

IN THE
Mississippi Supreme Court

NO . 2015-CA-1177

HENRY W. KINNEY, *Appellant*

VERSUS

SOUTHERN MISSISSIPPI PLANNING AND
DEVELOPMENT DISTRICT, INC.

AND

MISSISSIPPI ASSOCIATION OF PLANNING
AND DEVELOPMENT DISTRICTS
Appellees

ORAL ARGUMENT REQUESTED

BRIEF OF APPELLANT, HENRY W. KINNEY

MICHAEL ADELMAN, ESQUIRE
MS STATE BAR No. 1153
ADELMAN & STEEN, L.L.P.
224 SECOND AVENUE
POST OFFICE BOX 368
HATTIESBURG, MS 39403-0368
601/544-8291; 601/544-1421 (FAX)

COUNSEL FOR HENRY W. KINNEY

IN THE SUPREME COURT OF MISSISSIPPI

CASE NO.: 2015-CA-1177

HENRY W. KINNEY

APPELLANT

VS.

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AND DEVELOPMENT DISTRICT, INC.**

AND

**MISSISSIPPI ASSOCIATION OF PLANNING
AND DEVELOPMENT DISTRICTS**

APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons, have an interest in the outcome of this case. These representations are made in order that the Appellate Court may evaluate possible disqualification or recusal.

1. Henry Kinney APPELLANT
4395 Menge Avenue
Pass Christian, MS 39571

2. Donald Rafferty, Esq. PRIOR ATTORNEY FOR APPELLANT
2118 18th Street
Gulfport, MS 39502

3. Michael Adelman, Esq. ATTORNEY FOR APPELLANT
Adelman & Steen, L.L.P.
Post Office Box 368
Hattiesburg, MS 39403-0368

- | | | |
|----|--|---|
| 4. | Leonard Bentz
c/o Southern Mississippi Planning
& Development District, Inc.
9229 HWY. 49
Gulfport, MS 39503 | EXECUTIVE, DIRECTOR |
| 5. | Hugh D. Keating, Esq.
Dukes, Dukes, Keating & Faneca, P.A.
2909 13 th Street, 6 th Floor
Gulfport, MS 39501 | ATTORNEY FOR APPELLEE,
SOUTHERN MISSISSIPPI PLANNING &
DEVELOPMENT, INC. |
| 6. | JeNell B. Blum, Esq.
Dukes, Dukes, Keating & Faneca, P.A.
2909 13 th Street, 6 th Floor
Gulfport, MS 39501 | ATTORNEY FOR APPELLEE,
SOUTHERN MISSISSIPPI PLANNING &
DEVELOPMENT, INC. |
| 7. | James Harold Herring, Esq.
Herring, Long & Crews, P.C.
Post Office 344
Canton, MS 39046 | ATTORNEY FOR APPELLEE,
MISSISSIPPI ASSOCIATION OF
PLANNING & DEVELOPMENT
DISTRICTS |
| 8. | Southern Mississippi Planning
& Development District, Inc.
9229 HWY. 49
Gulfport, MS 39503 | APPELLEE |
| 9. | Mississippi Association of Planning &
Development Districts
Post Office 4935
Jackson, MS 39296 | APPELLEE |

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APPELLEES

BRIEF OF APPELLANT, HENRY W. KINNEY

STATEMENT OF ISSUES

1. Whether the evidence establishes that Southern Mississippi Planning and Development District is a public body subject to certain Mississippi statutes regulating public and governmental bodies
2. Whether the lower Court erred in relying exclusively on Attorney General Opinions and ignored statutory language and documents which establish that Southern Mississippi Planning and Development District is a public body subject to certain Mississippi statutes regulating public an governmental bodies?
3. Whether the deposition of Lynn Cartlidge supports a finding that Southern Mississippi Planning and Development District is a public body subject to certain Mississippi statutes regulating public an governmental bodies?

4. Whether Southern Mississippi Planning and Development District's status as a non-profit corporation prohibits any consideration of said District as a public or governmental body?
5. Whether the Court erred in denying Appellant's Motion for Recusal?
6. Whether the lower Court erred by granting intervention to Mississippi Association of Planning and Development Districts?

STATEMENT OF THE CASE

I. PROCEEDINGS.¹

Plaintiff, Henry W. Kinney filed a Complaint on December 4, 2013 (R. 4-23) and Amended Complaint on January 17, 2014 (R. 35-38) seeking a Declaratory Judgment that South Mississippi Planning and Development District is a public agency subject to the Mississippi Public Records Act, *Miss. Code Ann.* §25-61-1, *et seq.*; Mississippi Public Procurement laws, *Miss. Code Ann.* §31-7-1, *et seq.*; Open Meetings laws, *Miss. Code Ann.* §25-41-1, *et seq.*; Mississippi's Ethics in Government laws, *Miss. Code Ann.* §25-4-1, *et seq.*; and Mississippi Code Ann. §25-4-101, *et seq.*; Mississippi law regarding the salaries and compensation of public officials, *Miss. Code Ann.* §25-3-1, *et seq.*; general provisions applicable to public offices, *Miss. Code Ann.* §25-1-1, *et seq.*; Mississippi laws regarding removal from public office, *Miss. Code Ann.* §25-5-1, *et seq.*; and State auditing requirements, *Miss. Code Ann.* §7-7-211; that the appointment of Leonard Bentz was invalid because it did not comply with §25-41-1, *et seq.* (Open Meetings laws) and that Leonard Bentz is not the Executive Director of South Mississippi Planning and Development District because he does not meet the qualifications for said position

¹References to the Clerk's papers are to (R. -) and references to the two (2) volume transcript are (T. -).

and his appointment is invalid. On January 31, 2014, South Mississippi Planning and Development District filed Answer, Defenses, and Counterclaim (R. 41-116). On March 3, 2014, Henry W. Kinney filed Defenses in Reply to Counterclaim (R. 171-178).

On April 22, 2014, the Lower Court entered its Order granting Mississippi Association of Planning and Development District's Motion to Intervene, after a hearing on the record (R. 415-417; T. 1-55).

On July 11, 2014, Plaintiff filed a Motion for Recusal based on comments by the Court during the hearing regarding Mississippi Association of Planning and Development Districts' Motion to Intervene, held on April 15, 2014 and during a status conference held on June 11, 2014. (R. 794 -895). The Court entered its Opinion and Order Denying Motion to Recuse on August 14, 2014 (R. 1081-1088) after a hearing on the record (T. 91- 154).

The Court entered its Order Granting Motion to Dismiss Counterclaim on March 31, 2015 (R. 1208).

