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

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# BRIEF FOR APPELLANTS

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## CERTIFICATE OF INTERESTED PERSONS

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The undersigned counsel of record certifies that the following list of persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or refusal.

1. The Colom Law Firm, LLC, Appellant
2. Monique Brooks Montgomery, Esq., Appellant
3. Gary Street Goodwin, Esq., Attorney for Appellant
4. Board of Trustees, Columbus Municipal School District, Appellee
5. Jeffrey J. Turnage, Esq., Attorney for Board of Trustees, Columbus Municipal School District, Appellee
6. Mitchell, McNutt & Sams, Of Counsel for Board of Trustees, Columbus Municipal School District, Appellee
7. Christopher D. Hemphill, Attorney for Board of Trustees, Columbus Municipal School District, Appellee and Dunn & Hemphill, P.A., Appellee
8. Dunn & Hemphill, P.A. (f/k/a Dunn, Webb & Hemphill, P.A.), Appellee
9. Tommy Prude, Trustee, Columbus Municipal School District
10. Bruce Hanson, Trustee, Columbus Municipal School District
11. Julie Jordan, Trustee, Columbus Municipal School District
12. Glenn Lautzenhiser, Trustee, Columbus Municipal School District
13. Alma Turner, Trustee, Columbus Municipal School District
14. Honorable Jon M. Barnwell, District 7 Chancellor

So certified, this the 6th day of October, 2008.

GARY STREET GOODWIN,
ATTORNEY FOR APPELLANTS
MSB #[redacted]

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## STATEMENT OF THE ISSUES

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### 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?

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## STATEMENT OF THE CASE

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### COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Appellants, who were Plaintiffs in the lower court (hereinafter referred to as "Colom/Montgomery") filed an action against the Appellees (hereinafter referred to respectively as "the trustees of the Columbus Municipal School District" or "CMSD"), and Dunn, Webb and Hemphill, P.A. (n/k/a Dunn & Hemphill, P.A., and referred to hereinafter as "Dunn & Hemphill"), contending that Colom/Montgomery were deprived of an opportunity to be present at a board meeting and therefore, the opportunity to be considered to be hired as legal counsel for the CMSD. R 83, E 59. Colom/Montgomery asserted that the CMSD trustees and Dunn & Hemphill adopted a "connivance" to avoid compliance with §§ 37-6-11 and 25-41-13 of the *Mississippi Code of 1972*, as amended, by failing to properly call a special board meeting by order of its President or three members (as required by § 37-6-11) and then failing to give proper public notice, pursuant to the Open Meetings Act (as required by § 25-41-13). At the special board meeting, CMSD hired Dunn & Hemphill as its attorneys. R 87, E63.

Colom/Montgomery claimed that the violation of the two statutes rendered the proceedings a nullity, and requested the Court declare the same a nullity (presumably rendering the contract void) and award Colom/Montgomery relief against CMSD in the form of an injunction, attorney's fees and costs under § 25-

41-15 of the *Mississippi Code of 1972*, as amended, which is the remedial provision of the Open Meetings Act. R 88, E 64. After the issue was joined in lower court, the trustees of CMSD moved for judgment on the pleadings, or in the alternative, summary judgment, on the grounds that even assuming the "connivance" allegation was true, the failure to comply with §§ 37-6-11 and/or 25-41-13 of the *Mississippi Code of 1972*, as amended, was insufficient as a matter of law to declare the act of the board a nullity. R 36, E 27.

The lower court sustained the motion, finding no support in the remedial portion of the Open Meetings Act (§ 25-41-15) and the case law interpreting same to indicate that the Open Meetings Act can be used to declare actions of a non-complying board or commission void, relying principally upon *Shipman v. North Panola Consolidated School District*, 641 So.2d 1106 (Miss. 1994). R 125, E 100. For reasons not made clear in its order granting the judgment on the pleadings, the trial court "certified" the judgment as a final judgment, pursuant to M.R.C.P. 54(b), thereby mandating this appeal of part of the case.

