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**

APPEAL FROM THE CHANCERY COURT OF LEE COUNTY, MISSISSIPPI
HONORABLE EDWARD C. PRISOCK, SPECIAL CHANCELLOR

BRIEF OF APPELLANT CITY OF SALTILLO

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ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

The Appellant, the City of Saltillo, believes that oral argument would be beneficial to the Court in this case due to its complicated set of facts and the intensive nature of the Daubert analysis. The City of Saltillo therefore requests that the Court grant the parties the opportunity to argue this case orally.

STATEMENT OF ISSUES

I. Whether *Daubert* is the proper standard for admitting expert testimony in an annexation proceeding.

II. Whether the Court had jurisdiction to proceed on the City of Tupelo's annexation petition when it failed to continue process to a future day certain from the initial hearing held on the annexation matter.

III. Whether the City of Tupelo's request for voluntary dismissal of the prior annexation petition bars the use of the annexation ordinance in a second subsequent action for annexation without re-authorization of the annexation ordinance by Tupelo's newly constituted city council.

STATEMENT OF THE CASE

The City of Tupelo filed a Petition for Approval of the Extension of the Boundaries of the City of Tupelo, Mississippi in the Chancery Court of Lee County, Cause No. 08-1446, on September 12, 2008. The City of Saltillo participated in all aspects of litigation objecting to the annexation of Areas 6, 1 and 2 North[1] of the proposed annexation area (PAA).

The City of Saltillo filed a motion to dismiss raising the trial court's loss of jurisdiction for failing to continue process and the invalidity of the City of Tupelo's annexation ordinance. Lee County filed a similar motion to dismiss based upon the City of Tupelo's failure to preserve process and subsequent loss of jurisdiction. The trial court denied the motions to dismiss and preceded to set dates for a trial beginning March 29, 2010.

A twenty-two (22) day trial was held in this matter on the following days: March 29th, 30th and 31st, April 1st, 5th, 6th, 12th, 13th, 14th, 15th, 19th, 20th, 21st and 22nd, May 24th, 25th, 26th and 27th and June 1st, 2nd, 3rd and 7th. The sum of 3,547 pages were transcribed from the proceedings. Thirteen (13) expert witnesses testified during the trial, including three experts in the field of urban and regional planning.

On the 15th day of trial the City of Tupelo sought to present the testimony of its annexation expert, Karen Fernandez. The City of Saltillo then undertook to voir dire Ms. Fernandez of her expert opinions pursuant to Rule 702 of the *Mississippi Rules of Evidence* and *Daubert*. After cross examination under which the City of Tupelo's expert was unable to provide

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[1]The City of Saltillo refers to Areas 1, 2 North and 6 as Areas 6, 1 and 2 North because of the alignment of said areas from left to right on the annexation map. See Record Excerpts, Tab 9, p. 90; R. 1038 [The citation "R" shall refer to the pages of the Trial Court Record].

appropriate responses, the trial court stopped the City of Saltillo's voir dire and ruled, over the City of Saltillo's objections, that Ms. Fernandez's testimony would be allowed.

The City of Saltillo timely submitted the City of Saltillo's Proposed Findings of Fact and Conclusions of Law outlining in ninety-one (91) pages the substantial evidence that disfavored the City of Tupelo's annexation of Areas 6, 1 and 2 North. The trial court entered its findings of fact and conclusions of law on November 29, 2010, finding annexation of Areas 6, 1 and 2 North to be reasonable. Later, on December 20, 2010, the trial court issued a revised findings of fact and conclusions of law and entered the Final Judgment Approving the Enlargement and Extension of Boundaries of City of Tupelo, Mississippi As Modified. The City of Saltillo timely and properly filed a Notice of Appeal of said judgment on December 29, 2010.

STATEMENT OF FACTS

A. Initial Hearing, Saltillo's Motion to Dismiss and Petition for Permission to Appeal

The City of Tupelo filed a Petition for Approval of the Extension of the Boundaries of the City of Tupelo, Mississippi in the Chancery Court of Lee County, Cause No. 08-1446, on September 12, 2008. An Order setting a date certain for the hearing on the City of Tupelo's annexation petition was entered on September 30, 2008. (R. 43) The Summons served upon the City of Saltillo and the Notice of Hearing posted and published in Lee County required the City of Saltillo and all unknown objectors to appear and defend at the hearing on November 3, 2008. (R.44-59) A hearing was convened on November 3, 2008, wherein the trial court noted the appearance of fifteen objectors to the annexation and addressed counsels' concerns regarding the entry of a scheduling order. The hearing recessed without the trial court's continuance to a later day for hearing. Over sixteen (16) months elapsed from the initial hearing on the City of Tupelo's annexation petition and no additional summons or process were issued, published or posted for the setting of the trial date.

The ordinance attached to the City of Tupelo's annexation petition was passed on July 3, 2007, and was the basis of an attempt for annexation filed in the Chancery Court of Lee County, Cause No. 08-0546. The City of Tupelo filed a Motion for Voluntary Dismissal in Cause No. 08-0546 and the annexation petition was dismissed upon the entry of an Order dated September 8, 2009. The annexation petition filed in Cause No. 08-0546, was voluntarily dismissed by the City of Tupelo, due to the City of Tupelo's failure to comply with Rule 4(h) of the Mississippi Rules of Civil Procedure pertaining to the time limit for service of process.

The City of Tupelo gave up its two at-large city council seats as a result of its violation of Section 2 of the Voting Rights Act as established in *Jamison v. City of Tupelo*, 1:04cv366, Northern District of Mississippi. Chief Judge Michael P. Mills entered an order on January 23, 2007, finding that the 7-2 (ward/at-large) hybrid election system in the city of Tupelo violated §2 of the Voting Rights Act of 1965 (42 U.S.C. §1973). Thereafter, on March 5, 2007, the City of Tupelo entered into an Agreed Order to adopt and submit to the Department of Justice for approval a redistricting plan that complied with the District Court's decision. On February 12, 2008, Chief Judge Mills dismissed the case without prejudice after the City of Tupelo submitted a redistricting plan to the Department of Justice. Following the municipal elections in the summer of 2009, the City of Tupelo's city council was reconstituted with five new council members among its seven member council. Only two council members remain on the City of Tupelo's city counsel that passed the annexation ordinance on July 3, 2007.

The City of Saltillo and Lee County filed separate motions to dismiss based upon Tupelo's failure to preserve process in the annexation proceeding. (R. 308-318 and 322-346; Record Excerpts, Tab 8) The trial court heard the motions to dismiss on December 14, 2009, and an Order Denying Motion to Dismiss of Lee County and Denying Motion to Dismiss of City of Saltillo was entered on January 4, 2010. (R. 401-402; Record Excerpts, Tab 5) The trial court also entered an Order Setting Trial (R.404) on January 4, 2010, for a trial beginning March 29, 2010, and continuing each weekday thereafter (excluding Fridays and April 7 and 8) through May 6, 2010, for a total of six weeks of trial.

The City of Saltillo properly and timely filed a Petition for Permission to Appeal to this

Court on January 25, 2010[2]. Said Petition sought this Court's review of the trial court's interlocutory order denying the City of Saltillo's motion to dismiss for lack of jurisdiction (Issue II herein) and the invalidity of the annexation ordinance (Issue III herein). This Court denied the City of Saltillo's interlocutory appeal on February 18, 2010.

