IN THE SUPREME COURT OF MISSISSIPPI
NO. 2008-CA-00447

THE COLOM LAW FIRM, LLC and
MONIQUE BROOKS MONTGOMERY — APPELLANTS

VERSUS

BOARD OF TRUSTEES, COLUMBUS
MUNICIPAL SCHOOL DISTRICT IN
THEIR OFFICIAL CAPACITY AND
DUNN & HEMPHILL, P.A. — APPELLEES

APPEAL FROM THE CHANCERY COURT
LOWNDES COUNTY, MISSISSIPPI

BRIEF FOR APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certify that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. The Colom Law Firm, LLC, Appellant.
2. Monique Brooks Montgomery, Esq., Appellant.
3. Gary Street Goodwin, Esq., Goodwin Law Firm, Attorney for Appellant.
4. Board of Trustees of the Columbus Municipal Separate School District, Appellee, comprised of Tommy Prude, Bruce Hanson, Julie Jordan, Glenn Lautzenhiser, Alma Turner.
5. Christopher D. Hemphill, Esq., Dunn & Hemphill, P.A., Attorney for Appellee, Dunn & Hemphill, P.A.
6. Jeffrey Johnson Turnage, Esq., Mitchell, McNutt & Sams, P.A., Attorney for Appellee, Municipal Separate School District.
7. Honorable Jon. M. Barnwell, Special Chancellor

So certified, this the 14th day of October, 2008.

JEFFREY JOHNSON TURNAGE,
ATTORNEY FOR APPELLEES, BOARD OF TRUSTEES

CHRISTOPHER D. HEMPHILL,
ATTORNEY FOR APPELLEE DUNN & HEMPHILL, P.A.

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STATEMENT REGARDING ORAL ARGUMENT

Oral Argument is Not Requested.

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COUNTER-STATEMENT OF THE CASE

I. COURSE OF THE PROCEEDINGS AND DISPOSITION IN THE COURT BELOW.

This is an appeal from an order granting partial summary judgment on the pleadings entered on February 13, 2008, by Honorable Jon Barnwell, sitting as Special Chancery Court Judge for the 14th Judicial District, Lowndes County, Mississippi, in favor of the Defendants, the Board of Trustees of the Columbus Municipal School District ("District") and Dunn & Hemphill ("Dunn & Hemphill"), and against the Plaintiffs, the Colom Law Firm, LLC ("Colom") and Monique Brooks Montgomery ("Montgomery"). (R. 125-136).

The suit began on September 22, 2004, when Colom and Montgomery, a law firm in Columbus and one of its associates, filed suit, seeking, among other things, to have a meeting of the District declared void and nullified after the District's Board of Trustees re-hired its longstanding general counsel, Dunn & Hemphill. (R. 8). Colom and Montgomery claimed in their Complaint, that the District held the meeting complained of without proper call and without proper notice and claimed that these alleged failings justified the claim to void the meeting. (R. 8).

The Chancery Court found that Dunn & Hemphill were necessary parties to the suit and the plaintiff amended the complaint so to add Dunn & Hemphill and made the same claims in the amended suit. (R. 87). The District moved for Partial Judgment on the Pleadings or for partial Summary Judgment on the basis that the statute on enforcement of the open meetings act, and the cases that followed it, did not permit declaring a meeting void or a nullity. (R. 36-39). Colom and Montgomery opposed the Motion. (R. 67-69).

The Chancery Court twice heard argument on the District's motion for partial Judgment on the Pleadings or Partial Summary Judgment. Based upon the reasons stated in the memorandum opinion, the trial court entered partial judgment on the pleadings in favor of the Defendants on February 13, 2008. (R. 125-136). In the Order, the Court certified the issue pursuant to Rule 54(b). (R. 125). It is from this Judgment that Colom and Montgomery appeal. Colom and Montgomery have already sought an order from this Court to vacate the appeal, claiming that the Chancellor should not have certified the judgment pursuant to Rule 54(b). The District and Dunn & Hemphill opposed the vacation and moved to dismiss the appeal with prejudice because the Appellants failed to timely file their Brief of the Appellant. This Court denied the motion to vacate and denied the motion to dismiss.

