IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-CP-00477

STEVE LACROIX

APPELLANT

v.

MARSHALL COUNTY BOARD OF SUPERVISORS et al

APPELLEE

DATE OF JUDGMENT: 02/20/08

TRIAL JUDGE: SPECIAL CHANCELLOR, HON. JOHN A. HATCHER

COURT FROM WHICH APPEALED: MARSHALL COUNTY CHANCERY COURT

ATTORNEYS FOR APPELLANT: PRO SE

ATTORNEYS FOR APPELLEE: KENT E. SMITH ([redacted]
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NATURE OF THE CASE: CIVIL, CONSTITUTIONAL, US 42 1983

APPELLANT'S BRIEF

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ORAL ARGUMENT NOT REQUESTED.

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CERTIFICATE OF INTERESTED PARTIES

The undersigned certifies that, in addition to those listed in the brief of Appellant LaCroix, the following listed persons have an interest in the outcome of the case:

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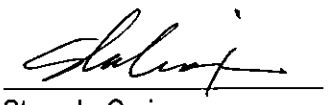

Steve LaCroix

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ISSUES ON APPEAL

I. Whether the Trial Court erred as a matter of law, when against the weight of the evidence, it denied and dismissed with prejudice LaCroix's claim under U.S. 42 Section 1983 and under Miss. Code Annotated §19-5-22, holding that administrative review under Miss. Code Annotated §11-51-75 is the proper form of redress for violations of State law and Due Process guaranteed by the Constitutions.

II. Whether the trial court erred as a matter of law holding that Miss. Code Annotated §19-5-22 permits collection of ad valorem tax or fees to fund garbage collection from a tenant who pays those costs as a portion of his or her rental agreement.

III. Should pro se Plaintiff have been permitted to introduce evidence not previously available to him in support of his violation of Open Meetings claim before final judgment was entered and his claim dismissed with prejudice.

IV. Where each parties duties were set out in a sufficiently specific and unambiguous manner as to constitute a clear command, did the trial court abuse it's discretion by failing to objectively consider the frivolous nature of Defendant's Motion for Contempt against LaCroix and to assess sanctions against Defendant and their attorney pursuant to Rule 11 and the Litigation Accountability Act for filing a frivolous motion.

V. Did the trial court abuse it's discretion when it created an exception to the Public Records Act by condoning the Defendant's refusal to permit an inspection of public records simply because it might be inconvenient for the public body to comply.

STATEMENT OF THE CASE

¶1. LaCroix and his wife own five (5) homes in Marshall County, Mississippi. One is LaCroix's residence and 4 are residential rentals. All tax records, building records and other official records maintained by Marshall County show the LaCroixs as the legal owners and the persons responsible for payment of taxes on these properties, including the ad valorem tax assessed monthly for funding garbage collection. All tenants of the rental properties, pursuant to their written rental agreements pay LaCroix, as a portion of their rent, the monthly fee for garbage collections. (Exhibit No. 13, Plaintiff's Memorandum in Support of Motion for Summary Judgment-Rental Agreement). All monthly bills for garbage collection are sent, or should be sent, to LaCroix, at his residence with LaCroix paying the monthly bills for the five (5) addresses receiving garbage collection services.

¶2. On July 25, 2007, one of LaCroix's tenants, Francisco Leal, who rented the residence at 374 River Ridge Circle, informed LaCroix that earlier that day he attempted to renew his car tags at the Marshall County tax collectors office and was not permitted to do so. Leal was informed by the tax collector he owed delinquent fees for garbage collection and was referred to the office of County Administrator where he was told by employees of the Board of Supervisors that he owed $141.40 in delinquent fees for garbage collection for 372 River Ridge Circle. Leal was then told if he wanted to renew his car tags he had to pay that amount, in cash.

¶3. Intimidated by the Board's employees and ignorant of his legal rights, Leal paid the amount demanded by the Board's employees so he could obtain his car tags. Not having enough cash after paying the amount demanded, Leal drove to the LaCroix residence to get reimbursed so he would have the funds to renew his car tags the following day.

¶4. On July 25, 2007 the rental property at 372 River Ridge Circle was and still is rented to Augustin Olvera, not Francisco Leal. Leal was, on July 25, 2007, a tenant at 374 River Ridge Circle.

¶5. LaCroix made three (3) Public Records requests pursuant to M.C.A.§ 25-61-2. LaCroix requested information that would support the actions of the Board and its employees including records evidencing how the account was established in Leal's

name; an accounting for the amount paid by Leal; notes and records evidencing the County's collection attempt(s) and attempt(s) to contact LaCroix and a copy of the due process notice sent to LaCroix pursuant to §19-5-22 prior to the final action of the Board of Supervisors or its employees.

¶6. LaCroix's Public Records requests were summarily denied by the Board of Supervisors, the Chancery Court Clerk, County Administrator and his employees, the Planning Commission, it's employees and the attorney for the Board of Supervisors. With the exception of copying final minutes of Board meetings, corresponding audio recordings and some handwritten notes used to compile the final minutes of those meetings, LaCroix was denied access to public records that would evidence the Board of Supervisors guilt and failure to comply with M.C.A. §19-5-22 and the Constitutional Due Process requirement.

¶7. LaCroix obtained final minutes and audio recordings of the meetings of the Marshall County Board of Supervisors for a period of approximately two years which revealed numerous, inveterate abuses of the Open Meetings Act by the members of the Board of Supervisors, the Chancery Court Clerk defendant Thomas and the County Comptroller, defendant Hill.

¶8. Having been denied inspection of public records requests and uncovering evidence of violations of the Open Meetings Act, LaCroix filed a cause in Chancery Court as required by the Public Records Act and Open Meetings Act. Pursuant to reasonableness and economy; to avoid a charge of claim splitting and pursuant to the Supremacy Clause of the U.S. Constitution [1], LaCroix included in his suit, a claim for a violation of substantive and procedural due process under M.C.A. §19-5-22 and U.S. § 1983 for a violation of due process. See *Felder V. Casey*, 487 U.S. 131 (1988).

¶9. Following discovery LaCroix filed a Motion for Summary Judgment on all claims. (See Plaintiff's Memorandum in Support of Motion for Summary Judgment.)

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[1] One aspect of the Supremacy Clause obliges state judges to follow the law of the Constitution at the trial level even if there is a conflicting state law. In short, the U.S. Constitution trumps state law.

Defendants responded with a Cross-Motion for Summary Judgment. (See Tab 1 of LaCroix's Addendum) On January 14, 2008, the trial court faxed all parties its Corrected Opinion and Partial Summary Judgment. The trial court opined the collection from LaCroix's tenant **"is not inconsistent with Miss. Code Ann. 19-5-22"; "Moreover, Section 19-5-22(4)(b) directs that an appeal from payment of delinquent garbage collection fees should be made pursuant to Section 11-51-75."** (Corrected Opinion & Partial Summary Judgment, page 7, (D)(2)) Thus, the court denied LaCroix's Section 1983 and Miss. Section 19-5-22 claims and granted judgment in favor of Defendants. LaCroix was denied Summary Judgment on the Open Meetings violations, the trial court stated only **"that there is insufficient evidence to show a violation of the Open Meetings Act."** (Corrected Opinion and Partial Summary Judgment, page 8, line 1)

¶10. Upon entry of the trial courts Opinion and Partial Summary Judgment, LaCroix filed a Rule 60 Motion to Reconsider by serving a copy to the Chancellor in Tupelo, Miss., the Attorney for the Defendants and filing it with the Marshall County Chancery Court Clerk. LaCroix's Motion to Reconsider proffered evidence in support of the Open Meetings Claims that was not available to LaCroix when he filed his Motion for Summary Judgment. LaCroix proffered to the court that "evidence received subsequent to Plaintiff's Motion for Summary Judgment will prove beyond doubt that Defendants are in violation of the Open Meetings" (LaCroix's Motion to Reconsider, Page 24, Paragraph 3).

¶11. New evidence furnished by Defendants as supplemental discovery includes handwritten notes compiled at Board meetings and audio recordings of Board meetings, which evidence the Board going into executive sessions to discuss public business, not for permissible reasons enumerated in the Open Meetings Act. Additional final minutes furnished that correspond to the new evidence, make numerous omissions and do not reflect the actual topics of discussion but are nonetheless certified by the Board Clerk as true and correct. (See Tab 2 of Plaintiff's Addendum)

¶12. On 2-01-08, in chambers prior to the commencement of the trial, the Chancellor summarized what would be tried in open court. LaCroix's Motion to

Reconsider was not on the agenda. The Chancellor stated he did not receive it and was unaware that a Motion to Reconsider had been filed. The Chancellor informed LaCroix that he would rule on the Motion to Reconsider from the bench, during the trial.

¶13. The trial ended without the Chancellor making a ruling on LaCroix's Motion to Reconsider. LaCroix for a second time re-urged his Motion, whereupon the Chancellor summarily denied same without providing findings of fact, conclusion of law or providing any reason for denying the Motion to Reconsider.

¶14. At trial, a Bench Order was issued mandatorily enjoining all defendants to produce to LaCroix all of the Public Records he was previously denied. The Public Records were enumerated in the Bench Order and ordered to be provided to LaCroix no later than fourteen (14) days from February 1, 2008 and whether the Chancellor had the Order signed in writing or not.

¶15. February 14, 2008 Defendants filed a Motion for Protective Order seeking to exempt the public records ordered to be produced by the Court. (Tab 3 of Plaintiff's Addendum) Defendants claimed records used to notify the tax collector to charge a lien against a property are exempt pursuant to the Public Records Act. Defendants also claimed part of the records are maintained by a 3rd party, RES, Inc., Marshall County's garbage vendor, and thus exempt. Defendants further sought an exemption under 18 U.S.C. §2721, The Drivers Privacy Act which expressly permits the records to be disclosed and states in relevant part:

> Uses described in (b)(4) expressly permits those records to be disclosed for the following reason: For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

¶16. Not receiving all public records as Ordered by the Court, on February 17, 2008, LaCroix filed a Motion for Contempt. (Tab 4 LaCroix's Addendum). Additionally LaCroix was billed a substantial amount for producing records not ordered to be produced and a $50.00 per hour fee for Defendants attorney's fees which does not

comport with the Public Records Act or Defendants Public Records policy. (See Tab 5 to LaCroix's Addendum-Invoice; See Exhibit 24 to Plaintiff's Motion for Summary Judgment - Marshall County Public Records Fee Schedule)

¶17. February 20, 2008 a final Judgment was served to both parties by the Chancellor via a fax. The Judgment ordered LaCroix to pay Defendants the amount of $206.00 for the production of the records enumerated in the Bench Order of the court. LaCroix was ordered to pay the amount within two (2) weeks. (See Mandatory Record Excerpts). At no time prior to the final Judgment was LaCroix ordered to pay a specific amount, by a date certain. LaCroix paid the amount Ordered to the Chancery Court on 3-3-08, within the time allotted to pay. (See Tab 6 of LaCroix's Addendum).

¶18. On 2/22/08, Defendants filed a Motion for Contempt against LaCroix. (Tab 7, Def. Motion for Contempt) Defendants charged that LaCroix "willfully denied payment to Defendants". The Bench Order did not specify any amount and or due date by which LaCroix was to pay. The court instructed LaCroix to pay, "if it's a reasonable bill within compliance with the Public Records Act." (Bench Order Page 3, line 7-10) Furthermore, Defendants and their attorney had been served with the final judgment just two days prior to filing their Motion for Contempt and reasonably should have known there was no contempt by LaCroix.