In the City of Tupelo's written response to the City of Saltillo's motion to dismiss and at the hearing held on December 14, 2009, counsel for the City of Tupelo announced that it would re-post and re-publish a notice of the setting of the trial dates for the annexation proceeding. T. 177-179[3]. The City of Tupelo's offer to re-post and re-publish the setting for the annexation trial is found in paragraph 6 of the Response of City of Tupelo to City of Saltillo's Motion to Dismiss (R. 382). Counsel for the City of Tupelo announced the following at the hearing held on December 14, 2009:

> Any concerns that subsequent summons should be given for due process concerns or for due process issues is premature.
>
> We will, as did the parties in this Horn Lake case, we will republish and repost when we have a trial date. That was what was done at the trial level there. It was not a requirement and it was not even an issue before the Court. It was solely something that was recited in the facts, and I think it's from that that this recitation of facts that Saltillo and Lee County have apparently built it up into some sort of legal requirement.....

[text block continues on next page]

[2]The City of Saltillo's Petition was filed in Cause No. 2010-M-00118-SCT.

[3]The citation "T" shall refer to the pages of the Trial Court Transcript.

MRS. STEGALL: We won't be doing summonses as such, but do the publication and the posting, just republishing and reposting as we did the first time that just says, Here's the trial date.

JUDGE PRISCOCK: All right.

MRS STEGALL: Just out of an abundance of caution. But we will not be issuing summons to any individuals, no, your Honor.

JUDGE PRISCOCK: Okay.

MRS STEGALL: Those individuals that care to appear have already appeared and - - like I said, some are here and present. But as far as publishing and posting, we do intend to do that.

Your Honor, I don't believe we have anything else at this point to add on this particular issue.

Contrary to the City of Tupelo's announcement, the City of Tupelo did not re-post and re-publish a notice of the setting of the trial dates for the annexation trial. The City of Tupelo stated the following at page 8 of its Response of the City of Tupelo to Petition for Permission to Appeal:

> Although Tupelo had at one time determined to negate such an argument by reposting and republishing once a trial date had been set by the lower court [footnote omitted], Tupelo has since determined that it will not undertake the unnecessary, expensive and time-consuming effort of re-posting and re-publishing solely to negate an unfounded and incorrect argument that may never be raised.

The City of Tupelo cited the following observation of the trial court at page 8 of its Response:

> I'm somewhat concerned about the issuing a whole bunch of summonses. I don't know where that's going to lead. Notice, fine; informal notice, [footnote omitted] fine but a whole bunch of summonses, I don't think the statute requires it, nor should it be done. . . . [I]t would be a most confusing thing to issue multiple

> summons. Make informal notices, that's fine. . . . Now I can see notice like y'all all agreed to up here that day [added text omitted], that you keep people informed like you do in any normal civil case. You don't give summonses every time a case is continued.

(T. 178, 180)

B. City of Saltillo's *Daubert* Challenge

On the 15th day of trial the City of Tupelo sought to present the testimony of its annexation expert, Karen Fernandez. The City of Saltillo then undertook to voir dire Ms. Fernandez of her expert opinions pursuant to Rule 702 of the *Mississippi Rules of Evidence* and *Daubert*. After cross examination under which the City of Tupelo's expert was unable to provide appropriate responses, the trial court stopped the City of Saltillo's voir dire and ruled, over the City of Saltillo's objections, that Ms. Fernandez's testimony would be allowed. The City of Saltillo made a proffer on the record.

The relevant statements made by the trial court and the City of Saltillo regarding the *Daubert* challenge are included in the Argument section below under Issue I.

STANDARD OF REVIEW

This Court may reverse a chancellor's determination that an annexation is either reasonable or unreasonable if that decision is manifestly erroneous or is unsupported by substantial and credible evidence. *In the Matter of the Enlargement and Extension of the Mun. Boundaries of the City of Clinton*, 920 So. 2d 452, 454 (Miss. 2006) (*citing In re Extension of the Boundaries of the City of Batesville*, 760 So. 2d 697, 699 (Miss. 2000)). More recently, this Court stated that it may reverse a chancellor's determination that an annexation is either reasonable or unreasonable "where the chancery court has employed erroneous legal standards or where we are left with a firm and definite conviction that a mistake has been made." *City of Horn Lake*, 57 So. 3d 1253, 1258 (Miss. 2011) (*citing Bassett v. Town of Taylorsville*, 542 So. 2d 918, 921 (Miss. 1989)).

SUMMARY OF ARGUMENT

Application of *Daubert*

The trial court's admission of the City of Tupelo's annexation expert, Karen Fernandez, was improper in light of the City of Saltillo's *Daubert* challenge. Karen Fernandez's testimony did not meet the requirements for expert opinion testimony set forth in Rule 702 of the *Mississippi Rules of Evidence* and caselaw.

Loss of Process

The trial court lost jurisdiction to proceed in the annexation matter when the November 3, 2008 hearing was recessed without the trial court's continuance to a later day for hearing. The trial court did not reestablish jurisdiction to proceed in the annexation matter because the City of Tupelo refused to re-post and re-publish notice of the trial setting and the trial court did not order the City of Tupelo to re-post and re-publish. At law, the City of Tupelo's failure to continue process to a day certain for hearing renders the trial court without jurisdiction to proceed on the City of Tupelo's annexation action. As a matter of equity and in consideration of constitutional principals, a dismissal of the City of Tupelo's annexation matter is merited based upon the City of Tupelo's refusal to re-establish process since the initial hearing on the annexation matter on November 3, 2008, over sixteen (16) months prior to the annexation trial.

Stale Ordinance

The City of Tupelo's annexation ordinance was passed in 2007 and used as a basis of an annexation petition in 2008 which was voluntarily dismissed by the City of Tupelo. The dismissal of the City of Tupelo's annexation petition bars the use of the 2007 annexation ordinance for a subsequent annexation petition without re-authorization by the Tupelo City

Council. The Court should dismiss the City of Tupelo's annexation action for the City of Tupelo's failure to re-authorize its annexation ordinance.

ARGUMENT

ISSUE I: WHETHER *DAUBERT* IS THE PROPER STANDARD FOR ADMITTING EXPERT TESTIMONY IN AN ANNEXATION PROCEEDING.

All trial courts have a gate keeping responsibility to determine whether the testimony of an expert is relevant and reliable. Such gate keeping responsibility was announced by the United States Supreme Court in *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579 (1993) and has been adopted by this Court. *See Miss. R. Evid.* 702 and Comment; and *Rhodes v. Rhodes*, 52 So. 3d 430 (Miss. Ct. App. 2011) (*citing Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31 (2003)). The *Daubert* trilogy refers to the three United States Supreme Court cases that articulate the *Daubert* standard.

Daubert v. Merrill Dow Pharm., Inc. overturned the seventy-year-old rule of admissibility of expert scientific testimony in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The older *Frye* rule was that expert scientific testimony was to be admitted only when it had received "general acceptance" in the relevant scientific community. The *Daubert* rule is a directly evidential relevancy test, which would admit any expert testimony deemed helpful and germane to the scientific issue before the court. The legal focus on evidential relevance shifts from the scientific community to the evidence itself. The *Daubert* Court indicated that there are at least four factors to consider: testability, specifically Popperian falsifiability; publication and peer review; the known or potential rate of error; and widespread acceptance in the relevant scientific community. Thus, the *Frye* test reappears as merely the fourth factor.

