

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT  
OF HARRISON COUNTY, MISSISSIPPI

IN THE MATTER OF THE ENLARGEMENT  
AND EXTENSION OF THE MUNICIPAL  
BOUNDARIES OF THE CITY OF GULFPORT,  
HARRISON COUNTY, MISSISSIPPI

CITY OF GULFPORT, MISSISSIPPI

VS.

CITY OF BILOXI, MISSISSIPPI

**FILED**  
JUN 17 2011

JOHN MORRISON, CHANCERY CLERK

*Arck Wilk* D.O.  
PLAINTIFF

CAUSE NO. 09-01924-3

DEFENDANT

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FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

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COMES NOW, the Court and makes its Order and includes its Findings of Fact and Conclusions of Law:

**I. BACKGROUND AND PROCEDURAL HISTORY**

On June 3, 2009, the City of Gulfport adopted an Ordinance Enlarging, Extending and Defining the Corporate Limits and Boundaries of the City of Gulfport, Harrison County, Mississippi ("Annexation Ordinance"). Gulfport's annexation case, as indicated by its Annexation Ordinance and extensive witness testimony throughout the discovery and trial phases of these annexation proceedings, is premised almost entirely on the annexation of property owned by James C. Frisby and/or Pitcher Point Investments, LLC. To this end, Gulfport's Annexation Ordinance specifically references and incorporates therein three (3) agreements between the City of Gulfport and Pitcher Point Investments, LLC (collectively referred to hereinafter as the "Frisby Agreements"). By the plain language of its Annexation Ordinance, Gulfport's plan for providing services to the Frisby property is based solely on the three original

agreements. Section 3 of the Ordinance states as follows with regard to the timing, manner, and delivery of municipal services and improvements to the Proposed Annexation Area:

Agreements related to the manner and timing of certain municipal improvements have been executed by and between Pitcher Point Investments, LLC and the City of Gulfport. The City of Gulfport will extend improvements to said area in the time and manner set forth by said Agreements.

The three (3) Frisby Agreements establish and set forth the contractual rights, duties, and obligations of the City of Gulfport and Pitcher Point Investments with regard to the delivery of municipal services and improvements to Gulfport's Proposed Annexation Area ("PAA"). The Frisby Agreements with Gulfport, which are incorporated into Section 3 of the City's Annexation Ordinance, are as follows:

- a. 500 Housing Unit (Minimum, Not to Exceed "131,250" Gallons Per Day) Water and Sewer Option Agreement Between Pitcher Point Investments, LLC and the City of Gulfport, Mississippi Memorandum of Understanding (Gulfport Trial Exhibit G-5);
- b. Development Agreement Between Pitcher Point Investments, LLC and the City of Gulfport, Mississippi Memorandum of Understanding (Gulfport Trial Exhibit G-21); and
- c. Support Agreement Between Pitcher Point Investments, LLC and the City of Gulfport, Mississippi Memorandum of Understanding (Gulfport Trial Exhibit G-46).

On July 27, 2009, the City of Gulfport filed its Complaint in the Nature of a Petition for the Ratification, Approval, and Confirmation of an Ordinance Enlarging, Extending and Defining the Corporate Limits and Municipal Boundaries of the City of Gulfport, Harrison County, Mississippi (Gulfport's "Annexation Petition").

On February 5, 2010, this Court entered a Scheduling Order in this matter providing certain deadlines, including a December 3, 2010 deadline for the completion of discovery and a

January 6, 2011 deadline for the parties' exchange of trial exhibits. (See Scheduling Order in file).

On February 1, 2011, the trial of this matter commenced, and continued thereafter for two (2) weeks. At the conclusion of the first two (2) weeks of trial, this Court recessed the matter until Monday, February 28, 2011. Over the course of the first two (2) weeks of trial, every department head of the City of Gulfport testified in this matter, including Police Chief Leonard Papania, Leisure Services Director David D'Aquila, Fire Chief William Bragg, and Urban Development Director Gary Joffion, as well as Gulfport's civil engineering expert and Interim Director of Public Works Kris Riemann, its Chief Administrative Officer, Dr. John Kelly, and its Director of Finance and Administration, Mr. Mike Necaize. At the end of the initial two (2) weeks of trial, the City of Gulfport had called all of its trial witnesses in its case-in-chief, with the exception of its final two witnesses, Mayor George Schloegel and Christopher Watson.

On February 22, 2011, less than a week before the trial of this matter was set to resume, the Gulfport City Council adopted a "Resolution by the Gulfport City Council approving Memorandum of Clarification and Agreement and authorizing the Mayor to execute the same and for related purposes." Specifically, in adopting the February 22, 2011 Resolution, the Gulfport City Council has approved and adopted the following new annexation plans and contracts:

- (1) Amended and/or Supplemental Agreements with Pitcher Point Investments, LLC/  
James C. Frisby;
- (2) New engineering plans for the provision of water to the Proposed Annexation Area;
- (3) New engineering plans for the provision of sanitary sewer to the Proposed  
Annexation Area;

- (4) New engineering cost estimates for the construction and installation of water and sewer infrastructure in the Proposed Annexation Area; and
- (5) Documents and Contracts or Amended Contracts between Gulfport and the Harrison County Utility Authority and the Harrison County Wastewater Management District.

The City of Gulfport does not dispute that during the two-year course of this litigation, it has not produced these documents to counsel opposite, nor has it put the parties on notice that significant changes to the contracts which form the basis of this "special purpose" annexation were under consideration. Not once during the City of Biloxi's extensive *Mississippi Rule of Civil Procedure* 30(b)(6) deposition of the City of Gulfport were any plans to "clarify" or otherwise revise, amend, or supplement the Frisby Agreements disclosed to the City of Biloxi. As evidenced by the eight (8) days of deposition testimony by designated representatives of the City of Gulfport, extensive Rule 30(b)(6) testimony was offered by the City of Gulfport on very specific and technical aspects of the negotiation, financing, implementation, operation, and respective rights and obligations of the City of Gulfport and Pitcher Point Investments, LLC under the Frisby Agreements. Furthermore, Biloxi and Harrison County also took the Rule 30(b)(6) deposition of Pitcher Point Investments, LLC, in which James C. Frisby was the designee, and James C. Frisby in his individual capacity on issues specific to the funding and implementation of water, sewer, and road infrastructure and municipal facilities, as well as the provision of various municipal services, under the Frisby Agreements. (The Court reviewed Rule 30(b)(6) Deposition of the City of Gulfport, Mississippi and the Notice of Rule 30(b)(6) Deposition of Pitcher Point Investments, LLC). If Frisby was aware of Gulfport's intention to change the Agreements, he did not disclose that information during either of the two depositions.

Not once in the City of Gulfport's final supplementation of its responses to expert interrogatories is there any mention of the Amended Frisby Agreements, the new engineering plans for the provision of water and sewer to the PAA, or the engineering cost estimates for the delivery of water and sewer, nor how each respective expert is anticipated to testify regarding these new agreements, plans, and contracts. (See Supplemental Answers of City of Gulfport to First Set of Interrogatories Propounded by the City of Biloxi reviewed by the Court). Not once during the Pretrial Conference did Gulfport disclose its intentions to adopt the Amended Frisby Agreements, nor did Gulfport disclose the same in the Agreed Pretrial Order entered in this matter. (See Pretrial Order reviewed by the Court). In fact, by its own words, Gulfport stated the following in its portion of the Pretrial Order with respect to the Frisby Agreements:

**The provision of municipal services and improvements is development driven; therefore, the City of Gulfport's annexation ordinance and development agreements with Mr. Frisby represent a reasonable plan to deliver services to this special purpose annexation.**

[Exhibit H, p. 15].

Moreover, as if the production of these various new contracts, water and sewer plans, and cost estimates well after the close of discovery was not enough, Gulfport is now requesting this Court to allow it to "recall any witness who has heretofore testified with regard to the viability or adequacy of said plans from an engineering or financial standpoint." (See Supplementation of Discovery Responses). Gulfport, however, has yet to supplement its responses to interrogatories propounded by either the City of Biloxi or Harrison County to reflect what these witnesses will testify to upon being recalled. To say that Gulfport's actions represent a callous disregard for the resources of this Court and the taxpayers of the City of Biloxi and Harrison County, all of which have been spent in both the discovery and trial phases of this

"special purpose" annexation based upon the three original Frisby Agreements, would be a gross understatement.