II. COUNTER-STATEMENT OF THE FACTS

A. *FACTS GIVING RISE TO THE SUIT AND THE LITIGATION THAT FOLLOWED*

1. *COLOM'S REQUEST TO BE HIRED AS LEGAL COUNSEL*

The Amended Complaint in this case alleges that Colom and Montgomery asked the president of the District if they could be considered for hiring as legal counsel. The president of the Board of Trustees of the District told Colom and Montgomery during the early summer of 2004, that the engagement of the general counsel would come up for renewal in March of 2005 and that they would have a chance to be considered for the position at that time. (R. 86-87). The statement is not alleged to have occurred in a meeting of the Board of the District. It is not alleged that the District itself ever promised Colom or Montgomery that it wished to consider them for the position. The Complaint

does not allege that any meetings of the District were held wherein the District resolved to accept proposals for professional services. The record is likewise devoid of any minutes of the District indicating an interest in accepting proposal for legal services from Colom and Montgomery or anyone else.

2. DISTRICT'S REHIRING OF CURRENT COUNSEL

After the alleged promise by the President in the early summer of 2004, that the contract would renew in March of 2005, the District had a meeting on the 2nd of August, 2004. The meeting was a special meeting at 7:30 AM at the District's normal meeting place. Special meetings are required to be held in accordance with the Open Meetings Act of the Mississippi Code as set forth in Section 25-41-13(1). This Code section provides that a notice must be posted within one hour of the call of the meeting in a prominent place where the meeting is normally held and that it set forth the items to be considered at the meeting. Colom and Montgomery allege that the notice was not posted in the time required and did not specify the items to be considered. Further, Colom and Montgomery complain that the notice did not specify that the District would entertain the re-hiring of the general counsel and that the District amended the agenda at the meeting to consider the issue without notice. (R. 86-87). At the meeting, the District engaged the general counsel, Dunn & Hemphill for another year from August of 2004 to the end of June, 2005. (R. 103-104).

3. COMPLAINT BY COLOM AND MONTGOMERY

When Colom and Montgomery found out about the rehiring, they complained, arguing that the meeting was illegal and void. The District, clearly not being interested in honoring their wish to accept their proposal to be counsel for the School District, rejected

their complaint that the meeting was illegal and refused their demand for consideration as general counsel. When they realized the District was not going to reverse itself, Colom and Montgomery hired outside legal counsel and, on September 22, 2004, they sued the District, seeking among other things, to have the meeting declared void. (R. 3-9).

4. MOTION BY DISTRICT FOR PARTIAL JUDGMENT ON THE PLEADINGS

The District, in turn hired counsel, answered the complaint and immediately moved for partial judgment on the pleadings so as to immediately dismiss the part of the complaint that sought to have the meeting declared void. (R. 36-40). The motion had attached an AG opinion and a Mississippi Supreme Court case that clearly provided that declaring the meeting void was not a remedy available under the enforcement provision of the Open Meetings Act at Section 25-41-15. (R. 41-61).

The undersigned counsel for the District felt that the motion would generate a confession from the Plaintiffs of that part of their complaint that sought to void the meeting since the law was so well settled that such a remedy was unavailable to Colom or to Montgomery. But, Colom and Montgomery steadfastly held to their argument that the meeting was void. They did so, notwithstanding that the express language of Section 25-41-15, limited relief to the issuance by the court of writs of mandamus, injunctions, and to a $100 penalty and expenses in the case of a willful violation. They argued, through their counsel that because of their belief that the Board was guilty of a "connivance", that the Court was free to engraft a new provision onto Section 25-41-15 and declare the meeting void.

5. *GRANT OF MOTION BY CHANCERY COURT*

The Chancery Court was apparently not impressed with the arguments of Colom and Montgomery and therefore it granted the District's and Dunn & Hemphill's motion and dismissed the part of the Complaint that sought to declare the meeting a nullity. (R. 125-136). Exercising its discretion, the Court certified the matter pursuant to Rule 54(b). (R. 125-126).

6. *APPEAL BY COLOM AND MONTGOMERY*

Colom and Montgomery quickly appealed on March 13, 2008 and designated the record on March 20, 2008. (R. 137-141). They then sought, and were granted three extensions of time to file their appellate brief. When the deadline for filing the Brief came and went, Colom and Montgomery filed nothing.

