 12 at 29-30. Despite the fact that the Incorporators relied on the July 22, 2008 Voter Roll, which showed the total amount of qualified electors at 5,920, and entered the Voter Roll into evidence, they did not use that number for the purposes of meeting the two-thirds requirement. ***Id.*** at 31. Instead, they substituted a number based on their own calculations of who should have been on the Voter Roll and who should not. ***Id.*** at 32.

The trial court also addressed whether the Incorporators had provided proper notice under statute. It held that "[n]otice was published in a newspaper of general circulation in the area sought to be incorporated in the time and manner provided by law." R.E. 18 at 3778.

After the findings were issued by the trial court, the Incorporators submitted a Final Decree of Incorporation, which was signed by the chancellor and placed on the docket on

January 12, 2010. R.E. 19. From that Final Decree, the Objectors timely appealed.[3] Once this case was docketed on appeal, the Incorporators petitioned and were granted the right to supplement the record to include the Proof of Publication contained as the Appendix to this Brief, and the Objectors were allowed to amend their original filing to address the full record.

Standards of Review

The Court reviews questions of law *de novo*. ***City of Jackson v. Byram Incorporators***, 16 So. 3d 662, 670 (Miss. 2009) ("***Byram***"). However, in general the Court "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.***

As to the factual issues in the case, the "Court applies the standard of manifest error," which generally defers to the finding of the chancellor who observed the trial and evidence. ***Id.*** at 675.

Summary of the Argument

The Final Decree must be reversed for two major jurisdictional defects. First, the Incorporators did not obtain the statutorily required two-thirds signatures required to sustain the Petition. Secondly, the Incorporators failed to properly notice the actual day of the hearing.

Further, the Final Decree must be reversed because the Incorporators' witnesses were permitted to testify without being subjected to cross-examination. Lastly, the chancellor who entered the final decree of incorporation should have held a new trial after the prior chancellor passed away.

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[3] State law allows that "[a]ny person interested in or aggrieved by the decree of the chancellor, and who was a party to the proceedings in the chancery court, may prosecute an appeal therefrom to the supreme court . . . ." Miss. Code Ann. § 21-1-21. The statute is to be read broadly as to apply to all persons whose property rights were adjudicated. *See* ***Sperry Rand Corp. v. City of Jackson***, 245 So. 2d 574, 575 (Miss. 1971). The Objectors in the case at hand appeared at trial and made their objections known, their property rights have been affected, and no party has argued that they do not have standing to pursue this appeal. Further, on September 15, 2008, several of the Objectors caused a handwritten pleading entitled "List of Interested Parties" to be filed on the docket. R.E. 7.

ARGUMENT

I. The Failure to Obtain Two-Thirds of the Signatures of the Qualified Electors Mandates Dismissal.

Because the Incorporators failed to obtain the signatures of two-thirds of the qualified electors as listed on the Voter Rolls at the time the case was filed, the chancery court did not have jurisdiction, and this Petition must be dismissed.

In relevant part, the incorporation statute requires that:

> 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:
> . . .
> (3) it *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 (emphasis added). State law provides strict jurisdictional guidelines that must be met when petitioning for incorporation, or the petition will be rejected. "[T]he two-thirds-signature element is a mandatory and jurisdictional requirement, and a petition for incorporation cannot be amended to include additional signatures." ***Byram***, 16 So. 3d at 673; *see also* ***In re City of Ridgeland***, 494 So. 2d 348, 353 (Miss. 1986) ("***Ridgeland***") (annexation petition would be dismissed without prejudice when it "has not been joined by the percentage of qualified electors" required by statute).

Further, the Incorporators bear the burden of proving the two-thirds jurisdictional mandate was met. *See generally* ***Myrick v. Incorporation of a Designated Area into a Municipal Corp. to be Named Stringer***, 336 So. 2d 209, 210 (Miss. 1976) ("***Stringer***") ("The burden of proof was upon the petitioners to show that they had met the statutory requirements to give the court jurisdiction to hear their petition"); ***Byram***, at 671 ("the petitioners for incorporation have the burden of proving the sufficiency of the petition") (internal quotations

and alterations omitted).