General Electric Co. v. Joiner, 522 U.S. 136 (1997) held that an abuse of discretion standard of review was the proper standard for appellate courts to use in reviewing a trial court's

decision of whether expert testimony should be admitted.

Kuhmo Tire Co. v. Carmichael, 526 U.S. 137 (1999) held that the judge's gate keeping function identified in *Daubert* applies to all expert testimony, including that which is non-scientific.

From *Rhodes v. Rhodes* 52 So. 3d at ¶¶63-64:

> ¶ 63 . . . The *Daubert* standard is a two-pronged inquiry: (1) whether the expert opinion is relevant in that it must "assist the trier of fact" and (2) whether the proffered opinion is reliable. [*Miss. Transp. Comm'n v. McLemore*, 863 So. 2d] at 38 (¶ 16).
>
> ¶ 64. *Daubert* provides a list of factors for assessing reliability, including:
>
> whether the theory or technique can be and has been tested; whether it has been subjected to peer review and publication; whether, in respect to a particular technique, there is a high known or potential rate of error; whether there are standards controlling the technique's operation; and whether the theory or technique enjoys general acceptance within a relevant scientific community.
>
> *McLemore*, 863 So. 2d at 37 (¶ 13) (citing *Daubert*, 509 U.S. at 592–94, 113 S.Ct. 2786). The party offering an expert's opinion has the burden to show the opinion is based on reliable methods and procedures, and not on unsupported speculation or subjective beliefs. [*Miss. Transp. Comm'n v. McLemore*, 863 So.2d] at 36 (¶ 11).

This Court and the Mississippi Court of Appeals have reversed and remanded cases in which the trial court erroneously included or excluded expert testimony. *See Investor Res. Servs., Inc. v. Cato*, 15 So. 3d 412, ¶ 5 (miss. 2009) (provides recitation of reversed and remanded cases). There are at least six reported cases where a Chancery Court's use of *Daubert* was analyzed.

Giannaris v. Giannaris, 960 So. 2d 462 (Miss. 2007) (reversed and rendered in part, reversed and remanded in part) held that a social worker's opinion that a child was adversely affected by alleged change in circumstances was insufficiently reliable to be admitted as expert testimony.

Jones v. Jones, 43 So. 3d 465 (Miss. Ct. App. 2009) (affirmed in part, reversed and remanded in part) held that a guardian ad litem's qualifications and opinions should be based on the principles set forth in *Daubert*.

Minter v. Minter, 29 So. 3d 840 (Miss. Ct. App. 2009) (affirmed) held that the testimony of an expert in counseling, sociology, and social work regarding a child's custody was relevant and reliable.

S.G. v. D.C., 13 So. 3d 269 (Miss. 2009) (reversed and remanded) held, similar to *Jones v. Jones*, that a guardian ad litem's qualifications and opinions should be based on the principals set forth in *Daubert*.

Investor Res. Servs., Inc. v. Cato, 15 So. 3d 412 (Miss. 2009) (reversed and remanded) held that an accountant offered relevant testimony and had the requisite experience.

Rhodes v. Rhodes, 52 So. 3d 430 (Miss. Ct. App. 2011) (affirmed in part, reversed and remanded in part) held an accountant had the requisite accounting knowledge but that the exclusion of testimony was otherwise proper for the accountant's improper valuation.

Clearly, from an evidentiary standpoint, an annexation proceeding is no different than any other matter tried before a Chancellor (or, in this case, a Special Chancellor). Certainly, the *Daubert* standard applies to all expert testimony offered in annexation proceedings. Whether expert testimony is offered to one small aspect or, as is in this case, the whole encompassing theory of a case, the *Daubert* standard applies.

The City of Tupelo offered Karen Fernandez as an expert in the field of urban and regional planning during her direct examination on the 15th day of trial. (T. 2643-2644) The City of Saltillo began its voir dire of Karen Fernandez inquiring of her opinion of the City of Tupelo's need to

expand. (T. 2644-2645)

Ms. Fernandez and Saltillo's counsel engaged in the following exchange before counsel for the City of Tupelo injected with an objection:

> Q My question was what theory or technique did you utilize in reaching an opinion on that indicia.
> A Well, in terms of a theory, it's basically growth of a city. I mean, not so much of a theory, but you have to look at and analyze what's on the ground and what has occurred, so I'm not sure I'm following you by what theory you're asking.
> Q As an expert in urban and planning development --
> A It's urban and regional planning.
> **Q Urban and regional planner, as an expert as an urban and regional planner, I'm simply asking you, did you employ a technique or theory on the indicia of the municipality's need to expand, and if your answer is no, that's fine.**
> **A My answer is -- no, I'm sorry if I didn't explain it correctly before. In terms of technique, we analyzed data, historic data, what's on the ground now.**

(T. 2646-2647) (Emphasis added).

Counsel for the City of Tupelo asserted that the nature of the City of Satlillo's voir dire was more appropriate for cross-examination. (T. 2647) The Court allowed the City of Saltillo to continue voir dire and the counsel for Saltillo explained the purpose of a *Daubert* challenge as follows:

> Q Well, I think we may be confused, Ms. Fernandez, and, perhaps, I'm asking poor questions. What you have just given me is the fact and the data that you are relying upon. I'm asking you -- and we'll get to this in a moment. The way Daubert works, we take the facts and the data, and there's going to be several questions about that, and you apply it to a reliable method, that being the technique or theory, and you get a result, and that result, no matter who the expert is,

[text block continues on next page]

should be the same every time. If you use the same facts and data, and you apply it with a methodology that is proven, and it is proven reliable, then we're going to get the same results no matter whether it's you, or Mr. Watson, or 10,000 other land planners, so what you've just given me is the facts and data. You're telling me you rely on U. S. Census Bureau facts and data. I'm still asking you about the technique or theory that you have utilized in rendering an opinion or coming to the conclusion of an opinion as to the city's need to expand.

A And I guess I'm still not understanding, because what I'm trying to tell you is we utilize different data sources, whether primary or secondary data, analyze that data in regard to the indicia of reasonableness to develop my opinion.

(T. 2651-2652)

Ms. Fernandez offered the following testimony in response to the City of Saltillo's voir dire for the specific technique or theory utilized by Ms. Fernandez in rendering her opinion as to the City of Tupelo's need to expand:

1) Ms. Fernandez follows U.S. Census Bureau data and analysis (T. 2652);

2) Ms. Fernandez studied planning theory under Professor Fritz Wagner at the University of New Orleans in 1986 or 1987 (T. 2654);

3) "[C]ities grow based upon a number of factors, including their population, their quality of life, their economic base, their land development practices." (T. 2654);

4) "[C]ities grow because of certain things like quality of life, economic base, job opportunities, housing, development codes, or development management, growth and management." (T. 2655);

5) Question: When has your theory been peer reviewed?

   Answer: "[M]y definition is we've had a number of people working on this with us from my staff, as well as people from the City of Tupelo, to review and analyze it." (T. 2655-2656);

6) Question: When has your theory been peer reviewed by other urban and regional planners?

Answer: "Well, I think – I don't know that this necessarily is applicable here. I mean, the underlying theory of how cities grow is tested every day, which is what I thought you originally asked me, and I apologize if it's not, and I'm trying to be responsive. I'm not just sure what –" (T. 2656);

7) Question: What group of peers has reviewed your theory in this annexation?