¶19. On 02/25/08 LaCroix filed a Rule 52 Motion to Alter or Amend Judgment, asking that LaCroix be relieved from paying the unauthorized and erroneous amount billed for Defendants attorney's fees and costs for producing irrelevant records. The bill for producing Public Records (Tab 5 LaCroix's Addendum) was substantially for copying documents and records not ordered produced by the trial court nor requested by LaCroix. $210.00 of the $353.00 bill consisted of attorney fees charged by the Board's attorney, Kent Smith, allegedly for the attorney gathering copies to send to LaCroix, pursuant to the court's order. (See Tab 8, LaCroix's Addendum)

¶20. March 14, 2008 a hearing was held on post judgment Motions filed by both parties. Following the motion hearing, the Court's Order was entered on 3/24/08. It was the Order of the Court, because defendants could not produce a copy of their pre-deprivation notice sent to LaCroix, defendants did not provide LaCroix with any due process notice as required by §19-5-22. (Mandatory Excerpts). The Court further

Ordered Defendants to refund $126.50 of the erroneous amount LaCroix paid for Defendants and their attorney's bill for production of Public records. The final Order dismissed all other motions, including Defendants Motion for Contempt filed against LaCroix. It was the opinion of the court that Defendants Motion for Contempt was harmless error that was corrected in open court and was not "without any possibility of success". [2]

STATEMENT OF FACTS

¶21. Two of the three issues raised herein are matters of important public interest. The due process claim pursuant to Miss. Code Ann.§ 19-5-22 and the Constitutions is an issue of first impression and its decision will be of significant precedential value having effect on all residents of the state of Mississippi that are assessed an ad valorem tax or charged a fee for funding the collection of garbage by the County. The ancillary violations of the Open Meetings Act is also a matter of great import to all citizens of Mississippi and the ruling of this Court will be of significant precedential value by grounding the legislative intent of the Act.

¶22. In 1997 the United States District Court, N.D. Mississippi, Eastern Division ruled in *Laudermilk v. Fordice*, Civil Action No.1:95cv161-D-D that parts of Miss. Code Ann. §19-5-22 were unconstitutional as written and applied because it did not provide a taxpayer with a notice that complies with the due process requirements of the Mississippi and Federal Constitutions. The District Court ruled that Mississippi residents were entitled to a pre-deprivation hearing, as matter of due process, in connection with collection of ad valorem taxes funding garbage collection.

¶23. Following *Laudermilk*, in 1997 the Regular Session of the Mississippi Legislature (Chapter No. 423; H.B. No. 1605) amended section §19-5-22, to bring the

[2] The Court held further that its inquiry into whether a party had any hope of success is an objective one "to be exercised from the vantage point of a reasonable party in (litigant's) position as it filed and pursued its claim." Tricon Metals & Services, Inc. v. Topp, 537 So. 2d 1335 (Miss. 1989)

statute into compliance with the Federal and State Constitution's due process requirements. As amended, in relevant part, the statute states: "any person who pays, as a part of a rental or lease agreement, an amount for garbage or rubbish collection or disposal services shall not be held liable upon the failure of the property owner to pay those fees" and "the county shall mail a notice of the lien, including the amount of unpaid fees and a description of the property subject to the lien, to the owner of the property".

¶24. It is, therefore, the intent of the Mississippi Legislature that before depriving a person of property and or rights that they be afforded minimum due process that complies with the Mississippi and U.S. Constitutions by mailing notice to the property owner affording an opportunity for a due process hearing; and no tenant of a rental property shall be held liable for garbage collection fees if the fee is paid as a part of his or her monthly rent. Marshall County, Mississippi utilizes a policy that contradicts the Legislative intent, Section 14 of the Mississippi Constitution and the 14th Amendment to the U.S. Constitution.

¶25. On October 22, 2001 The Marshall County Board of Supervisors entered an Order in the final Minutes which states in full: "The Board of Supervisors make the landowners in Marshall County, Mississippi, the ultimate responsible party for garbage collection fees." There is a logical and reasonable inference and presumption that the Board's Order stands for identifying the owner of the property in the event it is necessary for the Board or its employees to take final action for unpaid ad valorem tax for garbage collections. Contrary to the Order of the Board, this is not how the Board of Supervisors enforce the statutory imperatives of garbage tax collections pursuant to §19-5-22. (See Ex. 5 to LaCroix's Memorandum in Support of Motion for Summary Judgment)

¶26. Pragmatically, the Order of the Board is a sham and is at best, ostensible rather than practical because the Board's policy does not take into proper consideration the law relating to the enforcement of garbage fees pursuant to §19-5-22 and the Constitutions. Following the rationale of the Laudermilk ruling by the Northern District Court, the procedure used by Marshall County Board of Supervisors to collect ad valorem taxes for garbage collection is likewise unconstitutional. Based upon

available public records and documentation, or more appropriately, the lack of records and documentation, the Marshall County Board of Supervisors use an arbitrary and capricious unwritten policy for enforcing collections of delinquent ad valorem tax which is unfettered by the notice and hearing requirements mandated by Miss. Code Annotated §19-5-22 and the Constitutions.

¶27. It is the position of the Marshall County Board of Supervisors that it was the duty of LaCroix, the property owner to request a hearing after the Board and its employees took final action because in defendant's analysis §19-5-22 "does not state that a hearing is automatic but is just available". Factually, this conclusion is correct, a hearing is not "automatic", however, §19-5-22 does mandatorily require the Board of Supervisors to provide the property owner with a notice providing an opportunity for a hearing prior to taking final action.

¶28. The Boards policy is characterized by clear abuse of discretion. The procedure used by the board and it's employees consists of nothing more than arbitrarily flagging by highlighting with a marker a name and address on the State's car tag renewal form [3] for a tax lien and then returning the form to the County's tax collector. The tax collector in turn imposes a tag lien and refuses to issue tags to anyone that might be associated with the address "flagged" by the county. (Tab 9 of LaCroix's Addendum)

¶29. A tag lien is enforced against anyone whose name or address has been highlighted on the list regardless of whether that person is the property owner, a tenant, that pays garbage fee as a portion of his/her rent or anyone that formerly lived at and registered a vehicle to the subject address but may not have changed their address with the Department of Motor Vehicles.

¶30. When an address is flagged, the tax collector will not accept the delinquent fees and issue tags or renewals. Instead the party must travel to the office of the County Administrator and pay in cash the amount claimed to be due before being

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[3] The form is officially the Mississippi State Tax Commission Motor Vehicle Title/registration Sys County Pre-renewal Registration Edit County: Marshall report which the State send to each county tax collectors monthly to inform them of car tags that will be due for renewal in the following month.

issued car tags/renewal . Arguendo, if the County Administrator's Office is closed, that person may not obtain his or her tags until such time as the Administrators Office is open for business. If a person attempts to renew his or her tags on Friday afternoon when the Administrators Office might be closed they will not have legal use of their vehicle until the office re-opens on Monday, assuming Monday is not a county holiday.

¶31. As recently as March 14, 2008, the Marshall County Board of Supervisors did not provide notice to any persons that comports with the due process requirements of the Constitutions and M.C.A. Section 19-5-22. The Board knowingly and willfully do not check tax records to determine the property owner prior to taking final action so that the property owner shall be afforded an opportunity for a hearing pursuant to §19-5-22. [4]

¶32. Although Section §19-5-22(4)(a) does authorize the Board of Supervisors, in its discretion to establish procedures for the manner in which notice shall be given, the contents of each notice shall include the amount of fees and shall prescribe the procedure required for payment of the delinquent fees. No notice is sent by the Board or any employee of Marshall County pursuant to the Board's established policy.

¶33. The Board's position and policy is that the regular, monthly bill sent by the county's vendor, RES, Inc is the only notice sent before notifying the tax collector to assess a lien. Up to and including the Post Judgment motion hearing of Chancery Court action on 3/14/08, the regular monthly bills sent by RES, Inc, did not contain any notice affording an opportunity for a hearing or notice of the intent of the Board of Supervisors or its employees to notify the Tax Collector to charge a lien unless the delinquency is cured.

¶34. PROPOSITION: **IF** the regular monthly bills sent by RES, Inc, the county's vendor, did provide such notice, it still would not meet the requirements of Section 19-5-22 which states: **The county shall mail a notice of the lien**, including the amount of unpaid fees **and a description of the property subject to the lien, to the**

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[4] The Marshall county Board of Supervisors and its employees all have access to computers and the Internet. The names and address of all property owners is and has been available to any and everyone at www.deltacomputersystems.com/MS/MS47/INDEX.HTML, making access to the names of delinquent property owner immediately accessible.

owner of the property. It is the logical presumption that the County shall mail the notice, because it is the duty of the Board of Supervisors to adhere to Section 19-5-22 and the due process requirements of the Constitutions, not a 3rd party vendor that has no legal duty imposed upon it to meet these legal requirements.

¶35. No consideration is given when "flagging" a name or address to whether the person lives at the subject address, ever lived at the address or is legally liable for any delinquent tax or fees related to that address. The flagging is done arbitrarily, capriciously and without attention to notifying the property owner which would allow him or her to pay or to dispute the amount claimed owed and the recording of a lien.

¶36. All real property assessed property tax and every person who owns real property in Marshall County is listed by name and address in the Tax Office of Marshall County which is situated directly next door to the office of the Board of Supervisors and directly across the street from the County Administrators office.

¶37. It is improbable that it is too troublesome for any member of the Board of Supervisors and/or its employees to walk next door, across the street or place a telephone call to the tax office to verify property ownership. They could however, if it is a chore, without leaving their desk, obtain the necessary information via the Internet by going to *deltacomputersystems.com* which contains all tax records for Marshall County.

¶38. The policy adopted by the Board allows for egregious errors to be made including duplicate billing or other accounting errors made by Marshall County's garbage vendor, but equally serious errors by the Board of Supervisor's unlawful enforcement policy which can occur because not every resident that may renew his or her cars tags that may be subjected to a lien is a property owner. Having one's name or address arbitrarily flagged on the State's tag renewal report without first assuring the person being flagged is the property owner subjects persons who are not liable to the inability to renew their car tags unless they submit to the collection of a tax not owed by them but properly owed by the property's owner. (Ex. 5 to LaCroix's Memorandum in Support of Motion for Summary Judgment).

¶39. Public records made available prior to and following the judgment of the trial court show that the Marshall County Board of Supervisors, historically, has never adhered to the dictates of §19-5-22 by providing a due process notice or holding pre-

deprivation hearings, and does willfully and knowingly collect ad valorem tax to fund garbage collection from third parties that do not owe the tax. (Ex. 32 to LaCroix's Memorandum in Support of Motion for Summary Judgment)

¶40. More importantly, the Marshall County Board of Supervisors maintains no records which would evidence its compliance with due process notices and the hearing requirements of §19-5-22. Nor does the Board maintain any records related to the collection efforts made by its employees to collect a delinquent tax or fee.