The Voter Roll is clear that there were 5,920 qualified electors in the Diamondhead community at the time the Petition was filed on July 22, 2008. The two-thirds number of qualified electors must be calculated from this number, 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." ***City of Pascagoula v. Scheffler***, 487 So. 2d 196, 200 (Miss. 1986). Further, this Court has also made clear that "the question of whether the two-thirds requirement . . . has been met must be determined by an ascertainment of the number of persons living in the area to be annexed who on [the day of filing] were registered voters in Madison County, Mississippi, and then determining whether two-thirds of that number have signed the complaint." 494 So.2d at 352 (examining the analogous annexation statute).

It is uncontested there were 5,920 qualified electors on the Voter Roll the day the Petition was filed.[4] Two-thirds of that number (or 66.7 percent) is 3,943 people. Although the Incorporators never detailed in their Petition or other pleading how many signatures they obtained, nor testified specifically at trial, one of their exhibits at trial calculated their number of signatures at 3,518.[5]

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[4] Specifically, there were 4,208 voters in Diamondhead East, and 1,712 in Diamondhead West. R.E. at 3.

[5] See Exhibit P-012, the "Signature Tabulation Worksheet." R.E. at 9.

Oddly, the number of qualified electors on the Voter Roll and actual number of signatures needed to fulfill the two-thirds requirement were never referenced in the case below. Nowhere in the Petition, the bench trial, the findings of fact and conclusions of law (based heavily off the arguments of the Incorporators), or the Final Decree (which was wholly authored by the Incorporators) is the *actual number* disclosed of how many citizens constitute two-thirds of the qualified electors; this number is buried only a summary exhibit introduced at trial. Similarly, the Incorporators never specify *how many* actual signatures they obtained save on the summary exhibit. There are only repeated and vague references to how the Incorporators have "more than" two-thirds of the qualified electors, without detail or specification. This failure to specify does not meet the ***Stringer*** burden of affirmative proof that the chancery court had jurisdiction.

The Incorporators needed 3,943 signatures to fulfill the two-thirds statutory requirement; they only obtained 3,518, or about 59 percent. The Incorporators simply did not obtain the 2/3 signatures they needed. For this critical reason, the Petition must be dismissed without prejudice, as the chancery court did not have jurisdiction to hear the case.

From the Record, it seems that the Incorporators tried to craft a "better" estimate of the number of qualified electors than the Voter Roll, purging those qualified electors they thought deceased, moved, incapacitated, or out of the proposed incorporation area. R.E. 12 at 30-32. However, the ***Ridgeland*** case is clear that the Voter Roll *at the time the Petition is filed* controls the two-thirds number. 494 So.2d at 352. Additionally, "[w]hen the language used by the legislature is plain and unambiguous . . . and where the statute conveys a clear and definite meaning . . . the Court will have no occasion to resort to the rules of statutory interpretation." ***Nat'l Union Fire Ins. Co. v. Mississippi Ins. Guar. Ass'n***, 990 So. 2d 174, 180 (Miss. 2008) (internal quotations and citation omitted). Two-thirds means two-thirds.

The lack of specificity begins at the moment of "conception" for the proposed City—on the first page of the Petition, which only states, "The Petitioners herein are two-thirds (2/3rds) and more of the qualified electors residing in the territory proposed to be incorporated and are each adult resident citizens of Hancock County, Mississippi." R.E. 2 at 1. The Objectors ascertained the lack of detail immediately, asking "[w]hat authority determined the number of signatures required to file the petition?" and "What authority verified . . . the number and validity of the acquired signatures?" R.E. 5. These questions were never answered.

They were certainly not answered at the bench trial. Although extensive testimony was presented at trial on *how* the signatures were collected and indexed, no actual numbers were presented. Tr. 19-40. The Incorporators only offered vague generalities. One witness for the Incorporators stated that "[o]ver 75 percent of those electors in the area to be incorporated signed the petition for incorporation," and later the Incorporators' expert repeated the same number. R.E. 10 at 21-22; R.E. 11 at 125. Another stated that she agreed "that more than two-thirds of the qualified electors have signed the petitions," and "[t]hat we have adequate signatures for the two-thirds [requirement]." R.E. 12 at 34. Even after being alerted at the bench trial that 13 persons wished to be taken off the Petition, the numbers did not gain weight or specificity. Tr. at 35. Ultimately, the Incorporators simply asserted without detail "[t]hat more than two-thirds of the qualified [electors] in the proposed incorporation area did, indeed, favor incorporation." R.E. 12 at 40.