In adopting the Amended Frisby Agreements, the Gulfport City Council has entirely changed the original Frisby Agreements. While the parties have had no opportunity to conduct discovery on the City's 11<sup>th</sup> hour amendments, the Resolution on its face appears to include the following fundamental changes and revisions to the original Frisby Agreements: the complete overhaul of water and sewer infrastructure proposed for the PAA, including changing the locations of the water lines, the locations of sewer transmission lines, and the wastewater treatment facility which will ultimately treat sewer collected from the PAA to a facility located in the City of Biloxi; the abandonment of millions of dollars of street and roadway improvements promised by the City under the original Frisby Agreements; and the adoption, for the first time during this annexation case, of detailed construction cost estimates for the proposed water and sewer system infrastructure and facilities. All of these contractual amendments have been made subsequent to the close of discovery, subsequent to the completion of months of written discovery and witness depositions, and after counsel for the City of Biloxi and Harrison County, Mississippi have completed cross-examination of Gulfport's trial witnesses, including Gulfport's experts in civil engineering and municipal finance. Moreover, every witness who has testified to this point in trial has testified either on direct or cross examination regarding the Frisby Agreements and the City's plans for this annexation which were set forth therein.

Gulfport's adoption of the Amended Frisby Agreements on the eve of the third week of trial creates a number of substantive problems related to the continuance of this matter. First, it appears to this Court that Gulfport's adoption of Amended Frisby Agreements renders the City's current Annexation Ordinance invalid because the City's statutorily-required description of the

timing and delivery of municipal improvements (i.e., the Frisby Agreements) has been completely changed from that specifically described in the City's current Annexation Ordinance. To this end, it really does not matter what Rule of Civil Procedure is being discussed, Gulfport has voided its Annexation Ordinance and, as such, this Court does not have an ordinance before it which could be ratified, and Gulfport's case must be dismissed. Second, Gulfport's actions violate nearly every rule of discovery and absolutely deny the City of Biloxi and Harrison County of their right to conduct discovery upon the Amended Frisby Agreements, the new water and sewer plans, and the new infrastructure construction cost estimates. Third, allowing Gulfport to recall all of its witnesses to testify to a different set of plans associated with this annexation than they testified to when they were previously on the stand will create a record that is, as counsel aptly described during oral argument, a "nightmare." On these grounds, both the City of Biloxi and Harrison County have moved this Court for a dismissal of the City of Gulfport's action. As discussed below, this Court finds that the Motion of the City of Biloxi is well-taken, and the City of Gulfport's Annexation is hereby dismissed without prejudice.

## II. DISMISSAL PURSUANT TO MISS. R. CIV. P. 12

*Mississippi Code Ann.* § 21-1-27 provides, in part, the following mandatory requirements for a valid annexation ordinance:

In the event the municipality desires to enlarge such boundaries, such ordinance shall in general terms describe the proposed improvements to be made in the annexed territory, the manner and extent of such improvements, and the approximate time within which such improvements are to be made . . . .

To this end, in *City of Hattiesburg*, the Mississippi Supreme Court reaffirmed its holding in *Dodd v. City of Jackson*, 118 So. 2d 319 (Miss. 1960), stating that *Dodd* makes "mandatory the inclusion in the ordinance of the statutorily mandated requirements concerning

improvements, public services, and the extent and time within which they are to be made.”  
*Matter of the Extension of the Boundaries of the City of Hattiesburg*, 840 So. 2d 69, 79 (Miss.  
2003).

In an effort to comply with mandatory, jurisdictional requirements of *Mississippi Code Ann.* § 21-1-27, the City of Gulfport, in its adopted Annexation Ordinance, describes the improvements to be delivered to the Proposed Annexation Area (“PAA”) through the incorporation by reference of the underlying Frisby Agreements entered into by and between the City of Gulfport and Pitcher Point Investments, LLC. Specifically, Section 3 of the City of Gulfport’s Annexation Ordinance provides, in part:

Agreements related to the manner and timing of certain municipal improvements have been executed by and between Pitcher Point Investments, LLC and the City of Gulfport. The City of Gulfport will extend improvements to said area in the time and manner set forth by said agreements.

Accordingly, pursuant to the City of Gulfport’s adopted Annexation Ordinance, the statutorily-required description of the manner and timing of the delivery of municipal improvements to the PAA are set forth in the original Frisby Agreements. To this end, this Court notes that every Gulfport witness who has testified throughout the first two (2) weeks of trial, has testified consistent with Gulfport’s assertion that the Frisby Agreements are incorporated into Gulfport’s Annexation Ordinance and set forth the City’s plan for delivering municipal services and improvements to the PAA.

Gulfport’s adoption of the February 22, 2011 Resolution, however, completely overhauls the underlying agreements which were incorporated into the Ordinance to satisfy the mandatory, jurisdictional requirements of *Miss. Code Ann.* § 21-1-27, and which were the foundation for this “special purpose” annexation. Accordingly, because the City of Gulfport has altered or amended



its plan for the delivery of municipal services and improvements to the PAA in the manner set forth in the original Frisby Agreements (and its current Annexation Ordinance), the City of Gulfport cannot proceed with its currently operative Annexation Ordinance.

The City of Gulfport, however, has failed to adopt an Amended Ordinance reflecting the new agreements (and resultant new municipal improvement proposals), has not sought leave of this Court to file an amended complaint, and has otherwise failed to satisfy the statutorily required notice provisions of *Mississippi Code Ann.* §§ 21-1-31 and 21-1-15 with regard to any amended ordinance and petition. Accordingly, as discussed below, this Court finds that, pursuant to *Mississippi Rules of Civil Procedure* 12 and/or 56, the City of Gulfport's Petition shall be, and hereby is, dismissed without prejudice.

*A. Mississippi Rule of Civil Procedure 12(b)(1) and/or 12(h)(3).*

*Mississippi Rule of Civil Procedure* 12(b)(1) provides for the dismissal of an action for lack of subject matter jurisdiction. Further, *Mississippi Rule of Civil Procedure* 12(h)(3) provides that "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action or transfer the action to the court of proper jurisdiction." Furthermore, the issue of subject matter jurisdiction may be raised at any time. *Graves v. Dudley Maples, L.P.*, 950 So. 2d 1017, 1022 (Miss. 2007); *See also, Miss. R. Civ. P. 12* cmt. ("Under Rule 12(h)(3) a question of subject matter jurisdiction may be presented at any time . . . ."); *Wiggins v. Perry*, 989 So. 2d 419, 428 (Miss. Ct. App. 2008) ("Subject matter jurisdiction is an issue that may be raised by any party at any time, including being raised for the first time on appeal.").

In this matter, the City of Gulfport's February 22, 2011 Resolution fundamentally altered the Gulfport Annexation Ordinance which is before this Court. The City of Gulfport, however,

has not taken the steps to adopt an amended annexation ordinance, nor has it taken the necessary steps to vest this Court with jurisdiction over any amended ordinance. As the City's Ordinance which is before this Court no longer satisfies the provisions of *Mississippi Code Ann.* § 21-1-27, *et seq.* (the "mandatory" description as to the timing, manner, and extent of the delivery of improvements to the PAA contained in the City's Annexation Ordinance, i.e., the Frisby Agreements, have effectively been repealed), this Court presently does not have jurisdiction over Gulfport's annexation. Accordingly, this matter should be dismissed for lack of subject matter jurisdiction.

*B. Rules 12(b)(6) and/or 12(c) converted to Rule 56.*

In the alternative, were this Court to determine that it retains jurisdiction over the City of Gulfport's Annexation, this matter should be dismissed pursuant to *Mississippi Rules of Civil Procedure* 12(b)(6) and/or 12(c), converted to a Rule 56 Motion for Summary Judgment. In the event that this Court elects to convert the City of Biloxi's Motion to Dismiss to a Motion for Summary Judgment, this Court must give the parties ten (10) days' notice of the conversion and a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." *See, e.g., Palmer v. Biloxi Regional Medical Center*, 649 So. 2d 179, 182-83 (Miss. 1994).