¶41. The arbitrary, non-conforming policy used by Marshall County Board of Supervisors to collect delinquent ad valorem taxes funding garbage collection does no less than exploit a large number of citizens that do not have the knowledge, ability or means to seek redress through legal proceedings. The population of Marshall County is in excess of 35,000 citizens which incontestably gives rise to an immense number of violations since the statute was amended in 1997.

¶42. The numerous violations of the Board of Supervisors have gone unchallenged, arguendo, in part due to the laborious difficulty and the time and expense involved in filing a lawsuit for redress. The Board of Supervisors unconstitutional policy has and will likely continue to cause egregious harm and insult to a myriad of persons not responsible for payment of a tax by needlessly denying them the right to renew their car tags and demanding and collecting a tax or fee they do not owe.

¶43. When attempting to inspect and copy Public Records relevant to the wrongful property lien and collection from LaCroix's tenant, LaCroix discovered another serious issue of public concern. The final minutes and corresponding audio recordings of the Board of Supervisors reveal commonplace and willful negligence on the part of the Board of Supervisors and the Chancery Court Clerk to follow the directives of Mississippi's Open Meetings Act.

¶44. LaCroix purchased copies of the final Minutes of the Board along with copies of the corresponding audio recordings of those Board meetings, dating back to January 2001, in an attempt to learn the policy and procedures of the Board of Supervisors for enforcing Section 19-5-22. Upon careful inspection of the final minutes, an abundance of handwritten notes and corresponding audio recordings it became obvious that the Board of Supervisors and the Chancery Court Clerk routinely and

openly violate the Open Meetings Act by failing to announce the specific reason for going into closed sessions, then ensure that a record of the closed sessions is made and entered in the final minutes. It is the regular practice of the Board of Supervisors, regardless of the reason for entering executive sessions, to announce the purpose of the closed sessions is to discuss "pending litigation and personnel" [5]. (Tab 2 of LaCroix's Addendum)

¶45. It is apparent from the final minutes that no executive session of the Marshall County Board of Supervisors has ever been called where deliberations occurred because there are no final minutes or otherwise of the Marshall County Board of Supervisors containing any records of any such deliberations or any other discussions pertaining to closed sessions. The minutes do not, but should, summarize the subject matter discussed, who was present and a record of deliberations and votes, if a vote was taken. Since at least as far back as January 2001, the Marshall County Board of Supervisors routinely violated the Open Meetings Act by failing to announce any specific, arguable reason for entering executive sessions and record and maintain minutes of any and all closed sessions as required by M.C.A. §25-41-11, which requires

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[5] The reason given for going into executive session must be meaningful and must be of sufficient specificity to inform those present that there is in reality a specific, discrete matter or area which the public body had determined should be discussed in executive session; "To simply say, 'personal matters,' or 'litigation' tells nothing," the justices said, and **failure to be specific constitutes a violation**. Without a specific summary of why an issue requires a closed session, the public cannot be certain a discussion requires a closed session. Hinds County Bd. of Supervisors v. Common Cause of Mississippi 551 So.2d 107 (Miss. 1989);

the minutes of the Board to be an accurate recording of final actions taken and by whom in open and closed sessions. (Tab 2 LaCroix's Addendum) *Bd. of Trustees of State Insts. of Higher Learning v. Miss. Publishers Corp.*, 478 So 2d, 278 (Miss. 1985) (prohibits any attempt to use an executive session to circumvent or defeat the purposes of the Act.) [6]

¶46. On February 1, 2008 a trial was held on the single issue of whether or not the Public Records violation by the Marshall County Planning Commission was willful. Following hearing on the limited issue of one public records violation, the Chancellor issued an Order from the bench that Defendants were to turn over specific Public Records to LaCroix by 2/15/08, whether the final order of the court as signed in writing or not. (Bench Order-Mandatory Record Excerpts). Defendants failed to obey the order of the court by delivering all of the Public Records to LaCroix and filed a Motion for Protective Order on 2/14/08, seeking to make the records exempt under the Public Records Act. Defendants erroneously claim that the records contain "taxpayer status", "confidential, commercial and financial information of other citizens" thus, Defendants claimed the records the court instructed defendants to make available are exempt from public access. Defendants Motion for Protective Order was, and is, misplaced because the Public Records Act, Section § 25-61-9 states: such records shall be released within a reasonable period of time unless the said third parties shall have obtained a court order protecting such records as confidential. Notwithstanding the clear instructions of Section § 25-61-9, the Chancery Court ordered Defendants to make those records available to LaCroix. Defendants Motion was improper, a waste of taxpayer money,

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[6] From Board of Trustees. No doubt, some public bodies in this state, from time to time, may use the labels, "executive session," and "social gathering," in artful attempts to circumvent the clear mandate of the Act. They shouldn't, and they should be on notice that this Court has a duty to ensure that the legislative intent of the Act is followed by rejecting such attempts, creative though they may be. We will. PITTMAN, C.J., SMITH, P.J., COBB AND CARLSON, JJ. JOIN THIS OPINION.

caused plaintiff to waste time and expense mounting an unnecessary defense as well a waste of the courts time.

¶47. On February 20, 2008, the Chancellor faxed a copy of the final judgment to each party. The Court found in favor of LaCroix on the Public Records Act violations and assessed the statutory penalty against the Board of Supervisors and the County Administrator. The Court found the Planning Commission and its employees claim of being too "busy with pending elections" to be reasonable grounds to deny LaCroix's request to inspect and copy public records. According to the Court, the Planning Commission's offer to accommodate LaCroix's request at a later date, more convenient to the Planning Commission, made the denial not a willful denial subject to statutory penalties.

¶48. The final judgment mandatorily enjoined all defendants to produce to LaCroix the report used by the Board or its employees to report the lien to the tax collector, a history of the account showing how it was established in the tenant's name as well as a copy of the due process notice that the Board of Supervisors sent LaCroix before taking final action.

¶49. The Chancellor summarily denied LaCroix's Motion to Reconsider claims of violation of the Open Meetings Act and Due Process, as entered in the partial summary judgment, offering no rationale or logic for his decision. The court made no finding in support of the denial, gave no opinion supporting the denial, offered no legal conclusion or otherwise stated it's reason for denying LaCroix's Motion to Reconsider the Open Meeting and Due Process violations.

¶50. In spite of having received the final judgment of the court two days earlier, clearly stating that LaCroix had 14 days, or until March 5, 2008, to satisfy defendants bill for producing the documents by paying $206.00, defendants filed a Motion for Contempt against LaCroix on February 22, 2008. Defendants charged that LaCroix willfully failed to remit payment for the production of public records for which Defendants billed LaCroix $353.00. LaCroix paid $206.00, the amount Ordered, to the Chancery Court on March 3, 2008. (Tab 6 LaCroix's Addendum)

ARGUMENT

¶51. The following arguments rely upon *W. A. Coleman v. State of Mississippi*

on Writ of Certiorari, NO. 2004-CT-00346-SCT, ¶35, (Miss. 2006) (All words and phrases contained in the statutes are used according to their common and ordinary acceptation and meaning) This court stated, when called upon to apply statutes to specific factual situations, "we apply the statutes literally according to their plain meaning, and there is no occasion to resort to rules of statutory interpretation where the language used by the legislature is plain, unambiguous and conveys a clear and definite meaning". *Chandler v. City of Jackson Civil Serv.*, 687 So. 2d 142, 144 (1997) (citing *Jones v. Mississippi Employment Sec. Comm'n*, 648 So. 2d 1138, 1142 (Miss.1995); *Marx v. Broom*, 632 So. 2d 1315, 1318 (Miss.1994); *City of Natchez v. Sullivan*, 612 So. 2d 1087, 1089 (Miss. 1992); *Forman v. Carter*, 269 So. 2d 865, 868 (Miss.1972)

Due Process Claim Pursuant To

Miss. Code Ann. 19-5-22 and U.S. 42 Section 1983

¶52. The plain language of M.C.A. Section 19-5-22 states in relevant part:

(A) Any person who pays, as a part of a rental or lease agreement, an amount for garbage or rubbish collection or disposal services shall not be held liable upon the failure of the property owner to pay those fees.

(B) The fees (for funding garbage collection) shall be a lien upon the real property offered garbage or rubbish collection or disposal service.

(C) The county shall mail a notice of the lien, including the amount of unpaid fees and a description of the property subject to the lien, to the owner of the property.

(D) Before notifying the tax collector, the board of supervisors shall provide notice of the delinquency **to the person who owes the delinquent fees** and shall afford an opportunity for a hearing, that complies with the due process protections the board deems necessary, consistent with the Constitutions of the United States and the State of Mississippi.

SOURCES: 1. Mississippi Legislature, 1997 Regular Session (Chapter No. 423; H.B. No. 1605), an Act to Amend Section 19-5-22, Mississippi Code of 1972, to Require the Board of Supervisors to Provide Notice and Opportunity for Hearing to Any Person Owing Delinquent Garbage Fees Before Notifying the Tax Collector to Withhold a License Tag; 2. United States District Court, N.D. Mississippi, Eastern Division;

Abraham LAUDERMILK and M.C. Rogers, Plaintiffs, v. Governor Kirk FORDICE, et al.supra.

¶53. In *Marx v. Broom* supra, our supreme court repeated its long-standing rule that "[w]hen the language used by the legislature is plain and unambiguous and where the statute conveys a clear and definite meaning the Court will have no occasion to resort to the rules of statutory interpretation." The court further held that courts cannot restrict or enlarge the meaning of an unambiguous statute.

¶54. On January, 14, 2008, the trial court entered its Corrected Opinion and Partial Summary Judgment which adjudged: **"LaCroix alleged that his tenant, who is not a party to this action, was required to pay garbage collection fees: however, such payment is not inconsistent with Miss. Code Ann. 19-5-22. Moreover, Section 19-5-22(4)(d) directs that an appeal from payment of delinquent garbage collection fees should be made pursuant to Section 11-51-75[]."**

¶55. The Corrected Opinion and Partial Summary Judgment instructed that the case be set for hearing on 2/1/08, with regard to one (1) limited issue regarding the determination of whether one of three Public Records violations claimed by LaCroix was a willful violation, thus subject to statutory penalties. Inasmuch as the trial court barred argument, review of facts, merits and evidence for all other claims made by LaCroix, it is the presumptive conclusion that the opinions stated in the trial court's Corrected Opinion and Partial Summary Judgment are too, the courts judgment regarding LaCroix's claims under Section 1983 and M.C.A. §19-5-22, with the courts opinion, cited herein, and standing for the findings of facts and conclusion of law in support of its partial summary judgment against the state and constitutional due process violation.