7. *MOTION TO VACATE APPEAL*

A few days later, Colom and Montgomery filed a motion with this Court to vacate the appeal, for the first time complaining that the Chancery Court should not have certified the judgment and that it should be sent back to the trial Court. The District and Dunn & Hemphill filed a response to the Motion and a Counter Motion to dismiss the appeal with prejudice based upon the failure of Colom and Montgomery to timely submit the Brief of the Appellant.

8. *DENIAL OF MOTION TO VACATE APPEAL*

On September 23, 2008, this Court entered an order denying Colom and Montgomery's motion to vacate the appeal and denying the District's counter motion to dismiss the appeal with prejudice.

SUMMARY OF THE ARGUMENT

The Appellants suit, among other things, sought to declare as a nullity, a special meeting of the District. The basis of the suit is that the District did not comply strictly with the State Open Meetings Act, located at Section 25-41-1 *et. seq.* of the Mississippi Code. Section 25-41-15 of the Mississippi Code sets forth the powers of the Court to deal with violations of the Open Meetings Act. Nowhere is it written in this section that a lack of recorded notice of a special meeting nullifies all the actions taken. Notwithstanding the absence of any language in this statutory section giving authority to declare the meeting void and a nullity, the Appellants claim the existence of that remedy.

Section 25-41-15 provides that a chancery court can issue an injunction or a writ of mandamus. It does *not* provide the right to declare a meeting void. The Mississippi Supreme Court considered this exact issue in *Shipman v. Panola Consolidated School District,* 641 So. 2d 1106 (Miss. 1994). There, the Court held that a defect in a proper notice would not give rise to a nullification. In fact, the Court held that a meeting would not be nullified even if the complaining party could conclusively prove that <u>*no notice*</u> was given.

After *Shipman* was decided in 1994, the Mississippi Legislature, in 2003 amended and reenacted Section 25-41-15. When it did so, the Legislature did not change the language of the statute so as to authorize the chancery courts to declare a meeting nullified.

The Doctrine of *stare decisis* applies to this case. Because *Shipman* is squarely on point, its ruling as set forth above, binds this Court to the same result unless this Court finds that the prior decision is pernicious, impractical or is mischievous in its effect, and

resulting in detriment to the public. Regardless of this stated standard, this Court should continue to apply *Shipman's* interpretation of Section 25-41-15, pursuant to the doctrine of *stare decisis.* This is because the Legislature amended or reenacted the statute without changing the prior interpretation as set forth in *Shipman.* Such action on the part of the Legislature amounts to incorporation of the Court's previous interpretation, as set forth in *Shipman,* into the reenacted and amended Enforcement Statute.

Further, the Appellant's argument that the Appeal should be vacated should fail. This issue was already litigated between the parties and disposed of in the Order of this Court dated September 23, 2008. The Appellants did not file a motion to reconsider this Order and should be estopped from arguing it again here.

ARGUMENT

I. STARE DECISIS

As will be shown below, because we have an unambiguous statute that does not offer nullification as a remedy, nullification is not a remedy available to the Appellants. Even though citation to a case under these circumstances should not be necessary, *Shipman v. North Panola Consolidated School District,* 641 So.2d 1106 (Miss. 1994) clearly explains that failure to provide a proper notice cannot be a basis for voiding a meeting. Even before the case of *Caves v. Yarbrough,* 2008 WL 4351357 (Miss. 2008), a case decided only a few weeks ago, the doctrine *stare decisis* would have required the court to affirm the Chancery Court's decision. But after *Caves*, it is more clear than ever that this Court should affirm the Chancery Court's Order granting the District's motion for judgment on the pleadings. A review of *Caves* is a good beginning point to the analysis.

A. CAVES V. YARBROUGH

Last month, this Court decided the case of *Caves v. Yarbrough*, 2008 WL 4351357 (Miss. 2008). In *Caves* a widow of a man who died as a result of a septic colon, brought a medical malpractice suit against a county hospital and its employee physician. She did not file the claim within the limitations period of when the alleged malpractice occurred. The trial court dismissed the case on summary judgment and the Supreme Court affirmed. However, on rehearing, the widow argued that the Mississippi Tort Claims Act had a judicially-created "discovery rule", which extended the limitations period of the MTCA to one year following her reasonable discovery of the alleged malpractice.

