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

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

VS.

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

APPEAL FROM THE CHANCERY COURT OF LOWNDES COUNTY, MISSISSIPPI

APPELLANTS' REPLY BRIEF

GOODWIN LAW FIRM
GARY STREET GOODWIN
ATTORNEY AT LAW
POST OFFICE BOX 524
COLUMBUS, MS 39703
(662) 328-1101 TELEPHONE
(662) 328-1102 FACSIMILE
goodwinlawfirm@bellsouth.net
MSB #[redacted]

ATTORNEY FOR APPELLANTS

TABLE OF CONTENTS

Page #

TABLE OF AUTHORITIES

MISSISSIPPI SUPREME COURT

MISSISSIPPI RULES:

TREATISES:

NEWSPAPERS:

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

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

VS.

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

APPEAL FROM THE CHANCERY COURT OF LOWNDES COUNTY, MISSISSIPPI

REPLY TO COUNTER-STATEMENT OF CASE

In the Brief for Appellants, the Colom Law Firm, LLC and Monique Brooks Montgomery, appellants (hereinafter "Colom/Montgomery"), set forth a statement of the case. *Brief for Appellants, pp. 2-7.* Apparently dissatisfied, the Board of Trustees of the Columbus Municipal School District (hereinafter "CMSD") and Dunn & Hemphill (hereinafter "Dunn and Hemphill") filed their own counter-statement of the case. *Brief for Appellees, pp. 1-7.* To the extent that the Brief for Appellees misstates the nature of the case and the present posture before this Court, Colom/Montgomery finds it necessary to reply to the counter-statement of the case.

The appellees claim that in the course of proceedings and disposition in the court below, Colom/Montgomery complained in their Complaint that the CMSD 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. *Brief for Appellees, p. 1.* As properly noted in the Brief for Appellants and in the Complaint, not only did Colom/Montgomery claim what appellees state they claimed, but Colom/Montgomery alleged that this board meeting, considering the circumstances, constituted a "connivance" to address the employment of Dunn and Hemphill. In other words, although these are facts that have yet to be proven, in the current

state of the case, the Court must consider on appeal the facts alleged in the Complaint in the light most favorable to the appellants. Accordingly, not only does Colom/Montgomery claim that the proceedings were statutorily deficient, but they were deficient for a reason, i.e., the "connivance" in an attempt to accomplish the act outside of what should have otherwise been a public meeting. *Brief for Appellants, p. 6.*

The counter-statement of the case goes on to give certain facts which are not present in the Complaint. The appellees have misplaced the necessity of alleging things that did not occur. They alleged certain motivations and facts outside the record that are not before the Court in an attempt to prejudice the Court in deciding whether or not judgment on the pleadings should have been granted. Colom/Montgomery reiterates to the Court that they realize they must prove the facts alleged in their Complaint. However, for the purposes of appeal and for the purposes of deciding the motion on the judgment on the pleadings, the Court must consider the facts alleged in the Complaint to be true. This is especially important where the appellees have put misplaced reliance on matters outside the pleadings and failed to address the facts before this Court, as set forth in the Complaint that everything done by CMSD and Dunn and Hemphill were a "connivance".

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

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

VS.

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

APPEAL FROM THE CHANCERY COURT OF LOWNDES COUNTY, MISSISSIPPI

ARGUMENT

APPELLANTS' PROPOSITION NO. 1

DID THE LOWER COURT ERR IN SUSTAINING APPELLANTS' MOTION FOR JUDGMENT ON THE PLEADINGS OR IN THE ALTERNATIVE, SUMMARY JUDGMENT, ON THE GROUNDS THAT THE REMEDIAL PORTIONS OF THE OPEN MEETINGS ACT AND THE CASE LAW INTERPRETING SAME DOES NOT AUTHORIZE THE COURT TO DECLARE THE ACTIONS OF A NON-COMPLYING BOARD OR COMMISSION VOID?

APPELLANTS' PROPOSITION NO. 2

DID THE LOWER COURT ERR IN CERTIFYING THE JUDGMENT AS FINAL PURSUANT TO M.R.C.P. 54(b), AS IT DID NOT ADJUDICATE THE CLAIM, BUT RATHER THE SCOPE OF THE RELIEF THAT COULD BE ACCORDED, AND SHOULD THIS COURT VACATE THE APPEAL AND REMAND THIS ISSUE TO THE TRIAL COURT?