Answer: "Well, the American Planning Association, the Urban Land Institute, Allied Professionals utilize similar data, the American Society of Landscape Architects, the American Institute of Architects utilize similar data, so they could be what you consider the peer review." (T. 2657-2658);

8) Question: What publications support the theory you are utilizing?

Answer: "I think there are a number of publications", "*Life and Death of Great American Cities* by Jane Jacob", and "I have a number of books on urban planning, on, you know, what happens with cities, on analyzing data for cities" (T. 2658-2659);

9) Question: Is *Life and Death of Great American Cities* by Jane Jacob a fiction or nonfiction publication?

Answer: "Well, okay. That's a – let me think of some other ones. Certainly, there's books about New Orleans." (T. 2659); and

10) Question: "What you have testified so far is what makes a city grow; correct?"

Answer: "Well, I've given you an underlying theory of how a city grows, yes." (T. 2659).

The City of Saltillo's voir dire halted with the following question before counsel for the City of Tupelo and the Court interjected comments:

> Q All right. I want to go back to what's relevant in this case, and the first indicia is the need, not how Tupelo grows, not why it grows, not where it grows, but the need, the reasonableness of the need for the City of Tupelo to grow. Do you have a theory or technique for that?

(T. 2660)

The Court stated that there are two issues regarding Ms. Fernandez's testimony:

1) "[I]s urban and city planning a legitimate field of study, or is it some novel, commonly called junk science." (T. 2660); and

2) "[I]s [Ms. Fernandez] qualified as an expert to testify in urban and city planning, or urban and regional planning." (T. 2660).

Counsel for the City of Saltillo offered the argument to the questions raised by the Court as follows:[4]

BY MR. HERRING: There was a case not long ago across the hall that there had been a psychologist testifying in the chancery courts for over 25 years, and, certainly, psychology was an area that had been widely accepted by Daubert, but that particular witness in that particular case, Judge Malski didn't allow to testify under a Daubert Challenge applying the Giannaris versus Giannaris case, which I'm sure everyone in this courtroom is familiar with. It was a 2007 case decided by the Mississippi Supreme Court in those areas of that particular area of social work and psychology, which we all know are disciplines that are not junk science, but as to the particular witness, and I think the Court has hit upon or stated that particular witness, how that particular witness applied the facts and data and a method within that discipline to come to a scientific conclusion, and, Your Honor, as a matter of this record, Your Honor, I think it is necessary that we go through each opinion that she says she's going to testify about.

I think, Your Honor, it is absolutely necessary, absolutely incumbent upon me to go through each of these things, each of these questions that our supreme court has set out for us, and it's really not that long. There's about seven or eight with a couple of

[4] This excerpt from the transcript is lengthy but the City of Saltillo includes it here to show the Court the effort that the City of Saltillo made to explain the context and scope of the *Daubert* standard.

subparts, seven or eight Daubert questions that has to be asked on every opinion that is intended to be given by an expert.

Your Honor, I'll be happy to share, if I could, if the Court would indulge me, in the Giannaris case, it's 960 So.2d 462. It's a 2007 case. It's a chancery court case. And the excerpt from that opinion says that the admission of expert testimony is within the sound discretion of the trial judge, Puckett versus State. Therefore, the decision of the trial judge will stand unless we conclude that the discretion was arbitrary and clearly erroneous and amounting to an abuse of discretion, Mississippi Transportation Commission versus McLemore.

Then it says, Mississippi Rules of Evidence 702 provides if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data. Now, that's basically what we've heard so far. (2) The testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

And that's why it's necessary -- I agree with Your Honor. We're not here to put on trial regional and city planning. I mean, I'm not putting that on trial, but what we are putting on trial is this particular witness, and the case goes on and says, this Rule recognizes the gate keeping responsibility of the trial court to determine whether expert testimony is relevant and reliable.

First, the Court must determine that the expert testimony is relevant, that is, the requirement that the testimony must assist the trier of fact means the evidence must be relevant. Next, the trial court must determine whether the proffered testimony is reliable depending on the circumstances of the particular case. I think this gets to the

issue that the Court is interested in.
Depending on the circumstances of the particular case, many factors may be relevant in determining reliability, and the Daubert analysis is a flexible one. Daubert provides an illustrative, but not an exhaustive, list of factors that trial courts may use in assessing the reliability of expert testimony, and it goes to Footnote 11 and says according to McLemore.
And McLemore is the 863 So.2d 31 supreme court decision issued in 2003 that says this: These factors include whether the theory or technique can be and has been tested. Well, obviously, if you've got a theory or technique to be tested, first off, you've got to have a theory or technique. That was my first question.
Second, whether it has been tested, as I just stated.
Third, whether it has been subjected to peer review and publication.
Fourth, whether in respect to a particular technique there is a high known or potential rate of error.
Next, whether there are standards controlling the techniques of operation and whether the theory or technique enjoys general acceptance, going back to the old Frye standard, within a relevant scientific community.
All of those questions, Your Honor, are very applicable.
Now, typically, the argument that I would get into a situation is, judge, this isn't medicine, it's not science, but I know the Court, I'm sure, and counsel opposite are all familiar with the Daubert Trilogy, that being Daubert versus Merrell Dow, General Electric versus Joiner and Kumho Tire versus Carmichael. Those are the three Daubert cases, and the Kumho case says this: Kumho versus Carmichael held that a judge's gate keeping function identified in Daubert applies to all expert testimony, including that which is nonscientific.
So what we have here, Your Honor, again, is not an attack on urban and regional

planning, because I think there are persons that are qualified to testify to that. They apply certain theories and techniques, they get different facts and data, depending upon where their planning is going on, they apply it to that method, and they get a result, and you should be able to take 10 urban and regional planners, give them the same facts and data, apply the same method and come out with the same result.
That's what Daubert is all about.
Daubert is about preventing 10 experts in the same case giving 10 different opinions, getting rid of junk science. It's about if you have two plus two, it's going to equal four, regardless of which expert has it, and that's what this is all about. It's not about attacking urban and regional planning, Your Honor.
I think in this particular case, it is very, very, very important, and we'll get there in a moment, hopefully, about what theory or techniques she is utilizing, what facts and data she collected, whether she obtained independent verification, because that's in the Giannaris case, that's a side issue in the Giannaris case about whether or not the social worker had obtained independent verification and how that is applied to the method, the theory or technique, to result in an opinion or a conclusion that is acceptable under Daubert.
And, Your Honor, in all candor to the Court, that is the road that I am traveling, and in all candor to the Court, you know, I told counsel here with Lee County, I said, you know, this Daubert Challenge could last 10 minutes, or it could last for I don't know how long. If she knows her theories and techniques, knows when they have been published, knows when they have been peer reviewed, then she probably won't have any problem with it.

(T. 2661-2666)

The Court and counsel for the City of Tupelo made additional comments and the Court

ruled as follows: 1) that urban and regional planning was a legitimate field of professional expertise and that it qualifies under the *Daubert* standards and 2) that counsel for the City of Saltillo could not continue to voir dire Ms. Fernandez for a *Daubert* challenge. (T. 2669-2670)

The trial judge stated the following in his ruling on the City of Saltillo's *Daubert* questioning:

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

(T. 2669-2670)

Counsel for the City of Saltillo offered the following comments for clarification of the court's ruling:

> BY MR. HERRING: Yes, sir. Your Honor, let me make sure that I'm clear. I had no intentions of getting into her opinions. Basically, it was simply are you going to give -- do you intend on giving an opinion on this particular indicia of the 12 reasonable Indicia, and then if she says no, then, obviously, we would move on, and I think she would be through with that area. I mean, she couldn't later come on and then give an opinion in a particular area, because this is our chance to Daubert her or to voir dire her. I was not going to get into, well, give me that opinion, just simply do you intend on giving an opinion and what theory or

[text block continues on next page]

technique, has it been tested, has it been peer reviewed, has it been published, what is the known rate of error, and is it generally accepted in the community.