## FACTS

As will be shown, *infra*, a motion for judgment on the pleadings is the functional equivalent of a motion to dismiss for failure to state a claim upon which relief can be granted. Accordingly, the Court must look at the facts pled in the Complaint and deem them true for the purposes of the motion. Accordingly, it is necessary to review the facts stated in the Complaint.

The Colom Law Firm, LLC, is a Mississippi limited liability company, with offices in Columbus, Mississippi. Through its members and associates, it provides legal services within the State of Mississippi, and is domiciled in Lowndes County, Mississippi. It also pays *ad valorem* taxes on real and/or personal property to the City of Columbus, Mississippi, part of which are designated as municipal school district taxes for the support of the CMSD. R 83, E 59. Monique Brooks Montgomery is a an adult resident citizen of the State of Mississippi, and is a duly licensed attorney at law, who was a member of The Colom Law Firm, LLC at the time of the relevant instances herein. She provided legal services through The Colom Law Firm,

LLC within the State of Mississippi, and particularly in Lowndes County, Mississippi. Monique Brooks Montgomery also pays *ad valorem* taxes on real and/or personal property to the City of Columbus, Mississippi, part of which are designated as Municipal School District taxes for the support of the CMSD. R 83, E 59.

Dunn, Webb & Hemphill, P.A., is a Mississippi professional corporation in good standing, whose principal attorney is W. David Dunn, and he is employed by CMSD. R 84, E 60. The Board of Trustees of the CMSD are duly appointed by the City of Columbus, Mississippi. At the time this action was filed the Trustees were: Tommy Prude, President, Julie Jordan, Secretary, Alma Turner, Paul Veal, and Glenn Lautzenhiser. Since such time, Paul Veal has resigned as a member of the school board and Bruce Hanson has been appointed by the Columbus City Council to fill out Dr. Paul Veal's unexpired term. R 84, E 60.

The Complaint alleges that Colom/Montgomery expressed desires to various boards and commissions, within Lowndes County, Mississippi, to provide legal services, and through Monique Brooks Montgomery, requested an opportunity to provide legal services to CMSD, addressing the request to the President, Tommy Prude. She was advised by Tommy Prude shortly prior to August 2, 2004 that the matter of legal services would come up for contract renewal in March of 2005. R 84, E60. CMSD is a duly constituted governing body, whose regular meetings are held on the second Monday of each month. On or about October 13, 2003, CMSD employed the firm of Dunn, Webb & Hemphill, PA, to provide legal services to the Board of Trustees, pursuant to the legal authority set forth in § 37-7-301(x) of the *Mississippi Code of 1972*, as amended. The firm's engagement letter, was purportedly an agreement for a period of one year, beginning November 1, 2003, and ending on October 31, 2004, unless modified prior to that date. A true copy of this letter agreement was attached to the Complaint. R 85, 89-90, E 61, 65-66.

On July 12, 2004,CMSD had their regular meeting on the second Monday of July, as shown by the minutes of the meeting, which was attached to the Complaint. No special board meetings in the future, nor any agenda thereof, were scheduled or declared at this regular board meeting of the CMSD on July 12, 2004.

R 85, 91-93, E 61, 67-69. It is important to note that Colom/Montgomery pled that CMSD's practices were controlled by two statutes:

> § 37-6-11 of the *Mississippi Code of 1972*, as amended, provides as follows:
>
> The school boards of all school districts shall meet regularly at such time and at such place as shall be designated by an order entered upon the minutes thereof. Special meetings of such boards shall be held upon the call of the president thereof, or upon the call of a majority of the members thereof.
>
> § 25-41-13(1) of the *Mississippi Code of 1972*, as amended, provides in pertinent part as follows:
>
> Any public body which holds its meetings at such times and places and by such procedures as are specifically prescribed by statute shall continue to do so and no additional notice of such meetings shall be required except that a notice of the place, date, hour and subject matter of any recess meeting, adjourned meeting, interim meeting or any called special meeting 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. A copy of the notice shall be made a part of the minutes or other permanent official records of the public body.