In addressing Appellants' Proposition No. 1 and Appellants' Proposition No. 2 above, the appellees have reiterated their contention that *Shipman v. North Panola Consolidated School District,* 641 So.2d 1106 (Miss. 1994) precludes any action by any court to void action taken at a meeting that does not comply with the Open Meetings Act. After discussing the *Shipman* case, appellees conclude that the Mississippi Supreme Court "nail[ed] that door firmly shut". *Brief for Appellees, p. 14.* What the appellees fail to realize is that

each case discussed by appellants in their brief clearly reveal that the cases are decided on their own facts. If *Shipman* "nailed the door shut", why did this Court undertake an examination of the same issues in *Citizens for Equal Property Rights v. Board of Supervisors of Lowndes County*, 730 So. 2d 1141 (1999) and *Burgess v. City of Gulfport*, 814 So. 2d 149 (2002)? In both of those cases, this Court focused on the issues of prejudice due to lack of notice. *Brief for Appellants, pp. 13-14.* In the quote found at page 13 of the Brief for Appellants from the *Citizens* case, this Court will notice that part of the quote referring to *Shipman* states that the focus was *on the meeting that was in question* before the Court in the *Shipman* case. Thus, *Shipman* does not preclude the Court focusing on prejudice due to lack of notice.

The appellees also posit that the enforcement provisions of the Open Meetings Act, as it was written prior to 2003, and as it was amended in part by additional language after 2003, was an affirmance by the legislature of the Supreme Court's finding in the alleged holding of *Shipman*. While this is generally true as a matter of law, the appellants submit that their construction of *Shipman* as set forth in their original brief, and before the lower court in this case, is the correct reading of *Shipman*. Otherwise, *Citizens* and *Burgess* would have never addressed the issue of nullification of acts under the Open Meetings Act with anything but language clearly indicating that those remedies were foreclosed by *Shipman*. They would have never focused on prejudice due to lack of notice.

The Open Meetings Act clearly gives jurisdiction for enforcement to the chancery courts and specifies that the chancery courts shall have the right to issue writs of injunction or mandamus. However, nowhere in the enforcement provision does it indicate that a chancery court is limited in crafting an injunction. Indeed, appellants submit that nullification is merely a factual finding which would result in an injunction issuing, returning the parties to the *status quo* that existed before a meeting was held which had violated the Open Meetings Act. This is certainly within the ambit of the language used by the legislature when they authorized the use of the writ of injunction. In a venerable treatise written by one of the greatest

legal minds of the State of Mississippi, the author stated:

> An injunction is a writ framed according to the circumstances of the case restraining an act which the court regards as contrary to equity and good conscience, or commanding an act which it esteems essential to justice; and it is so far in the nature of a judgment that it can issue only upon the previous order of the chancellor, or of some other superior judge. It cannot be ordered by the clerk. It had its origins in the inefficiency of the common law courts in that they had no power to protect rights except by punishment or by award of damages for an antecedent violation of those rights; there was no authority in them to prevent a threatened or continuing wrong, *nor to compel a wrong-doer to put matters in statu quo, and thus undo his wrong.* When therefore as to impending or continuing injuries the limited common law remedies by way of compensation afforded completely just and adequate relief, as was often the case, it was necessary, in order to give actual truth to the assertion that there shall be no right without a remedy, that equity should intervene and furnish, in all such cases, a just and complete remedy, and this it did by the aid of the injunction. Inadequacy of the remedy at law was the ground upon which the jurisdiction was founded, and to this day it remains as the basis upon which the power of injunction is exercised.
>
> In view of the constant growth of new rights as civilization advances the courts do not attempt to specify, by way of exact limitation, the particular cases wherein, and wherein only, the injunction will issue. The general principle, however, is stated as follows: Courts of equity concern themselves only with matters of property and with the maintenance of civil rights, and do not interfere with issues that are purely personal, or political, or with crimes; but with these aside, then within the whole range of rights and duties, so far as the same are of civil or property rights, wherever a right exists or is created, whether by the ownership of property, or by contract, or however it may arise or exist, if it be one cognizable by law, a definitely threatened or continuing violation of that right will be prohibited by injunction, *and in cases of extreme necessity will be protected by a restorative or mandatory injunction:* Provided, that there is no full, adequate and complete remedy at law, and relief by injunction is practicable and can be practicably and efficiently enforced. (*Emphasis added*).

Griffith, Mississippi Chancery Practice, 2d Ed. (1950) *pp. 430-432.*

The appellants suggest that perhaps we forget in the modern day practice of law just what powers are given to our chancery courts. If the Mississippi Legislature had deigned to strictly limit what type of remedial measures a chancery court could undertake, they would have done so in enacting this statute. Once the legislature specified that the chancery court would have jurisdiction to enforce the Open Meetings Act, it was not necessary to specify that the court could use the writs of mandamus or injunction. Chancellors were already authorized to utilize those writs. It was, however, necessary to specify the use of costs, fines and attorney's fees, since fines are penal in nature and attorney's fees and costs would have otherwise been

controlled by the American rule.