Defendant South Mississippi Planning and Development District filed its Motion for Summary Judgment and Motion to Dismiss or in the Alternative, for Summary Judgment on April 14, 2014 (R. 273 - 346). Intervenor's Motion for Summary Judgment and Motion to Dismiss, or in the Alternative, Summary Judgment was filed on May 2, 2014 (R. 501-524).

The Court entered its Opinion and Order Granting Motion for Summary Judgment on July 23, 2015 (R. 1645 -1655) after a hearing on the record. (T. 200 - 242).

Plaintiff filed a timely Notice of Appeal on August 4, 2015 (R. 1656).

II. FACTS.

Kinney's original complaint was prompted by numerous news stories which appeared in the *Sun Herald* and the *Clarion Ledger*.² The Plaintiff was curious as to how an agency he believed to be public could conduct its business behind closed doors and not provide the public access to its books and records. The complaint does not seek enforcement of any salutary statutory provisions, but merely a declaration by the court that the SMPDD is subject to those statutes. Paragraph 6 of the complaint states:

²See following Editorial from the *Sun Herald* newspaper, dated August 14, 2013 which reads as follows:

“The names of the other candidates weren't released by the board, although one of the candidates who was passed over leaked the names of the other finalists to the press. But even those candidates were more qualified, there's little that can be done now. Our government should not be allowed to operate in this manner.

It's our fault. For too long, the taxpayer has been a silent partner in the operation of government. Too few raise voices of concern over the fate of the millions of dollars these agencies control.

So those in power run free with little to rein them in except a little after-the-fact grumbling from the populace. Oh, they value our input, though - the input of our tax dollars into their budgets.

Not surprisingly, the public at large was absent from the SMPDD meeting at which 21 of the 34 members of the board dined at the Great Southern Yacht Club before unanimously voting for Bentz Jr. Most of the vetting took place behind closed doors.

We doubt the directors would have been so festive and cavalier if audiences routinely contained a couple dozen well-informed citizens.

And perhaps Leonard Bentz Jr. wouldn't be leaving his seat on the PSC and starting his new job at the SMPDD under such questionable circumstances.”(R. 1568-1569).

“Plaintiff brings this complaint pursuant to Rule 57 of the Mississippi Rules of Civil Procedure seeking a Declaration that the Southern Mississippi Planning and Development District is a public agency, subject to the Mississippi Public Records Act, open meetings requirements, auditing requirements, procurement law, and all other rules and regulations applicable to public agencies.”

Paragraph 7 specifically deals with the applicability of the Open Meetings law:

“Plaintiff also seeks a declaration that the action of hiring and appointing Leonard Bentz as the Executive Director of the Southern Mississippi Planning and Development District is invalid because, *inter alia*, the action did not take place in compliance with the open meetings laws contained in *Miss. Code Ann. §25-41-1, et seq.* and other laws governing public agencies, such that Mr. Bentz is not the Executive Director of the Southern Mississippi Planning and Development District.”

See also paragraph 27:

“Since SMPDD is a public agency, SMPDD’s compliance with the Mississippi Public Records Act, *Miss. Code Ann. §25-61-1, et seq.* and with all other rules and regulations applicable to public agencies is mandatory. These laws include, but are not limited to: Mississippi Public Procurement laws, *Miss. Code Ann. §37-7-1, et seq.*; Open Meetings laws, *Miss. Code Ann. §25-41-1, et seq.*; Mississippi Ethics in Government laws, *Miss. Code Ann §25-4-1, et seq.*; Mississippi laws regarding the salaries and compensation of public officials, *Miss. Code Ann. §25-3-1, et seq.*; general provisions applicable to public officers, *Miss. Code Ann. §25-1-1, et seq.*’ Mississippi laws regarding removals from public office, *Miss. Code Ann. §25-5-1, et seq.*; and State Auditing requirements, *Miss. Code Ann. §7-7-211.*”

(I). Open Meetings Laws

The first statute that Plaintiff believes is applicable to the SMPDD is the open meetings law of the State of Mississippi found in §25-41-1. This statute states:

“It being essential to the fundamental philosophy of the American constitutional form of representative government and to the

maintenance of a democratic society that public business be performed in an open and public manner, and that citizens be advised of and be aware of the performance of public officials and the deliberations and decisions that go into the making of public policy, it is hereby declared to the policy of the State of Mississippi that the formation and determination of public policy is public business and shall be conducted at open meetings except as otherwise provided herein.

The statute applies to Public bodies which are defined, in part as:

“(a) “Public body” means any executive or administrative board, commission, authority council department agency, bureau or any other policy-making entity, or committee thereof, of the State of Mississippi, or any political subdivision or municipal corporation of the state, whether such entity be created by statute or executive order, which is supported wholly or in part by public funds or expends public funds, and any standing, interim or special committee of the Mississippi Legislature. The term “public body” includes the governing board of a charter school authorized by the Mississippi Charter School Authorizer Board.”

The SMPDD is a public body which consists completely and wholly of governments of the county and municipalities and which are “wholly” supported by public funds (Charter, SMPDD-00014; first amendment, SMPDD-00016; second amendment, SMPDD-00018; Bylaws, Exhibit O [R. 1585-1594]; financial statement of Harrison County, Exhibit N [R. 1582-1584]; and the SMPDD tax return, Exhibit H [R. 1430-1547].)

(ii.) Public Records Laws

Secondly, Plaintiff submits that the SMPDD is governed by the provisions of the public records laws of the State of Mississippi as found in *Miss. Code Ann.* §25-61-1 which states:

“This chapter shall be known and may be cited as the “Mississippi Public Records Act of 1983.” It is the policy of the Legislature that public records must be available for inspection by any person unless otherwise provided by this act [Law 1996, Ch. 453].

Furthermore, providing access to public records is a duty of each public body and automation of public records must not erode the right to access to those records. As each agency increases its use of and dependence on electronic record keeping, each agency must ensure reasonable access to records electronically maintained, subject to the rules of records retention.”

This statute applies to public bodies which are defined in *Miss. Code Ann.* §25-61-3(a) as:

“(a) “Public body” shall mean any department, bureau, division, council, commission, committee, subcommittee, board, agency and any other entity created by the Constitution or by law, executive order ordinance or resolution. The term “public body” includes the governing board of a charter school authorized by the Mississippi Charter School Authorizer Board. Within the meaning of this chapter, the term “entity” shall not be construed to include individuals employed by a public body or any appointed or elected public official.”

And public records which are defined in *Miss. Code Ann.* §25-61-3(b) as:

“(b) “Public records” shall mean all books, records, papers, accounts, letters, maps, photographs, films, cards, tapes, recordings or reproductions thereof, and any other documentary materials, regardless of physical form or characteristics, having been used, being in use, or prepared, possessed or retained for use in the conduct, transaction or performance of any business, transaction, work, duty or function of any public body, or required to be maintained by any public body.”