Now, Your Honor, in all candor and in all due respect thus far to Ms. Fernandez, under the dictates of what the Court has given us under the last -- well, it may not be the last, but, certainly, a recent chancery court decision is she doesn't qualify, because she hasn't given us a theory or a technique, she hasn't told us about it being tested, the peer review, the publications, you know, she gave one book, and when I asked her was it fiction or nonfiction, she had to move on.

Judge, we're a long way from being Daubert proved on at least this indicia. I'm not suggesting when we get to the others she might be able to, but I wanted the Court to make sure that the Court understood that I was not going to get into cross-examining her on all of her opinions, the substance of those opinions. Basically, how in the world did you get to this opinion, which, again, Daubert requires us to do.

If it's the Court's ruling that Daubert is -- that you've heard enough on that, certainly, I will abide by this Honorable Court's ruling.

(T. 2670-2672)

The trial judge responded with the following comments:

CHANCELLOR PRISOCK: Well, again, the Court's ruling is that urban and regional planning is a legitimate field of expertise for professionals that are trained educationally and professionally to make evaluations based on any number of factors. It's not new science, it's been around a long time, the supreme court has recognized it in many cases. The Court recognizes it's a field of expertise that the Court is going to hear testimony on from a person who has the proper

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basis to make those evaluations. That's a matter of what she is going to apply. If she's using the wrong standard, if she's making her evaluation based on the setting of the moon tonight, then I don't think that's a very -- that's not meeting Daubert standards. If she's got other factors and uses those, then I think she's qualified to do it.

(T. 2672)

Counsel for the City of Saltillo offered the following proffer for its *Daubert* challenge of Karen Fernandez:

BY MR. HERRING: Yes, sir. Your Honor, the City of Saltillo is now going into a proffer. The City of Saltillo would show unto this Honorable Court that the Daubert standard requires that any person who testifies as an expert in the State of Mississippi must first apply certain theories or techniques, whether or not they have been tested, whether they have been subjected to peer review and publication, whether with respect to a particular technique, there is a high known or potential rate of error, whether there are standards controlling the techniques of operation, whether the theory or technique enjoys general acceptance within a relevant scientific community, and that Ms. Fernandez is unable to adequately answer those questions under the Daubert standard and applying the Daubert trilogy from the United States Supreme Court and should be prohibited from testifying as an expert witness, and if the City of Saltillo were able to continue the questioning concerning each Daubert standard, or, excuse me, the Daubert standard on each indicia that Ms. Fernandez would likewise not be able to answer the questions in a meaningful way that is sufficient under Daubert. That would conclude the proffer from the City of Saltillo, Your Honor.

(T. 2673-2674)

The City of Saltillo preserved its objection to the expert testimony offered by Karen Fernandez and its *Daubert* challenge before beginning cross-examination. (T. 2673-2674)

There is a long line of Mississippi cases interpreting and clarifying the purpose and procedure for a *Daubert* examination. *See Miss. Transp. Comm'n v. McLemore*, supra; *Giannaris v. Giannaris*, supra; *Int'l Paper Co. v. Townsend*, 961 So. 2d 741 (Miss. Ct. App. 2007); *Watts v. Radiator Specialty*, 990 So. 2d 143 (Miss. 2008); *Worthy v. McNair*, 37 So. 2d 609 (Miss. 2010); and *Hubbard ex. rel. Hubbard v. McDonald's Corp.*, 2010 WL 2521738 (Miss. June, 24, 2010). The Mississippi Supreme Court amended Rule 702 of the Mississippi Rules of Evidence to clarify the gatekeeping responsibilities of the court in evaluating the admissibility of expert testimony and to establish the order and manner of challenging expert testimony. Clearly, the *Daubert* standard is applied to expert testimony before substantive testimony is to be received by the trier of fact.

This Court has stated that "whether testimony is based on professional studies or personal experience, the 'gatekeeper' must be certain that the expert exercises the same level of 'intellectual rigor that characterizes the practice of an expert in the relevant field.' " *Giannaris v. Giannaris*, 960 So. 2d at ¶16 (quoting *Miss. Transp. Comm'n v. McLemore*, 863 So. 2d at 37-38).

While the trial court's Findings of Fact and Conclusions of Law (Record Excerpts, Tab 2 and 3; R. 1304-1328) makes no mention of Karen Fernandez's specific testimony, it must be recognized that Karen Fernandez's findings and opinions were the engine of the City of Tupelo's annexation case. Karen Fernandez was hired in August 2007 by the City of Tupelo as an urban and regional planner. (T. 3170) At that time, the annexation ordinance had already been passed and she was hired to analyze the PAA lines for their reasonableness in the 12 indicia. (T. 3171) Ms. Fernandez and her firm prepared over forty (40) different maps, graphics, etc. that the City of Tupelo presented as

exhibits at trial. (T. 2653) Ms. Fernandez reviewed and mapped the PAA's and analyzed Tupelo's need to expand through a variety of methods, including looking at the internal growth of Tupelo. (T. 2691, 2719-2720) Ms. Fernandez prepared charts and graphs that showed population, number of building permits, value of these permits, new buildings, value of commercial buildings, where commercial developments are located using GEO codes, and existing land use. (T. 2728-2729, 2730-2731, 2733, 2735, 2737-2739)

Ms. Fernandez's firm also prepared maps and graphs which showed and analyzed undeveloped land, traffic volumes, septic tank suitability, the City of Tupelo's general fund balance, tax revenue history, estimates of property taxes that could be collected within the PAA's, the City's Service and Facilities Plan, census records and voting populations, total housing units, micropolitan and metropolitan areas in Mississippi, population growth, sales tax diversions, land use, population and population trends, areas the City of Tupelo won't be able to provide retail water after the annexation, racial breakdown of population, the City of Tupelo's annexation history from 1989, and a breakdown of parcels of developable land. (T. 2757, 2759, 2774, 2780, 2800-2801, 2816, 2819, 2825-2827, 2835-2836, 2838, 2841-2845, 2869, 2972, 3023, 3061, 3101, 3119-3120, 3132, 3178, 3225, 3247) Ms. Fernandez also took photos of various places in Lee County in March 2009 and presented these as exhibits to her testimony. (T. 2800-2801)

Ms. Fernandez used the over forty maps and graphs prepared by her firm to complete her analysis of the proposed annexation. (T. 2653) She reviewed the City of Tupelo's financial ability, environmental features of soil, groundwork, estimated population, and other factors. (T. 2653,

2686, 2816) Through her analysis, Ms. Fernandez found the proposal to be reasonable.[5] (T. 3175)

It cannot be argued now that the trial court did not consider or give any weight to the testimony and evidence offered by Karen Fernandez. Her findings and opinions in favor of the City of Tupelo were recycled and repeat in almost every witness offered by the City of Tupelo.