The Supreme Court granted rehearing and ultimately reversed itself. Thus, this Court reversed the summary judgment and remanded the case to the trial court for further proceedings. In doing so, the Court analyzed the language of the MTCA and took note that the language of the Act contained no discovery rule. However, notwithstanding the lack of a discovery rule in the statutory language, the Court applied the principal of *stare decisis*. In following *stare decisis*, the Court followed the prior precedent of the Court, which, though wrongly decided, had applied a discovery rule to the MTCA's limitation period.

The Court explained as follows how it considered prior decisions and applied *stare decisis* to cases pending before it:

> In *stare decisis* generally, we look for error, but, finding that, we look for more and we look largely in the area of public or widespread disadvantage. Ordinarily, we do not overrule erroneous precedent unless it is "pernicious," *Stone v. Reichman-Crosby Co.*, 43 So. 2d 184, 190 (Miss. 1949); "impractical," *Robinson v. State*, 434 So. 2d 206, 210 (Miss. 1983) (Hawkins, J., concurring); or is "mischievous in its effect, and resulting in detriment to the public." *Childress v. State*, 188 Miss. 573, 577, 195 So. 583, 584 (1940). We look for "evils attendant upon a continuation of the old rule." *Tideway Oil Programs, Inc. v. Serio*, 431 So. 2d 454, 467 (Miss. 1983).

Caves, 2008 WL 4351357 at *7 (*citing State ex rel. Moore v. Molpus*, 578 So. 2d 624, 635 (Miss. 1991). In spite of this rigid standard against reversing prior precedent, the Supreme Court has reversed its prior decisions when it felt the Court had incorrectly interpreted a statute. In *Caves*, the Court stated that a standard or rule to guide the Court was necessary, so it would be better able to know when *stare decisis* required it to continue to apply prior precedent. Therefore, the Court looked for guidance to the United States Supreme Court's application of *stare decisis* and concluded that action by the Legislature was relevant to how the doctrine should be applied. In doing so, the Court

said:

> While we do not agree that the Legislature's mere silence is enough, we do agree with the view offered by Justice Roberts in *Helvering v. Hallock*, 309 U.S. 106, 130-32, 60 S.Ct. 444, 84 L.Ed. 604 (1940), that congressional re-enactment of a statute creates a presumption of legislative approval of the Court's prior interpretations of that statute. This threshold test for application of *stare decisis* has been followed in numerous cases. For instance, in *Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 580-81, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978), Justice Marshall noted, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."

Caves, 2008 WL 4351357 at *9.

After reviewing this language, this Court adopted a rule that requires the application of *stare decisis* where the Legislature reenacted the statute without change and stated:

> We agree with this reasoning, and hold that-in cases where this Court concludes a **statute** was incorrectly interpreted in a previous case-we will nevertheless continue to apply the previous interpretation, pursuant to the doctrine of ***stare decisis***, upon finding the Legislature **amended** or reenacted the **statute** without correcting the prior interpretation. In our view, such action on the part of the Legislature amounts to incorporation of our previous interpretation into the reenacted or amended statute. The Legislature is, of course, free to preclude our incorrect interpretation by specific provision, failing which, we must conclude that the legislative silence amounts to acquiescence. Stated another way, the incorrect interpretation becomes a correct interpretation because of the Legislature's tacit adoption of the prior interpretation into the amended or reenacted statute.

Id.

Of course, *Caves, supra*, is different from the case now before the Court for consideration. The major distinction between *Caves* and the case *sub judice*, is that here, the Enforcement provision under consideration DOES NOT authorize a court to declare a meeting a nullity. As will be shown below, the statutory section only authorizes the

issuance of an injunction or a writ of mandamus. However, even if the language of Section 25-41-15 authorized declaring the meeting a nullity (which it most certainly does not), if the Legislature reenacted or amended the statute without change after the Court construed the statute, then the application of *stare decisis* would require this Court to follow it. Therefore, an analysis of the history of the Open Meetings Act enforcement provisions is necessary.

B. Section 25-41-13

The Complaint in this case claims that the District failed to strictly follow the requirements of the Open Meetings Act when it called the special meeting of August 2, 2004. Special meetings are required to be called in accordance with Section 25-41-13(1) of the Code. This section provides that no notice is required for *regular* meetings of a public body. In the case of a *special* meeting however, statutory notice *is* required. Thus, when a public body decides to have a special meeting, "notice of the place, date, hour and subject matter ... shall be posted within one (1) hour after such meeting is called in a prominent place available to examination and inspection by the general public in the building in which the public body normally meets." MISS. CODE ANN. § 25-41-13(1) (1972).