(iii.) Public Procurement Laws

The Public Procurement laws of this state can partially be found in *Miss. Code Ann.* §31-7-1, and its applicability can be found in that beginning statute as follows:

“(b) “Governing authority” means board of supervisors, governing boards of all school districts, all board of directors of public water supply districts, boards of directors of master public water supply districts, municipal public utility commissions, governing authorities of all municipalities, port authorities. Mississippi State

Port Authority, commissioners and boards of trustees of any public hospitals, boards of trustees of public library systems, district attorneys, school attendance officers and any political subdivision of the state supported wholly or in part by public funds of the state or political subdivisions there...”

See also *Miss. Code Ann.* §31-7-13 governing bidding requirements.

(iv.) Ethics in Government - Conflicts of Interest

The Mississippi laws concerning ethics in government and governing conflicts of interest are found in *Miss. Code Ann.* §25-4-101 as follows:

“The Legislature declares that elective and public office and employment is a public trust and any effort to realize personal gain through official conduct, other than as provided by law, or as a natural consequence of the employment of position, is a violation of that trust. Therefore, public servants shall endeavor to pursue a course of conduct which will not raise suspicion among the public that they are likely to be engaged in acts that are in violation of this trust and which will not reflect unfavorably upon the state and local governments.”

These statutes apply to the following:

Miss. Code Ann. §25-4-103

“(g) “Government” means the state and all political entities thereof, both collectively and separately, including, but not limited to:

- (I) Counties;
- (ii) Municipalities;
- (iii) All school districts;
- (iv) All courts; and
- (v) Any department, agency, board, commission, institution, instrumentality, or legislative or administrative body of the state, counties or municipalities created by statute, ordinance or executive order including all units that

expend public funds.”

As a citizen, Mr. Kinney sought information and accountability under the above statutes which he deemed essential for the public good. See *Harrison County Dev. Comm. v. Kinney*, 920 So. 2d 497 (Miss. Ct. App. 2006).

SUMMARY OF ARGUMENT

The evidence establishes that Southern Mississippi Planning and Development District, Inc. is a public body. The lower court’s Opinion and Order Granting Summary Judgment is inconsistent with the definitions of a public body in three (3) of the statutes which Mr. Kinney maintains apply to Southern Mississippi Planning and Development, Inc. and contradicts the fact that Southern Mississippi Planning and Development District has already been found to be subject to public audit by the State auditor under §7-7-21, *et seq.*, Miss. Code Ann. The lower court’s Opinion and Order Granting Summary Judgment is also inconsistent with Attorney General’s Opinion dated November 26, 2003, in which Attorney General Mike Moore found that planning and development districts “are either public entities or instrumentalities of political subdivisions” and for that reason are subject to audit by the State auditor.

The fact that Southern Mississippi Planning and Development District may not be subject to either the Mississippi Tort Claims Act or PERS should not be controlling. Other public bodies such as community hospitals are covered under the Mississippi Tort Claims Act but not under PERS.

The argument that because Southern Mississippi Planning and Development District is a non-profit corporation, it cannot constitute a public body is based on a false premise. There

is nothing in the case law or in the Non-Profit Corporation's Act that would prevent Southern Mississippi Planning and Development District, as a non-profit corporation, from also being subject to the Public Records Act, the Open Meetings Laws, the Ethics in Government Laws, the Procurement Laws and state laws generally applicable to public officers and state laws regarding removal of public officers.

Additional statutes of the State of Mississippi recognize planning and development districts as governmental agencies and they are cited below in Appellant's Brief.

The Mississippi Association of Planning and Development Districts Directory recognizes planning and development districts are governmental agencies. They are defined in the directory as Mississippi's official sub-state regions.

The Financial Statement Audit Report and tax returns filed by Southern Mississippi Planning and Development District, Inc. also establish that it is a governmental agency. Southern Mississippi Planning and Development District, Inc. is subject to state audit and follows the Governmental Accounting Standards Board (GASB) in filing its annual tax returns.

The deposition of Lynn Cartlidge supports a finding that Southern Mississippi Planning and Development District, Inc. is a public body. Mr. Cartlidge himself is a government appointee, first by virtue of his having served concurrently as a Supervisor and as a SMPDD Board Member and then as a nominee, not an appointment, of the Workforce Agency. Mr. Cartlidge testified explicitly that Southern Mississippi Planning and Development District has all of the characteristics of a governmental agency. (R. 1306-1372; Cartlidge deposition).

The lower court also erred in denying Appellant's Motion for Recusal. It is apparent

from statements made by the Chancery Judge that he had formed an opinion regarding the merits of Appellant's case despite the fact that the case had not been submitted to the Chancery Judge.

The Court should not have granted the Motion to Intervene filed by the Mississippi Association of Planning and Development Districts, since MAPDD could not establish that it had a bonafide interest in this litigation. Any interest expressed by the Mississippi Association of Planning and Development Districts was derivative and Mississippi Association of Planning and Development Districts could not show that it was not adequately represented by Southern Mississippi Planning and Development District, Inc. in this case.

ARGUMENT

STANDARD OF REVIEW.

In reviewing a trial court's grant of Summary Judgment, the Supreme Court employs a *de novo* standard of review. *Anglado v. Leaf River Forrest Prods., Inc.*, 716 So. 2d 543, 547 (¶13)(Miss. 1998). Summary Judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Blackston v. Epps*, 95 So. 3d 667, 668 (¶6) (Miss. Ct. App. 2011); M.R.C.P. 56(c). The appellate court must consider all of the evidence before the lower court in the light most favorable to the non-moving party. *Palmer v. Anderson Infirmary Benevolent Ass'n.*, 656 So. 2d 790, 794 (Miss. 1995). The party opposing the motion "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

Blackston v. Epps, supra; M.R.C.P. 56(e).

Both Southern Mississippi Planning and Development District, Inc., and the Mississippi Association of Planning and Development Districts, in support of their Motions for Summary Judgment, relied exclusively on advisory opinions from both the Attorney General and the Ethics Commission. Opinions of the Attorney General do not have the force of law. As this Court has noted, such opinions are not an exercise of a judicial function but are an exercise of judicious discretion under a legislatively mandated duty. See *Secretary of State v. Weisenberg*, 633 So. 2d 983, 998 (Miss. 1994); *State v. Southern Pine, Co.*, 38 So. 2d 442, 447 (1949). In *State by Mississippi Ethics Com. v. Aseme*, 583 So. 2d 955, 960 (Miss. 1991), the Hinds County Chancery Court reversed an opinion of the Ethics Commission and granted appellee summary judgment. That ruling by the Hinds County Chancery Court was upheld by the Mississippi Supreme Court.