¶56. First, the Court must consider the threshold question of whether, taken in the light most favorable to the party asserting injury, if the facts alleged demonstrate the violation of a constitutional right. If the party asserting the injury alleges facts which establish such a constitutional violation, then the Court must consider whether the alleged conduct was objectively unreasonable in the light of the clearly established law at the time of the incident. *Connelly v. Texas Dept. of Criminal Justice*, 484 F.3d 343, 346 (5th Cir. 2007). M.C.A. Section 19-5-22 clearly establishes the requirement of the

board of supervisors to notify the owner of the property receiving garbage collection, in writing before taking final action. Section 19-5-55 also clearly states that the board of supervisors shall not collect from a tenant who pays the fees for garbage as a part of his or her rental agreement. Failing to inform LaCroix and afford an opportunity for a hearing violated LaCroix's procedural and substantive due process, as such, the board acted objectively unreasonably in the light of clearly established law. *Colston v. Barnhart*, 130 F.3d 96, 99 (5th Cir. 1997)

¶57. The Chancellor committed manifest error and abused his discretion in awarding partial summary judgment to Defendants on LaCroix's Section 1983 and M.C.A 19-5-22 due process claim. Defendants did not raise any issue of material fact on which the trial court based its decision, thus LaCroix was entitled to summary judgment as a matter of law. (Rule 56, M.R.C.P) (when there is no genuine issue of material fact, moving party is entitled to a judgment as a matter of law) Baptiste v. Jitney Jungle Stores of Am., 651 So. 2d 1063, 1065, (withstanding summary judgment). Defendants never raised the issue of LaCroix's failure to file a Bill of Exceptions pursuant to Section 11-51-75 or the failure to adhere to §11-51-75 in any pleadings filed with the court. The ruling that LaCroix should have filed a bill of exceptions in circuit court, was the conclusion reached by the trial court, sua sponte.

¶58. The Marshall County board of supervisors and its employees ultra vires policy of enforcement and collection of delinquent tax or fees pursuant to Section 19-5-22 is arbitrary and capricious, is not supported by records[7] as required and violates statutory and constitutional rights. The board of supervisors and its employees take final action in absentia with the party whose rights are violated having no advance knowledge of what is occurring or is about to occur thus not being afforded an opportunity to effect the outcome. LaCroix is entitled to a judgment under Section 1983 and M.C.A. §19-5-22 as a matter of law because no genuine issue of material fact

[7] a standard that administrators must say at least minimally why they do what they do so someone can see whether it be arbitrary or capricious. *McGowen v. Miss. State Oil & Gas Bd.*, 604 So. 2d 312, 322 (Miss. 1992)

exists. *Brown v. Credit Center*, 444 So. 2d 358, 362 (Miss. 1983). *Lattimore v. City of Laurel*, 735 So. 2d 400, 402 (Miss. 1999), (citing *Newell v. Hinton*, 556 So. 2d 1037, 1041-42 (Miss. 1990)

¶59. The courts ruling regarding the violation of §19-5-22 makes clear that requiring LaCroix's tenant, who has no duty under law to pay garbage collection fees is consistent with Section 19-5-22. Section 19-5-22(4)(b)(1) does state that "Fees for garbage or rubbish collection or disposal shall be assessed jointly and severally against the generator of the garbage or rubbish and against the owner of the property furnished the service." While the statute calls for fees to be jointly assessed, it expressly forbids collecting those fees from the tenant, if the tenant pays the fees as part of his rental agreement when is states, **"Any person who pays, as a part of a rental or lease agreement, an amount for garbage or rubbish collection or disposal services shall not be held liable upon the failure of the property owner to pay those fees."** The reasonable inference is, as well, that the tenant shall not be subjected to a lien to enforce payment of those fees (Ex. 19, 20, 21, 22 to LaCroix's Memorandum in Support of Motion for Summary Judgment) The bright line language of the statute makes clear the required written notice to the owner of the property before taking final action because the property owner is the party ultimately responsible for payment of the tax. Thus, the judgment of the trial court constructively created an ad hoc exception under Section 19-5-22 (4)(b)(1) to permit collecting from LaCroix's tenant who pays his garbage fees as a portion of his rent, and permit doing so without first notifying LaCroix, the property owner. This court has held that an exception cannot be created by construction, when none is necessary to effectuate the legislative intention. "That an exception must appear plainly from the express words or necessary intendment of the statute. Where no exception in positive words is made, the presumption is the legislature intended to make none." *Marx v. Broom*, supra; also see *Mississippi Ins. Guarnty. Ass'n v. Vaughn*, 529 So. 2d 540, 542 (Miss. 1988)

¶60. The court correctly stated that §19-5-22(4)(d) directs that an appeal from the payment of delinquent garbage collection fees should be made pursuant to Section 11-51-75 (Bill of Exceptions from "judgment or decision " of the board). However, the board of supervisors and/or its employees held no hearing wherein a judgment or

decision regarding a dispute over an order of payment was entered that could conceivably be applicable under Section 11-51-75. LaCroix's Chancery claim is not for the purpose of making an appeal from payment or from a judgment or decision of the board of supervisors or its employees. It is for the knowing and wilful failure of the board of supervisors and its employees under its discretionary policy to take ultra vires final action without first notifying LaCroix as required by law. Furthermore, the trial court failed to provide any findings of facts, conclusions of law or articulate how Section 11-51-75 is applicable to LaCroix's Section 1983 and 19-5-22 claims. *Park County Resource Council, Inc. v. United States Dep't of Agriculture,* 817 F.2d 609, 617 (10th Cir.1987); *Hustler Magazine, Inc. v. United States Dist. Court*, 790 F.2d 69, 70-71 (10th Cir.1986) (A example of abuse of discretion is where the trial court failed to consider either an applicable legal standard or the facts upon which the exercise of its discretionary judgment is based)

¶61. Such a constructive ruling by the trial court is, without doubt, contrary to the plain meaning and intent of Sections 1983 and 19-5-22. The court's ruling is contrary to both the evidence and the law. As plain error, the trial courts opinion and partial summary judgment in favor of Defendants is contrary to the facts, to the law, and to the overwhelming weight of the evidence. The courts findings and conclusion is based on an interpretation of law which is not applicable to LaCroix's claim.

¶62. A property interest may be established by policies, customs, practices, and understandings. *Kaiser Aetna v. United States*, 444 U.S. 164, 179, 100 S.Ct. 383, 393, 62 L.Ed.2d 332 (1979); *Winegar v. Des Moines Indep. Comm. Sch. Dist.*, 20 F.3d 895, 899 (8th Cir.1994); *Richardson v. Town of Eastover*, 922 F.2d 1152, 1156 (4th Cir.1991). LaCroix possesses a property interest in the income derived from his rental properties; the care and good will afforded his tenants is ancillary to that interest. There is no doubt that the continued financial relationship between LaCroix and his tenants implicates important interests of LaCroix. Thus this interest constitutes a legitimate claim of entitlement to procedural and substantive due process be provided by the Board. Because, **fees for garbage collection shall be a lien upon the real property** offered garbage collection services pursuant to § 19-5-22 (2), it is clear the Legislature intended that the board of supervisors **shall mail a notice of its intent to place a lien,**

including the amount of unpaid fees to the owner of the property [LaCroix] **before taking any action**. The statute is clear regarding a tenants liability and there is no language allowing the county to collect from a property owners tenant, as described in §19-5-22 (1) it is a violation to do otherwise. Quoting *McMillan v. Puckett*, 678 So. 2d 652 (Miss. 1996): "Whatever the legislature says in the text of the statute is considered the best evidence of the legislative intent". I n addition to the language of §19-5-22 which mandates that the property owner **shall** be notified, the Order of the Board entered on October 22, 2001 also makes clear that the Landowner is the ultimate responsible party for garbage collection fees. The board's order evidences its understanding that before taking final action the board and its employees must make a reasonable attempt to notify the landowner before taking final action.

¶63. PROPOSITION: A 100 unit apartment building located in Marshall County becomes delinquent in it's payment of garbage collection fees for that building....the Marshall County Board of Supervisors may, pursuant to law, withhold automobile license renewal for all of the residents of that apartment building including any person that ever lived at that address but whose address has not yet been changed with Miss. Dept. of Motor Vehicles ?

¶64. There is an abundance of well-established law which support the proposition that the plain language of law prevails. This Court holds that the courts cannot restrict or enlarge the meaning of an unambiguous statute and have a duty to give statutes a practical application consistent with their wording, unless such application is inconsistent with the obvious intent of the legislature. *Marx v. Broom*, supra. Plainly speaking, had it been the intent of the Mississippi Legislature to have property owners file a Bill of Exceptions for constitutional due process claims and permit the county to collect from a property owners tenants that pay fees with their rent, the legislature would have so stated.

¶65. Reasonably and practically construed neither Section 19-5-22 nor 11-51-75 state that a first instance issue claim for violations of state law and constitutional rights shall or even may be reviewed on a bill of exceptions. Section 11-51-75 is not intended to reverse deliberate indifference, the conscious or reckless disregard of the consequences of a board of supervisors or its employees acts or omissions nor is §11-51-75 permitted to compensate an individual for loss of civil rights on a claim for

damages. It has been established and it is undisputed that the Marshall County Board of Supervisors proprietary policy did not provide LaCroix with an opportunity for a pre-deprivation hearing. Where the board entered no "judgment" or "decision" to charge a lien against LaCroix's property, deny his tenant's rights to renew his car tags and collect the delinquent amount from tenant, therefore, and again, appeal pursuant to Section 11-51-75 is misplaced because of it's inapplicability to the case at bar. Furthermore this court has reasoned that § 11-51-75 contemplates the circuit court sitting in an appellate capacity which reasons that the board held a hearing on the matter in issue and that issue is in dispute. But, where no hearing has been held, the circuit court does not sit in its appellate capacity and may proceed de novo with respect to the evidence.

¶66. This Court stated, "**that where no hearing is held, the action does not necessarily proceed under § 11-51-75 at all.**" *Cook v. Bd. of Supervisors of Lowndes County*, 571 So. 2d 932, 934 (Miss. 1990). As the records of the trial court show, the board did not make a judgment or enter a decision pursuant to §19-5-22 from which an appeal could be made under any circumstances. (Para. 4, Order 3/18/08 -Mandatory Record Excerpts) Also see, *Falco Lime, Inc. v. Mayor And Aldermen of The City of Vicksburg*, NO. 1999-CA-01284-SCT, ¶25 (Miss. 2002)

¶67. The U.S. Supreme Court ruled in a case, where a state court dismissed a 1983 claim because the plaintiff failed to comply with a state procedural law, that the state statute requiring notice of intention to sue could not bar the individuals federal claim in state court. (11-51-75, Bill of Exceptions, 11-46-1, Tort Claims Act) *Felder v. Casey*, supra. (U.S. Constitution trumps state law) Thus, the court was manifestly wrong to dismiss LaCroix's Section 1983 due process claim for failure to comply with state administrative remedies, specifically, a Section 11-51-75, Bill of Exceptions.