*Mississippi Rule of Civil Procedure* 12(b)(6) provides for the dismissal of an action where the plaintiff has failed to state a claim upon which relief can be granted. Pursuant to *Miss. R. Civ. P.* 12(h), it is permissible to file a Rule 12(b)(6) motion to dismiss during the trial on the merits. Furthermore, it is a fundamental principle that motions under Rule 12(b)(6) "test the legal sufficiency of the complaint. *See, e.g., Rose v. Tullos*, 994 So. 2d 734 (Miss. 2008); *Little v. Miss. Dep't of Human Servs.*, 835 So. 2d 9, 11 (Miss. 2002).

*Mississippi Rule of Civil Procedure* 12(c) provides the authority for a party to move for judgment on the pleadings after the pleadings are closed. The Mississippi Supreme Court has held that motions for judgment on the pleadings under *Miss. R. Civ. P.* 12(c) serve a similar function to the Rule 12(b)(6) motion for failure to state a claim. *R.J. Reynolds Tobacco Co. v. King*, 921 So. 2d 268, 271 (Miss. 2005) (citing *City of Tupelo v. Martin*, 747 So. 2d 822, 829 (Miss. 1999)). Rule 12(c) motions should be granted when it appears “beyond any reasonable doubt that the non-moving party will be unable to prove any set of facts in support of the claim which would entitle the non-movant to relief.” *R.J. Reynolds Tobacco Co.*, 921 So. 2d at 271 (Miss. 2005) (citing *Bridges ex rel. Bridges v. Park Place Entm’t*, 860 So. 2d 811, 813 (Miss. 2003)).

Pursuant to Rules 12(b) and (c), if on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted or a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. *See also, McMichael v. Howell*, 919 So. 2d 18, 21 (Miss. 2005) (“A motion to dismiss is converted into a motion for summary judgment if the trial court considers matters outside the pleadings when ruling on the motion.”); *Bolton v. Equitprime, Inc.*, 964 So. 2d 529, 533-34 (Miss. Ct. App. 2007) (“If matters outside the pleadings are presented and accepted by the court during consideration of a Rule 12(b)(6) motion, the motion is converted to a motion for summary judgment and disposed of pursuant to the dictates of Rule 56 of the *Mississippi Rules of Civil Procedure*.”). To this end, whether a Rule 12 motion “ought to be converted into a motion for summary judgment is a function of whether the [Chancery] Court finds it necessary to resort to matters outside the

pleadings in order to dispose of the motion." *Vinson v. Prather*, 879 So. 2d 1053, 1055 (Miss. Ct. App. 2004) (citing *Walton v. Bourgeois*, 512 So. 2d 698, 700 (Miss. 1987)).

Rules 12(b) and (c) provide that, upon the motion being converted to one under Rule 56, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." However, the Mississippi Supreme Court has held that "no specific decree is required by the court when a Rule 12(b)(6) motion is converted into a motion for summary judgment so long as an adequate opportunity to respond has been given to the party opposing the motion." *Jones v. Jackson Public Schools*, 760 So. 2d 730, 731 (Miss. 2000). To this end, the Mississippi Supreme Court has held that, while this will frequently necessitate a continuance of the hearing on the motion, a continuance will generally not be necessary where, as is the case before this Court today, the basis for the motion is a legal defense. *Walton v. Bourgeois*, 512 So. 2d 698, 700 (1987).

In the case at hand, the City of Gulfport initiated this action through the filing of a "Complaint in the Nature of a Petition for Ratification, Approval and Confirmation of an Ordinance Enlarging, Extending and Defining the Corporate Limits and Municipal Boundaries of the City of Gulfport, Harrison County, Mississippi" on July 29, 2009. [emphasis added]. In other words, the City of Gulfport is seeking this Court's approval of the Ordinance it adopted on June 3, 2009, and which is attached to its Complaint as Exhibit "A." However, as discussed above, the Ordinance which Gulfport seeks to have this Court ratify, approve, and confirm has since been fundamentally altered through the adoption of the Amended Frisby Agreements. Furthermore, the City of Gulfport has neither not sought leave of this Court to file an Amended Complaint, nor followed the statutorily-required steps for properly amending an ordinance, as set forth in *Miss. Code Ann.* § 21-13-1, *et seq.* See also, 1996 WL 88921 (Miss. A.G. Feb. 12, 1996)

(opining that municipal authorities must follow the procedures set forth in *Miss. Code Ann.* § 21-13-1, *et seq.* to amend an ordinance).

Furthermore, adoption of an amended ordinance by the City of Gulfport will necessitate Gulfport's compliance with the statutorily-required notice to all parties interested in, affected by, or being aggrieved by Gulfport's proposed annexation as set forth in *Mississippi Code Ann.* §§ 21-1-15 and 21-1-31. Specifically, Gulfport will be required to re-post notice in at least three (3) places in the PAA, and re-publish notice in a newspaper having general circulation in the PAA, both of which must be accomplished at least thirty (30) days prior to a hearing on Gulfport's amended petition and amended ordinance.

As previously stated, the *Mississippi Rules of Civil Procedure* provide that when motions under Rule 12(b)(6) and Rule 12(c) are made and matters outside the pleadings are considered, the motion shall be treated as one for summary judgment and disposed of as set forth in Rule 56. *Miss. R. Civ. P.* 12(b) and (c); *see also, Bolton*, 964 So. 2d at 533-34; *McMichael*, 919 So. 2d at 18. In this instance, this Court's consideration of the City of Gulfport's 11<sup>th</sup> hour amendment of its Annexation Ordinance through the adoption of the Amended Frisby Agreements (which are not in evidence in this matter), requires this Court to go outside the pleadings in this matter. Accordingly, this Court treats the City of Biloxi's Motion to Dismiss as one for summary judgment pursuant to *Miss. R. Civ. P.* 56.

Pursuant to *Mississippi Rule of Civil Procedure* 56, summary judgment is appropriate where the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." To prevent summary judgment, the

non-moving party must establish a genuine issue of material fact by means allowable under the Rule. *Gross v. Chevrolet Country, Inc.*, 655 So. 2d 873 (Miss. 1995).

As discussed above, the City of Gulfport's Petition seeks this Court's ratification, approval, and confirmation of Gulfport's June 3, 2009 Annexation Ordinance. However, the City's actions on February 21, 2011 fundamentally altered Gulfport's June 3, 2009 Annexation Ordinance (which as a practical matter effectively amended the existing ordinance by changing the time, extent, and manner for the provision of services and improvements to the PAA), and the City has not sought leave to amend its complaint to reflect an amendment of its Ordinance. As this Court does not have before it any ordinance of the City of Gulfport which is in compliance with the mandatory directives of *Miss. Code Ann.* § 21-1-27 (as a result of the fundamental alteration of the existing ordinance by changing the terms, manner, and timing of the provision of services and improvements to the PAA), the City of Gulfport is entitled to no relief whatsoever on its Petition. Further, there are no set of facts under which the City of Gulfport can avoid summary judgment, short of the proper adoption of an amended ordinance, obtaining leave of this Court to file an amended petition, and the re-posting and re-publishing of notice as required by *Miss. Code Ann.* §§ 21-1-15 and 21-1-31. Accordingly, this Court finds that, under these circumstances, the City of Biloxi, Mississippi's Motion to Dismiss, as converted by this Court to a Motion for Summary Judgment, is well-taken, and is hereby granted.