The lower Court's Order Granting Summary Judgment in this case should be reversed, if for no other reason, than the lower Court chose to rely on selected advisory opinions rather than the clear statutory language supporting Plaintiff's cause of action.

I. THE EVIDENCE ESTABLISHES THAT SOUTHERN MISSISSIPPI PLANNING AND DEVELOPMENT DISTRICT IS A PUBLIC BODY

A. The Lower Court's Order Granting Summary Judgment Is Deeply Flawed

The lower Court's decision is contrary to Mississippi statutory law, is not supported by any case law, and is contradicted by the fact that Southern Mississippi Planning and Development District, Inc. and the State's nine (9) other Planning and Development Districts are subject to audit by the State Auditor. There is no legal basis for the lower Court's Order granting Summary Judgment in favor of Appellees.

Paragraphs 16, 17 and 18 the lower Court's Order go to the formation and history of Southern Mississippi Planning and Development District. These paragraphs find that Southern Mississippi Planning and Development District was formed as a non-profit corporation whose sole "purpose is for the public" and whose only money "comes from the public." Southern Mississippi Planning and Development District is one of ten (10) Planning and Development Districts in the State of Mississippi.

Paragraph 19 acknowledges that in June, 1970, Governor John Bell Williams signed Executive Order 81 which "officially designated all of the Mississippi planning and development districts as the regional clearinghouses for federal programs and the coordination of federal grants." Yet, the lower Court hastily concludes that Executive Order 81 "did not give the Planning and Development Districts s governmental authority, power, or benefits." But, that finding by the lower Court is inconsistent with the definitions of a public body in three (3) of the statutes which Appellant maintains apply to Southern Mississippi Planning and Development District and contradicts the fact that Southern Mississippi Planning and Development District has already been found to be subject to public audit by the State Auditor under Sec.7-7-21 *et seq.*, Miss. Code Ann.

A. *Public Records Act*, Miss. Code Ann., Sec. 25-61-1 *et seq.*

Sec. 25-61-3 defines a "public body" to include "any department, bureau, division, council, commission, committee, subcommittee, board, agency and *any other entity . . . created by the Constitution or by law, executive order . . .*"

(Emphasis supplied.)

B. *Open Meetings Laws*, Miss. Code. Ann. Sec. 25-41-1 et seq.

Sec. 25-41-3 defines a “public body” to include “any other *policy-making entity* . . . whether such entity be created by statute or *executive order, which is supported wholly or in part by public funds* . . . “ (Emphasis supplied.)

C. *Ethics in Government Laws*, Miss. Code Ann., Sec. 25-4-1 et seq.

Sec. 25-4-3 defines “public employee” as any “individual who receives a salary, per diem or expenses paid in whole or in part out of funds authorized to be expended by the Mississippi State Legislature or by the governing body of any political subdivision thereof, *or any other body politic within the State of Mississippi.*” (Emphasis supplied.)

D. *State Auditing Requirements*, Miss. Code Ann., Sec. 7-7-21 et seq.

As noted *supra*, in Paragraph 21 of its Order, the lower Court concludes that Southern Mississippi Planning and Development District is subject to audit by the State Auditor, a finding completely at odds with the Court’s ultimate finding that Southern Mississippi Planning and Development District is not a “public body.” Since the lower Court relied exclusively on opinions from the Mississippi Ethics Commission and the Mississippi Attorney General, the lower Court was compelled to find that Southern Mississippi Planning and Development District is subject to audit under Sec. 7-7-21 et seq. of the Mississippi Code. The lower Court had no other choice. In an Attorney General’s Opinion dated November 26, 2003, Attorney General Mike Moore wrote and concluded as follows:

“Regardless of the unclear origins of PPDs, there is no doubt as to the continuous character public character of the PPDs’ purposes and functions. As such it is our opinion that Planning and Development Districts are either public entities or instrumentalities of political subdivisions of the state and, as such, are subject to audit by the State Auditor. It is also our opinion that the State Auditor has the power to audit and investigate the financial affairs of PPDs. Miss. Code Ann. Section 7-7-211(f); MS AG Op. Williams (Dec. 20, 1996). Furthermore, PPDs are custodians of public funds and property and therefore subject to demand and suit by the State Auditor in a proper case. Miss. Code Ann. Section 25-1-73; MS AG Op., Bryant (April 11, 1997).” MS AG Op, McLeod (Nov. 26, 2003), 2003 WL 22970530 (Miss. A.G.) (Emphasis supplied.)

The lower Court’s analysis should have ended with the above Attorney General’s Opinion. But, the lower Court actually turns Attorney General Moore’s opinion on its head by finding that since Southern Mississippi Planning and Development District is subject to audit by the State Auditor, there is no need to find that Southern Mississippi Planning and Development District is a public body subject to the Public Records Act or the Open Meeting Laws. (Paragraph 24 of the lower Court’s Order). It is the classic “I win if it’s tails, and you lose if it’s heads.” Thus, despite the clear language of the foregoing Attorney General’s Opinion, recognizing that Planning and Development Districts are either public entities or instrumentalities of political subdivisions, the lower Court uses this very opinion to reach the diametrically opposite decision.

The only other factors relied upon by the lower Court in reaching its decision granting Summary Judgment are the Court’s opinions expressed in Paragraph 21 of its Order that “Southern Mississippi Planning and Development District does not enjoy immunity under the Mississippi Tort Claims Act,” that its employees are not entitled to health insurance offered to

government employees and are not “eligible for participation in the Public Employees Retirement System.” (Hereinafter referred to as “PERS.”) However, the lower Court cites no case law that establishes that these particular factors should have controlled the outcome in this case, nor is there any case law to that effect. Further, their application is not uniform, i.e. coverage under the Mississippi Tort Claims Act does not mandate coverage under PERS or vice versa.

For example, community hospitals, e.g. Forrest General Hospital, are covered under the Mississippi Tort Claims Act, but not under PERS. Sec. 25-11-103(l) of the Miss. Code Ann. limits PERS coverage to “any person legally occupying a position in the state service” which does not include employees of community hospitals. Sec. 11-46-1(i) of the Mississippi Tort Claims Act specifically includes “community hospitals.” Further, the issue as to whether Southern Mississippi Planning and Development District or any other Planning and Development district is covered under the Mississippi Tort Claims Act has yet to be tested in the Mississippi Supreme Court or the Court of Appeals. It is not unreasonable to contemplate that if Southern Mississippi Planning and Development District were to be sued for negligence, its attorneys would raise defenses under the Mississippi Tort Claims Act. In fact, it is Appellant’s position that they would be obligated to do so.