¶68. The ruling of the trial court serves to bar a 1983 claim in lieu of appeal through Mississippi Code Ann. §11-51-75 which conflicts with both the purpose and effects of §1983's remedial objectives. Notice of claim rules are not in any sense essential prerequisites to litigation of a Section 1983 claim in State court. *Combined Util. Sys. Revenue Bond v. Gautier Util. Dist. of Jackson County* 465 So. 2d at 1019 (right to be heard in a judicial forum on constitutional and ultra vires questions). Additionally, Section 19-5-22 does not provide specific remedies for violations

therefrom. Section 19-5-22 provides that the fees for garbage collection becomes a tax lien, assessed against the property on the date they become due for payment. (19-5-22) and where a tax matter is involved, the filing of a Bill of Exceptions is not a prerequisite to filing suit on the evidence. *Lenoir v. Madison County*, 641 So. 2d 1124, 1132 (Miss. 1994) (ad valorem tax cases heard de novo)

¶69. It is clear, the Legislatures intent regarding §19-5-22 is determined from the language used as well as it's historical background, the subject matter and the purposes and objectives to be accomplished. The purpose and objective of the legislative changes appear clear....that notice be provided to the property owner so that unacquainted, non-liable tenants and/or other innocent persons will not be subjected to erroneous and arbitrary impairment by a board of supervisors. *Clark v. State ex rel. Miss. State Med. Ass'n*, 381 So. 2d 104, 1048 (Miss. 1980). Citing the *Estate of Stacey Kay Klaus et al. v. Vicksburg Healthcare et al.*, NO. 2006-IA-00675-SCT, ¶20 (Miss. 2006) (Where statute is plain and unambiguous there is no room for construction)

¶70. The trial court neglected to consider that the party from whom the Tax Collector, on instructions from the board and its employees, refused car tags and the Board's employees collected from was not the tenant who lives at the subject address. The tenant that was required to pay before being issued his car tags did not live at the subject address, which, by reasonable assumption is why §19-5-22 mandates that the county "shall mail a notice of the lien, including the amount of unpaid fees and a description of the property subject to the lien, to the owner of the property". LaCroix's colorable interest in the subject matter of the litigation was adversely effected by the conduct of the defendant because LaCroix relies upon the well being of his tenants as they are a source of LaCroix's income. This court's constructive ruling is of grave concern as it does not even limit collection of garbage fees to actual residents of the subject address.

¶71. A clear example of an abuse of discretion is where the trial court fails even to consider either an applicable legal standard or the facts upon which the exercise of its discretionary judgment is based. *Park County Resource Council, Inc. v. United States Dep't of Agriculture*, supra; *Hustler Magazine, Inc. v. United States Dist. Court*, supra.

¶72. M.C.A. §11-51-75 provides administrative relief to "any person aggrieved by a judgment or decision of the board of supervisors." The Mississippi Supreme Court has ruled that where no judgment or decision was entered that §11-51-75 is not a proper form of review and that a court may hear a case based on the evidence. Assuming arguendo that the trial court's ruling is correct regarding the requirement to file a bill of exceptions for a due process violation under §19-5-22 and the 14th Amendment is liken to the Parratt Doctrine, which would obviate filing a claim for a Constitutional due process violation in state or federal courts. (*Parratt v. Taylor*, 451 U.S. 527 (1981)

¶73. In the case at bar, the Marshall County board of supervisors and its employees act without guidelines as no written policy exists, and the result is ad hoc decision-making at its worst. It is critical that there be guidelines so that a reviewing court may readily determine whether an action was arbitrary and capricious. *McGowan v. Miss. State Oil & Gas Bd.*, supra. The logical corollary is the presumption that the board and/or its employees should check the county records to determine the owner of the property so that notice will be sent as required before taking final action to enforce garbage collections.

Mississippi Open Meetings Act

¶74. This Court employs a de novo standard of review of a lower court's grant or denial of summary judgment. *McMillan v. Rodriguez*, 823 So. 2d 1173, 1176-77 (¶9) (Miss. 2002)

> **In Hinds County Board of Supervisors v. Common Cause, 551 So. 2. nd. 107 (Miss. 1989), this court stated: "To simply say, 'personal matters,' or 'litigation' tells nothing," and failure to be specific constitutes a violation."**

¶75. Open Meetings violations, specifically executive session violations cannot be succinctly summarized because one must prove the impossible, expressible only as propositions in inferences. However where the clear instructions of the Open Meetings Act requires the board of supervisors to record and keep minutes of executive sessions, the absence of any final minutes of executive sessions of the board of supervisors is

the axiom of proof. [8]

¶76. The Partial Summary Judgment of the trial court was not a final judgment because it did not contain the necessary language required by Rule 54(b), Mississippi Rules of Civil Procedure, making an express determination that there is no just reason for delay and containing an express direction for the entry of the judgment, thus it was plain error not to permit a hearing on LaCroix's Rule 60 motion to reconsider the summary judgment. Pursuant to Rule 54(b), the action was not terminated as to any of LaCroix's claims against any parties until Final Judgment is entered by the Court. LaCroix's claim, in fact, presented multiple claims for relief against multiple parties. This court has held, pursuant to Rule 54(b), that any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities. Owens v. Nasco Intern., Inc., 744 So. 2d 772, 773 (¶3) (Miss. 1999).

¶77. Defendants failed to offer proof required in order to withstand summary judgment in favor of LaCroix. *Luvene v. Waldrup*, 903 So. 2d 745, 748 (¶10) (Miss. 2005) (citing *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So. 2d 1205,1214(Miss.1996). Defendant's response to LaCroix's Motion for Summary Judgment failed completely to refute LaCroix's Open Meetings Claims. Defendants unsupported defense in response to LaCroix's summary judgment is that defendants are protected by sovereign immunity and LaCroix's failure to proved Defendants notice pursuant to M.C.A. §11-46-9, the Tort Claims Act, of LaCroix intent to sue for violations of the Open Meetings Act, thus Defendants stood on the same claims

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[8] [A] measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Some guesswork and speculation are necessarily involved []. *City of Jackson v. Locklar*, 431 So. 2d 475, 478-79 (Miss. 1983)

appropriate in favor of LaCroix. Celotex Corp. v. Catrett, supra. "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. at 322-23. Accordingly, Goenaga v. March of Dimes Birth Defects Foundation, 51 F.3d 14, 18 (2d. Cir. 1995) (movant's burden satisfied if it can point to an absence of evidence to support an essential element of nonmoving party's claim).

¶81. Evidence put forth in LaCroix's Motion for Summary Judgment is sufficient to raise a presumption of fact and establish the fact in question which is without rebuttal from Defendants. LaCroix's motion for summary judgment alleges facts adequate to prove the conduct of the board and its clerk which supports the cause of action and summary judgment. That defendants failed to introduce contradictory evidence or assert any defense to summary judgment, judgment should be granted in favor of LaCroix as a matter of law.

¶82. The Chancery Court Clerk testified that he does not records and maintains Minutes of all meetings of the board of supervisors creates a genuine issue of fact, the trial court's finding of insufficient evidence to support LaCroix's claim is erroneous, based on the available evidence. The testimony of the Chancery Clerk that no minutes of executive sessions are made or kept and that the final minutes of the board do not contain proper minutes of executive sessions creates the basis for a reasonable legal inference and not mere suspicion. (Ex. 23 to LaCroix's Memorandum in Support of Motion for Summary Judgment) Wesson v. United States, 172 F.2d 931, 933 (8th Cir. 1949) (circumstantial evidence) The undisputed facts and reasonable inferences drawn from these facts point toward the board's guilt of not recording and maintaining minutes of all of its meetings. Reasonable inferences, after examination of the Chancery Court Clerks testimony and other available evidence would lead a prudent person to find that minutes of all meetings of the board are not made and maintained. The trial court, in determining if summary judgment should be granted must decide whether, under the totality of the circumstances and viewing the defendant's conduct in the aggregate that a reasonable hypothetical trier of fact could have found

the board guilty of the Open Meetings Act. [9] *United States v. Ashcroft*, 607 F.2d 1167 at 1171 (5th Cir. 1979); *C & C Trucking Co. v. Smith*, 612 So. 2d 1092, 1098 (Miss. 1992) (citations omitted) The new evidence proffered by LaCroix may well have been such a material change in circumstances that it would compel alteration of the judgment.

¶83. On viewing the defendant's conduct in the aggregate, It is clear and undisputed that the Board of Supervisors and its employees were found guilty by the trial court of three (3) violations of the Public Records Act. The refusal to provide LaCroix with post-deprivation due process at the insistence of LaCroix by not supporting their actions under Section 19-5-22, clearly demonstrates the boards desire to prevent LaCroix from evidencing the board's failure to follow the law. Following the Order of the trial court to make those records available to LaCroix and which the board did not comply with entirely because it does not maintain those records nor does the board maintain any records of it's actions regarding enforcement procedures under Section 19-5-22.

¶84. The Chancery Court necessarily erred by granting summary judgment in favor of Defendants based upon the issue presented along with the evidence provided by LaCroix and the failure of Defendants to put forth any issue of material facts. Contrary to the required duty imposed by 25-41-11, Open Meetings Act, which states; Minutes shall be kept of all meetings of a public body, whether in open or executive session, showing the members present and absent; the date, time and place of the meeting and M.C.A. Section 19-3-27 (Duties of Clerk for the Board) which states: It shall be the duty of the clerk of the board of supervisors to keep and preserve a complete and correct records of all the proceedings and orders of the board. He shall enter on the minutes the names of the members who attend each meeting, and the

[9] Summary judgment is properly granted if the record does not contain appropriate summary judgment evidence which would sustain a finding in the nonmovant's favor on any issue as to which the nonmovant would bear the burden of proof at trial. Celotex Corp. v. Catrett, 106 5th S.Ct. 2548, 2554 (1986)(2552-2553)

names of those who fail to attend.

¶85. The trial court in considering a motion for summary judgment is required to consider all evidence on file, including discovery documents. *Brown v. Credit Center, Inc.*, supra) ("The judgment sought shall be rendered forthwith if the pleadings, deposition, answers to interrogatories, and admissions on file, show that there is no genuine issue as to any material fact)" Fed.R.Civ.P. 56(c)). The trial court could not have considered all evidence on file, including discovery documents when entering summary judgment because the file was maintained in Marshall County and was never in the Chancellors possession, in his district, for him to review. The file never left the Marshall County Court house. The first time the Special Chancellor had access to the file was on 2/01/08, the date of the trial.

¶86. The Chancery Court Clerk and clerk for the board of supervisors testified several times, in his sworn Answers to Interrogatories, that were included as exhibits in LaCroix's motion for summary judgment, that records and minutes of executive session of the board of supervisors are not maintained unless necessary. (Ex. 23 to LaCroix's Memorandum in Support of Motion for Summary Judgment) This implies a discretionary policy of the board and Chancery Clerk, however, the Act makes keeping minutes mandatary.

¶87. **Miss. Code Ann. § 25-41-11 (1991), Open Meetings Act, states in part that Minutes shall be kept of all meetings of a public body, whether in open or executive session.** Citizens for Equal Property Rights v. Board of Supervisors of Lowndes County, No. 96-CT-00019-SCT, (Miss 1999)

¶88. It is difficult to fathom that the Marshall County Board of Supervisors has never, in executive session deliberated or contemplated any issue that is required to be entered in the Minutes. Furthermore, the evidence provided to LaCroix by Defendants after LaCroix submitted his Motion for Summary Judgment, which included handwritten notes, audio recordings and final minutes of the board clearly show that not all executive sessions are limited to the same people each session. This raises the issue that no records are kept which would at a minimum show the names of the persons in attendance.

¶89. **PROPOSITIONS**: (1) Is it disconnected to expect that any issue(s)

discussed by the board of supervisors in executive session, where the discussion is conclusive or otherwise, constitutes considerations and deliberations of the board? (2) Should the considerations of the board be summarize, in the final minutes of the board, showing at a minimum, the persons in attendance and the topic(s) being discussed? (3) If the Board votes to enter executive session to discuss "pending litigation and personnel", should minimally, the "pending litigation" case style and the "personnel" to be discussed be announced so the public knows there is a genuine need for the board to enter closed session and then a record made of the issue(s) factually discussed ? (4) How does informing the public of the legal case name and/or employee to be discussed in executive session jeopardize a legal strategy session of the board or infringe the confidentiality of the employee to be discussed?