In *Giannaris*, this Court stated the trial court "erred in granting any weight to [the expert's] testimony, as it lacked sufficient reliability under Miss. R. Evid. 702." *Giannaris v. Giannaris*, 960 So. 2d at ¶16. The additional standard imposed by this Court in *Giannaris* is that expert testimony that fails the *Daubert* standard must be wholly rejected and not considered. According to *Giannaris*, any weight given to expert testimony that cannot satisfy *Daubert* is error and cause for reversal.

The testimony offered by Ms. Fernandez during her voir dire did not satisfy the threshold standards imposed by the Mississippi Supreme Court for expert testimony. The trial court erred in 1) admitting Ms. Fernandez's testimony without sufficient evidence that her opinions were based upon sufficient facts and data or the product of reliable principles and methods, and 2) preventing the City of Saltillo from engaging in more extensive voir dire. In this case, the Court allowed Ms. Fernandez's testimony as an expert based upon her association with urban and regional planning. If the Court had properly scrutinized Ms. Fernandez's testimony during her voir dire pursuant to the requirements of *Daubert* and Rule 702, the Court would not have allowed the expert testimony of Ms. Fernandez. Under the present circumstances, the Court should strike the testimony of Karen Fernandez and dismiss the annexation petition for the City of Tupelo's failure to meet its burden of reasonableness under a totality of the circumstances; or in the alternative, reverse and remand for

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5 In the City of Jackson's annexation case in which Ms. Fernandez testified, she also found the City of Jackson annexation plans to be reasonable, and the trial court reduced the area that she said was reasonable by 83%. (T. 3170)

further proceedings consistent with *Daubert*.

ISSUE II: WHETHER THE COURT HAD JURISDICTION TO PROCEED ON THE CITY OF TUPELO'S ANNEXATION PETITION WHEN IT FAILED TO CONTINUE PROCESS TO A FUTURE DAY CERTAIN FROM THE INITIAL HEARING HELD ON THE ANNEXATION MATTER.

This issue was presented in the City of Saltillo's Petition for Permission to Appeal under the heading "Loss of Process."

The annexation petition should be dismissed as a matter of law for the City of Tupelo's failure to follow the strict notice requirements of Miss. Code Ann. Sections 21-1-15 and 21-1-31 and Rule 81 of the Miss. R. Civ. P. "In annexation proceedings, the Mississippi Rules of Civil Procedure should be enforced only where they do not conflict with procedural rules provided by statute." *Harrison County v. City of Gulfport*, 557 So. 2d 780, Footnote 2 (Miss. 1990). *See* Rule 81(a)(11), Miss. R. Civ. P.; *In re City of Ridgeland*, 494 So. 2d 348, 354 (Miss.1986).

Miss. Code Ann. Section 21-1-31 states:

> Upon the filing of such petition and upon application therefor by the petitioner, the chancellor shall fix a date certain, either in term time or in vacation, when a hearing on said petition will be held, and notice thereof shall be given in the same manner and for the same length of time as is provided in Section 21-1-15 with regard to the creation of municipal corporations, and all parties interested in, affected by, or being aggrieved by said proposed enlargement or contraction shall have the right to appear at such hearing and present their objection to such proposed enlargement or contraction. However, in all cases of the enlargement of municipalities where any of the territory proposed to be incorporated is located within three miles of another existing municipality, then such other existing municipality shall be made a party defendant to said petition and shall be served with process in the manner provided by law, which process shall be served at least thirty days prior to the date set for the hearing.

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The relevant portion of Miss. Code Ann. Section 21-1-15 is as follows:

> 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. The first publication of such notice and the posting 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 . . . .

The relevant portions of Rule 81 of the Miss. Rules of Civil Procedure are as follows:

> (a) Applicability in General. These rules apply to all civil proceedings but are subject to limited applicability in the following actions which are generally governed by statutory procedures.
>
> . . .
>
> (11) creation of and change in boundaries of municipalities;
>
> . . .
>
> (d)(5) Upon the filing of any action or matter listed in subparagraphs (1) and (2) above, summons shall issue commanding the defendant or respondent to appear and defend at a time and place, either in term time or vacation, at which the same shall be heard. Said time and place shall be set by special order, general order or rule of the court. If such action or matter is not heard on the day set for hearing, it may by order signed on that day be continued to a later day for hearing without additional summons on the defendant or respondent. The court may by order or rule authorize its clerk to set such actions or matters for original hearing and to continue the same for hearing on a later date.
>
> . . .
>
> (g) Procedure Not Specifically Prescribed. When no procedure is specifically prescribed, the court shall proceed in any lawful manner not inconsistent with the Constitution of the State of Mississippi, these rules, or any applicable statute.

While Rule 81(a) states that the Rules of Civil Procedure have limited applicability in

annexation matters, this Court should not find that the Rules of Civil Procedure, especially Rule 81, have no applicability upon annexation matters. Based upon the authorities herein, the City of Saltillo contends that Sections 21-1-15 and 21-1-31 and Rule 81 are *in pari materia* and must be read together. It therefore follows that in annexation matters the petitioning municipality is required to preserve process by the court's continuance of the annexation matter to a day certain for trial or the trial court loses its jurisdiction.

If, upon review of Sections 21-1-15 and 21-1-31 and Rule 81(a) and (d), the Court is not convinced of the clear mandate requiring an order of continuance to a date certain to preserve process in an annexation matter, **Rule 81(g) states that the court "shall proceed in any lawful manner not inconsistent with Constitution of the State of Mississippi, these rules, or any applicable statute."** *See* Rule 81(g), supra. **Clearly, the City of Saltillo's position for the preservation of process adheres to the highest principals of constitutional due process[6], the annexation statutes, case law and the Rules of Civil Procedure, particularly Rule 81(d), which requires the preservation of process in a vast array of chancery matters. To the contrary, Tupelo's position that there is no requirement for preservation of process is not in keeping with principals of constitutional due process, is not supported by the annexation statutes and case law and does not comport with the Rules of Civil of Procedure.**

This Court clearly signaled the importance of continuing process in annexation matters in its opinion rendered in *In re Enlargement, Extension of Mun. Boundaries of City of Horn Lake*, 822 So. 2d 253 (Miss. 2002). While the gravamen of the appeal focused on an individual's standing, this Court noted in the recitation of the facts that Special Chancellor Ray Hillman Montgomery

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[6] *See* infra at pages 9-13 and Mississippi Constitution Article 3, Section 14.

recognized that process had not been continued and ordered the City of Horn Lake to republish and repost process. The relevant portions of this Court's statement of facts are as follows:

> ¶ 2. On December 17, 1997, the City filed a petition for the enlargement and extension of its municipal boundaries in the Chancery Court of DeSoto County. A hearing was scheduled for January 27, 1998. Written objections were filed on or before the hearing date. On January 27, 1998, the lower court continued the case until April 15, 1998. . . .
>
> . . .
>
> ¶ 4. On April 9 and 15, 1998, two other chancellors recused themselves from hearing the case. On April 14, 1998, the matter was again continued to June 8, 1998. **However, on June 8, 1998, no hearing was held, and there was no order continuing the matter. On July 22, 1998, the appointment of a special chancellor was requested pursuant to Miss. Code Ann. § 9-1-105.** By order dated December 4, 1998, this Court approved the request for a special chancellor, appointing the Honorable Ray H. Montgomery to hear the case.
>
> ¶ 5. On January 27, 1999, the City filed a Notice of Motion to Compel Discovery and for Sanctions with the lower court and sent the notice to four attorneys representing individuals, including Jerry L. Mills, attorney for Cox. **On February 11, 1999, the special chancellor recognized that there was no order continuing the case from June 8, 1998. Therefore, in his order dated February 11, 1999, the special chancellor ordered a republishing and reposting of the matter.** A sheriff's return and affidavit as to the posting and notice of proof of publication were filed with the chancery court.
>
> . . .
>
> ¶ 7. Beginning on June 28, 1999, through completion on January 25, 2000, the trial court heard testimony concerning the annexation. On September 15, 2000, the special chancellor issued his opinion in which a portion of the proposed area was annexed and portions of proposed Sections 7, 8, and 9 were not included in the annexation. On October 17, 2000, the special chancellor rendered a judgment. The judgment acknowledged that proof of the required notice was provided by proof of publication in the newspaper, as well as the posting of the notice in at least three places within the City and

territory. On October 20, 2000, Cox appealed from the judgment of the DeSoto County Chancery Court to this Court.