B. Southern Mississippi Planning and Development District Status as a Non-Profit Corporation Does Not Prohibit a Finding that Southern Mississippi Planning and Development District Is a Public Body

Appellant argued below that Southern Mississippi Planning and Development District cannot qualify as a nonprofit corporation because it is a government entity. That certainly would

be true of branches of state government or political subdivisions. However, a public body such as Southern Mississippi Planning and Development District may be a public body without being a branch of government or a political subdivision.

The lower Court concluded that Mr. Kinney does not have standing to challenge the actions of Southern Mississippi Planning and Development District and based its conclusion on Sec. 79-11-55, stating that under this section only the Attorney General, or a director, member, trustee or legal representative of Southern Mississippi Planning and Development District would have such standing. Perhaps, the lower Court mis-cited the statute it was attempting to rely upon or was unaware of changes in Mississippi's law regarding non-profit corporations. But, the present Sec. 79-11-55 pertains only to the conduct of private foundations and is not part of the present Mississippi Nonprofit Corporation Act, Sec. 79-11-101 et seq. Miss. Code Ann.

The argument that because Southern Mississippi Planning and Development District is a non-profit corporation it cannot constitute a public body is based on a false premise. Southern Mississippi Planning and Development District admits as much in its Reply in Support of Motion for Summary Judgment and Motion to Dismiss Or In The Alternative Motion for Summary Judgment at page 8, when it quotes from Attorney General Opinion No. 98-0269 as follows:

“Community hospitals constitute government entities created and owned by counties, municipalities or a combination thereof, pursuant to Section 41-13-15. As such, a community hospital is an ‘entity’ and therefore a ‘person’ authorized to act as a member, and the only member of a nonprofit corporation in Mississippi.”

If one conclusion can be gleaned from the numerous Ethics Commission Opinions and Attorney General Opinions cited to the lower Court in this case, it is the observation by the

Attorney General in MS AG Op. Abbott (Oct. 26, 2001), 2001 WL 1513807 (Miss. A.G.) “... that Districts [Planning and Development Districts] are considered governmental subdivisions for some purposes.” Appellees and the lower Court agree that Planning and Development Districts are public bodies subject to audit by the State Auditor. There is nothing in the case law or in the Nonprofit Corporations Act, *supra*, or the numerous Ethics Commission and Attorney General Opinions which prevents Southern Mississippi Planning and Development District from also being subject to the Public Records Act, the Open Meeting Laws, the Ethics in Government Laws, the Procurement Laws and state laws generally applicable to public officers and state laws regarding the removal of public officers. As with community hospitals, Planning and Developments Districts can be found subject to these specific state laws as public bodies or instrumentalities of government without sacrificing their underlying structure as nonprofit corporations.. In their opinions, Mississippi Attorney Generals have repeatedly found that Planning and Development Districts constitute government entities or public bodies, yet retain their membership and governance structure. In the case of Southern Mississippi Planning and Development District, membership is fifteen (15) county governments and the incorporated municipalities contained with those fifteen (15) counties. In fact, Southern Mississippi Planning and Development District recognized below that while no elected official may be employed by Southern Mississippi Planning and Development District, those same officials may serve on the District’s Board of Directors. See Memorandum Brief in Support of Defendant’s Motion for Summary Judgment and Motion to Dismiss, Or in the Alternative, For Summary judgment, p. 10.

The argument by Appellees below that §79-11-127 Miss. Code Ann. prevents a finding that Southern Mississippi Planning and Development District, Inc. is a public entity because it is a non-profit corporation begs the question. In Opinions cited *supra*, the Attorney General has already found that Southern Mississippi Planning and Development District is a public entity for purposes of public audit. In the MS AG OP Abbot Opinion, the Attorney General finds that planning and development districts are considered “governmental divisions for some purposes.” If a planning and development district is functioning as a public entity, then §79-11-127 should not become a shield preventing a planning and development district from being treated for statutory purposes as a public entity. The courts will look behind labels to determine the real function of a given party, whether an individual or a corporate entity. For example, the Courts look at the “economic reality” to determine employee status under the Fair Labor Standards Act for purposes of overtime payment and other possible benefits. See *Carrell v. Sunland Constr., Inc.*, 998 F. 2d 330, 334 (5th Cir. 1993).

Here, the issue is what is the functional reality pertaining to Southern Mississippi Planning and Development District provides. Appellant submits that at every level it functions as a governmental or public entity. Its sole purpose is to provide for the economic planning and development of governmental entities such as counties and municipalities.

The fact that Planning and Development Districts are governmental entities for some purposes and not for others is consistent with the fact that Mississippi branches of government and political subdivisions are not equally authorized to perform all government acts. See *Mayor and Board of Aldermen, City of Ocean Springs, Mississippi v. Homebuilders Association of*

Mississippi, Inc. et al, 932 So.2d 44 (Miss. 2006).

In *Ocean Springs*, the City adopted an ordinance which authorized the assessment or exaction of “development impact fees” which were calculated to defray cost of capital improvement required to accommodate new land development. The lower Court held that the impact fees were actually unauthorized taxes. They were an assessment for public purposes without individual privilege or benefit to the payor. The Mississippi Supreme Court upheld the analysis provided by the lower Court and stated as follows:

“Because these fees constitute a tax, the municipality must have enabling legislation in order to levy and collect this tax. The municipality has been given no such authority and imposing such fees has stepped outside of its authority.” 932 So. 2d at 60. (¶70)

The fact that the City of Ocean Springs did not have this authority did not eliminate Ocean Springs as a governmental entity.

C. Additional Statutes of the State of Mississippi Recognize Planning and Development Districts As Governmental Agencies

In addition to those statutes cited *supra*, Planning and Development Districts are defined as public agencies in the following three (3) statutes:

Miss. Code Ann. §17-17-305:

“R “Public agency” means any incorporated city or town, county, political subdivision, governmental district or unit, public corporation, public institution of higher learning, community college district, planning and development district, or governmental agency created under the laws of the state.”

Miss. Code Ann. §17-17-501:

“(a) “Applicant” means any person except a public agency applying for a permit to operate and/or construct a commercial

nonhazardous solid waste management facility or commercial hazardous waste management facility. If a public agency applies for a permit and proposes to operate a facility by contract, the contractor shall also be required to file a disclosure statement as described in Section 17-17-503 and the permit board shall evaluate such statement as described in Section 17-17-505.

(b) “Business concern” means any corporation, association, firm, partnership, trust, joint venture or other form of commercial organization.

(c) “Key employee” means any person employed by an applicant in a management capacity and empowered to make operational or financial management decisions with respect to solid waste or hazardous waste management operations of the business concern as determined by the commission, but shall not include employee primarily engaged in the physical or mechanical treatment, processing, storage or disposal of solid or hazardous waste.

(d) “Public agency” means any incorporated city or town, county, political subdivision, governmental district or unit, public corporation, public institution of higher learning, community college district planning and development district or governmental agency created under the laws of the state.”