¶90. This Court has stated that, a public body must state in the open meeting of a board of supervisors, a specific, concrete reason why it is going into executive session; simply claiming, "personnel matters" or "business litigation" is not sufficient. This court also ruled that the public must be informed with "sufficient specificity" the reason for an executive session. **"To simply say, 'personal matters,' or 'litigation' tells nothing," and failure to be specific constitutes a violation.**" "The reason must be of sufficient specificity to inform those present that there is in reality a specific, discrete matter or area which the board had determined should be discussed in executive session." Hinds County Board of Supervisors v. Common Cause,supra. The Marshall County board of supervisors refusal to state specific reasons for entering executive sessions is a violation of the statute and the rulings of this court. Likewise, the trial court was bound by stare decisis to follow the statutory interpretations of this court. *Comm'r v. Hutton*, 307 So. 2d 415, 421 (Miss. 1974) (holding that stare decisis is particularly applicable in cases involving the interpretation of statutes); *Horton v. American Tobacco Co.*, 667 So. 2d 1289, 1298 (Miss. 1995) (the application of stare decisis provides a certainty of a logical anticipation of what result the law will reach when considering various issues). This Court should rely upon its own body of law to ensure predictability and consistency. *Myers v. Miss. State Bar*, 453 So. 2d at 1023 (Miss. 1985) This holds true so that the task of fashioning and preserving a jurisprudential system is not based upon an arbitrary discretion.

¶91. This court also stated, that "no doubt, some public bodies in this state may use the label, 'executive session' in artful attempts to circumvent the clear mandate of the Act. They shouldn't, and they should be on notice that this Court has a duty to ensure that the legislative intent of the Act is followed by rejecting such attempts, creative though they may be. We will." Gannett River States Publishing Corporation v. City of Jackson, CA-02032-SCT (Miss 2002) (Pittman, Smith, Cobb and Carlson, joined this Opinion)

¶92. It therefore follows that even though an executive session might come under "pending litigation and personnel" matters, this alone is insufficient in the absence of at least a reasonably arguable basis of an actual, present need for a closed meeting on the subject. To hold otherwise would indeed be making the exception as broad as the Act itself, and emasculate the admonishment of Miss. Code Ann. Section 25-41-7(3) [10]

¶93. "The executive session statutory provision is one of the most lethal assaults on the public's right to know. The common practice of closing meetings prevents taxpayers from fully gauging the responsiveness and effectiveness of their governing bodies and makes the concept of public business a mere oxymoron." Author, Dan E. Way, *Mississippi Center for Freedom of Information, University of Mississippi,* www.mcfoi.org/newsletters/spring2001.html

¶94. Defendant Thomas, the Chancery Court Clerk and clerk of the board of supervisors testified that, *"if necessary,* I keep the minutes of the executive session." The requirement to record and keep minutes is a ministerial function required by the Act and is not discretionary as stated by Thomas. (Ex. 23 to LaCroix's Memorandum in Support of Motion for Summary Judgment Interrogatory no. 12). The Act does not permit the use of discretion to record minutes of all meetings of the board nor does it provide that minutes be kept "if necessary." It clearly states that minutes of all meetings shall be kept whether in open or closed session.

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[10] "We struggle from not what's done in the board meetings but what is done in the shadows," Russell Turner, editor, Greene County Herald, Leakesville, MS

¶95. In Answer to interrogatory no 13, Defendant Thomas's testimony contradicts his testimony in Answer to Interrogatory no. 12, when he states in No.13, "the law does not allow me, as clerk for the board of supervisors or the Chancery Court Clerk to make arbitrary determinations about what should or should not be entered into the minutes at any and all meetings at which it is my duty to record and keep minutes." Neither does the law permit the clerk for the board or the Chancery Court Clerk to arbitrarily record and maintain or not, minutes of executive sessions. (Ex. 23 to LaCroix's Memorandum in Support of Motion for Summary Judgment)

¶96. When asked to produce copies of Minutes of a particular executive session (Ex. 23 to LaCroix's Memorandum in Support of Motion for Summary Judgment), Thomas responded by stating that, "no notes, records or audio recordings are kept of executive sessions. Minutes of executive sessions are only kept if board action is taken during the executive session". In response to Request for Production No. 6 wherein LaCroix requested a copy of the complete minutes, including the executive session of the board, Thomas emphatically responds that, "no notes, records or audio recordings are kept of executive sessions." Thomas likewise, responds to Interrogatory No. 25, stating that records are not kept of executive sessions. (Ex. 23 to LaCroix's Memorandum in Support of Motion for Summary Judgment)

¶97. Interrogatory No. 29 is an illustration of an improper executive session by the Marshall County board of supervisors. The interrogatory stemmed from Audio recordings furnished to LaCroix by the Chancery Court Clerk pursuant to a public records request when seeking to review records pertaining to the due process violation as discussed hereinabove. In the open session of a regular board meeting, a vote was taken regarding a re-zoning issue, the board voted to approve the re-zoning and the citizen seeking the re-zoning was advised in open session of that outcome. The board then went into executive session, to discuss "pending litigation and personnel". Upon returning to open session, district supervisor, Defendant Taylor stated that he wanted to change his vote favoring the re-zoning to a vote against the re-zoning. Even if it was not the case in this instance, the appearance that discussions concerning the re-zoning request were held in closed session leading to Supervisor Taylor changing his vote. A zoning or re-zoning issue, absent providing the public with an arguable reason, is not

one of the enumerated reasons for entering executive session and certainly does not fall under "pending litigation and personnel". (Ex. 23 to LaCroix's Memorandum in Support of Motion for Summary Judgment)

¶98. Where Marshall County board of supervisors, according to common practice does not record and or maintain minutes of executive sessions as required, the board may not demonstrate its compliance with the law because it is firmly rooted in this state's judicial precedent that "public boards speak only through their minutes and their actions are evidenced solely by entries on their minutes." *Burdsal v. Marshall County*, 937 So. 2d 45 (¶8) (Miss. Ct. App. 2006); *Thompson v. Jones County Cmty. Hosp.*, 352 So. 2d 795, 796 (Miss. 1977) The Mississippi Supreme Court has stated the reasons for recording and maintaining minutes as follows: "(1) That when authority is conferred upon a board, the public is entitled to the judgment of the board after an examination of a proposal and a discussion of it among the members to the end that the result reached will represent the wisdom of the majority rather than the opinion or preference of some individual member; and (2) that the decision or order when made shall not be subject to the uncertainties of the recollection of individual witnesses of what transpired, but that the action taken will be evidenced by a written memorial entered upon the minutes at the time, and to which all the public may have access to see what was actually done." *Rawls Springs Utility Dist. v. Novak*, 765 So. 2d 1288, 1291 (Miss. 2000); *Nichols v. Patterson*, 678 So. 2d 673, 676-77 (Miss. 1996). The Marshall County Board of supervisors final minutes do not reflect the "pending", impending and or actual "litigation" cases it has ever gone into executive session to discuss nor do the minutes name any "personnel" that the board has entered executive session to discuss.

¶99. The Mississippi Supreme Court has characterized the minutes requirement as "an important public policy issue," cautioning that "public interest requires adherence thereto, notwithstanding the fact that in some instances the rule may work an apparent injustice." *Butler v. Bd. of Supervisors for Hinds County* , 659 So.2d 578, 579 (Miss. 1995) (quoting *Colle Towing Co. v. Harrison County*, 57 So.2d 171, 172 (Miss. 1952))

¶100. Further circumstantial evidence of the Marshall County board of supervisors failure to record and maintain minutes of all meetings lies in the board's

violation of Section 19-5-22. M.C.A. 19-5-22 (4)(a) states in part: The board of supervisors shall establish procedures for the manner in which notice shall be given and the contents of the notice; the board may designate a disinterested individual to serve as hearing officer. If a "disinterested individual" is not designated to serve as "hearing officer", the presumption is that the board presides over pre-deprivation hearings. Because the board has no minutes or records of any pre-deprivation hearings, there must have been none. Because the Board does not maintain records of notices sent by the board, it sent none.

¶101. LaCroix's Motion to Reconsider was hand delivered to the Chancellors court by FedEx. It was first discovered on 2/01/08, just prior to the trial, that the Chancellor did not have in his file nor had he seen or had the opportunity to consider LaCroix's Motion to Reconsider. In chambers, before the trial, LaCroix asserted to the Chancellor the desire to present and preserve in the record newly obtained evidence in support of the Open Meeting Claims and was advised by the Chancellor that the Motion would be addressed in open court.

¶102. At the conclusion of the trial, the Chancellor did not rule on or address LaCroix's Motion to Reconsider. LaCroix reurged the issues of the due process claim and Open Meeting Claims by asking the Chancellor for clarification on two claims. The Chancellor informed LaCroix that he denied the Open Meetings and Section 1983 due process claim without making further comments.

¶103. On February 20, the court entered it's final judgment, wherein it denied LaCroix's claim of violation of the Open Meetings Act and Due Process. The court offered no reason for the denial and gave no facts or conclusions of law regarding the summary denial. Although implicitly inferring the reason for denying the Open Meetings claims (insufficient evidence) and Due Process claim (failure to file a Bill of Exceptions pursuant to 11-51-75) in his Opinion and Partial Summary Judgment, The Chancellor failed completely to give any reason(s) for summarily denying LaCroix's Motion to Reconsider the claims. Simply stated, the Chancellor failed to articulate any reason for denial of the Motion and then apply the various factors that bear on whether to allow new evidence and to place the reason for denial in the record. "Chancellors are to consider those factors on the record and are to support their decisions with

findings of fact and conclusions of law for appellate review." *Ferguson v. Ferguson*, 639 So. 2d 921, 928 (Miss. 1994)

¶104. Albeit LaCroix may not have assertively articulated in his Motion to Reconsider that he had received additional evidence, nonetheless, had the trial court properly considered LaCroix's Motion and permitted a hearing on the issue, as requested by LaCroix in chambers, it would be apparent that LaCroix proffered new evidence, not previously available, in support of his Open Meetings claim. The U.S. Supreme Court stated, "We frequently have stated that pro se pleadings are to be given a liberal construction.... pleadings shall be so construed as to do substantial justice." *Baldwin County Welcome Center v. Brown* 466 U.S. 147, 104 S. Ct. 1723, 80 L. Ed. 2d 196, 52; *Moore v. Ruth*, 556 So. 2d 1059, 1061 (Miss. 1990) (Meritorious claim not lost because inartfully drafted).