Colom and Montgomery do not allege that the District totally failed to comply with Section 25-41-13(1) of the Mississippi Code. The Complaint does not claim that there was no notice whatsoever. Rather, the Complaint says that the notice of the special meeting was "deficient." (R. 87 at ¶ XIII). Instead of a total failure to post any notice whatsoever, the Complaint alleges that "there was not strict adherence to the Open

Meetings Act." (R. 87, at ¶ XIV). Finally, the Plaintiffs admit in their Complaint that "there might appear to be substantial compliance." (R. 87, ¶XIV).

As shown above, the District's special meeting of August 2, 2004 was subject to the requirements of Section 25-41-13(1) of the Mississippi Code. **The key question that must be answered in order to properly resolve this case then, is what is the consequence for the failure on the part of a public body to comply with the Notice provisions of the Open Meetings Act?** To answer this question, one must look to Section 25-41-15 of the Mississippi Code. This section shall be discussed below. A history of the Code section both before and after *Shipman v. North Panola Consolidated School District*, is instructive.

1. Section 25-41-15 as written in 1975

Section 25-41-15 of the Mississippi Code is entitled "***Enforcement.***" This code section originally was passed by the Mississippi Legislature in 1975. At that point it consisted of one sentence. That sentence simply said the following:

> The chancery courts of this state shall have the authority to enforce the provisions of this chapter upon application of any citizen of the state, and shall have the authority to issue injunctions, or writs of mandamus to accomplish that purpose.

MISS. CODE ANN. § 25-41-15 (1975). A true and correct copy of the 1975 version of this code section is appended to this brief at tab 1 of the brief. Upon its face, nothing in the 1975 version of Section 25-41-15 appears to have allowed the Courts to declare an improperly noticed meeting void or a nullity. Rather, it appears that the chancery courts may grant two types of relief upon application of a citizen: (1) issuance of injunctions; or (2) writs of mandamus. In order to test the meaning of the code though, it would be appropriate to see how the Mississippi Supreme Court has interpreted this section after its

enactment in 1975. The watershed case on that subject is *Shipman v. North Panola Consolidated School District*, 641 So. 2d 1106 (Miss. 1994).

2. *Shipman v. North Panola Consolidated School District*

Shipman, supra, was decided in 1994. In that case the Board of Trustees of the North Panola Consolidated School District passed a resolution which called for a special election concerning the issuance of $4,000,000 in school bonds. After the election failed to pass an election of the populace, the Board called another special meeting and set another election and the bond issue passed by a substantial margin. *Shipman*, 641 So. 2d at 1108. No notice of the meeting was to be found in the minutes or in the records of the school district. *Id.*

Not long after the bond election in *Shipman*, a group of taxpayers, unhappy with the outcome of the vote, filed suit in Chancery Court in Panola County and, among other things, raised the issue of numerous irregularities in the election, the minutes of the meetings and of the meetings themselves by the Board of Trustees. The first issue this Court dealt with in *Shipman* was the failure of the Board to have a record of the notice of the meeting. The Chancery Court, and the Supreme Court as well, studied the matter and found that failure to comply with the notice provisions of the Open Meetings Act would not justify declaring the meeting a nullity.

Specifically, the Supreme Court in *Shipman* stated:

> Notice of the July 31, 1991, board meeting was never entered into any of the school board minutes or in any other permanent official school records as required by Section 25-41-13(1) of the Mississippi Open Meetings Act. **This violation in and of itself, however, does not make the meeting a nullity**.