Miss. Code Ann. §51-39-5:

“(m) “Public agency” means any municipality, county, political, subdivision, governmental district or unit, public institution of higher learning, community college district, planning and development district, or any body politic and corporate or governmental agency created under the laws of the state.”

The following statutes also specifically reference Planning and Development Districts:

Miss. Code Ann. §17-19-1:

“The board of supervisors of each county and the governing authorities of each municipality in the state are authorized and empowered, in their discretion to appropriate and pay such sums as they deem necessary and desirable, out of any available funds of the county or municipality which are not required for any other

purpose, to the planning and development district in which the county or municipality is located.”

Miss. Code Ann. §27-3-52:

“(1) The Department of Revenue shall promulgate rules and regulations setting forth the minimum requirements for which tax assessors and/or their deputy assessors or assistants, appropriate state employees, employees of planning and development districts or other persons may attain certification as an appraiser. The Department of Revenue shall establish and conduct such educational and training programs as may be appropriate to assist such persons in attaining such certification.”

Miss. Code Ann. §57-1-54:

“Nothing in the Mississippi Executive Reorganization Act of 1989 [Laws 1989, Chapter 544] shall be construed to eliminate or change in any manner the duties, functions or operations of the planning and development districts heretofore created by executive order of the Governor.”

Miss. Code Ann. §57-1-67:

“The Mississippi Department of Economic Development, pursuant to contractual agreements with individual planning and development districts, assign field office staff of the department to a planning and development district office. Planning and development district directors may be consulted by the department as any annual work programs for field office staff so assigned and prepared. Any such work programs shall be designed to address issues and projects of mutual interest to the department and districts and to the accomplishment of their respective economic development missions.”

Miss. Code Ann. §57-10-103:

“It is the purpose of this article to promote economic and community development in the State of Mississippi through the planning and development districts in Mississippi by providing assistance for job creation and retention and small business development and to authorize the issuance of state bonds or notes

for funding such assistance.”

Miss. Code Ann. §57-10-505:

“The following words and phrases when used in this article shall have the meaning given to them in this section unless the context clearly indicates otherwise:

(g) “Planning and development districts” means an organized planning and development district in Mississippi.”

Miss. Code Ann. §57-10-507:

“There is hereby established, under the direction of DECD, a program to be known as the Mississippi Small Business Assistance Program for the purpose of making grants to the planning and development districts and qualified entities for their use in providing assistance to small businesses in accordance with this article for the purpose of creating and retaining jobs and small business development.”

Miss. Code Ann. §57-10-515:

“The Planning and development districts and qualified entities are hereby authorized to engage legal counsel, accountants, financial advisors, appraisers, consultants and others as needed in connection with providing assistance to small businesses pursuant to this article, and to charge the costs of these services to the small businesses receiving such assistance or charge the proceeds of such assistance therefor. To the extent required by DECD, such professional services shall be engaged on a statewide program basis.”

Miss. Code Ann. §57-10-505:

“The following words and phrases when used in this article shall have the meaning given to them in this section unless the context clearly indicates otherwise:

(g) “Planning and development districts” means an organized planning and development district in Mississippi.”

“Part III of the economic development plan shall provide a procedure for monitoring the implementation of the state’s economic development efforts. In formulating this procedure, the University Research Center will survey, identify and analyze every government program and private resource and activity that is available to, that is being applied toward, or that contributes to the accomplishment of the goals set in the long range plan. The resources and economic development activities (programs) of state government, local government, federal government and private business shall be identified and analyzed to determine the specific areas in which they contribute to achievement of the overall goals.

The planning and development districts shall be utilized fully in determining the goals established herein and shall be the primary source of information and evaluation as to local and regional economic priorities as well as the identification and reporting of local governments and local and regional private business resources available for the accomplishment of such goals.

Each agency and institution of state government involved in economic development, including the Institute for Technology Development and the state universities and junior colleges, is hereby directed to prepare and submit to the Department of Economic Development, the University Research Center and Legislative Budget Committee work programs covering their economic development activities. The University Research Center shall specify a uniform format for agencies to follow in preparing their work programs. These work programs shall cover in general the next five (5) years of the plan and, in significant detail, the upcoming fiscal year. With each annual work program for the upcoming fiscal year, each agency shall make a full report on accomplishments of its previous year’s work program. Work programs shall be submitted by August 15, 1987, for the fiscal year 1988 by those agencies identified by the Department of Economic Development as being required to submit work programs in accordance with this chapter. Work programs submitted August 15, 1987 shall report on accomplishments of the prior fiscal year’s work in economic development activities. The work program for fiscal year 1989, and for succeeding years, shall be submitted on June 1 prior to the beginning of the ensuing fiscal year. The state

long range plan shall require copies of the overall economic development plans from each of the ten (10) planning and development districts to be submitted annually to the University Research Center along with annual work programs and details of accomplishments of the prior fiscal year's work program. These materials shall be incorporated by reference in Part III of the plan." (Emphasis supplied.)

Miss. Code Ann. §57-79-9:

"The Mississippi Small Town Development Program shall consist of the following:

(b)(ii) Shall be organized by geographically using Mississippi Planning and Development District lines."

The above statutes are consistent with a finding that Planning and Development Districts are public agencies and undercut the lower Court opinion to the contrary.

D. Other Evidence that Planning and Development Districts are Governmental Agencies.

1. The Mississippi Association of Planning and Development Districts Directory recognizes Planning and Development Districts are governmental agencies.

In its directory, Intervenor, Mississippi Association of Planning and Development Districts, (MAPDD) defines the ten (10) planning and development districts as follows:

"The ten Planning and Development Districts were created by local governments in the late 1960s in an attempt to address problems and issues on a multijurisdictional basis. In creating these organizations, technical assistance was provided by the then Office of Federal-State Programs under the administration of Governor John Bell Williams. There also were federal matching grant incentives to the Districts, as well as to the local governments, if they met and maintained certain eligibility criteria, especially in the area of economic development. In 1971, in an attempt to standardize regional economic development and planning boundaries, Governor Williams issued Executive Order 81 designating the Planning and Development Districts as Mississippi's official sub-state regions. This order also designated

the Districts as agencies to provide project notification and review under the U.S. Office of Management and Budget Circular A-95, thus insuring that federally funded projects were in accord with local plans and did not produce duplication. The Planning and Development Districts still play the same basic role, but they are governed by Federal Executive Order 12371 rather than Budget Circular A-95.” (Emphasis supplied.)

Based on the directory furnished by the Mississippi Association of Planning and Development Districts, it should be clear that Intervenor recognizes that planning and development districts are “sub-state regions.” They perform governmental functions. They do not perform all governmental functions, but they perform a specific governmental function and as such constitute public bodies.