In sum, appellees misplace their reliance upon *Shipman*. No matter how many times they tell themselves that their reading of *Shipman* controls, it is just not true. Finally, nullification is certainly a remedy within the ambit of granting an injunction. This case should be remanded back to the lower court for a full examination of the facts at trial. Only then can this Court make a proper decision based on evidence. Otherwise, appellees would have this Court be in the position of merely announcing policy statements and making law, rather than applying the law as written by the legislature. Accordingly, this cause can be reversed and remanded to the trial court without a decision on the merits of whether or not nullification is precluded by *Shipman*. To do otherwise, and make a policy pronouncement that the Open Meetings Act can be totally, completely and intentionally avoided, is tantamount to destroying the entire act. Boards, commissions and other entities subject to the Open Meetings Act can then act in any way they desire. They can ignore the law, make policy, appropriate money and the like, and never be subject to anything but a $100.00 personal fine, with attorney's fees and costs being paid out of the public treasury. Mississippi will continue to remain in the dark ages, relative to transparency in government activities.[1]

REPLY TO APPELLEES' COUNTER-STATEMENT OF THE ISSUE NO. 3

WHETHER *RES JUDICATA* OR THE "LAW OF THE CASE" DOCTRINE HAS ALREADY SETTLED THE ISSUE OF WHETHER THE APPEAL SHOULD BE VACATED?

As part of their argument and counter-statement of the issues, the appellees note in their brief that the motion to vacate the appeal and remand to the trial court, or in the alternative, for a stay of proceedings, was denied by this Court and therefore, this issue has been decided. The appellees submit that the denial of the motion to vacate precludes this Court's consideration of Appellants' Proposition No. 2, which

---

[1] "Mississippi: The Secret State" Remedies proposed to allow more sunshine in Mississippi government, Leonard Van Slyke, *The Sun Herald*, February 17, 2008 (http://www.sunherald.com/471/story/358165.html)

appellants admit is a reiteration of the argument made in the brief in support of the motion to vacate. The appellees submit that addressing this argument in the appeal is inappropriate because of the denial of the motion. Appellees submit that appellants did not file a motion to reconsider under Rule 27(h). However, Rule 27(h) provides as follows: "Motions for reconsideration, vacation or modification of rulings of the Supreme Court and the Court of Appeals *on motions are generally not allowed*". *(Emphasis added)*. M.R.A.P. *27(h)*. Therefore, appellants did not file a motion for reconsideration.

Appellants are aware that this Court sits in panels. However, M.R.A.P. 24(b) provides, in pertinent part, as follows:

> In the event the justices composing any panel shall differ as to the judgment to be rendered in any cause, or in the event any justice of any panel shall certify that in his opinion any decision already made or about to be made by any panel of the Court is in conflict with any prior decision of the full Court, or of any panel, or that the cause is of such importance that it should be considered by the full Court, the cause shall then be considered and adjudged by the full Court.

M.R.A.P. 24(b). Accordingly, the failure to assign the issue of whether or not the appeal should be vacated and remanded to the trial court is one that would have been waived if it had not been preserved in the Brief for Appellants. It is conceivable under the above cited rule, that a justice of the panel deciding this case could certify that the decision to be made in the case is in conflict with prior decision of the full court, or a panel of the court, or that it is a matter of such public importance that it should be considered by the full court. Therefore, the argument of the appellees that the matter should not have been assigned as error is not well taken.

CONCLUSION

For the foregoing reasons, appellants reiterate that the Court should reverse this case and remand to the lower court for trial so as to fully develop the facts of the case regarding the issues of standing, substantial compliance and prejudice in light of the absence of strict compliance. Further, in the alternative, the judgment appealed from, being improvidently granted certification, should be vacated and the case

remanded back to the trial court for a determination of the application of law to the facts adduced at trial.

Respectfully submitted, this the 28th day of October, 2008.

THE COLOM LAW FIRM, LLC AND
MONIQUE BROOKS MONTGOMERY,
APPELLANTS

BY: _____

GARY STREET GOODWIN,
THEIR ATTORNEY
MSB #[redacted]

CERTIFICATE OF SERVICE

This will certify that I, Gary Street Goodwin, have this day mailed via United States mail, postage prepaid, a true and correct copy of the foregoing APPELLANTS' REPLY BRIEF to the following: Jeffrey J. Turnage, Esq., *Attorney for Columbus Municipal School District*, Post Office Drawer 1426, Columbus, MS 39703-1426, Christopher D. Hemphill, Esq. *Attorney for Columbus Municipal School District and Dunn & Hemphill*, P. A., Post Office Box 1366, Columbus, MS 39703-1366, and Hon. Jon M. Barnwell, District 7 Chancellor, Post Office Box 1579, Greenwood, MS 38930-1579.

So certified, this the 28th day of October, 2008.

GARY STREET GOODWIN