

**SUPREME COURT OF THE STATE OF MISSISSIPPI**

**CASE NO. 2011-CA-00016**

**IN THE MATTER OF THE EXTENSION  
OF THE BOUNDARIES OF THE  
CITY OF TUPELO, MISSISSIPPI**

**CITY OF SALTILLO; LEE COUNTY, MISSISSIPPI;  
PALMETTO-OLD UNION FIRE PROTECTION  
DISTRICT; BELDEN FIRE PROTECTION DISTRICT;  
AND UNITY FIRE PROTECTION DISTRICT**

**APPELLANTS**

**VS.**

**CITY OF TUPELO**

**APPELLEE**

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**REPLY BRIEF OF APPELLANT CITY OF SALTILLO**

**in response to Brief of Appellee City of Tupelo**

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## CITY OF SALTILLO'S *DAUBERT* CHALLENGE

Issue I presented in the City of Saltillo's Appellant Brief was: "Whether *Daubert* is the proper standard for admitting expert testimony in an annexation proceeding." In over thirty pages of briefing on this issue in its Brief of Appellee, the City of Tupelo provides this Court with misinformation about the application of *Daubert* and rejects the *Daubert* standard as it should be applied in annexation cases. The aim of the City of Tupelo is to have this Court rule that the *Daubert* standard does not apply in annexation cases.

In page 1 of its Brief of Appellee, the City of Tupelo states: "There is no question but that Karen Fernandez is an expert in the field of urban and regional planning, based on her extensive training, experience, knowledge and skill." In stating as much, the City of Tupelo dismisses eighteen years (eight in Mississippi<sup>1</sup>) of the application of the *Daubert* factors, factors which were incorporated into Rule 702 of the *Mississippi Rules of Evidence* which was amended in 2003 "to clarify the gatekeeping responsibilities of the court in evaluating the admissibility of the expert testimony." *Miss. R. Evid.* 702, Comment.

Also, on page 1 of its Brief of Appellee, the City of Tupelo states:

Saltillo's argument is that *Daubert* established a particular list of inquiries, which are commonly referred to as the "*Daubert* factors," that must be asked of and answered by all experts in all types of cases to establish reliability of testimony, and that this must occur before the expert gives substantive testimony, even when the factfinder is the judge; otherwise, the expert must be prohibited from testifying. **This is incorrect.**

(Emphasis added.)

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<sup>1</sup>

This Court's first reference to *Daubert* appears to be in a dissent issued by Justice Chuck McRae in *Howard v. State*, 853 So.2d 781 (Miss. 2003).

On page 2 of its Brief of Appellee, the City of Tupelo states:

Saltillo's argument also ignores that the reasoning behind *Daubert* - to protect a jury from unreliable and/or irrelevant testimony - is of limited import in a non-jury trial where the judge, as trier of fact, is certainly capable of hearing evidence and discerning for himself whether the evidence is reliable and relevant and, therefore, whether it should be given any weight and, if so, what extent.

Clearly, the City of Saltillo's argument is correct. At pages 14 and 15 of the Brief of Appellant the City of Saltillo discussed the five reported cases<sup>2</sup> where a Chancery Court's use of *Daubert* was analyzed. Time and time again our trial and appellant courts have applied *Daubert* in bench trials. In fact, in *S.G. v. D.C.*, 13 So.3d 269 (Miss. 2009), this Court stated that guardian ad litem recommendations to a chancery court must adhere to the strict guidelines of *Daubert*. See *S.G. v. D.C.*, 13 So.3d 269, footnote 5. *Daubert* is the standard for the admission of expert testimony and it is applied to all expert testimony. There is no exception for annexation cases, which are always heavily reliant upon expert testimony on the twelve indicia of reasonableness. Certainly, in the annexation *sub judice* the City of Tupelo relied almost exclusively on the maps, graphs and charts prepared by Karen Fernandez and her firm.<sup>3</sup>

It would be a step back in time for this Court to hold that *Daubert* is inapplicable in annexation cases. The City of Saltillo went through extensive attempts in citing and discussing the application of *Daubert* to the trial court. The City of Saltillo provided an extensive

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<sup>2</sup> At page 15 of the Brief of Appellant, the City of Saltillo mistakenly identified *Investor Res. Servs., Inc. v. Cato*, 15 So.3d 412 (Miss. 2009), as a matter arising out of a chancery court. The City of Tupelo pointed out the mistake in footnote 8 of its Brief of Appellee. This Court cited *Giannaris v. Giannaris*, 960 So.2d 462 (Miss. 2007) at paragraph 5 of *Investor Res. Servs., Inc. v. Cato*.