This lack of specificity is a separate reason why the Petition should fail, as the Incorporators did not meet their burden of proving that the two-thirds of qualified electors supported the Petition.

Nor did the Incorporators seek to have the Voter Roll purged or "cleaned up" at the time of filing, an issue in the ***Scheffler*** case. The question in that case concerned whether the incorporators had properly sought a purge of their voter rolls; the Court ultimately found "no fault with actions taken by the Gautier incorporators to aid the commissioners of election in removing the names of non-resident or deceased electors." ***Scheffler***, 487 So. 2d at 200. Unlike that case, the Incorporators 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.

In general the Court "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*." ***Byram***, 16 So. 3d at 670 (emphasis added). In this case, the trial court was manifestly wrong when it accepted the Incorporators' argument that they had obtained two-thirds of the required signatures. In the end, the calculation is simple. Mississippi law requires two-thirds of qualified electors to support a Petition. The Voter Roll at the time the Petition sets the number of qualified electors and the two-thirds number; that number was 5,920.[6]

Because the Incorporators did not obtain the signatures of two-thirds of the 5,920 qualified electors, and their Petition must be dismissed without prejudice, as the chancery court did not have jurisdiction over this case.

II. The Newspaper Publication Did Not Give Actual Notice of the Hearing.

State law requires very precise notice to persons affected by a proposed incorporation, and the Incorporators failed to provide actual notice of the date of the incorporation hearing. Because of the lack of proper notice, the Final Decree must be reversed.

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[6] While the Voter Roll clearly states that there were 5,920 qualified electors as of July 22, 2008, the Incorporators' "Signature Tabulation Worksheet" pegs this number at 6,571. R.E. 9. Their reasoning is unknown.

The statute governing notice of hearing sets out a multi-part process for providing notice to those affected by the proposed incorporation. First, after the petition is filed:

> [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). After the date for the hearing is set, the Incorporators are required to alert the affected populace about the hearing in two different ways. "The said notice *shall be given* by publication thereof in some newspaper published or having a general circulation in the territory proposed to be incorporated once each week for three consecutive weeks, *and* by posting a copy of such notice in three or more public places in such territory." Miss. Code Ann. § 21-1-15 (emphases added). "The first publication of such notice and the posted notice shall be made at least thirty days prior to the day fixed for the hearing of said petition, and such notice shall contain a full description of the territory proposed to be incorporated." Miss. Code Ann. § 21-1-15.

In summary, the court sets the date for the incorporation hearing, and those seeking incorporation have to inform people in the community about the date of the actual hearing through newspaper publication and posted notices. The statute assumes that people will only be noticed through the postings and advertisements.

The Supreme Court has ruled that failure to strictly comply with the notice statute will result in a dismissal of the petition to incorporate: for where "[n]o affidavit was filed as provided for in this section and no attempt was otherwise made to prove that the notices were posted as required by statute," the trial court does not have jurisdiction to consider the petition

for incorporation. ***Stringer***, 336 So. 2d at 210-11.[7] Quoting ***Stringer***, the Court has held that "[u]nder our established case law, the notice requirement *must be strictly complied with* . . . 'as required by statute.'" ***Wiley v. Corporate Boundaries of City of Iuka***, 441 So.2d 116, 117 (Miss. 1983) (emphasis added).

In the case at hand, the record shows that the Incorporators posted notice and also ran newspaper ads in the *Sea Coast Echo* about the incorporation hearing. Yet the advertisements in the *Echo* stated "that a hearing on the petition to incorporated [sic] said City of Diamondhead will be held on the 15th day of September, 2008 . . . All persons interested in, affected by, or having objections to the proposed incorporation of the City of Diamondhead, Mississippi have the right to appear and enter their objections, if any, to the proposed incorporation." Appendix to this Brief. Yet the chancery court did not hold the hearing over the incorporation *until several months later*, on January 9, 2009. The docket sheet shows a continuance for that September 15, and on September 30, 2009, all the local chancellors recused from the case; it was not until October 15, 2009, that the Supreme Court even appointed Judge Middleton, who heard the bulk of the case.