### III. DISMISSAL PURSUANT TO MISS. R. CIV. P. 37

Despite unequivocal deadlines having been set by this Court for the completion of discovery and the exchange of trial exhibits in this matter, the City of Gulfport, after two weeks of trial, adopted the Amended Frisby Agreements, amended water and sewer plans, and new cost estimates for the delivery of water and sewer to the PAA. Gulfport has indicated to this Court of its intention to offer such documents into evidence and to recall all witnesses that have previously testified that the prior Frisby Agreements were reasonable, despite the fact that neither the City of Biloxi, nor Harrison County, has had an opportunity to conduct any discovery upon the amended agreements and/or plans, nor has the City of Gulfport supplemented the opinions of its expert witnesses who will invariably have to testify regarding the new plans and agreements (as acknowledged by the City of Gulfport in its "Supplementation of Discovery" filed on February 23, 2011).

*Mississippi Rule of Civil Procedure 26* provides that parties may obtain discovery regarding any matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party. Further, the Mississippi Supreme Court has repeatedly held that the *Mississippi Rules of Civil Procedure* are in place to promote fair trials, to avoid unfair surprise and trial by ambush, and to afford parties reasonable time to prepare for trial. *See, e.g. APAC Mississippi, Inc. v. Johnson*, 15 So. 3d 465, 473 (Miss. Ct. App. 2009); *Poole ex rel Wrongful Death Beneficiaries of Pool v. Avara*, 908 So. 2d 716, 725 (Miss. 2005). To this end, the Mississippi Supreme Court has held that Rule 26 "requires strict compliance to prevent trials from being tainted with surprise and unfair advantage." *Foster v. Noel*, 715 So. 2d 174, 182-83 (Miss. 1998); *see also, Jones v. Hatchett*, 504 So. 2d 198, 201 (Miss. 1987) (holding that

providing the name of expert four days before trial was not sufficient to discharge the duty required by Rule 26 because “[t]he very purpose of our civil discovery procedures is to prevent such trial by ambush”).

The very situation before this Court with the City of Gulfport’s 11<sup>th</sup> hour adoption of the Amended Frisby Agreements seems to be the exact scenario the Mississippi Supreme Court sought to prevent and prohibit through the adoption of the *Mississippi Rules of Civil Procedure*. The Amended Frisby Agreements, revised water and sewer plans, and newly-created water and sewer cost estimates come on the heels of two (2) weeks of trial and the testimony of every Gulfport department head, its engineering expert Kris Riemann, its Chief Administrative Officer, Dr. John Kelly, and its Director of Finance and Administration, Mr. Mike Necaie, not to mention countless hours of depositions, written discovery, and trial preparation costing the taxpayers of the City of Biloxi, Mississippi, and Harrison County, Mississippi, hundreds of thousands of dollars. Not once during the course of trial or during the course of discovery did the City of Gulfport indicate its intention to abandon the original Frisby Agreements, which were specifically incorporated into Section 3 of Gulfport’s Annexation Ordinance, and which every trial witness has testified sets forth the City’s plans for the delivery of services and improvements to the PAA. This Court notes, however, that comments made during the Gulfport City Council meeting on February 22, 2011, at which the Amended Frisby Agreements were adopted, indicate that the Council has been discussing the changes in executive sessions for months. (See Video of February 22, 2011 Gulfport City Council Meeting admitted as Exhibit HC-1 during this Court’s February 28, 2011 Motion Hearing).

*Mississippi Rule of Civil Procedure 37* provides, in part:

**(b) Failure to Comply With Order.**



....

**(2) Sanctions by Court in Which Action Is Pending.** If a party or an officer, director, or managing agent of a party or a person designated under Rules 30(b)(6) or 31(a) to testify in behalf of a party fails to obey an order to provide or permit discovery, including an order made under subsection (a) of this rule, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

- (A) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
- (B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
- (C) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
- (D) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

....

**(e) Additional Sanctions.** In addition to the application of those sanctions, specified in Rule 26(d) and other provisions of this rule, the court may impose upon any party or counsel such sanctions as may be just, including the payment of reasonable expenses and attorneys' fees, if any party or counsel (i) fails without good cause to cooperate in the framing of an appropriate discovery plan by agreement under Rule 26(c), or (ii) otherwise abuses the discovery process in seeking, making or resisting discovery.

It is well settled that the decision to impose sanctions for a discovery abuse is vested in the trial court's discretion, and that the provisions for imposing sanctions pursuant to *Mississippi Rule of Civil Procedure 37* are designed to give the trial court great latitude. *Allen v. National R.R. Passenger Corp.*, 934 So. 2d 1006, 1009 (Miss. 2006). Moreover, the Mississippi Supreme Court has ruled that sanctions may be imposed even without a prior court order compelling discovery. *See, e.g., TXG Intrastate Pipeline Co. v. Grossnickle*, 716 So. 2d 991, 1013 (Miss. 1997); *Denman v. Hardy*, 437 So. 2d 426, 429 (Miss. 1983). To this end, the Mississippi Supreme Court has stated that "under the inherent power of the courts to protect the integrity of their process, courts may impose sanctions without a court order." *Kilpatrick v. Mississippi Baptist Medical Ctr.*, 461 So. 2d 765, 767 (Miss. 1984).

In *Bowie v. Montfort Jones Memorial Hosp.*, 861 So. 2d 1037, 1042 (Miss. 2003), the Mississippi Supreme Court stated:

**Our trial judges are afforded considerable discretion in managing the pre-trial discovery process in their courts, including the entry of scheduling orders setting out various deadlines to assure orderly pre-trial preparation resulting in timely disposition of the cases. Our trial judges also have a right to expect compliance with their orders, and when parties and/or attorneys fail to adhere to the provisions of these orders, they should be prepared to do so at their own peril.**

[emphasis added].

Our State Supreme Court perhaps put it best in *Guaranty Nat'l Ins. Co. v. Pittman*, 501 So. 2d 377, 388-89 (Miss. 1987), where, in upholding a trial court's refusal to set aside a default judgment, the Supreme Court stated:

**It may be that people will miss fewer trains if they know the engineer will leave without them rather than delay even a few seconds. Although we are not about to inaugurate a policy of entering irrevocable defaults where no answer has been filed by the thirty-first day, we are equally resolved that people know that the duty to answer must be taken seriously. At some point the train must leave.**

[emphasis added].

In this matter, Gulfport's train left the station on December 3, 2010, the court-imposed discovery deadline. Moreover, not only did Gulfport's train leave, it nearly reached a destination (albeit apparently not the destination Gulfport had intended), with two weeks' worth of trial, countless hours of trial preparation, and countless hours of extensive written discovery and depositions in the rear-view mirror before Gulfport decided to change trains. Large sums of billing hours have been spent by the parties completing discovery, preparing for trial, and proceeding through two weeks of trial, all of which was based upon Gulfport's repeated representations to the parties and to this Court that its plans for delivering municipal services and improvements to the PAA in connection with this "special purpose annexation" were set forth in the original Frisby Agreements, which were specifically incorporated into the City's Annexation Ordinance. Gulfport's eleventh hour overhaul of the agreements which form the very basis of this "special purpose" annexation constitutes a violation of the *Mississippi Rules of Civil Procedure* and the Scheduling Order entered by this Court, and is, in the opinion of this Court, action worthy of this Court exercising its "inherent power" to protect the integrity of its process through the imposition of sanctions against the City of Gulfport pursuant to *Mississippi Rule of Civil Procedure 37*. See, e.g., *Kilpatrick*, 461 So. 2d at 767. However, this Court does not find that large sums of money is a proper sanction under the facts of this case. A further discussion of monetary sanctions against Gulfport for its actions might be in order upon which this Court bases its position not to award sanctions. It appears to this Court that remarks by Gulfport's counsel gleaned from a few questions by the Court regarding the original Frisby Agreements makes the attorney somewhat concerned about the success of further proceedings would not be in his client's (Gulfport's) favor if the Frisby Agreements were not changed. The thought concept by

the said counselor was clearly conjecture on his part. For whatever reason, the manner in which Gulfport chose the course of action to call a special meeting and changed it was not a good solution while the Court might be able to understand the reason, it was not properly done.