¶105. The chancellor barred a hearing on the additional evidence and summarily denied LaCroix's Motion to Reconsider making no findings which makes it impossible for this Court to review the chancellor's decision. *Thomas Quitman Brame, Jr. v. Sherrye Polk Brame*, on Writ of Certiorari, NO. 98-CT-00502-SCT, (Miss, 2001) (hearing on additional evidence) The Chancellor failed to properly and thoroughly review the Motion before or during the trial. It is plain error not permitting the violations of the Open Meetings Act to be raised during the trial because no final judgment had been entered as required by Rule 54(b),

¶106. Regarding a related issue raised by the Chancellor at the trial on 2/01/08 the trial court denied defendants Motion for Protective Order (Tab 3 of LaCroix's Addendum), seeking to make the records ordered to be produced exempt, thus withholding certain public records (Tab 9 of LaCroix's Addendum). The trial court agreed with LaCroix rebuttal to Defendants Petition for Protection that the statute cited by defendants in support of withholding those records, necessarily makes those records available pursuant to any form of legal or administrative hearing. (See 18 U.S.C. §2721, Drivers Privacy Act) Following the Chancery Court's ruling that Defendants Petition for Protection was not meritorious and the records were ordered to be made available, LaCroix made an additional Public Records Request seeking to inspect and copy additional records used by the board of supervisors and its employees when

notifying the tax collector to charge a lien for delinquent garbage fees. In response to LaCroix's new public records request, on March 3rd, 2008, Defendants filed a Petition for Declaratory Judgment in the Marshall County Chancery Court, Docket No. 080120-A. The new petition filed is identical in every respect to the previous petition filed in the instant cause, citing the same authorities and seeking to exempt the same records.

¶107. It would be objectively reasonable for the average person to believe that the Marshall County board of supervisors and its employees prefers to operate in the dark, not wanting the public to be privy to its activities and not making public records available because they may be incriminating to the board and/or its employees regarding the policy and procedures regarding M.C.A.§ 19-5-22, other statutes and day to day performance of it's duties as well as the duties of each district supervisor individually.

¶108. It would be inconsistent with a reasonable theory of innocence that the board, each supervisor and the board's attorney operate in an open, accountable manner. Upon being sued by LaCroix for violations of the Open Meetings Act and other charges (the instant case), the Board entered an order to destroy and otherwise secret an abundance of public records by turning them over to its attorney Kent Smith so that the public records could be claimed as privileged information under the attorney-client privilege and the work-product doctrine and no longer be made available to LaCroix or any other members of the public. (Ex. 31 to LaCroix's Memorandum in Support of Motion for Summary Judgment; Tab 10 to LaCroix's Addendum; Ex. 7 to LaCroix's Memorandum in Support of Motion for Summary Judgment) The Order of the Board entered on September 4, 2007 was entered because of incriminating evidence discovered by LaCroix and cited against the board of supervisors in LaCroix's chancery court claim. The board's order specifically called for all "tapes, cassettes, CD recordings and/or rough drafts of meetings and minutes be destroyed". For years, it has been the policy and custom of the board of supervisors to make audio recordings of their open sessions for the benefit of having a record. These audio recordings were also ordered turned over to attorney Smith. Since the filing of LaCroix's Chancery Court suit against the board, it is now the policy of the Chancery Court Clerk to destroy all handwritten

notes used in preparation of the final minutes and to no longer make audio recordings of board meetings, presumably, so that an accurate record of the actual discussions during the board's open meetings do not exist.

¶109. In summation, judgment for LaCroix should have been entered as a matter of law as Defendants never raised any issue of material or relevant fact. The evidence in the court file contains prime facie evidence of violations of the Open Meetings Act. Pursuant to Rule 54(b), the claim was still pending and properly before the court for hearing however, arguments pertaining to the claim were summarily denied without LaCroix having the opportunity to introduce sufficient evidence to prove the claim.

PUBLIC RECORDS ACT

¶110. On the dates LaCroix made the public records request, Marshall County did not have a written policy governing compliance with the Public Records Act. LaCroix, in any event, made his requests in writing, in advance of the intended inspect inspection date. The Public Records Act, section 25-61-5(1) states in relevant part: **[I]n the event that a public body has not adopted such written procedures, the right to inspect, copy or mechanically reproduce or obtain a reproduction of a public record of the public body shall be provided within one (1) working day after a written request for a public record is made.** No public body shall adopt procedures which will authorize the public body to produce or deny production of a public record later than fourteen (14) working days from the date of request for the production of such record.

¶111. On August 2, 2007 LaCroix notified the Marshall County Planning Commission (Zoning) in writing, via fax and e-mail of his intent to inspect public records on 8/06/07. On 8/06/07 LaCroix made an appearance at the zoning office to inspect public records. Present were Defendant Moore the Planning Commissioner and Defendant Wilson, an employee of the zoning office. (Ex. 3 to LaCroix's Memorandum in Support of Motion for Summary Judgment)

¶112. LaCroix was told by Defendant Wilson that the County had thirty days to comply with LaCroix's request then informed LaCroix that permission from the Board of Supervisors or the Board's attorney must be obtained by LaCroix before public

records could be inspected and/or copied. Wilson told LaCroix that a Public Records Request was going over his head and that he could not permit public records to be inspected. Defendant Moore, the Planning Commissioner, was present during the time LaCroix was there but failed to correct Wilson and/or intervene in Wilson's refusal to permit LaCroix to inspect records. At no time during LaCroix's visit to the Zoning Department was LaCroix told he could not inspect public records because the department was too busy with "pending elections" (Ex. 25 to LaCroix's Memorandum in Support of Motion for Summary Judgment)

¶113. The afternoon of August 6, 2008, after LaCroix's records request was denied, LaCroix received a letter from the Board's attorney, Kent Smith regarding the records request made to the Planning Commission. The sum of Smith's letter was an acknowledgment that the Planning Commission did in fact receive the written request on 8/2/07 and Smith informed LaCroix that "due to impending primary elections which will be held on August 7, 2007, **we** do not have sufficient time to make these records available to you on the day before the election". (Ex. 4 to LaCroix's Memorandum in Support of Motion for Summary Judgment; Tab 11 to LaCroix's Addendum)

¶114. Aware that the county had no written Public Records policy, Smith erroneously advised LaCroix that "the Mississippi Public Records Act provides Marshall County fourteen (14) days to comply" with LaCroix's request. Smith then informed LaCroix to make an appointment, with his office to inspect the records, but that LaCroix would not be permitted to inspect and or copy public records during the week of August 6-10, 2007 "due to all of the factors associated with the elections." (Ex. 4 to LaCroix's Memorandum in Support of Motion for Summary Judgment)

¶115. At the hearing on 2/1/08, following testimony from Defendant Moore that she had taken off work the day of LaCroix's scheduled inspection and that she had another emergency in the office that morning, being Ms. Eloise Finley could not work, the court ruled the Planning Commission's refusal to permit LaCroix to inspect public records was not a willful violation.

¶116. The chancellor stated, "[T]he Court finds it was not willful, because they tried to provide a date when they could get this information to him, so, therefore, there's not going to be any statutory penalty civil in regard to the issue of the Zoning Board".

¶117. West's Encyclopedia of Law defines "willful" as: Intentional; not accidental; voluntary; designed. The violation by defendant Planning was just that, intended to delay or prevent an inspection, was not accidental but a voluntary denial and was designed to prevent LaCroix from inspecting and obtaining copies of exculpatory evidence in regard to the violation of section 19-5-22. "Willful" is defined as "proceeding from a conscious motion of the will; voluntary; knowingly; deliberate. Intending the result which actually comes to pass; designed; intentional; purposeful; not accidental or involuntary." Black's Law Dictionary 1599 (6th ed. 1990). Defendant's intention to prevent LaCroix's inspection factually came to pass as the ruling was in favor of a denial, just not a willful one.

¶118. Black's defines "intentionally" in part as willfully or purposely, and not accidentally or involuntarily." Black's Law Dictionary 810 (6th ed. 1990. Webster's Third New International Dictionary 2617 (1986) defines willful as done deliberately: not accidental. Black's Law Dictionary 1276 & 1593 (7th ed. 1999) defines willful as voluntary and intentional, but not necessarily malicious. NO. 93-DP-00619-SCT Gerry Lynn Lester v. State of Mississippi (Miss. 1997) Defendant's action was willful, thus subject to liability because defendant and it's attorney reasonably knew that it's conduct was governed by the Mississippi Public Records Act. *Brennan v. Heard*, 491 F.2d 1, 3 (5th Cir. 1974) *Donovan v. Sabine Irrigation Co., Inc.*, 695 F.2d 190, 196 (5th Cir. 1983)

¶119. Defendant's attorney, Kent Smith testifying at the trial, stated when defining "willful": "Your Honor, it talks about the intent to refrain from performing any act the law requires and indifference to whether or not an action or inaction violates the law, and it's directed towards achieving this specific purpose". The law absolutely requires that public records were to be made available on the date LaCroix was denied, no exemption exists for reasons claimed by Defendants. To deny access to public records, other than for one of the reasons enumerated in the statute does constitute "an action or inaction [that] violates the law". The planning commission had no way of knowing of Ms. Finely' "emergency" causing her inability to work that day or jow busy the office may be on a future date and the denial was "directed towards achieving this specific purpose", the purpose being, to refuse to permit LaCroix to inspect public

records, on the date compliance was required. Trial transcript, Page 78, line 15) Mclaughlin v. Richland Shoe Co., 486 U.S. 128 (1988) (defines willful)

¶120. The chancellor's ruling constitutes a plain and manifest error[11]. The trial court reconstructed the Public Records Act, creating an exemption from compliance for the Planning Commission's reasons for denying a request to inspect and copy public records. The ruling is especially erroneous and harmful considering that had the Mississippi Legislature intended to dispense with the Public Records Act during times leading up to elections and because employees take the day off, an exemption for that reason would have been included in the statute. Notwithstanding the erroneous ruling, the Marshall County Planning Commission is not involved in any way with planning and preparation of "pending elections", thus this was not a reasonable basis for denying LaCroix access to inspect public records. The court's ruling that trying to provide a date when Defendant could conveniently get this information to LaCroix does not comport with a fair reading of the plain language compliance of the Act, as it is the general understanding that the word **"willful" refers to conduct that is "voluntary," "deliberate," or "intentional," and not merely negligent**. Further, the ruling's potential applicability, virtually obliterates the distinction between willful and non-willful violations which the Mississippi Legislature obviously intended to draw.

¶121. It is a long-standing rule that "[w]hen the language used by the legislature is plain and unambiguous and where the statute conveys a clear and definite meaning the Court will have no occasion to resort to the rules of statutory interpretation." The trial courts cannot restrict or enlarge the meaning of an

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[11] In Mississippi, a finding of plain error is necessary where a party's substantive/fundamental rights are affected and the error results in a "manifest miscarriage of justice." Williams v. State, 794 So. 2d 181, 187 (¶23) (Miss. 2001). To determine whether plain error has occurred, the appellate court "must determine if the trial court has deviated from a legal rule, whether that error is plain, clear or obvious, and whether the error has prejudiced the outcome of the trial." Cox v. State, 793 So. 2d 591, 597 (¶22) (Miss. 2001)

unambiguous statute.

¶122. An exception cannot be created by construction, when none is necessary to effectuate the legislative intention. An exception must appear plainly from the express words or necessary intendment of the statute. Where no exception in positive words is made, the presumption is the legislature intended to make none. *Marx v. Broom*, supra.