On Friday, July 16, 2004, at 8:00 a.m., a purported special board meeting was held by the Board of Trustees at Brandon Central Services Center. The Notice, Agenda and Minutes of this meeting, attached to the Complaint, show that there was no order of the President, nor of three (3) members calling such board meeting, and that the Notice did not specify the subject matter of the special meeting. R 86, 94-96, E 62, 70-72. Under similar circumstances, another special board meeting was held on July 23, 2004, at 5:00 p.m. by the Board of Trustees, and a copy of those similar proceedings were attached to the Complaint. R 86, 97-99, E 62, 73-75.

At none of the board meetings was there any special board meeting ordered by the CMSD to be held on August 2, 2004. On August 2, 2004, the CMSD held a special board meeting, beginning at 7:30 a.m. and took action, purporting to accept a letter proposal from Dunn, Webb & Hemphill, PA, dated August 2, 2004, to provide legal services for the time period beginning August 2, 2004, and ending July 30, 2005. Colom/Montgomery alleged in the Complaint that the notice of the place, date and hour of the subject matter

of this called special meeting was not posted within one (1) hour after such meeting was called in a prominent place available to examination and inspection by the general public, in the building in which the public body normally meets, i.e., the Brandon Central Services Center. Further, they alleged that if any agenda or subject matter of this special board meeting was posted, the agenda was amended at the time of the meeting at 7:30 a.m., to accommodate the proposed engagement of legal counsel. Finally no order entered by the president of the board, nor three (3) members thereof, directing this special call Board Meeting be held. Colom/Montgomery concluded the board meeting that was purportedly held, was held in a manner so as to preclude proper notice being given to the public and all board members, particular Dr. Paul Veal. Dr. Veal did not attend the special board meeting of August 2, 2004, at 7:30 a.m., and Colom/Montgomery alleged that he received no lawful notice. Accordingly, the August 2, 2004 board meeting held at 7:30 a.m. was , considering the circumstances, a connivance to address employment of Dunn, Webb and Hemphill, P.A., and extend the contract, despite previous representation to The Colom Law Firm, LLC , through Plaintiff Monique Brooks Montgomery, Esq., that the firm would have an opportunity to be considered as legal counsel for the school district, when the matter was taken up in March of 2005. The purported proceedings of August 2, 2004, at 7:30 a.m., including the modified agenda, the minutes and the relevant contract, was attached to the Complaint. R 86-87, 100-104, E 62-63, 76-80.

Colom/Montgomery claimed that the CMSD board meeting was not held pursuant to § 37-6-11 of the *Mississippi Code of 1972*, as amended, and the notice thereof was deficient, pursuant to § 25-41-13(1) of the *Mississippi Code of 1972*, as amended, and therefore, the actions taken by the board in the employment of counsel were a nullity. The Complaint requested the Court declare the meeting to be a nullity, without prejudice to the board to act in the future. Colom/Montgomery claimed that there was not strict adherence to these statutes, and although there might appear to be substantial compliance with both, they were prejudiced. They claimed that at the time of the consideration of re-employment, Colom/Montgomery would

have likely been considered for providing legal services to the CMSD. Without proper adherence to the legal requirements of taking action at a properly noticed special board meeting, CMSD prejudicially precluded any consideration of Colom/Montgomery. R 87, E 63.

## STANDARD

The lower court decided the issues on this appeal, pursuant to a motion for partial judgment on the pleadings, pursuant to M.R.C.P. 12(c). This is the functional equivalent of a motion to dismiss for failure to state a claim upon which relief can be granted, made pursuant to M.R.C.P. 12(b)(6). Indeed, the comment to M.R.C.P. 12 provides, in pertinent part, as follows:

> Rules 12(b)(6) and 12(c) serve the same function, practically, as the general demurrer. *See Investors Syndicate of America, Inc. v. City of Indian Rocks Beach, Florida*, 434 F.2d 871, 874 (5th Cir. 1970). They are the proper motions for testing the legal sufficiency of the complaint; to grant the motions there must appear to a certainty that the plaintiff is entitled to no relief under any set of facts that could be proved in support of the claim.
>
> If the complaint is dismissed with leave to amend and no amendment is received, the dismissal is a final judgment and is appealable unless the dismissal relates to only one of several claims. *See Ginsberg v. Stern*, 242 F.2d 379 (3rd Cir. 1957).
>
> A motion pursuant to Rule 12(c) may be granted if it is not made so that its disposition would delay the trial; the moving party must be clearly entitled to judgment. *See Greenburg v. General Mills Fun Group, Inc.*, 478 F.2d 254, 256 (5th Cir. 1973).
>
> Under 12(d), the decision to defer should be made when the determination will involve the merits of the action, thus making deference generally applicable to motions on Rules 12(b)(6) and (c).