*A. Dismissal of Gulfport's Case With Prejudice Pursuant to Rule 37.*

In *Pierce v. Heritage Properties, Inc.*, the Mississippi Supreme Court adopted the Fifth Circuit's test set forth in *Batson v. Neal Spelce Assocs.*, 765 F.2d 511, 514 (5th Cir. 1985), for determining whether dismissal with prejudice pursuant to Rule 37 is warranted, to wit:

First, dismissal is authorized only when the failure to comply with the court's order results from willfulness or bad faith, and not from the inability to comply. Dismissal is proper only in situations where the deterrent value of Rule 37 cannot be substantially achieved by the use of less drastic sanctions. Another consideration is whether the other party's preparation for trial was substantially prejudiced. Finally, dismissal may be inappropriate when neglect is plainly attributable to an attorney rather than a blameless client, or when a party's simple negligence is grounded in confusion or sincere misunderstanding of the court's orders.

*Pierce v. Heritage Props., Inc.*, 688 So. 2d 1385, 1389 (Miss. 1997). These factors are, however, only considerations and are not four absolute requirements. *Smith v. Tougaloo College*, 805 So. 2d 633, 640 (Miss. Ct. App. 2002).

This Court finds that all of the elements set forth in the *Pierce* test are present in this case, and that a Rule 37 dismissal with prejudice of the City of Gulfport's "special purpose" annexation is warranted.

First, this Court finds that Gulfport's failure to comply with this Court's Scheduling Order, and the deadlines imposed therein, does not result from any inability of the City of Gulfport to comply. Rather, this Court finds that Gulfport disregarded this Court's deadlines in adopting the Amended Frisby Agreements. To this end, Mississippi Supreme Court and the Mississippi Court of Appeals have held that "[a] finding of willfulness may be based upon either

a willful, intentional, and bad faith attempt to conceal evidence or a gross indifference to discovery obligations.”

*Rhaly*, 2011 WL 1486624, at \*4.

Gulfport initiated this so-called “special purpose” or “development-driven” annexation on the basis of several agreements which it had entered into with a private developer. The City represented to the objectors throughout discovery, and to this Court throughout the first two (2) weeks of trial, that the City’s plan for delivering municipal improvements to the Proposed Annexation Area was set forth in the original agreements with Pitcher Point Investments (“PPI”), which agreements had been incorporated into the City’s Annexation Ordinance. During the first two (2) weeks of trial, the Objectors, namely the City of Biloxi and Harrison County, identified significant problems with the Frisby Agreements, resulting in Gulfport’s reaction of adopting entirely new agreements with Pitcher Point/Frisby **IN THE MIDDLE OF A MONTH-LONG TRIAL**. Gulfport actions reflect a gross indifference to its discovery obligations and amount to a willful, last-ditch effort to rehabilitate its case by throwing out the window the original agreements which formed the basis for its annexation, and adopting new agreements which no party to this action had previously seen, much less conducted any discovery whatsoever, including written discovery or witness depositions.

Second, this Court finds that the deterrent value of Rule 37 cannot be substantially achieved by the use of less drastic sanctions. For example, this Court finds that the mere exclusion of the Amended Frisby Agreements from evidence would place this Court in the position of ruling upon the reasonableness of this “special purpose” annexation, the foundation of which is the original Frisby Agreements, all the while knowing that the City of Gulfport and Frisby/PPI no longer intend to abide by the agreements which are in evidence.

Moreover, merely continuing the trial of this matter to allow additional discovery is not a viable option. The City of Gulfport adopted the Annexation Ordinance underlying this "special purpose" annexation on June 3, 2009. The original Frisby Agreements were an integral part of the underlying action, having been specifically incorporated into the City's Annexation Ordinance. Hundreds, if not thousands, of hours were spent by the parties engaging in written discovery and depositions, and preparing for trial, all based upon Gulfport's repeated representations that its plans associated with this "special purpose" annexation were set forth in the original Frisby Agreements. Gulfport now wants to render all of this discovery (and the associated trial testimony) absolutely meaningless, and recall its expert witnesses to testify regarding completely new plans, which anticipated testimony has still yet to be disclosed through formal supplementation. In other words, Gulfport wants a do-over at the expense of the tax payers of the City of Biloxi and Harrison County. To this end, the Mississippi Supreme Court has stated that "[w]e discourage trial courts from granting continuances because of discovery violations in civil cases, particularly where the surprised party has gone to some expense and trouble in preparing to try the case on the day it is set." *Read v. Southern Pine Elec. Powe Ass'n*, 515 So. 2d 916, 922 (Miss. 1987) (citing *Huff v. Polk*, 408 So. 2d 1368 (Miss. 1982)).

Third, this Court finds that, without a doubt, Biloxi and Harrison County's preparation for trial was substantially prejudiced by Gulfport's actions in adopting the Amended Frisby Agreements. Countless hours were spent by both Biloxi and Harrison County proceeding through discovery, preparing for trial, and participating in two (2) weeks of trial. Furthermore, this Court would expect that the expert opinions to be rendered by the municipal planning, finance, and engineering experts for Biloxi and Harrison County would be based upon the three original Frisby Agreements, as the original three (3) Agreements were the only agreements

disclosed during the discovery process. All of this time was spent based on Gulfport's representation that its plans associated with this "special purpose" annexation were set forth in the original Frisby Agreements, which had been specifically incorporated into the City's Annexation Ordinance, and which were the driving force behind this annexation. Gulfport, however, rendered all of this discovery, trial preparation, and trial testimony moot in adopting the Amended Frisby Agreements. To this end, the City of Gulfport admitted during this Court's February 28, 2011 Motion Hearing that additional discovery will have to be conducted on these Amended Frisby Agreements. (See Excerpts from February 28, 2011 Motion Hearing, pp. 213-214).

Finally, this Court finds that, in this instance, the City of Gulfport cannot be considered a "blameless client," and the City's actions cannot be attributed solely to their attorney, nor to any confusion or misunderstanding of this Court's Scheduling Order. Amending the original Frisby Agreements required official action of the City of Gulfport, and could not simply be done by their counsel. More importantly, the City's action in using the original Frisby Agreements to court Mr. Frisby away from the City of Biloxi and into the City of Gulfport, only to ultimately abandon the agreements two (2) weeks into trial, does not sit well with this Court. To this end, a bit of background is necessary.

In 2007, James Frisby, the developer which Gulfport contends is driving this annexation, filed a Petition seeking inclusion of his development into the City of Biloxi (the "Inclusion Petition"), to which the City of Gulfport objected. At some point during negotiations between Mr. Frisby and the City of Biloxi as to the delivery of municipal services and improvements to Mr. Frisby's development, representatives of the City of Gulfport approached Mr. Frisby and pitched him a better deal than he was getting from the City of Biloxi (what has come to be

known as the "Sweetheart Deal" embodied in the original Frisby Agreements). Accordingly, Mr. Frisby withdrew his Inclusion Petition and agreed to cooperate with the City of Gulfport in a so-called "special purpose" or "development driven" annexation based upon the original Frisby Agreements. The parties have proceeded through discovery and two weeks of trial on the original Frisby Agreements. However, following the completion of discovery and two (2) weeks of trial, Gulfport has abandoned the original agreements and adopted entirely new agreements with Mr. Frisby. Furthermore, based upon comments made by Gulfport City Council members R. Lee Flowers and Cara Pucheu during the Council's February 22, 2011 consideration and adoption of the Amended Frisby Agreements, the Gulfport City Council had been discussing amending the Frisby Agreements for months. (See Exhibit HC-1 to February 28, 2011 Motion Hearing). For example, Councilwoman Cara Pucheu stated during the adoption of the Amended Frisby Agreements that "[t]his is just to ratify the agreement we had discussed . . . and changes we made earlier like months ago when we talked about the issues that we wanted to address and now by agreement is confirming those." (See transcription of excerpts from February 22, 2011 Gulfport City Council Meeting; See also, Exhibit HC-1 to February 22, 2011 Motion Hearing). However, despite its admitted intent to amend the Frisby Agreements even before the trial started, the City of Gulfport, for strategic reasons, waited until the original Frisby Agreements had been criticized at trial to disclose its intention to amend the Agreements to the Court and the objecting parties. Further, Gulfport has indicated that, if permitted, it will recall its prior witnesses that have previously testified regarding the original agreements. Under these circumstances, this Court cannot say that Gulfport is "blameless."