Shipman, 641 So. 2d at 1116 (emphasis added). Thus, the Supreme Court closed the door on the idea that a special meeting can be declared a nullity as a result of non-compliance with the dictates of the Notice provisions of the Open Meetings Act. In explaining why it ruled as it did, the Court quoted Section 25-41-15, the Enforcement provision, of the Mississippi Code:

> Section 25-41-15 of this act governs how it is to be enforced and describes the remedies available to the public if the law is not followed:
>
> > *The chancery courts of this state shall have the authority to enforce the provisions of this chapter upon application of any citizen of the state, and shall have the authority to issue injunctions or writs of mandamus to accomplish that purpose.*

Shipman, 641 So. 2d at 1116 (*citing* MISS. CODE ANN. § 25-41-15). As stated, the court closed the door on the idea that a meeting can be a nullity for failure to give proper notice. However, with its next sentence of the opinion in *Shipman,* it proceeded to nail that door firmly shut:

> While noncompliance may subject a board to an injunction or writ of mandamus, **nowhere is it written that the lack of recorded notice of a special meeting nullifies all the actions taken**. There was some controversy at the hearing as to whether the notice had been posted at all. **This same rule applies, however, even if it had been conclusively proven that no notice of any kind was given**. While it was certainly a violation of the Open Meetings Act, the failure of the school board to record any notice of the special July 31, 1991, meeting did not void the actions of the school board taken at that meeting.

Shipman v. North Panola Consolidated School District, 641 So. 2d 1106, 1116 (Miss. 1994) (emphasis added). Of course, *Shipman* was decided over 14 years ago. Therefore it is appropriate to analyze whether the Mississippi Legislature reenacted or amended the Enforcement provisions since *Shipman* was decided.

3. *Act as Amended in 2003*

In 2003 the Mississippi Legislature amended Section 25-41-15 and added a second sentence. The sentence the Legislature added to Section 25-41-15 did not mention any sort of nullity remedy or grant authority to declare a meeting void. Rather, it provided:

> If the court finds that a public body has willfully and knowingly violated the provisions of this chapter, the court may impose a civil penalty upon the public body in a sum not to exceed One Hundred Dollars ($100.00) plus all reasonable expenses incurred by the person or persons in bringing suit to enforce this chapter.

MISS. CODE ANN. § 25-41-15[1]. In other words, the Legislature reenacted the first sentence without amendment and added the second sentence of Section 25-41-15 of the Mississippi Code.

C. APPLICATION OF *STARE DECISIS* IN LIGHT OF CAVES

Based upon the above, there can be no question that the meeting of the District cannot be declared void or a nullity. The doctrine of *stare decisis* requires this result even if the Mississippi Legislature had not reenacted the Enforcement provision after *Shipman*. This is because as stated, *Shipman* properly interpreted the statute according to its plain language. Nothing in the statute has ever authorized an aggrieved party to have an improperly called meeting declared void or a nullity. It simply was not a remedy given by the Legislature when it enacted Section 25-41-15.

Because *Shipman* did not engraft some added remedy onto the Enforcement provision of the Open Meetings Act, this Court does not even have to look at *Caves*. However, given the newly pronounced rule of *Caves,* there is no question whatsoever that

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[1] In August of 2008 the Statute was again amended to authorize an aggrieved person to seek enforcement through the Ethics Commission, with a right of appeal to the Chancery Court. Inasmuch as that amendment occurred well after the events that occurred in this case, the amendments are irrelevant.

the Chancery Court was correct in granting the motion for judgment on the pleadings and *stare decisis* requires this Court to affirm. Three reasons justify this conclusion. First, the Enforcement provision did not allow for the declaration of a nullity before *Shipman*. Second, *Shipman* held that even if the District completely failed to post any sort of notice at all, the meeting could not be declared a nullity. Third, after *Shipman*, the Legislature amended the Enforcement provision of the Code and did not add any language even hinting that a meeting could be declared void. Said another way, even if *Shipman* was wrong when it said "**nowhere is it written that the lack of recorded notice of a special meeting nullifies all the actions taken**" and "**This same rule applies, however, even if it had been conclusively proven that no notice of any kind was given**[2]" the Mississippi Legislature reenacted the same provision after *Shipman*. Therefore, regardless of whether *Shipman* was wrongly decided, it should be followed in this case as a result of the Supreme Court's new rule of *stare decisis* as set forth in *Caves*.