As shown above, the motion for partial judgment on the pleadings must be decided by looking to the facts of a well-pleaded complaint and, assuming those facts to be true, whether a plaintiff is entitled to relief.

## SUMMARY OF THE 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?

The lower court principally relied upon the case of *Shipman v. North Panola Consolidated School District*, 641 So. 2d 1106 (1994). Colom/Montgomery asserts that *Shipman* is the seminal case pertaining to the Open Meetings Act, and violations thereof. Colom/Montgomery's disagreement with the trial court is in how that case applies to the case *sub judice*. In *Shipman*, the Plaintiffs challenged the issuance of school bonds that were validated upon the call of a special meeting without notice. The court's opinion does not say that a violation of the Open Meetings Act will never make a meeting a nullity. Indeed, it leaves that issue open-ended.

When the CMSD board "called" its August 2, 2004, "special meeting", no mention had been made about rehiring Mr. Dunn as the school board attorney. Indeed, Tommy Prude, President of the school board, had indicated to Plaintiff Monique Montgomery that the board would take up the issue of employment of counsel in March of 2005. Further, no appellant or other members of the public interested in the issue were present. Indeed, one of the school board members, Dr. Veal, was not present. Finally, the notice contained no mention of the issue, and the agenda was amended to add rehiring Dunn the morning of the meeting.

The Open Meetings Act does not absolutely foreclose nullification as a remedy. Obviously, this Court has never had before it a case that genuinely deserved a nullification remedy. This Court should remand this action to the trial court to fully flesh out the facts of this case regarding issues of prejudice, substantial versus strict compliance and standing. If this Court were to rule that nullification is never a remedy, then Colom/Montgomery, interested citizens and taxpayers have no remedy. An injunction or writ

of mandamus to require compliance in the future by CMSD with the Open Meetings Act would be no remedy at all. Colom/Montgomery could not have appealed the decision in the case *sub judice* to the Circuit Court, as the action of the CMSD Trustees to hire counsel is in the nature of a legislative/judicial/administrative act. Such acts and orders are not directly appealable to Circuit Court, and are not matters for certiorari to Circuit Court from inferior tribunals. Thus, if the lower court found that citizens are without a remedy to nullify actions of their local boards and commissions under the Open Meetings Act for lack of compliance, then members of such boards and commissions whose actions cannot be directly appealed on a bill of exceptions to Circuit Court, or whose actions are not subject to review by writ of certiorari, may continue to conduct public business in what is essentially "secrecy".

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 TO THE TRIAL COURT THIS ISSUE FOR TRIAL?

As stated earlier, for reasons not made clear in its order granting the judgment on the pleadings, the trial court "certified" the judgment as a final judgment, pursuant to M.R.C.P. 54(b), thereby mandating this appeal of part of the case. However, what was left in the case and is presently before the lower court, was whether or not, if in fact there had been a "connivance" in failing to comply with these statutes, or that the CMSD did in fact fail to comply for whatever reason, that the lower court would (1) declare the actions of the board a nullity for the failure of the meeting to be properly called, and/or (2) award injunctive relief to the Plaintiffs, ordering the board of trustees to comply with relevant provisions of the Open Meetings Act.

Accordingly, this is a case in which the lower court decided a "single issue" of law, rather than holding the case for trial or full disposition on the merits. Colom/Montgomery brought one claim against both defendants. The lower court ruled that even if the Colom/Montgomery claim was true, part of the scope of the relief requested by Colom/Montgomery, would be denied. Thus, the case is now one in which the Colom/Montgomery complaint became truncated between the courts. Accordingly, the "certification" was improvident, as it did not adjudicate the claim, but rather the scope of the relief that could be accorded.