This Court finds that after considering the four factors set forth by the Mississippi Supreme Court in *Pierce*, may very well have the authority to dismiss the Complaint with prejudice pursuant to Rule 37 as a sanction for Gulfport's discovery abuse, but this Court does not think that the facts go so far, and therefore refuses to dismiss with prejudice.

Accordingly, this Court finds that, after considering the four factors set forth by the Mississippi Supreme Court in *Pierce*, Gulfport's case with prejudice pursuant to Rule 37 could conceivably be dismissed as the sanction for Gulfport's discovery abuse. *Pierce*, 688 So. 2d at 1389.

*B. Alternatively, Dismissal of Gulfport's Case Without Prejudice.*

In *Ngo v. Centennial Ins. Co.*, 893 So. 2d 1076 (Miss. Ct. App. 2005), the Mississippi Court of Appeals was asked to review a lower court's dismissal of a plaintiff's claim without prejudice due to, *inter alia*, the plaintiff's failure to respond to interrogatories and requests for production of documents. *Ngo*, 893 So. 2d at 1079-80. In upholding the lower court's dismissal, the Court of Appeals held that, while the Mississippi Supreme Court had adopted the *Pierce* test for determining whether a particular discovery violation warranted dismissal with prejudice pursuant to Rule 37, such test was only applicable to dismissals with prejudice. *Id.* at 1080. Accordingly, the Mississippi Court of Appeals held that when dismissing an action without prejudice as a result of a discovery violation, consideration of the *Pierce* factors need not be made, and an action may be discretionarily dismissible without prejudice even where there has been no willfulness or bad faith on behalf of the plaintiff. *Id.*

However, as discussed above with respect to the dismissal of Gulfport's case with prejudice pursuant to Rule 37, all of the *Pierce* factors are met in this case and, as the standard

for dismissing with prejudice has been met, it would unquestionably be permissible for this Court to dismiss the City of Gulfport's case without prejudice.

Furthermore, pursuant to *Mississippi Rule of Civil Procedure 37* this Court is empowered to impose additional sanctions against the City of Gulfport in terms of reasonable expenses, including attorneys' fees, for Gulfport's flagrant abuse of the discovery process. *See also, Irby v. Estate of Irby ex rel. Marshall*, 7 So. 3d 223, 229 (Miss. 2009); *Cooper Tyre & Rubber Co. v. McGill*, 890 So. 2d 859, 864 (Miss. 2004). In this regard, the City of Gulfport has allowed this matter to proceed through discovery and two (2) weeks of trial based upon the original Frisby Agreements, despite indications that the City has been considering changes to the agreements for months. Although all of this discovery, trial preparation, and trial participation have come at great expense to the City of Biloxi and Harrison County, and even though this Court finds that, pursuant to both Rule 37 and the inherent power of the Court, this Court finds that Gulfport attempted to change or amend their original complaint improperly and their case has been dismissed by this Court, such dismissal without prejudice, is sufficient to right the wrong.

#### IV. DISMISSAL PURSUANT TO MISS. R. CIV. P. 41

In addition to its authority to dismiss the City of Gulfport's Petition pursuant to *Miss. R. Civ. P. 37*, this Court likewise has the authority to dismiss the City of Gulfport's Petition pursuant to *Mississippi Rule of Civil Procedure 41*. Specifically, *Mississippi Rule of Civil Procedure 41* provides, in part, as follows:

**(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for a dismissal of an action or of any claim against him.** After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court may then

render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court may make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any other dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

[emphasis added].

The Comment to Rule 41 provides:

Rule 41(b) allows the court to dismiss an action involuntarily for three different causes: dismissal at the close of the plaintiff's evidence for failure to show a right to relief, which operates as a decision on the merits, dismissal for want of prosecution, which is a penalty for dilatoriness, and dismissal for failure to comply with "these rules" or any order of the court.

The Mississippi Supreme Court has previously stated that Rule 41(b) is concerned with "orders that are necessary for preparation of trial litigation as well as the trial itself and its procedure insofar as it relates to the rules of civil procedure" as "one central purpose of the procedural rules is to allow the trial court to move every case on the docket with reasonable promptness." *Wallace v. Jones*, 572 So. 2d 371, 377 (Miss. 1990).

The Mississippi Supreme Court has held that Rule 41(b) dismissals "for failure to comply with an order of the trial court [are] appropriate only where there is a clear record of delay or contumacious conduct and lesser sanctions would not serve the best interests of justice." *Wilson v. Nance*, 4 So. 3d 336, 341 (Miss. 2009).<sup>1</sup>

In addition, the Mississippi Supreme Court has further approved of dismissals for failure to comply with a court order under Rule 41(b) where there is at least one "aggravating factor" present. *Wilson*, 4 So. 3d at 341. Aggravating factors include "the extent to which the plaintiff, as

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<sup>1</sup> Black's Law Dictionary defines "contumacious conduct" as "a willful disobedience of a court order." *Black's Law Dictionary* 292 (7th ed. 2001).

distinguished from his counsel, was personally responsible for the delay, the degree of actual prejudice to the defendant, and whether the delay was the result of intentional conflict." *Id.*

Turning to the case before this Court, Gulfport's actions in adopting the Amended Frisby Agreements reflect a willful disregard for both the Scheduling Order entered by this Court and the *Mississippi Rules of Civil Procedure*. Specifically, this Court entered a Scheduling Order establishing a December 3, 2010 Discovery Deadline, and a January 6, 2011 deadline for the parties to exchange trial exhibits. Despite both deadlines, the City of Gulfport adopted the Amended Frisby Agreements on February 22, 2011, and notified the parties of its intent to offer the same into evidence through a "Supplementation of Discovery" (which is, in reality, nothing more than a pure statement of counsel) filed on February 23, 2011, well after the close of discovery in this matter.

As stated *supra*, the Mississippi Supreme Court has previously held:

**Our trial judges are afforded considerable discretion in managing the pre-trial discovery process in their courts, including the entry of scheduling orders setting out various deadlines to assure orderly pre-trial preparation resulting in timely disposition of the cases. Our trial judges also have a right to expect compliance with their orders, and when parties and/or attorneys fail to adhere to the provisions of these orders, they should be prepared to do so at their own peril.**

*Bowie*, 861 So. 2d at 1042. Accordingly, the City of Gulfport, in knowingly violating the established deadlines of this Court, with which both the City of Biloxi and Harrison County have abided, should be prepared to do so at its own peril.

Furthermore, Gulfport's actions are in violation of the rules of discovery set forth in the *Mississippi Rules of Civil Procedure*. To this end, the Mississippi Supreme Court, in reversing a lower court's allowance of the testimony of three expert witnesses whose names were revealed to

counsel opposite through the filing of "Supplemental Answers to Interrogatories" on the day of trial, held as follows:

Appellee contends that the noncompliance of the statute in question was cured when the lower court offered appellant a continuance. First, we have seen that appellant already had incurred the expense of preparation for trial, including the payment to a medical expert who was on his way from Jackson to Meridian. We can almost take judicial knowledge that this would be rather expensive.

The main point, however, is that under the lower court's ruling in this case, in justifying his actions by offering a continuance, the court is setting up a situation where either party to a cause in litigation may decide that he will not be ready for trial on the day it is set and wishes a delay. He could get one by not conforming to the above quoted discovery rules until the morning of the trial, knowing that he would get a continuance by the court giving the already prepared opposition a continuance. We certainly cannot condone the possibility of a situation such as that being legalized.

In summary, the rules of court procedure have been promulgated. As stated above, the particular discovery procedure in this appeal was first adopted by the legislature. The quoted parts were carried over (with additions) into the new rules. We recognize that some members of the bar are going to be unhappy when forced to conform. Regardless of this, we have no choice but to reiterate that attorneys are required to conform to the rules of procedure, regardless of how obnoxious or penal some are thought to be.

*Huff*, 408 So. 2d at 1368.