2. Financial statement audit report and tax returns establish that SMPDD is a governmental agency.

In its annual Internal Revenue Service tax form 990, Southern Mississippi Planning and Development District, Inc., follows the Governmental Accounting Standards Board (GASB) and not the Financial Accounting Standards Board (FASB). See Exhibit J, audit report of SMPDD IRS 000164. (R. 1557-1564) The audit report states as follows:

“We conducted our audit in accordance with standards generally accepted in the United States of America and the standards applicable to financial audits contained in Government Auditing Standards issued by the Comptroller General of the United States.” (Emphasis supplied). (R. 1557)

Likewise, the tax returns are also illustrative of the exact nature of the SMPDD’s operations and how it reports those operations. See Exhibit H, 2013 tax return Form 990. (R. 1430-1547).

A. It made a profit of \$1,788,518 in 2012 and \$967,803 in 2013 (IRS 00001,

part 1, line 19). (R. 1430).

- B. Family members of former or current officers and directors were employed by SMPDD (Part IV, line 28B). (R. 1470).
- C. An officer or director had a family or business relationship with other officers or directors or key employees (Schedule L; R. 1457-1458, D2).
- D. It maintained cash assets consisting of public monies in the amount of \$14,864,516.00 (Part X, Lines 1 and 2). (R. 1478).
- E. It owned land, buildings and equipment which cost at least \$2,381,130.00 (Part X, line 10A). (R. 1478).
- F. It had other assets of \$772,107 (Part X, line 15). (R. 1478).
- G. It held total assets of \$22,076,299.00, with net assets of \$22,076,299.00 (Part X, lines 16 and 34). (R. 1478).
- H. All of its revenue was from government (99.96%) (Schedule A, Part 1, line 7 and Part II, Section C, line 14). (R. 1480-1481).

Finally, as noted *supra*, the Lower Court found that Southern Mississippi Planning and Development District, Inc. is subject to audit by the state auditor and goes into “executive session” in accordance with the provisions of Section 25-4-7 of the Mississippi Code of 1972, as amended which governs closing of a public body’s meetings to conduct “public business.” These statutes are only applicable to public bodies. (Section 25-41-3(a)):

“(a) “Public body” means any executive or administrative board, commission, authority, council, department, agency, bureau or any other policy-making entity, or committee thereof, of the State of Mississippi, or any political subdivision or municipal corporation

of the state, whether such entity be created by statute or executive order, which is supported wholly or in part by public funds or expends public funds, and any standing, interim or special committee of the Mississippi Legislature. The term “public body” includes the governing board of a charter school authorized by the Mississippi Charter School Authorizer Board. There shall be exempted from the provisions of this chapter...”

As referenced *supra*, the SMPDD, according to its Bylaws (Exhibit O; R. 1585-1594), adopted by its members including Harrison County, of which Plaintiff is a taxpayer (Exhibit A; R. 1293), can assess each county on an annual basis. See Exhibit N, which is an excerpt of the accounts of Harrison County obtained by Plaintiff pursuant to a public records request. It can be seen that in 2013 Harrison County made a “dues” payment to the SMPDD in the amount of \$46,776.25 and made a total payment to this governmental entity in the amount of \$222,573.11. (R. 1582-1584).

The lower Court failed to address the statutes cited by Appellant *supra* and filed to address the affidavit and numerous supporting documents submitted by Appellant including the following:

- A. Deposition of Lynn Cartlidge (R. 1294- 1395);
- B. The Affidavit of Henry W. Kinney (R. 1412 - 1414);
- C. Mississippi Planning and Development District’s 2012 Directory (R. 1417 -1426);
- D. Southern Mississippi Planning and Development District, Inc.’s 2011, 2012 and 2013 tax returns (R. 1430 - 1546) ;
- E. Southern Mississippi Planning and Development District, Inc.’s 2012 Conflict of Interest Policy (R. 1556);
- F. Audit Report, dated January 25, 2013 (R. 1557 -1564);

- G. Media Reports regarding Bentz appointment (R. 1565 - 1578); and
- H. Bylaws of Southern Mississippi Planning and Development District, Inc. (R. 1585 - 1594)

It is significant that the Court failed to analyze any of the foregoing documents although many pertain to the very issue before the Court, i.e., whether Southern Mississippi Planning and Development District, Inc. is indeed a public entity.

II. THE DEPOSITION OF LYNN CARTLIDGE SUPPORTS A FINDING THAT SOUTHERN MISSISSIPPI PLANNING AND DEVELOPMENT DISTRICT, INC. IS A PUBLIC BODY

The deposition testimony of Lynn Cartlidge was introduced below in support of Appellant's opposition to the motions for summary judgment. Mr. Cartlidge himself is a government appointee, first by virtue of his having served concurrently as a supervisor and as a SMPDD Board member (R. 1306, lines 21-24) and then as a nominee, not an appointment, of the Workforce Agency (R. 1307, lines 1-4). The Workforce Agency itself does not appoint members to the Board but only the "... local elected officials of the Workforce Board of the fifteen county area... for the terms of the county/elected officials." Cartlidge confirmed the authenticity of the Bylaws attached to his affidavit as Exhibit A-3 as having been adopted or signed on February 9, 2011 (R. 1311-1312). Cartlidge further confirmed that the only members of SMPDD were the fifteen member counties and the incorporated municipalities:

- "A. Well, all counties and cities are part of the district, but they don't all serve on the board.
- Q. Doesn't this document say that the members of the corporation are the 15 counties and the incorporated municipalities thereof?

A. That is what it says. It says what it says. (R. 1317).

Subsequently, Cartlidge confirmed the counties and municipalities are annually taxed or assessed by the SMPDD and those government entities pay Plaintiff's and others tax dollars in support of SMPDD.

“Q. Well, let's talk about Article 2, Section 2, No. 2. The South Mississippi -- does the South Mississippi Planning and Development District assess annual dues on the counties and municipalities?”

A. They do.

Q. And those are paid by the counties and municipalities?

A. That's correct.

Q. Okay. And they do that with public funds?

A. They do.

Q. All of the board members that serve do so concurrently with the election cycle; is that accurate?

A. Yes I believe that is correct.” (R. 1320-1321).

Cartlidge cannot and did not testify as to who were the original incorporating counties nor who were the original members of the SMPDD.

“Q. Is it accurate to say that you were not involved with the SMPDD in 1966 when it was incorporated?”