In the case *sub judice*, Colom/Montgomery made claims against both CMSD and Dunn and Hemphill that the actions of CMSD were a nullity for the failure to properly call its special meeting by three members or the president, as well as the failure to comply with the public notice provisions of the Open Meetings Act. Colom/Montgomery also requested injunctive relief to require CMSD to comply with the Open Meetings Act in the future . The lower court went only so far under the motion for partial judgment on the pleadings to declare that it had no power under the Open Meetings Act to declare the meeting a nullity. This action was

certainly procedurally proper. What was improper was that the lower court certified the judgment as to this one single legal issue. What the lower court has done here is to require Colom/Montgomery to appeal a decision on an issue of law where no disposition of the claim itself has been made.

## ARGUMENT

### APPELLANT'S 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?

The lower court principally relied upon the case of *Shipman v. North Panola Consolidated School District*, 641 So. 2d 1106 (1994). Colom/Montgomery asserts that *Shipman* is the seminal case pertaining to the Open Meetings Act, and violations thereof. Colom/Montgomery's disagreement with the trial court is how that case applies to the case *sub judice*. In *Shipman*, the Plaintiffs challenged the issuance of school bonds that were validated upon the call of a special meeting without notice. The Court 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 record as required by § 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*, at 1116. The opinion does not say that a violation of the Open Meetings Act will never make a meeting a nullity. Indeed, it leaves that issue open-ended. In fact, the Court goes on in *Shipman* to say that "[a]lthough there were irregularities in the minutes *and the 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*, at 1122 (*emphasis added*). *Shipman* is a very fact-specific case, and one which differs from the case *sub judice*, in that the issuance of bonds had been on the table and in front of the public, and was a well-known issue at the time of the "special meeting". The Court relied on the fact that many members of the community interested in the issuance of the school bonds were present at the meeting, even though there was no notice given.

The facts in *Shipman* are markedly different from the facts in the present case. When the CMSD

board "called" its August 2, 2004, "special meeting", no mention had been made about rehiring Mr. Dunn as the school board attorney. Indeed, Tommy Prude, President of the school board, had indicated to Plaintiff Monique Montgomery that the board would take up the issue of employment of counsel in March of 2005. Further, no appellant or other members of the public interested in the issue were present. Indeed, one of the school board members, Dr. Veal, was not present. Finally, the notice contained no mention of the issue, and the agenda was amended to add rehiring Dunn the morning of the meeting.

The next case our Supreme Court had before it on the issue of nullification of official acts was *Citizens for Equal Property Rights v. Board of Supervisors of Lowndes County*, 730 So. 2d 1141 (1999). In *Citizens*, a Board of Supervisors decision adopting an Air Force Base compatible use zoning ordinance was appealed to the Supreme Court, in part, on the grounds that a zoning commission had not complied with the Open Meetings Act. The Supreme Court found the commission had substantially complied and refused to nullify the ordinance. Specifically, the Court said:

> CEPR argues that strict compliance is required as to notice and hearings for adoption of ordinances. However, in Shipman v. North Panola Consolidated School District, 641 So. 2d 1106 (Miss. 1994), this Court stated that failure to comply with the Open Meetings Act did not make actions taken at the meeting in question a nullity. There was some mention at one of the meetings that CEPR had attempted to obtain relief in the chancery court concerning these violations, as provided in the Open Meetings Act, but no orders from any chancery court were made a part of this record. Under these circumstances we find no reversible error on this issue.

*Citizens*, at 1144. However, the Court also noted that the Court of Appeals had properly found, "...there was substantial compliance with the Open Meetings Act, *which was sufficient in the absence of prejudice resulting from the lack of compliance.*" *Citizens*, at 1143. The Court also noted that the minutes of the commission had been made a part of the supervisors' minutes. Accordingly, the decision in *Citizens* clearly focuses on the issue of prejudice, which can result from less than strict compliance. Obviously, if every board or commission acted in strict compliance, there would never be any prejudice. However, if there is substantial compliance, the focus then becomes one of whether the compliance was substantial enough so as to avoid prejudice to

interested persons.