The notice provided by the Incorporators was therefore fatally flawed because no actual notice of the actual hearing date was provided in compliance with the statute. The only hearing date provided by the *Echo* was wrong, and would not reasonably alert a person in the area affected by the proposed incorporation of the date of the actual hearing.

While the ***Stringer*** and ***Iuka*** cases concerned the posting of notices under Section 21-1-15, not the lack of accurate information within the notice, the Court's reasoning in those cases is

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[7] Such an argument may be raised for the first time on appeal as "in the absence of proper notice, the trial court was without jurisdiction to order an incorporation, the decree doing so is void . . . ." ***Id.***; *see also* ***Norwood v. Extension of Boundaries of City of Itta Bena***, 788 So. 2d 747, 751-52 (Miss. 2001) (decree was void "in light of the absence of substantial credible evidence that the statutory notice requirements were met").

fully applicable to the requirements of newspaper publication. Failure to obey the statute's strict notice requirements will deprive the chancery court of jurisdiction over the case.

Further, "[t]he burden of proof was upon the petitioners to show that they had met the statutory requirements to give the court jurisdiction to hear their petition." ***Stringer***, 336 So. 2d at 210; see also ***Byram***, at 671 ("the petitioners for incorporation have the burden of proving the sufficiency of the petition"). While the Incorporators followed the statute to the extent that they published notices regarding the hearing, the notice advertisements in the *Echo* were a nullity, because they contained the wrong hearing date. Defective notice is no notice at all.

The trial court therefore committed manifest error when it found that newspaper publication was sufficient, as the Incorporators did not advertise the actual date of the incorporation hearing. Because the Incorporators failed to comply with state law requiring the publication by newspaper of the actual hearing date, the Final Decree must be reversed.

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

Because the trial court did not provide any opportunity for the Objectors to cross-examine the Incorporators' witnesses, the trial was constitutionally invalid.

The right to cross-examine witnesses is explicitly recognized in Mississippi law. *See* ***Netterville v. Mississippi State Bar***, 397 So. 2d 878, 884 (Miss. 1981); ***Edwards v. Ellis***, 478 So. 2d 282, 286 (Miss. 1985); ***Harrison v. Buxton TV, Inc.***, 460 So. 2d 828, 834 (Miss. 1984). Further, both Rule 3.03 and Rule 3.06 of the Uniform Chancery Court Rules detail the manner in which chancellors are to oversee the cross-examinations of witnesses. Rule 3.03 provides that "[t]he examination of witnesses shall be limited to the direct examination, *the cross-examination*, and the redirect examination *concerning matters brought out on cross-examination.*" Unif. Chan. Ct. R. 3.03 (emphasis added). Likewise, Rule 3.06 provides that "[o]nly one attorney for each

party to the action may examine a witness," thereby implying a right to cross-examination in all chancery court proceedings. Unif. Chan. Ct. R. 3.06.

This right to cross-examine has been examined in similar cases to the one at hand. In one challenge to a municipality's petition to annex, a set of co-defendants had challenged the due process of a trial where they had not been allowed to cross-examine all witnesses. ***Prestridge v. City of Petal***, 841 So. 2d 1048, 1060 (Miss. 2003). The Court found there was no denial of due process because the other set of co-defendants was allowed to cross-examine the municipality's witnesses. ***Id.*** at 1060. The Court reiterated that a defendant "has the right to cross-examine each plaintiff's witnesses," and while both sets of defendants had not been allowed to cross-examine the witnesses, the interests were sufficiently served by the existing cross-examination. ***Id.*** at 1060 (citing ***Jones v. Babst***, 323 So. 2d 757, 760 (Miss. 1975)).