<sup>3</sup> A summary of Karen Fernandez's participation in the City of Tupelo's annexation is included at pages 26-27 of the City of Saltillo's Brief of Appellant.

presentation of the arguments made before the trial regarding its *Daubert* challenge at pages 16-26 of its Brief of Appellant. The City of Tupelo claimed at trial and continues to claim that the City of Saltillo misunderstands *Daubert* but most of what was stated by the City of Saltillo at trial was verbatim from Mississippi Supreme Court holdings and a long line of applicable cases.

The City of Tupelo is taking the position that *Daubert* does not apply because that is the only position that makes up for the trial court's error in allowing the testimony of the City of Tupelo's annexation expert, Karen Fernandez. The City of Saltillo included a summary and excerpts from the transcript of the voir dire of Karen Fernandez at pages 16-18 of its Brief of Appellant and those segments will not be re-hashed here. A more straight forward summary of Mrs. Fernandez's voir dire goes as follows: Mrs. Fernandez was questioned according to the prompts provided for in *Giannaris v. Giannaris*, 960 So.2d 462 (Miss. 2007)(citing *Daubert* at ¶14); Mrs. Fernandez struggled answering the questions; counsel for the City of Tupelo objected; the Special Chancellor stated his thoughts; the City of Saltillo continued its voir dire and Mrs. Fernandez continued to struggle with the questions; counsel for the City of Tupelo objected again; and, without Mrs. Fernandez giving the basis of her opinion for the need to expand indicium, or any other indicia, the trial court stopped the City of Saltillo's *Daubert* challenge. The trial court provided the following statement, which clearly indicated the trial court's refusal to apply the *Daubert* standard:

[text block is included on next page]

19 You can ask the questions. As far as  
20 I'm -- the Court is of the opinion at this  
21 point that urban and regional planning is a  
22 legitimate field of professional expertise and  
23 that it qualifies under the *Daubert* standards.  
24 Now, the issue is, is she a qualified  
25 expert. The Court is not going to allow you  
26 to go through all of her testimony and find  
27 that out, but the Court will allow you to  
28 reassert your objection under the *Daubert*  
29 standards at the end of her testimony saying  
1 that she didn't do that, that she didn't apply  
2 the applicable standards that should have  
3 been.

(T. 2669-2670; excerpt may be found at Tab 7 of City of Saltillo's Record Excerpts) (Emphasis added.)

*Daubert* certainly applies in annexation cases and the trial court's allowance of Karen Fernandez's testimony was clear error. The *Daubert* factors are applied before the entry of evidence, or when the evidence is "at the gate," and not to the weight evidence, after the evidence has been allowed by the court. This Court should exclude her testimony and, accordingly, dismiss the annexation for lack of evidence, or, in the alternative, reverse and remand for new trial.

#### RE-AUTHORIZATION OF ANNEXATION ORDINANCE ISSUE

This is an issue of first impression. The City of Saltillo does not contend that a new board must re-adopt all ordinances from term to term. Such an insinuation is incredulous and distracts from the point at issue— an annexation ordinance is dependent upon judicial ratification to become effective unlike any other ordinance. An annexation ordinance is different because it is the creature of the statutory scheme allowing municipal annexation. At page 3 of the Brief of Appellee, the City of Tupelo states "to 're-authorize' the annexation ordinance is without any legal basis and, frankly, make no sense." Frankly, the issue is simple: If an annexation ordinance can only become effective upon judicial ratification of a

Special Chancellor, it logically follows that the Special Chancellor can dismiss and invalidate an annexation ordinance. A dismissal of an annexation proceeding in effect voids and invalidates the annexation ordinance. Otherwise, there would exist an ineffectual ordinance.

This "Stale Ordinance" issue was first raised by the City of Saltillo in its Motion to Dismiss filed in 2009. The city council for the City of Tupelo could have voted to re-authorize its 2007 annexation ordinance in 2009 and at any time prior to the closing of the annexation trial in June 2010. The City of Tupelo surprisingly refused to do so and, therefore, this Court should reverse and render a judgment of dismissal in this annexation matter.

**RESPECTFULLY SUBMITTED**, this the 13<sup>th</sup> day of October, 2011.

  
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### CERTIFICATE OF SERVICE

This is to certify that I, Jason D. Herring, Esq., one of the attorneys for the City of Saltillo, have this day served a true and correct copy of the above and foregoing Reply Brief of Appellant City of Saltillo to the following by United States Mail, postage prepaid thereon, to-wit:

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This the 13 day of October, 2011.

  
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