The next opportunity this Court had to address the issue of nullification was in *Burgess v. City of Gulfport*, 814 So. 2d 149 (2002). In *Burgess*, five plaintiffs sued the City of Gulfport for allowing the issuance of a tree removal permit. The City of Gulfport filed a motion to dismiss, or in the alternative for summary judgment, on the issue of whether or not their conduct violated the Open Meetings Act. The motion was granted by the Circuit Court, and was appealed to the Supreme Court. It affirmed the Circuit Court finding that Plaintiffs did not have standing. Thus the issue of violation of the Open Meetings Act and nullification was avoided. However, a reading of the case shows that once again, the Court focused on prejudice. Since the Appellants had no standing, they could not have been prejudiced by the lack of compliance with the Open Meetings Act.

The last word from this Court regarding the Open Meetings Act is found in *Gannett River States Publishing Corporation, Inc. v. City of Jackson*, 886 So. 2d 462 (Miss. 2004). Although *Gannett* did not involve a nullification issue, the Court announced that exceptions to the statute were to be construed narrowly, while the statute generally is to be construed liberally to keep public meetings open. *Gannett*, at 469.

In conclusion, none of the cases referred to above involving nullification absolutely foreclose nullification as a remedy. Obviously, this Court has never had before it a case that genuinely deserved a nullification remedy. In *Shipman* and *Citizens*, there was *de facto* notice to concerned parties. In *Burgess*, there was no *de facto* notice, but the parties lacked any semblance of standing. This Court should remand this action to the trial court to fully flesh out the facts of this case regarding issues of prejudice, substantial versus strict compliance and standing. If this Court were to rule that nullification is never a remedy, then Colom/Montgomery, interested citizens and taxpayers have no remedy. An injunction or writ of mandamus to require compliance in the future by CMSD with the Open Meetings Act would be no remedy at all. Colom/Montgomery could not have appealed the decision in the case *sub judice* to the Circuit Court, as the

action of the CMSD Trustees to hire counsel is in the nature of a legislative/judicial/administrative act. Such acts and orders are not directly appealable to Circuit Court, pursuant to § 11-51-75, *Mississippi Code of 1972*, as amended, and are not matters for certiorari to Circuit Court from inferior tribunals, pursuant to § 11-51-95, *Mississippi Code of 1972*, as amended, pursuant to *Anderson v. Franklin County School Board*, 164 Miss. 646, 146 So. 134 (1933). Thus, if the lower court found that citizens are without a remedy to nullify actions of their local boards and commissions under the Open Meetings Act for lack of compliance, then members of such boards and commissions whose actions cannot be directly appealed on a bill of exceptions to Circuit Court, or whose actions are not subject to review by writ of certiorari, may continue to conduct public business in what is essentially "secrecy". This flies in the face of the Court's decision twenty years ago where in Justice Robertson spoke for the Court in stating:

> Governmental service ought to be noble, if not heroic. Local self-government ... remains the essence of our democracy. Our legislature has decreed that its acts ought be conceived in the open air. That our statutes may be judged by some to have fallen short of the poet's perfection does not undercut the power of their policy. Openness in government is the public policy of this state.

*Mayor and Aldermen of the City of Vicksburg v. Vicksburg Printing and Pub. Co., 434 So. 2d 1333, 1336 (Miss. 1993)*. (footnote omitted).

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 TO THE TRIAL COURT THIS ISSUE FOR TRIAL?

As stated earlier, for reasons not made clear in its order granting the judgment on the pleadings, the trial court "certified" the judgment as a final judgment, pursuant to M.R.C.P. 54(b), thereby mandating this appeal of part of the case. However, what was left in the case and is presently before the lower court, was whether or not, if in fact there had been a "connivance" in failing to comply with these statutes, or that the CMSD did in fact fail to comply for whatever reason, that the lower court would (1) declare the actions of the board a nullity for the failure of the meeting to be properly called, pursuant to § 37-6-11 of the *Mississippi Code of 1972*, as amended, and/or (2) award injunctive relief to the Plaintiffs, pursuant to § 25-41-15 of the *Mississippi Code of 1972*, as amended, ordering the board of trustees to comply with § 25-41-13 of the *Mississippi Code of 1972*, as amended and other relevant provisions of the Open Meetings Act.