Unlike the ***City of Petal*** case, where one set of co-defendants was allowed to cross-examine the Incorporators' witnesses, *none* of the objectors in this case were allowed to cross-examine the witnesses. Indeed, there was no opportunity to cross-examine *at all*. The right to cross-examine was simply not provided to the Objectors.[8]

At the trial, the Incorporators presented four witnesses. Following their direct examinations, each witness was excused immediately and without any opportunity for cross-examination by the incorporation opponents. Following counsel for the Incorporators' direct examination of Charles Ingraham on behalf of the Incorporators, he told the chancellor, "We would tender the witness[,] Your Honor." R.E. 10 at 28. The trial judge's immediate response was, "You are free to step down, sir. Who do you propose to call next?" ***Id.***

[8] While Section 21-1-17, which governs incorporation hearings, does not specifically address cross-examination, Rules 3.03 and 3.06 of the Uniform Chancery Court Rules apply to *all* chancery court proceedings.

Following counsel for the Incorporators' direct examination of Audrey Ramirez, he told the chancery court, "With that, Your Honor, I tender the witness." R.E. 12 at 40. The chancellor's immediately responded by telling the witness, "You may step down." ***Id.*** The Incorporators' counsel then called his next witness, Dalton Roberson, and at the end of his testimony, the attorney again told the judge, "Your Honor, with that, we tender the witness[.]" R.E. 13 at 43-44. Again, the chancellor immediately responded, "You may step down." ***Id.*** at 44.

Even up to the Incorporators' final and most critical witness, an expert in city planning, the court failed to provide the plaintiffs' adversaries the opportunity of what the U.S. Supreme Court calls "testing in the crucible of cross-examination." ***Crawford v. Washington***, 541 U.S. 36, 61 (2004). That expert, Chris Watson, gave lengthy testimony about the incorporation, at the end of which counsel for the Incorporators told the trial judge, "We tender the witness, Your Honor." R.E. 11 at125. The chancellor then asked Mr. Watson to summarize his conclusions more succinctly, and the witness complied. Tr. at 125-30. Immediately thereafter, satisfied with the witness' responses to his inquiry, the chancery judge said, "Very well. You may step down as a witness." ***Id.*** at 130. A few minutes later, after having conducted four direct examinations, counsel for the Incorporators announced to the court that the petitioners rested their case – without a single opportunity for cross-examination having been provided to the Objectors.[9] ***Id.*** at 131.

The right to cross-examine is a component of due process, guaranteed by both the Fourteenth Amendment to the U.S. Constitution and Article 3, Section 14 of the Mississippi Constitution. When a certain right provided to a litigant by rule is arbitrarily denied, then that constitutional protection is violated. *See* ***Van Meter v. Alford***, 774 So. 2d 430, 432 (Miss. 2000).

[9]Regardless that the Objectors were not represented by counsel, the trial court was free to elaborate on the proper procedure during its consideration of the case, and at a minimum, the chancellor should have permitted the Objectors some manner of cross-examination.

The trial court's failure to provide the incorporation opponents and opportunity to cross-examine witnesses amounted to a violation of the opponents' constitutional right to due process.

Because "[t]he State may not intentionally deprive a citizen of life, liberty, or property without due process of law," this Court employs a two-step process when evaluating possible infringements of the right to procedural due process. ***Miss. H.S. Activities Ass'n v. Coleman***, 631 So. 2d 768, 774 (Miss. 1994). The questions to be answered are "whether the party had a property interest of which he was deprived and . . . if he was deprived of a property interest, what process was due him." ***Id.***

In the case at bar, the Objectors undoubtedly had a property interest – specifically, the interest in avoiding creation of a municipal government to which they and their property would be answerable. And because such matters are reserved by law for determination in a chancery court, all of the provisions of the Uniform Chancery Court Rules should have been afforded to the incorporation opponents – including the opportunity to cross-examine the Incorporators' witnesses.

The chancery court might have foregone cross-examination under the impression that "there is no legal and formal opposition to the petition . . . ." R.E. 11 at 131. In light of the repeated objections filed with the trial court, and the physical presence of Objectors at the trial, this assessment was unfounded. As the case's lengthy history and voluminous record demonstrate, the attempt to incorporate was fought by the effort's opponents at every opportunity, albeit without the representation of counsel.[10] Still, the right to cross-examination never has been conditioned upon whether someone has retained an attorney. Furthermore, the

[10] Although the incorporation opponents 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 that is immune from procedural bars. *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)).

Objectors were parties to the court action by virtue of state law, and in addition to being entitled to notice and service in the matter, they were entitled to cross-examine the witnesses for a new and unnecessary level of bureaucracy and taxes.