D. VIOLATIONS Of Section 37-6-11

Colom and Montgomery also complained in this case about the meeting in question being allegedly called in violation of Section 37-6-11 of the Mississippi Code. This section says that special meetings shall be called upon the call of the president or upon the call of majority of the members thereof. MISS. CODE ANN. § 37-6-11. The minutes of the meeting in question reveal that 4 of the 5 members were present for the meeting, including the President of the Board, Tommy Prude. Obviously they were satisfied the meeting was properly called. In fact, three of the members would have been

[2] *Shipman v. North Panola Consolidated School District*, 641 So. 2d 1106, 1116 (Miss. 1994) (emphasis added).

able to call the meeting, but 4 members of the 5 member Board were present including the President. The Appellants argued "on information and belief" that Dr. Veal did not get notice of the meeting. Even if that is true, this did not justify declaring the meeting a nullity. In March of 2005 the Attorney General offered an opinion on this issue to Larry Haynes of the Coahoma County School District in opinion number 2004-0053. Therein, the Attorney General opined that violations of Section 37-6-11 required looking to the Open Meetings Act. Thus, the opinion was that a violation of Section 37-6-11, as in *Shipman*, did not justify voiding the meeting as well. (R. 41-42). The Chancery Court in the case now under consideration specifically cited this Attorney General's Opinion with favor in its Findings of Fact and Conclusions of Law. (R. 134).

E. THE APPELLANTS' ARGUMENTS ARE MISPLACED.

In the Brief of the Appellants, they argue that *Shipman* leaves open the possibility that the meeting could have been declared void. The District and Dunn and Hemphill would submit that the Appellants have misread *Shipman.* In making their argument, the Appellants quote the following language from the *Shipman* case: "Although there were irregularities in the minutes and procedure of the July 31, 1991, meeting of the NPCSD Board of Trustees, they were not so severe as to require the nullification of the actions of the board at that meeting." *Shipman*, 641 So. 2d at 1122. This quote was offered by Colom and Montgomery's counsel to justify their argument that if the violations were severe, that the Court could nullify the meeting. This argument fails to hit the mark. The reason the argument fails is because the statement by the Court was being offered on the specific issue of **whether the bond issue could be declared void** for failure to follow the requirements of the statutes dealing with bonds. Indeed, the statement falls under the 5th

numbered issue taken up by the Court in *Shipman*. The statement relied upon by the Appellants fell under the heading of the opinion with the title that read "V. *WHETHER THERE WERE DEFECTS IN THE CERTIFIED TRANSCRIPT SENT TO THE STATE'S BOND ATTORNEY THAT WERE SO SEVERE THAT THE BONDS SHOULD NOT BE ISSUED.*" *Shipman*, 641 So. 2d at 1120. Whether the meeting could be declared void under the Open Meetings Act, was dealt with by the Court in *Shipman*, under the first numerical issue, which said "*IA. NOTICE OF THE JULY 31, 1991, SPECIAL MEETING WAS MISSING FROM THE SCHOOL BOARD MINUTES.*" *Id. at 1115.* It was under this heading that the Court discussed the Open Meetings Act and stated unequivocally that the meeting could not be declared void even if the objectors "conclusively proved" that District failed to provide any notice whatsoever of the meeting. *Id. at 1116.*

The Appellants also argue that if someone can argue "prejudice" from the lack of proper notice, that the meeting can be declared a nullity. Not a single case discussed by the Plaintiff says a finding of prejudice will justify a declaration that the meeting is null and void. In fact, what the Courts seem to be saying is that if there is substantial compliance and a lack of prejudice, then the Court will not find a violation of the Open Meetings Act even existed.

Finally, Colom and Montgomery argue that if nullification is not a remedy, then they will have no remedy at all. (Brief of Appellant, p. 14). It is submitted that the Appellants knew, or at least should have known, when they instituted this action, what their remedies were. Nullification was never a legal remedy available in the law. The remedy is not found in the Mississippi Code and it's not available under any case or authority in Mississippi. If the Appellants are not happy with this, their complaint lies

with the Mississippi Legislature. The Appellants instead ask this Court to pass some new judicial legislation to add to the Enforcement provisions of the Open Meetings Act. They ask this Court to add a remedy that the Legislature did not include. It is submitted that the Legislature knew what it was doing when it left off the remedy of nullification. One with only a decent imagination can see the chaos that might result if a citizen could make the results of a meeting of a governmental body void for failure to strictly follow the Act.