Accordingly, this is a case in which the lower court decided a "single issue" of law, rather than holding the case for trial or full disposition on the merits. Colom/Montgomery brought one claim against both defendants. The lower court ruled that even if the Colom/Montgomery claim was true, part of the scope of the relief requested by Colom/Montgomery, would be denied. Thus, the case is now one in which the Colom/Montgomery complaint became truncated between the courts. Accordingly, the "certification" was improvident, 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.

The seminal Mississippi case regarding interpretation of M.R.C.P. 54(b) was *Indiana Lumbermen's Mut. Ins. Co. v. Curtis Mathes Mfg. Co.*, 456 So.2d 750 (Miss. 1984). In that case, the insurance company, which was subrogated to a homeowners' claims for damages arising to a house after a television caught fire,

sued the manufacturer of the television and a repairman for negligence. The claims against the manufacturer were for products liability and negligence in the manufacture of the television set. The claims against the repairman were for negligence in a repair of the television set. Accordingly, the negligence claims against the two defendants were based on separate and independent theories. The repairman filed a motion for judgment on the pleadings, asserting a statute of limitations defense. The lower court sustained the motion, certified the judgment as to the repairman, and took no further action against the manufacturer, as an appeal against both defendants ensued. The Supreme Court held that the trial court had been correct, since the claims were separate and distinct, on different theories, and there was no reason for the repairman to be kept in the case. Following this case, the Supreme Court next decided *Cox v. Howard, Weil, Labouisse, Frederichs*, 512 So.2d 897 (1987) wherein the Court said the following:

> The entry of a Rule 54(b) judgment is not mandatory, the rule itself stating: "... the Court may direct the entry of a final judgment, ..." It is discretionary with the trial court, who acts as a "dispatcher." *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 76 S.Ct. 895, 100 L.Ed. 1297 (1956); *Indiana Lumbermen's Mutual Insurance Co. v. Curtis Mathis, supra.*
>
> The United States Supreme Court in *Curtiss Wright Corp. v. General Electric Co.*, 446 U.S. 1, 100 S.Ct. 1460, 64 L.Ed.2d 1 (1980), followed by us in *Indiana Lumbermen's Mutual Insurance Co. v. Curtis Mathis, supra*, at 752-753, held that the authority in a trial court to enter a Rule 54(b) judgment "should be exercised *cautiously* in the interest of sound judicial administration in order to *preserve the established judicial policy against piecemeal appeals* in cases which should be reviewed only as single units." [Emphasis added]
>
> The U.S. Supreme Court in *Curtiss Wright Corp. v. General Electric Co., supra*, also noted that because of the large number of possible situations in which a Rule 54(b) judgment might be given, they were reluctant either to "fix or sanction narrow guidelines for the district courts to follow." *Id.* 446 U.S. at 11, 100 S.Ct. at 1466, 64 L.Ed.2d at 13. The Court additionally observed the discretion must be exercised "in the interest of sound judicial administration," taking into account "judicial administrative interests, as well as the equities involved." *Id.*, 466 U.S. at 8, 100 S.Ct. at 1465, 64 L.Ed.2d at 11.
>
> In *Page v. Gulf Oil Corp.*, 775 F.2d 1311, 1313, n. 2 (5th Cir.1985), the Court of Appeals for the 5th Circuit stated:
>
> A 54(b) certificate should be reserved for a case where a delay in the appeal might result in prejudice to a party. The rule was adopted to avoid injustice, not to overturn the settle rule against piecemeal appeals. *Jasmin v. Dumas*, 726 F.2d 242, 244 (5th Cir.1984). A 54(b) certificate is not, therefore, to be granted routinely.

*Id.* at 1313.