Therefore, because the chancery court failed to provide due process to the opponents of incorporation by failing to permit cross-examination of the petitioners' witnesses in accordance with the Uniform Chancery Court Rules, this Court should reverse the trial court's judgment and remand for a new hearing on the Petition.

IV. The Second Chancellor Should Have Ordered a New Trial.

Instead of relying upon impressions and knowledge of the case of his predecessor, the second chancellor on the case should have held a new trial.

Generally speaking, and with good reason, the courts "are reluctant to reverse the chancellor who was present and saw and smelled the 'smoke of battle.'" ***Ferguson v. Lewis***, 31 So. 3d 5, 12 (Miss. Ct. App. 2009). The wide discretion afforded chancellors is partly due to the legal reality that they serve as not just judge but fact-finder. As Justice Robertson wrote for the Court:

> The trial court necessarily has an infinitely superior vantage point when compared with that of this Court, which has only a cold record to read.
>
> . . .
>
> The trial judge saw these witnesses testify. Not only did he have the benefit of their words, he alone among the judiciary observed their manner and demeanor. He was there on the scene. He smelled the smoke of battle. He sensed the interpersonal dynamics between the lawyers and the witnesses and himself. These are indispensable.

Culbreath v. Johnson, 427 So. 2d 705, 708 (Miss. 1983). There lies the twist: the chancellor in this case who entered the findings of fact and conclusions of law, and the resulting final decree, was more akin to an appellate court than the original trial judge, because he never smelled "the smoke of battle." In a case as complex as incorporation, the reality is that the findings of fact

and conclusions of law could have only be accurate if weighed and authored by the sitting trial judge.

Because the second chancellor should have ordered a new trial after appointment, the Final Decree must be reversed.

Conclusion

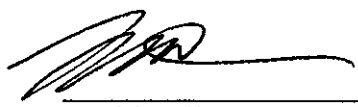
For four major reasons the Incorporation of Diamondhead must be reversed and remanded for a new proceeding. First, because the Incorporators failed to satisfy the statutory requirement of 2/3 signatures. Second, because the Incorporators listed the wrong date for the incorporation hearing in their newspaper publications. Third, because the trial court did not afford the Objectors the opportunity to cross-examine the Incorporators' witnesses. Last, because the second chancellor should have ordered a new trial so that he could properly weigh the testimony introduced in the case.

Accordingly, the Final Decree of the Hancock Chancery Court must be vacated, and the Incorporators' Petition dismissed without prejudice.

Filed this the 18th day of January, 2011.

Respectfully Submitted,

Attorneys for Appellants



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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:

Ms. Kathy Gillis, Clerk (via Hand Delivery)
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Jackson, Miss. 39205

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THIS, the 18th day of January, 2011.

DAVID NEIL McCARTY, ESQ.

The Sea Coast Echo
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TIMOTHY A. KELLAR
CHANCERY CLERK
BY [signature] D.C.

PROOF OF PUBLICATION

STATE OF MISSISSIPPI
HANCOCK COUNTY

#2008-618

PERSONALLY appeared before me the undersigned authority in and for said County and State, JAMES R. PONDER, publisher of THE SEA COAST ECHO, a newspaper printed and published in the City of Bay Saint Louis, said County, who being duly sworn, deposes and says the publication of this notice hereunto annexed has been made in the said publication 4 weeks to-wit:

On the 13 day of August 2008
On the 20 day of August 2008
On the 27 day of August 2008
On the 3 day of September 2008

James R. Ponder
Publisher

Sworn to and subscribed before me A NOT

[signature]

this 15 September 2008

Notary Public State of Mississippi At Large
My Commission Expires: November 01, 2009

PENGAD 800-631-6989

Approved

IN THE CHANCERY COURT OF HANCOCK COUNTY, MISSISSIPPI
IN THE MATTER OF THE INCORPORATION OF THE CITY OF DIAMONDHEAD, MISSISSIPPI, DIAMONDHEAD INCORPORATORS
PETITIONERS
VS.
CITY OF BAY ST. LOUIS, A MUNICIPAL CORPORATION
CITY OF WAVELAND, A MUNICIPAL CORPORATION, AND CITY OF PASS CHRISTIAN, A MUNICIPAL CORPORATION
DEFENDANTS
CIVIL ACTION NO. C2301-08-618(4)
NOTICE OF HEARING ON THE PETITION FOR THE INCORPORATION OF MUNICIPALITY TO BE NAMED THE CITY OF DIAMONDHEAD, MISSISSIPPI