In the case before this Court, Gulfport decided it was ready for trial, only to find that the City of Biloxi and Harrison County had exposed significant issues with regard to the very foundation of its "special purpose" annexation, the Frisby Agreements. Gulfport spent two (2) weeks in trial getting its case shredded as a result of its "Sweetheart Deal" with developer James Frisby before essentially asking this Court for a re-trial on the Amended Frisby Agreements. This Court simply cannot condone the actions taken by Gulfport as being within the Rules.

The City of Gulfport indicated at the City Council meeting in which the Amended Frisby Agreements were adopted that these changes had been being discussed for "months." Nonetheless, the City of Gulfport remained silent as to these ongoing discussions, and proceeded to trial on the original Frisby Agreements. At the very least, Gulfport acted with deception by not advising the Court and the parties that it intended to amend the Frisby Agreements and also sending its witnesses to swear under oath that it was reasonable and in the best interest of Gulfport to annex the Frisby Property pursuant to the original Frisby Agreements. Gulfport did so at its own peril.

This Court finds that, in light of the willful disregard for the Scheduling Order of this Court and the Rules of Civil Procedure, dismissal of the City of Gulfport's Petition is proper. Further aggravating this issue is the actual prejudice that the City of Biloxi and Harrison County would suffer were they forced to continue with the trial of this matter in its current state. As evidenced by Gulfport's adoption of the Amended Frisby Agreements in response to vigorous cross-examination by counsel for Biloxi and Harrison County, the City of Biloxi and Harrison County were adequately prepared to challenge and oppose Gulfport's annexation efforts when the trial of this matter began. To force them to the additional cost of further discovery and trial preparation based on Gulfport's "new" agreements is simply not in the interests of justice and fair play. Moreover, the Mississippi Supreme Court "discourages trial courts from granting continuances because of discovery violations in civil cases, particularly where the surprised party has gone to some expense and trouble in preparing to try the case on the day it is set." *Southern Pine Elec. Power Ass'n*, 515 So. 2d at 922.

Accordingly, this Court finds that, pursuant to *Mississippi Rule of Civil Procedure* 41(b), the City of Gulfport's Annexation Petition should be dismissed, without prejudice, as a result of Gulfport's failure to comply with the Order of this Court and the Rules of Civil Procedure.

Alternatively, this Court has the authority pursuant to *Mississippi Rule of Civil Procedure* 41 to dismiss the City of Gulfport's case on the grounds that, upon the facts and the law, Gulfport has shown no right to relief. *Miss. R. Civ. P.* 41(b). While such involuntary dismissals are generally made at the close of the plaintiff's case, other courts have approved of involuntary dismissals for failure to show a right to relief prior to the close of the plaintiff's case. *See, e.g., Mercado v. Austin Police Department*, 75 F.2d 1266, 1269-70 (5th Cir. 1985) (holding "it is not absolutely necessary that dismissal be delayed until the close of plaintiff's case," and that "it was a proper exercise of [the trial judge's] duty to conduct the trial process economically and efficiently to administer the *coup de grace* to what he found to be a hopeless case"); *D.P. Apparel Corp. v. Roadway Exp., Inc.*, 736 F.2d 1, 4-5 (1st Cir. 1984) (where it is manifestly clear to the judge that the plaintiff could not prove his case, and that "no apparent purpose would have been served by continuing the trial at great expense to the parties," dismissal before the close of the plaintiff's case was "well within the purview of the district court's power to manage its own affairs and to serve the interests of judicial economy"); *Lentino v. Fringe Employee Plans, Inc.*, 611 F.2d 474, 482 n. 15 (3d Cir. 1979) (court may grant involuntary dismissal prior to close of evidence where it is "manifestly clear that plaintiff will not prove his case").

Gulfport's adoption of the Amended Frisby Agreements is, in effect, an admission by Gulfport that this "special purpose" annexation, which is founded upon the three original Frisby Agreements, is fundamentally flawed. Gulfport specifically incorporated the three original Frisby Agreements into its Annexation Ordinance, and, in amending the Frisby Agreements, the City of

Gulfport improperly amended its Annexation Ordinance. Further, the City has failed to take necessary steps to vest this Court with jurisdiction over any amended ordinance. Accordingly, this Court finds that the City of Gulfport is entitled to no relief based upon its Annexation Petition, as the Petition seeks judicial ratification, approval, and confirmation of an Annexation Ordinance which is no longer effective. There being no effective ordinance, this Court finds that there is no reason to continue the trial of this matter at the expense of the City of Biloxi and Harrison County and, therefore, hereby dismisses Gulfport's Petition pursuant to Rule 41(b) as it is manifestly clear to this Court that Gulfport will not be able to prove that it is entitled to any of the relief sought in its Annexation Petition.

#### V. CONCERNS OF THIS COURT

##### A. At What Point During the Legal Proceedings Can a Party Amend the "Core Nucleus" of the Case?

The procedure for amendment of pleadings is governed by *Mississippi Rule of Civil Procedure* 15. Amendments are left to the sound discretion of the trial court and should be denied only where the amendment would cause actual prejudice to the opposite party. *See, e.g. Merchants Acceptance, Inc. v. Jamison*, 752 So. 2d 422, 426-27 (Miss. Ct. App. 1999). Further, while the trial judge has considerable latitude in permitting amendments, a party is not entitled to an absolute right to amend pleadings. *Mahaffey v. Maner*, 47 So. 3d 1190, 1192-93 (Miss. Ct. App. 2010). To this end, in *McCarty v. Kellum*, 667 So. 2d 1277, 1284-85 (Miss. 1995), the Mississippi Supreme Court stated:

The trial court has the discretion to decide whether an amendment to the pleadings should be granted, and when the amendment is offered at the end of trial, the potential for prejudice to the nonmovant exists.

Freedom to grant leave to amend when justice so requires, as provided by the [Mississippi Rules of Civil Procedure], diminishes as the litigation progresses. Since prejudice to the



opposing party is a key factor governing the court's discretion in granting leave to amend a pleading, the court will ordinarily refuse to grant such permission where the motion comes so late and in such circumstances that the right of the adverse party will necessarily be prejudicially affected.

*McCarty*, 667 So. 2d at 1284-85 (citing 61A Am. Jur. 2d *Pleadings* § 315 (1981)). [emphasis added]. Similarly, the Mississippi Supreme Court has held:

Amendments which are permitted in the latter stages of litigation may deny the important policy favoring finality of judgments and the expeditious termination of litigation. Thus, the policy to freely grant amendments is not allowed to encourage delay, laches and negligence. Examples of when [a] motion to amend may be prejudicial include: where it would burden the adverse party with more discovery, preparation, and expense, particularly where the adverse party would have little time to investigate and acquaint itself with the matter.

*Wal-Mart Super Center v. Long*, 852 So. 2d 568, 571 (Miss. 2003) (internal citations omitted).

In *William Iseltin & Co. v. Delta Auction & Real Estate Co.*, 433 So. 2d 911 (Miss. 1983), the Mississippi Supreme Court stated:

In light of the above considerations [of prejudice to an adverse party], we have consistently affirmed a chancellor's denial of an amendment in cases similar to the one now under consideration [where the plaintiff sought to file an amended proof of claim after the chancellor had announced his decision]. In *Rolkosky v. Rolkosky*, 237 Miss. 89, 113 So. 2d 661 (1959), the appellant contended that the chancellor erred in overruling her motion to amend her petition to conform to the proof. The motion was filed after the cause was submitted and the chancellor had announced his decision. The Court affirmed the chancellor's decision since the appellant's delay in filing the application to amend did not meet the requirements of due diligence. Similarly, in *Olivari v. Clark*, 175 Miss. 883, 168 So. 465 (1936), the Court concluded that a chancellor's refusal to allow an amendment was not error where the proposal to amend was not made until after the lower court had indicated its final decision on the case. Finally, in the old case of *Duggan v. Champlin*, 75 Miss. 441, 23 So. 179 (1898), the Court concluded that a request for an amendment came too late when made after the presentation of evidence and during the arguments.

Under the precedent established in the *Rolkosky*, *Olivari*, and *Duggan* cases cited above, the amended proof of claim simply came too late. The chancellor's denial of the amendment should be affirmed.