Trial courts are, of course, aware of the load this Court carries in deciding the cases we properly have on appeal. Trial attorneys and litigants are painfully aware of the time it takes to conclude a case on appeal. The last thing the judicial system in this state needs is to send this Court improper or unnecessary appeals. It is incumbent on trial attorneys and trial judges to recognize that Rule 54(b) judgments must be reserved for rare and special occasions. This case is not one of them. When there is a judgment dismissing one count of a complaint or counterclaim, a Rule 54(b) finality should never even be considered by the trial court unless the remainder of the case is going to be inordinately delayed, and it would be especially inequitable to require a party to wait until the entire case is tried before permitting him to appeal.

...

While we have illustrated in this case an instance of when a Rule 54(b) judgment should not be given, we will not attempt to specifically elaborate every circumstance when such a judgment should be granted. These matters should be left to the discretion of the trial judges. Trial attorneys should review *Wright and Miller, Moore's Federal Practice* and Federal case law before they propose a Rule 54(b) judgment to a trial court. In turn, trial judges should require such research and preparation before they even consider the propriety of granting it.

While the purely mechanical test of Rule 54(b) has been met by a statement in the judgment that there is no just reason for delay and the expressed direction that final judgment be entered, we also urge trial judges to set forth the specific findings and the reasons for directing Rule 54(b) judgments. While it is not mandatory in the 5th Circuit for a district judge to make an explanatory statement to accompany a Rule 54(b) judgment, *Rothenberg v. Security Management Co. Inc.*, 617 F.2d 1149 (5th Cir.1980); such a statement is necessary in the 9th Circuit, *Morris-Knudsen Co., Inc. v. Archer*, 655 F.2d 962, 965 (9th Cir.1981):

Rule 54(b) contains no specific requirements that a district court include a statement explaining its reasoning for applying the rule. ... The inclusion of such a statement is left to the discretion of the district court and is not imposed as a requirement in all cases. Thus, the district court was not in error in making the rule 54(b) certification without such an explanatory statement. However, when the case is of such a nature that the reasons for the 54(b) certification *are unclear*, it may be necessary for adequate appellate review to require that the district court's reasons be stated. What is said here is intended to encourage, not inhibit, such helpful explanations in any future cases, although we hold only that it is not a required procedure in this circuit at this time.

617 F.2d at 1150.

While we will not require a trial court to set forth specific reasons and findings prefatory to entering a Rule 54(b) judgment, we will look with disfavor on such judgment. Indeed, unless the reason the judgment was granted is clear from the record, we will not search for a justification, but will vacate the appeal.

In the case *sub judice*, Colom/Montgomery made claims against both CMSD and Dunn and Hemphill that the actions of CMSD were a nullity for the failure to properly call its special meeting by three members or the president, pursuant to § 37-6-11 of the *Mississippi Code of 1972*, as amended, as well as the failure to comply with the public notice provisions of § 25-41-13 of the *Mississippi Code of 1972*, as amended, which is part of the Open Meetings Act. Colom/Montgomery also requested injunctive relief to require CMSD to comply with the Open Meetings Act in the future . The lower court went only so far as under the motion for partial judgment on the pleadings to declare that it had no power under the Open Meetings Act to declare the meeting a nullity. This action was certainly procedurally proper. What was improper was that the lower court certified the judgment as to this one single legal issue. What the lower court has done here is to require Colom/Montgomery to appeal a decision on an issue of law where no disposition of the claim itself has been made.

## CONCLUSION

For the foregoing reasons, Appellants submit that this Court should reverse this case and remand to the lower court for trial so as to fully develop the facts of the case regarding 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 the law to the facts adduced at trial.

Respectfully submitted, this the 6th day of October, 2008.

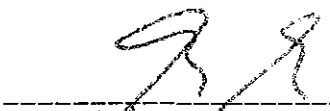
THE COLOM LAW FIRM, LLC AND
MONIQUE BROOKS MONTGOMERY,
APPELLANTS

BY: _____
GARY STREET GOODWIN

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 BRIEF FOR APPELLANTS 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 6th day of October, 2008.



GARY STREET GOODWIN