TO ALL PARTIES INTERESTED IN, AFFECTED BY OR HAVING OBJECTIONS TO, THE INCORPORATION OF THE CITY OF DIAMONDHEAD, MISSISSIPPI:

Notice is hereby given to all persons interested in, affected by, or having objections to the proposed incorporation of the City of Diamondhead, Mississippi, that a hearing on the petition to incorporated said City of Diamondhead will be held on the 15th day of September, 2008 at the Hancock County Chancery Court, 3068 Longfellow Drive, Bldg. 2, in Bay St. Louis, Mississippi at 9:30 o'clock a.m. All persons interested in, affected by, or having objections to the proposed incorporation of the City of Diamondhead, Mississippi have the right to appear and enter their objections, if any, to the proposed incorporation.

The territory proposed to be incorporated is described as follows:

Area Proposed to be Incorporated as the City of Diamondhead

Beginning at an iron pipe set on the Eastern bank of Rotten Bayou at the point of intersection of the aforesaid bank of Rotten Bayou and the Northern line of the Southwest Quarter of the Northwest Quarter, Section 26, Township 7 South, Range 14 West; thence East a distance of 932 feet to an iron stake set at the Northeast corner of the above mentioned Southwest Quarter of the Northwest Quarter; thence South to a point on the North line of the Southwest Quarter of said Section 26; thence East to the Northeast corner of the Southwest Quarter of said Section 26; thence South a distance of 550 feet, more or less, to a point on the Northerly right-of-way of an existing Mississippi Power Company Transmission Line Easement, said easement containing a 230 kV and a 115kV transmission line; thence run Northeasterly along the Northerly right-of-way of said existing Mississippi Power Company Transmission Line Easement to its point of intersection with the West line of the Northeast Quarter of the Southeast Quarter of said Section 26; thence run North to the Northwest corner of the Northeast Quarter of the Southeast Quarter of said Section 26; thence run East along the North line of the Northeast Quarter of the Southeast Quarter of said Section 26 to the East line of said Section 26, said point also lying on the Northwest corner of the South half of Section 25, Township 7 South, Range 14 West; thence run East along the North line of the South half of said Section 25 to the Northeast corner of the South half of said Section 25, said point also lying on the County line common to Hancock and Harrison Counties, and the same being the line common to Ranges 13 and 14 West, Saint Stephens Meridian; thence run Southerly along said common County line to a point intersecting the present corporate limits of the City of Bay St. Louis, said point lying at the intersection of the line common to Ranges 13 and 14 West, Saint Stephens Meridian, with the center of the St. Louis Bay; thence run Southwesterly along the present corporate limits of the City of Bay St. Louis to the center of regular Section 14, Township 8 South, Range 14 West; thence leaving the present corporate limits of the City of Bay St. Louis, run Northwesterly to the point where the thread or centerline of Cutoff Bayou intersects St. Louis Bay, said point lying at the mouth of said Cutoff Bayou; thence run Northwesterly along the meanderings of the thread or centerline of said Cutoff Bayou to the point of intersection of the thread or centerline of said Cutoff Bayou with the thread or centerline of the Jordan River (also known as the Jourdan River); thence run Northerly along the meanderings of the thread or centerline of said Jordan River to the point of intersection of the thread or centerline of said Jordan River with the thread or centerline of Rotten Bayou; thence run Northeasterly along the meanderings of the thread or centerline of said Rotten Bayou to its intersection with the North line of the Southwest Quarter of the Northwest Quarter of Section 26, Township 7 South, Range 14 West; thence run East along the North line of the Southwest Quarter of the Northwest Quarter of said Section 26 to an iron pipe set on the Eastern bank of Rotten Bayou and the Point of Beginning.

Given under my hand and seal of office this, the 8th day of August, 2008.

[SEAL]

TIMOTHY A. KELLAR
HANCOCK COUNTY CHANCERY CLERK