City of Horn Lake, 822 So. 2d ¶2-¶7 (emphasis added).

This Court has specifically stated that failure to give proper notice in annexation cases renders a chancery court without jurisdiction to hear the case at all. Further, the burden of proof is on the municipality seeking annexation to show that it met the statutory requirements for notice to give the court jurisdiction to hear the annexation petition. *See Norwood v. City of Itta Bena*, 788 So. 2d 747, ¶9-10 (Miss. 2001) (*citing Myrick v. Stringer*, 336 So. 2d 209, 210-11 (Miss.1976)).

Notwithstanding the cause for dismissal of this annexation matter, as a matter of law, the Court should dismiss same as a matter of equity and fundamental fairness to the fifteen pro se objectors and any unknown objectors to the proposed annexation. While all of the effects of the City of Tupelo's proposal for annexation upon the proposed areas cannot be enumerated here, it must be stated, in brief, that the proposed annexation would impose significant burdens on the life, liberty, and property of the citizens and landowners in the proposed areas of annexation. Certainly, in light of the cases cited herein, the Court should strive to mandate the highest standards for notice to see that "all persons interested in, affected by, or being aggrieved" by the proposed annexation are given a fair chance to protect their rights and interests. *See* Miss. Code Ann. Section 21-1-31, supra.

This Court has consistently affirmed and expanded the citizen's right to participate and challenge a municipality's efforts for annexation. In *In re Enlargement and Extension of Mun. Boundaries of City of Clinton*, 920 So. 2d 452 (Miss. 2006), this Court allowed a group of concerned citizens who had not appeared before the trial court to appeal an issue pertaining to the mandatory notice requirements. "While issues not raised at the trial court are typically not permitted to be argued on appeal, the issue of notice in annexation cases has been specifically classified as

jurisdictional by this Court and may be raised for the first time on appeal." *City of Clinton*, 920 So. 2d at ¶8. *See Norwood v. City of Itta Bena* and *Myrick v. Stringer*, supra.

When considering objectors' equitable rights to participate in the annexation litigation, the court's focus in the first instance should be upon preserving any potential objector's ability to be aware of the annexation litigation. At equity, this Court should not allow the City of Tupelo's annexation action, which was in "jurisdictional purgatory" for over sixteen months, to be resurrected against the pro se objectors and unknown objectors. "The clear purpose of Rule 81 is to give notice of **new proceedings in dormant litigation** in the manner that the state Supreme Court views as proper form and procedure to satisfy **constitutional due process**." *Bailey v. Fischer*, 946 So. 2d 404, ¶13 (Miss. Ct. App. 2006) (emphasis added).

In *In re Extension of Boundaries of City of Hattiesburg*, 840 So. 2d 69 (Miss. 2003),this Court offered the following analysis for the constitutionality of the annexation statutes:

> While the "reasonableness" test is no doubt malleable, it is what this Court has interpreted the statute to provide. So it is a logical impossibility to argue the statute is unconstitutional because of the "reasonableness" test, when the "reasonableness" test is not found in the statute, but instead is a creature of the judiciary. The statute is not unconstitutionally vague. This Court's interpretation of it may allow for ease of annexation, but if the objectors wish to make the "reasonableness" test less "nebulous," as they put it, the Mississippi Legislature is the proper avenue for so doing. The allegation by the objectors that this annexation is merely a "taking without the due process of law" is without merit. **The basis for this assertion is the sufficiency of the statutory notice required pursuant to Miss. Code Ann. § 21-1-31. The record reveals that the chancellor was cautious in assuring more than minimum notice to those citizens affected by Hattiesburg's annexation efforts. The record reveals that there were multiple notices placed on numerous occasions within the PPA, as well as the Hattiesburg newspaper. In the chancellor's order of June 22, 2000, there were provisions that a re-notice sh ould occur by re-posting notices of the pending annexation petition and impending trial date "in three places in**

> **each of the five non-contiguous parcels sought to be annexed." Pursuant to the chancellor's order, notice was filed on November 6, 2000, that a hearing would take place on the corrected petitions on February 5, 2001. Notice of Posting of the corrected petition was filed on November 29, 2000 by Charlie Sims, Hattiesburg Chief of Police. Notice was also placed in the Hattiesburg American newspaper to run for four weeks, November 8-29, 2000.** . . .

City of Hattiesburg, 840 So. 2d at ¶91 (emphasis added). Clearly, this Court's analysis of the constitutionality of Mississippi annexation laws is heavily dependent upon the stringent notice requirements to ensure that "all persons interested in, affected by, or being aggrieved" by the proposed annexation are provided notice of a municipality's efforts to annex property. *See* Miss. Code Ann. Section 21-1-31, supra, at p. 29.

The United States Supreme Court asserted the golden standard for notice in *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (reviewing the sufficiency of notice in a case of fiduciary breach pertaining to trusts located in the State of New York), stating:

> Against this interest of the State we must balance the individual interest sought to be protected by the Fourteenth Amendment. **This is defined by our holding that "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 . <u>This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.</u>**
>
> The Court has not committed itself to any formula achieving a balance between these interests in a particular proceeding or determining when constructive notice may be utilized or what test it must meet. Personal service has not in all circumstances been regarded as indispensable to the process due to residents, and it has more often been held unnecessary as to nonresidents. We disturb none of the established rules on these subjects. No decision constitutes a controlling or even a very illuminating precedent for the case before us. But a few general principles stand out in the books.

> **An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.** *Milliken v. Meyer*, 311 U.S. 457; *Grannis v. Ordean*, 234 U.S. 385 ; *Priest v. Las Vegas*, 232 U.S. 604 ; *Roller v. Holly*, 176 U.S. 398. The notice must be of such nature as reasonably to convey the required information, *Grannis v. Ordean*, supra, and it must afford a reasonable time for those interested to make their appearance, *Roller v. Holly*, supra, and cf. *Goodrich v. Ferris*, 214 U.S. 71. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied. "The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals." *American Land Co. v. Zeiss*, 219 U.S. 47, 67; and *see Blinn v. Nelson*, 222 U.S. 1, 7.
>
> **But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.** The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, compare *Hess v. Pawloski*, 274 U.S. 352 , with *Wuchter v. Pizzutti*, 276 U.S. 13, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

Mullane, 339 U.S. at 313-315 (emphasis added).

The trial court lost jurisdiction to proceed in the annexation matter when the initial hearing was recessed without a continuance to a later day for hearing. Notwithstanding, a dismissal of Tupelo's annexation matter is warranted based upon the City of Tupelo's refusal to re-establish process from the initial November 7, 2008 hearing, over sixteen (16) months prior to the annexation trial.