*William Iselin & Co.*, 852 So. 2d at 913.

Likewise, the Mississippi Supreme Court has previously held:

While a trial court has discretion to allow amendment and should do so freely under the proper circumstances, amendment should not occur when to do so would prejudice the defendant. Allowing the entire theory of liability to change at the conclusion of a three-day trial seriously prejudiced [the defendant]. From the complaint and conduct of counsel opposite, [the defendant] had the right to assume that the entire claim against him was grounded upon the theory of *respondeat superior* and that otherwise he had a right to repossess the vehicle in question. Clairvoyance by the defense would have been required to anticipate any contention beyond this. When both sides had rested, the issue was changed by the court from [the defendant's] having the clear right to repossess, but perhaps being liable based upon *respondeat superior*, because of Evans' tortuous conduct, to Brandy's not having the right to repossess. This drastically altered the basis upon which the case was brought to trial.

*Hester v. Bandy*, 627 So. 2d 833, 839-40 (Miss. 1993).

Similar to the defendant in *Hester*, the City of Biloxi and Harrison County had the right to assume that the City of Gulfport's "special purpose" annexation was grounded in the three original Frisby Agreements, which had been specifically incorporated into the City's Annexation Ordinance, and which the City of Gulfport has steadfastly maintained (throughout discovery and two (2) weeks of trial) set forth the City's plans for the provision of services and improvements associated with this "special purpose" annexation. Not once before February 21, 2011, did the City of Gulfport, or its counsel, indicate that the City was considering significant revisions and/or amendments to these agreements (despite indications from members of the Gulfport City Council during the adoption of the Amended Frisby Agreements that the City has been considering the changes for a number of months). Allowing Gulfport to now "drastically alter the basis upon which [its] case was brought to trial" would, beyond a doubt, prejudice the City of Biloxi and Harrison County. The City of Biloxi and Harrison County would be burdened with

additional discovery, preparation, and expense (over and above the hundreds of thousands of dollars spent litigating this matter based on the original Frisby Agreements). Moreover, as the Mississippi Supreme Court recognized in *McCarty*, the freedom to grant leave to amend diminishes as the litigation progresses (and certainly once the litigation has progressed through two (2) weeks of trial).

Further, *Uniform Chancery Court Rule 2.09* provides as follows:

Where either party during the term at which a cause is triable, or during the trial thereof, shall obtain leave to amend his pleadings concerning any material matter, which the opposite party is not prepared to meet, shall, if he so requests be entitled to a continuance, and the party so making such amendment shall, on motion of the opposite party, be taxed with all costs accrued to the time of granting such leave, unless special circumstances of the case make it inequitable so to do.

On its face, *Uniform Chancery Court Rule 2.09* presupposes that leave to amend has already been granted, which leave in this case has not even been requested, nor would such leave be proper at this stage of the litigation. However, were this Court to grant leave to the City of Gulfport based upon its new agreements (which would result in actual prejudice to the City of Biloxi), the parties would without question be entitled to a continuance of this matter, and the City of Gulfport "shall" be taxed with all costs accrued by the parties to the time of granting such leave. To this end, the City of Gulfport has acknowledged that it would have to pay the costs of additional discovery. (See Exhibit J, pp. 213-14).

**B. Is Notice to the Public of the Amended Agreements Necessary?**

*Mississippi Code Ann. § 21-1-27* provides that when any municipality shall desire to enlarge or contract its boundaries, the governing authorities of the municipality "shall pass an ordinance," *inter alia*, describing "the proposed improvements to be made in the annexed territory, the manner and extent of such improvements, and the approximate time within which

such improvements are to be made.” Construing this statute, the Mississippi Supreme Court has held that “the inclusion in the ordinance of the statutorily mandated ‘requirements concerning improvements, public services, and the extent and time within which they are to be made’” is mandatory. *City of Hattiesburg*, 840 So. 2d at 79.

As this Court is well aware, the City of Gulfport sought compliance with statutorily-mandated requirement concerning the description of improvements to be rendered in the Proposed Annexation Area through the specific incorporation into its Annexation Ordinance of certain agreements entered into between the City of Gulfport and Pitcher Point Investments. Specifically, Section 3 of Gulfport’s existing Ordinance provides:

Agreements related to the manner and timing of certain municipal improvements have been executed by and between Pitcher Point Investments, LLC and the City of Gulfport. The City of Gulfport will extend improvements to said area in the time and manner set forth by said agreements.

Following the adoption of its Annexation Ordinance and the filing of its Annexation Petition, *Mississippi Code Ann.* § 21-1-31 imposed upon the City of Gulfport certain notice and service of process requirements necessary to vest this court with jurisdiction over its Petition. These requirements include the posting and publication of notice within the area sought to be annexed, and the service of all municipalities within three (3) miles of the area sought to be annexed with a copy of the City’s Petition (and attached Annexation Ordinance). The Mississippi Supreme Court has made it abundantly clear that the notice requirements of annexation cases require strict compliance, and are both “mandatory and jurisdictional.” See, e.g., *Norwood v. Extension of Boundaries of City of Ita Bena*, 788 So. 2d 747, 751-52 (Miss. 2001); *In re Extension of Boundaries of City of Pearl*, 365 So. 2d 952, 954 (Miss. 1978).

Accordingly, to the extent that the City of Gulfport has complied with the mandatory jurisdictional notice requirements of *Mississippi Code Ann.* § 21-1-31, notice was provided to existing municipalities and residents and property owners in the PAA of the City's existing Ordinance which was adopted on June 3, 2009. That Ordinance described and set forth the timing, manner, and scope of promised services and improvements by specifically incorporating the three (3) original Frisby Agreements (See Section 3 of the City's Annexation Ordinance, Exhibit A). Consistent with this notice, the City of Gulfport has maintained throughout the trial of this matter that no "Services and Facilities Plan" was necessary because the residents and property owners of the PAA could expect to receive municipal services and improvements in the manner specifically described and set forth in the original Frisby Agreements, which were expressly incorporated into the Ordinance which has been published and noticed to the public.

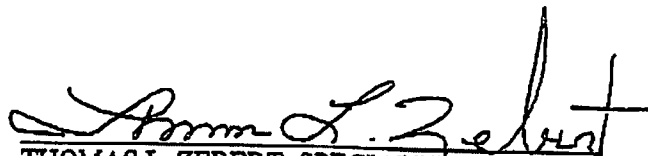
However, the City of Gulfport has fundamentally altered its plans for the delivery of municipal improvements from that which the residents and property owners of the PAA have been put on notice (i.e., the Frisby Agreements) through the adoption of the Amended Frisby Agreements. Furthermore, the City of Gulfport has not provided notice to the public of these fundamental changes in the scope, manner, and timing of the delivery of municipal improvements to the PAA from that described in Gulfport's currently operative Annexation Ordinance. In order for Gulfport to do so in accordance with the annexation statutes will require Gulfport to adopt a new annexation ordinance, seek leave of this court to file an amended petition, and re-post and re-publish notice as required by *Mississippi Code Ann.* §§ 21-1-15 and 21-1-31. Gulfport, however, has not taken any of these necessary steps. Accordingly, the City of Gulfport's Annexation Petition in this matter must be dismissed.

For all the reasons set forth above, the Court finds that because of the particular findings, that it is without jurisdiction to proceed further with this case.

Accordingly, the remaining motions not addressed in this opinion are neither denied nor dismissed but will remain to be asserted if future rulings are directed by the proper appellate court.

The City of Biloxi through their legal counsel will prepare an Order consistent with this opinion within ten (10) days of the entry of these findings of facts and conclusions of law.

ORDERED AND ADJUDGED, THIS THE 13 DAY OF JUNE, 2011.

  
THOMAS L. ZEBERT, SPECIALLY  
APPOINTED CHANCERY COURT JUDGE

Copies: Chadwick Nash, Esq.  
Jerry Mills, Esq.  
Jeffrey Truni, Esq.  
Jim Holleman, Esq.  
Ronald Parsich, Esq.  
Dina Somplero, Esq.  
Clifton Decker, Esq. 38