II. DISCRETIONARY CERTIFICATION PURSUANT TO 54(b)

Part II of the Appellants argument has already been decided by this Court. As outlined above in the Counter-Statement of the Facts, when the Chancery Court granted the District and Dunn & Hemphill's motion for judgment on the pleadings, it certified the issue pursuant to Rule 54(b). Colom and Montgomery did not file a motion in the Chancery Court to alter or amend the judgment, as they could have done under Rule 59. If they had done so, they could have asked the trial Court to remove that language from the Judgment. But they did not do so. Instead, the Appellants filed an appeal and designated the record. Then, they asked for additional time to file the brief of the appellant. After this, they asked for additional time to file their brief two more times. After the last deadline ran for filing their brief, the Appellants filed a motion to vacate the appeal.

The District and Dunn & Hemphill filed a response in opposition to the motion to vacate and filed a counter-motion to dismiss the appeal with prejudice for failure of the Appellants to timely file their Brief of the Appellant. A panel of this Court denied both the motion to vacate and the counter-motion to dismiss. The Appellants did not file a motion to reconsider under Rule 27(h) of the Rules of Appellate procedure. Therefore, it

appears this issue has been finally determined and should not be re-litigated here. To the extent the Court wishes to reconsider the Appellants' argument, the Appellees would refer this Court to the previous Response and Counter-Motion of the Appellees filed with this Court and docketed in the General Docket of this Court on September 10, 2008. To the extent this issue is being reconsidered, the Appellees incorporate the same by reference. In the interest of judicial economy, the Appellees will not waste the Court's time re-arguing the same response and counter motion again here.

III. CONCLUSION

Section 25-41-15 of the Mississippi Code sets forth the powers of the court to deal with violations of the Open Meetings Act. Nowhere is it written in this sectio that a lack of recorded notice of a special meeting nullifies all the actions taken. Notwithstanding the absence of any language in this statutory section giving authority to declare the meeting void and a nullity, the Appellants claim the existence of that remedy.

Section 25-41-15 provides that a chancery court can issue an injunction or a writ of mandamus. It does *not* provide the right to declare a meeting void. The Mississippi Supreme Court considered this exact issue in *Shipman v. Panola Consolidated School District*, 641 So.2d 1106 (Miss. 1994). There, the Court held that a defect in a proper notice would not give rise to a nullification. In fact, the Court held that a meeting would not be nullified even if the complaining party could conclusively prove that *no notice* was given.

After *Shipman* was decided in 1994, the Mississippi Legislature, in 2003 amended and reenacted Section 25-41-15. When it did so, the Legislature did not change the

language of the statute so as to authorize the chancery courts to declare a meeting nullified.

The doctrine of *stare decisis* applies to this case. Because *Shipman* is squarely on point, its ruling as set forth above, binds this court to the same result unless this Court finds that the prior decision is pernicious, impractical or is mischievous in its effect, and resulting in detriment to the public. Regardless of this stated standard, this court should continue to apply *Shipman's* interpretation of Section 25-41-15, pursuant to the doctrine of *stare decisis*. This is because the Legislature amended or reenacted the statute without changing the prior interpretation as set forth in *Shipman*. Such action on the part of the Legislature amounts to incorporation of the Court's previous interpretation, as set forth in *Shipman*, into the reenacted and amended Enforcement Statute.

Further, the Appellant's argument that the Appeal should be vacated should fail. This issue was already litigated between the parties and disposed of in the Order of this Court dated September 23, 2008. The Appellants did not file a motion to reconsider this Order and should be estopped from arguing it again here.

Respectfully submitted,

BOARD OF TRUSTEES OF THE COLUMBUS MUNICIPAL SCHOOL DISTRICT

By: _____
JEFFREY J. TURNAGE, MSB [redacted]

and

DUNN & HEMPHILL

By: _____
CHRISTOPHER D. HEMPHILL, MSB [redacted]

CERTIFICATE OF FILING

I, ROSALIE SPENCER, certify pursuant to Rule 25(a) of the Mississippi Rules of Appellate Procedure, that on the 14th day of October, 2008, I mailed via Federal Express, to the Mississippi Supreme Court Clerk the original and three (3) copies of the Appellee's Brief.

SO CERTIFIED, this the 14th day of October, 2008.

Rosalie Spencer

ROSALIE SPENCER

CERTIFICATE OF SERVICE

I, the undersigned, Jeffrey J. Turnage, do hereby certify that I have this day mailed, via United States first class mail, a true and correct copy of the foregoing Brief of the Appellee to the following:

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Honorable Jon M. Barnwell
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SO CERTIFIED this the 14th day of October 2008.

JEFFREY J. TURNAGE