ISSUE III: WHETHER THE CITY OF TUPELO'S REQUEST FOR VOLUNTARY DISMISSAL OF THE PRIOR ANNEXATION PETITION BARS THE USE OF THE ANNEXATION ORDINANCE IN A SECOND SUBSEQUENT ACTION FOR ANNEXATION WITHOUT RE-AUTHORIZATION OF THE ANNEXATION ORDINANCE BY TUPELO'S NEWLY CONSTITUTED CITY COUNCIL.

The City of Saltillo respectfully submits this issue to the Court as a matter of first impression that begs clarification within the context of annexation law. This issue was presented in the City of Saltillo's Petition for Permission to Appeal under the heading "Stale Ordinance."

The City of Tupelo's request for voluntary dismissal of the prior annexation petition in Cause No. 08-0546, bars the use of the annexation ordinance in a second subsequent action for annexation. The annexation ordinance attached to the City of Tupelo's annexation petition is only valid for use in this matter upon its re-authorization by the City of Tupelo's newly constituted city council.

Miss. Code Ann. Section 21-1-29 states:

> When any such ordinance shall be passed by the municipal authorities, such municipal authorities shall file a petition in the chancery court of the county in which such municipality is located; however, when a municipality wishes to annex or extend its boundaries across and into an adjoining county such municipal authorities shall file a petition in the chancery court of the county in which such territory is located. The petition shall recite the fact of the adoption of such ordinance and shall pray that the enlargement or contraction of the municipal boundaries, as the case may be, shall be ratified, approved and confirmed by the court. There shall be attached to such petition, as exhibits thereto, a certified copy of the ordinance adopted by the municipal authorities and a map or plat of the municipal boundaries as they will exist in event such enlargement or contraction becomes effective.

The ordinance attached to the City of Tupelo's annexation petition became a part of the judicial proceedings initiated in the Chancery Court of Lee County, Cause No. 08-0546, and the City of Tupelo's voluntary dismissal of that action constitutes an effective repeal of the ordinance. If an

ordinance for annexation is enacted upon the approval by the chancery court, it follows that the same ordinance for annexation can be repealed upon the dismissal of an annexation petition by the chancery court.

The difference between an ordinance and resolution is distinguished as follows:

> A "resolution," in effect, encompasses all actions of a municipal body other than ordinances. In this connection, it may be observed that a resolution deals with matters of a special or temporary character, that does not create a new expense or status of a constant and continuing nature, while an "ordinance" prescribes some permanent rule of conduct or government, to continue in force until the ordinance is repealed. Thus, an ordinance is distinctively a legislative act, while a resolution may be simply an expression of opinion or mind concerning some particular item of business coming within the legislative body's official cognizance, ordinarily ministerial in character and relating to the administrative business of the municipality. While the legislative body of a municipal corporation may act by resolution, or by ordinance, unless a particular mode of action is required by constitution, statute, city charter or another city ordinance, a resolution is customarily passed without the forms and delays that constitutions and municipal charters generally require for the enactment of valid laws or ordinances. Nevertheless, actions by resolution are subject generally to the same restraints as actions by ordinance.
>
> Depending on the exact circumstances and enabling laws involved, resolutions have been used to deal with matters such as—
> — administrative decisions of a city council.
> — rate increases for extending city water mains.
> — **nonlegislative powers**.
> — establishing educational requirements for employee promotion.
> — **authorizing the taking of an appeal in a civil action**.
> — amending the master plan of a municipal planning commission.

56 Am. Jur. 2d *Mun. Corp.* § 296 (footnotes omitted) (emphasis added).

The references in Mississippi law to a municipality's action for annexation as an "ordinance" are dubious as annexation ordinances lack authority and cannot be put into effect until authorized

by the chancery court.[7] Pursuant to Miss. Code Ann. Section 21-1-33, the chancellor "shall have the right and the power to modify the proposed enlargement or contraction by decreasing the territory to be included in or excluded from such municipality." The chancellor's ability to modify a municipality's annexation ordinance lends to the "annexation ordinance" as having a special non-legislative and temporary character that is more in the nature of a resolution.

Due process should require the City of Tupelo's newly constituted city council to reauthorize the annexation ordinance given 1) that the original judicial action initiated upon the passage of the annexation ordinance was dismissed and 2) that annexation ordinance was passed on July 3, 2007, over fourteen months prior to the filing of Tupelo's annexation petition in Cause No. 08-1446 and thirty-two months prior to the annexation trial which began on March 29, 2010. The City of Tupelo's failure to re-authorize its annexation ordinance warrants dismissal of this annexation matter.

CONCLUSION

The testimony offered by Karen Fernandez during the *Daubert* challenge did not satisfy the threshold standards imposed by the Mississippi Supreme Court for expert testimony. The trial court erred in admitting Ms. Fernandez's testimony. This Court should strike the testimony of Ms. Fernandez and dismiss the annexation petition because the City of Tupelo cannot meet its burden of reasonableness without the testimony of Ms. Fernandez, the City of Tupelo's annexation expert, or in the alternative, reverse and remand this matter.

Upon due consideration of the procedural issues presented herein, the Court should reverse

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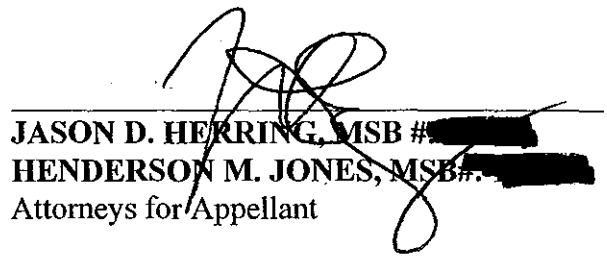
The only practical reason for a municipality's annexation action to be called an "ordinance" is to trigger the statutory notice and procedural safeguards that are required for the passage of a traditional ordinance. *See* Miss. Code Ann. Section 21-13-3 *et seq.*

the trial court and render a dismissal of the City of Tupelo's annexation matter. The Court had no jurisdiction to proceed on the City of Tupelo's annexation petition. The City of Tupelo failed to continue process to a future day certain from the initial hearing on the annexation matter on November 3, 2008. The City of Tupelo failed to re-establish process since the initial hearing on the annexation matter on November 3, 2008, over sixteen (16) months prior to the first day of the annexation trial. The Court should have dismissed this case as a matter of equity and fundamental fairness to the pro se objectors and any unknown objectors to the proposed annexation.

Notwithstanding the loss of process, the City of Tupelo's request for voluntary dismissal of the prior annexation petition in Cause No. 08-0546, bars the use of the annexation ordinance in a second subsequent action for annexation. The annexation ordinance attached to the City of Tupelo's annexation petition is only valid for use in this matter upon its re-authorization by the City of Tupelo's newly constituted city council. The annexation ordinance is defective and, therefore, the Court had no jurisdiction to proceed on the City of Tupelo's annexation petition.

Finally, the evidence disfavoring annexation should lead this Court to a firm and definite conviction that a mistake has been made and this matter should be reversed and remanded for further proceedings.

RESPECTFULLY SUBMITTED, this the 19 day of August, 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 Brief of Appellant City of Saltillo to the following by United States Mail, postage prepaid thereon, to-wit:

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This the 19 day of August, 2011.

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