¶123. The violation by Planning Commission was willful because defendants knew but nonetheless showed reckless disregard for the matter of whether its conduct was prohibited by the Mississippi Public Records Act. In other words, the violation of the Act was willful because defendant's knowingly violated the Act, and did so with reckless indifference to whether or not it violated the Act. Defendant's attorney's letter plainly evidences understanding that compliance is necessary but still attempted to create an exception for it's self by requiring LaCroix to make an appointment at the convenience of the defendants. *Robert K. Hillier and Orthopaedic Center of the Coast, Inc. v. Minas And Guest*; No. 1998-CA-01162-COA; (1998)

Rule 11 and Litigation Accountability Act

¶124. This court stated in *Tricon Metals & Services, Inc. v. Topp* 537 So.2d 1331, 1335 (Miss. 1989), "Largely ignored as a cause of judicial inefficiency have been the frivolous motions and pleadings filed by attorneys whose only motives are to harass litigants and delay proceedings. Frivolous filings impose substantial and unnecessary costs upon both litigants and the courts, and ultimately upon the public." Unless the Board attorney is sanctioned, he profits through billable hours at the expense of the public.

¶125. A claim is without substantial justification when it is frivolous or groundless in fact and "when, objectively speaking, the movant has no hope of success." *Stevens v. Lake*, 615 So.2d 1177, 1184 (Miss.1993). Defendants and their attorney's Motion for Contempt filed against LaCroix was frivolous, groundless and without arguable merit, the motion objectively speaking, (1) should have never been filed because all parties were served a copy of the Final Judgment on February 20, 2008 with the Order mandating how LaCroix was to pay; (2) Defendant's and their attorney's should have dismissed the motion before the hearing as a matter of routine

because the attorney was aware that per the Judgment of the Court LaCroix had fourteen (14) days from 2/20/08 to satisfy the Judgment; (3) caused LaCroix to substantial time and expense in preparing a defensive response and appearing defend a frivolous motion;

¶126. RULE 3.1 of the Professional Rules of Conduct dictate that a lawyer shall not bring or defend a proceeding, or assert an issue, unless there is a basis in law and in fact for doing so that is not frivolous. Rule 3.1 also states the action is frivolous if the lawyer is unable to make a good faith argument on the merits of the action taken or support the action by a good faith argument. DR 7-102(A)(2), permits a lawyer to advance a claim or defense unwarranted by existing law only if it can be supported by good faith argument and applies if the lawyer knows or when it is obvious that the litigation is not frivolous. Defendant's attorney filed the adverse motion against LaCroix when he reasonably should have known there was no basis in law or fact for advocating the position. Defendant's attorney was rewarded for filing the frivolous motion against LaCroix through his billable hours.

¶127. Rule 11 and the Litigation Accountability Act specifically prohibit attorneys from participating in the practice cf asserting frivolous defenses or positions, without any arguable or legitimate basis. *Mattie Smith and North Mississippi Rural Legal Services v. Oxford School District*, NO. 94-CA-00930 COA, (Miss. 1997)

¶128. The Chancery Court ruling denying sanctions against Defendants was based upon the trial courts opinion, not the merits, facts or law. Section 11-55-5 of the Litigation Accountability Act states in pertinent part: [I]n any civil action commenced or appealed in any court of record in this state, the court **shall award** reasonable attorney's fees and costs against any party or attorney if the court, upon the motion of any party or on its own motion, finds that an attorney or party brought an action, or asserted any claim or defense, that is without substantial justification. The Miss. Supreme Court has stated that a claim is without substantial justification when it is frivolous or groundless in fact. Defendants and their attorney reasonably knew that the trial court did not order LaCroix to pay as stated in the Motion for Contempt. Defendants were served a copy of the Order two (2) days before filing the Motion for Contempt against LaCroix, at which time there was no contempt by LaCroix. Under no

conceivable legal argument could defendants or their attorney support that Motion with a good faith argument. See C.F. & I. Steel Corp. v. Mitsui & Company, 713 F.2d 494, 496 (9th Cir.1983)

¶129. In summary, unless litigants/their attorneys are held to the standards required by the rules of civil procedure and rules of conduct, and are penalized for inappropriate conduct, there is no incentive for them to perform otherwise. Objectively speaking, Defendant's and their attorney's Motion for contempt was without justification and had no hope of success, therefore was frivolous as defined by this court. Stevens v. Lake, supra. Thus the trial court abused it's discretion by not sanctioning Defendant's and attorneys for filing a frivolous and vexatious motion.

¶130. As Miss. R. Civ. P. Rule11 (b) suggests, sanctions are appropriate under this rule only when a motion or pleading has been filed. City of Madison v. Bryan, 763 So. 2d 162, 168 (Miss. 2000) (quoting Tricon Metals & Servs., Inc. v. Topp, 537 So. 2d 1331, 1335 (Miss. 1989). Defendants motion was filed for the purpose of harassment and delay because Defendant's did not have a viable claim. Leaf River Forest Prod. Inc. v. Deakle, 661 So. 2d 188, 195 (Miss. 1995)

¶131. The subjective or objective standard suggests that Defendant's state of mind should be the primary focus of a court's inquiry, there is in fact general agreement among the circuits that the improper purpose inquiry employs an objective standard. See, Whitehead v. Food Max of Miss., Inc., 332 F.3d 796, 805 (5th Cir. 2003); G.C. & K.B. Invs., Inc. v. Wilson, 326 F.3d 1096, 1109 (9th Cir. 2003); Riccard v. Prudential Ins. Co., 307 F.3d 1277, 1294 (11th Cir. 2002); Pac. Dunlop Holdings, Inc. v. Barosh, 22 F.3d 113, 118 (7th Cir. 1994). The inquiry goes to the defendant's purpose, as demonstrated by the totality of the circumstances at the time the motion is filed. The court looks to objective indicators of purpose from which to infer improper purpose, rather than conducting an inquiry into the presenter's subjective bad faith. Chaudhry v. Gallerizzo, 174 F.3d 394, 410-11 (4th Cir. 1999); Derechin v. State Univ. of N.Y., 963 F.2d 513, 517 (2d Cir. 1992) "An attorney's subjective intent in filing is irrelevant to the Rule 11 analysis." Westlake N. Prop. Owners Ass'n v. City of Thousand Oaks, 915 F.2d 1301, 1305 (9th Cir. 1990).

¶132. Defendants and their attorney had no legitimate reason for filing the

Motion for Contempt against LaCroix. The fees charged by Defendants attorney outweighed any benefit Defendants could have possibly achieved, even if the Motion was successful and meritorious. *Whitehead v. Food Max of Mississippi*, supra.

CONCLUSION

¶133. By clear and convincing evidence, the cumulative violations of the Marshall County Board of Supervisors would lead a reasonable person to believe the county prefers to operate in the shadows and frowns on being questioned about it's methods and procedures or otherwise challenged by a citizen. In the board's intention to prevent LaCroix from obtaining exculpatory evidence, the board and it's employees committed three (3) violations of the public Records Act. From one perspective, having to pay an insignificant statutory penalty of $100.00 for two of the three violations may well have been more advantageous to the board as opposed to the risk of allowing the public to inspect additional incriminating records which might evidence more serious issues. This precept could also serve to identify the reason the Board routinely violates the Open Meetings Act by not maintaining records of action taken under Section 19-5-105 and in closed/executive board sessions. It's difficult to find a logical reason that is in the public interest why, after being sued by LaCroix, the Board entered an order to destroy and/or otherwise secret an abundance of its meetings records, which are public records and suddenly without providing a reason, stop the audio recording of it's meetings after incurring a large expense to install a sophisticated board room recording system, at public expense. Currently, the only record available is manipulated final minutes which do not include any records relating to any closed sessions of the board of supervisors or other matters discussed in open session which the board may choose to exclude from the record.

VIOLATION MCA19-5-22, U.S. SECTION 1983

¶134. Allowing the judgment of the trial court to stand would sanction unconscionable injustice. It would condone the long time, contemptuous, and insolent behavior of the Marshall County board of supervisors and its employees. LaCroix made a prima facie case that the board of supervisors and its employees violated M.C.A. §19-5-22 and Section 1983 by failing to provide LaCroix, a property owner, with a pre-deprivation notice in compliance with the due process requirements before imposing a

lien and collecting from his tenant, who by statute is not responsible or liable for payment of the garbage tax. The board of supervisors, each of them individually, and employees of the board should be subjected to punishment in order to deter their offensive conduct. *Harvey-Latham Real Estate v. Underwriters at Lloyd's, London*, 574 So. 2d 13, 17 (Miss. 1990). The Judgment of the trial court should be reversed on plain error and judgment notwithstanding the verdict entered against Defendant's for numerous, knowing and willful violations under U.S. Section 1983 and M.C.A. §19-5-22, *Crawford v. State*, 754 So.2d 1211, 1222 (Miss. 2000)

¶135. If the ruling of the trial court stands, that is, that a Bill of Exceptions must be filed for claims of unlawful acts of the board of supervisors, the board has no reason to comply with the law. The board can knowingly and willfully violate the law then simply wait for a citizen to file a bill of exceptions. Although this may be a better arrangement for the Board of Supervisors, not having to take the time to send notices to property owners, it is not the intention of the Mississippi Legislature that this burden be placed on the taxpayers. This issue should be remanded for a penalty hearing on the State and Constitutional Due process violation in accordance with State law. The purpose of punitive damages is to punish the offender and deter repeat behavior. *Prosser & Keaton on the Law of Torts* § 2. Without punitive damages, one who acts with deliberate disregard for the rights or safety of others faces no greater penalty than a well-meaning offender.

OPEN MEETINGS ACT

¶136. Defendants were required to offer significant probative evidence demonstrating the existence of a triable issue of fact regarding the Open Meetings Act, which it failed to do. *Newell v. Hinton*, 556 So.2d 1037, 1041-42 (Miss.1990). Thus, the Judgment of the trial court should be reversed as a matter of law, in favor of LaCroix for his Open Meetings claims. In the alternative, remand for a trial on the evidence in support of the claim.

SANCTIONS RULE 11 AND LITIGATION ACCOUNTABILITY ACT

¶137. Defendant's Motion for Contempt filed against LaCroix had no chance for success because defendants and their attorney knew or reasonably should have known

LaCroix was not in contempt pursuant to the Order of the trial court. Furthermore defendants attorney testified in open court that he was aware that LaCroix had paid but still did not dismiss the Contempt motion against LaCroix. (Tab 7 of LaCroix's Addendum). In reliance on the plain language of Rule 11, the Litigation Accountability Act and the abundance of rulings of this court, defendants and their attorney should be required to pay sanctions to LaCroix for filing a non-meritorious claim against LaCroix.

PUBLIC RECORDS ACT

¶138. There is no exception contained in the Public Records Act that permits discretionary compliance because a department speculates that it will "not have sufficient time to make records available" because of "impending elections" or because the department head may have taken the day off. The court trial condoned and wrongfully created an exception for defendants when it ruled: "it was not willful, because they tried to provide a date when they could get this information to him." Thus the ruling should be reversed, judgment entered and statutory penalties and costs assessed against defendants.

Respectfully submitted,

Steve E. LaCroix, pro se

CERTIFICATE OF SERVICE

I, Steve LaCroix, appellant pro se, certify that I have this day filed this Brief and Mandatory Record Excerpts with the Clerk of this Court, and have served a copy by United States mail with postage prepaid on the following:

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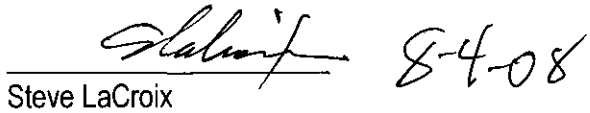

Steve LaCroix