A. Yes, sir. No, sir I was not involved.

Q. Okay. Do you know when it was actually formed as an entity itself?

A. Other than it is stated in 1966.

- Q. Yes sir.
- A. Then it was reorganized again later. I forgot when it was.
- Q. I'm going to ask you to look at Document 00008. And I'm going to direct you to the middle of that after the words South Mississippi Economic Development District it says "Unanimously approved by the membership thereof on November 3rd, 1966." Do you know if the membership in 1966 was the same as the membership in 2011?
- A. I do not.
- Q. Do you know if there was membership in the organization in 1966?
- A. Did I what?
- Q. Do you know if there was membership in the organization --
- A. No, sir. Only what this said. I read what this said. That's all.
- Q. Let me finish just so the question is complete. Do you know if there was membership of the organization in 1966?
- A. Only thing I know if what I read here.
- Q. Okay. Thank you. And I'm going to direct your attention to the next page, which is 00009?
- A. Okay.
- Q. And I'm going to ask to you look at No. 4. Do you see the words "no member of the corporation", that term?
- A. I see it says "Is a nonprofit and no shares of stock this corporate established is a nonprofit corporation." Is that what you asked?
- Q. Yeah. And the remainder of that sentence.

A. "No shares of the stock shall be issued."

Q. "And no member"?

A. "Of the corporation shall receive any profit from the operation".

Q. Do you have any knowledge about the membership in 1966? That is a question I have asked and I apologize for repeating it.

A. No, I don't know nothing about them." (R. 1331-1333).

Cartlidge confirms that the Charter dictates that the Bylaws determine membership:

"Q. Is it your understanding that according to Article 6 of the charter, which is at the top, that the membership of the corporation is to be determined by the bylaws? And that's the -- and I would direct you to the first sentence of the second paragraph.

A. That is what it says.

Q. So is it accurate to say that the bylaws determine who's a member?

A. Yes, sir." (R. 1334).

Cartlidge confirmed Bentz's salary as appeared in the media and added he also was given an automobile (R. 1345, lines 7-11). Cartlidge, after serving on the Board for thirty-five years, was unable to recall if the SMPDD had ever adopted a conflict of interest policy.

Cartlidge testified that Leonard Bentz was hired as the executive director, and approved by the Board while his father continued to serve on the Board of Directors. He was serving on the Board despite the fact that the Board member(s) had knowledge that Bentz, Jr. was applying for the job (R. 1381, lines 12-18; R. 1353, lines 1-25, and R. 1354, lines 10-130).

The executive sessions that are used by the SMPDD are the same “executive sessions” Mr. Carlidge used while he served on the Forrest County Board of Supervisors (R. 1358, lines 23-25 and R. 1359, lines 1-8).

Lastly, Mr. Carlidge confirmed the source of the SMPDD’s funding:

“Q. Does the SMPDD received public funds?

A. Well, I don’t know what all is considered public funds. Is that some individual giving some money to it or is that a county or city or - -

Q. Well, that’s a fair question. Does it receive money from any county, the city or the state?

A. The dues and - -

Q. Does it receive - - go ahead.

A. Well, dues from the counties and cities and I’m sure through the state through grants, but how those grants come about and different monies we get from the Federal Government and Hood and all those other agencies, you know. It’s just part of the planning and development districts and receive those monies to help people, you know.

Q. From the state or counties or the cities?

A. All of it. All monies put in separate funds for different budgets, you know, grants that we received kept those minorities, not only minorities, people that get in business and need some help when credit is kind of bad, and to help train people that lose their jobs and train them where they can take on another job, a lot of things, medical assistance to child support and education training. You know, and we do a lot of good for a lot of different areas and do a lot of work for the cities and counties redistricting and they pay fees, you know, for their different departments of planning an development district, not only Southern Mississippi but

all 10 of them. They do planning and development and every 10 years they have to draw ne lines, you know, for new supervisors and other elected official district lines and go out and maps and planning, get grants for the police department and fire departments. You know, a lot of good things and various funds available for that.”(R. 1371-1372)

III. THE LOWER COURT ERRED IN DENYING APPELLANT’S MOTION FOR RECUSAL.

Appellant Henry W. Kinney filed a Motion for Recusal, requesting that Chancellor Steckler recuse himself in this matter.³ Appellant’s Motion was supported by his own Affidavit as well as transcripts of the hearing held before Judge Steckler on April 15, 2014 and a status conference held before Judge Steckler on June 11, 2014. Appellant’s Motion was based on the fact that the Chancellor’s wife serves on the Board of the Heritage Trails Partnership of the Mississippi Gulf Coast and is the Executive Director of the Land Trust of the Mississippi Coastal Plain. From comments made by Chancellor Steckler at the April 15, 2014 motion hearing and the June 11, 2014 status conference, it appeared that Judge Steckler would be reluctant to rule in favor of Appellant. Judge Steckler’s statements indicated that he had formed an opinion regarding the merits of Appellant’s case, despite the fact that the case had not been submitted to Judge Steckler.

Also, Appellant set forth in his Affidavit that he had been contacted by two (2) Board members of the Heritage Trails Partnership and was asked to serve on the Board of Directors of

³Appellant filed a Petition to Review pursuant M.R.A.P. 48B and the Supreme Court entered its Order denying Plaintiff’s Petition on October 13, 2014 (R. 1203). Having complied with the requirements of Rule 48B, Appellant asks this Court to reconsider this issue as part of his direct appeal from the Chancellor’s Order granting summary judgment.

that organization. When Appellant later contacted one of the aforementioned Board members on or about June 28, 2014, he was informed that the Chancellor's wife had personally opposed the service of Mr. Kinney on the Board of Directors on the basis that Mr. Kinney "was contentious and controversial." (R. 800).

Ultimately, the lower court entered two (2) orders as a result of Appellant's Motion: Order Granting Motions *In Limine* (R. 1079-1080) and Opinion and Order Denying Motion to Recuse (R. 1081-1092).

The Order Granting Motions *In Limine* denied Appellant's request that the Chancellor's wife, Judy Steckler, be made available for testimony at the hearing on the Motion for Recusal.

As noted *supra*, the Court entered a separate Opinion and Order Denying Motion to Recuse.

In *Mississippi United Methodist Conference v. Brown*, 929 So. 2d 907 (Miss. 2006), the Mississippi Supreme Court held that the Circuit Judge's "comments and actions demonstrate that she cannot remain impartial in the case at bar." *Brown* at 910 (¶15). In discussing recusal of a trial judge, the Mississippi Supreme Court in *Brown* stated that recusal is required "where the Judge's conduct would lead a reasonable person, knowing all of the circumstances, to conclude that the 'prejudice is such a degree that it adversely affects the client.'" *Brown* at 909 (¶6).

Certainly, Appellant recognizes that the statements, even statements of bias or prejudice, expressed by a Judge's wife cannot automatically be imputed to a sitting judge. See *Washington Mutual Finance Group, LLC v. Blackmon*, 925 So. 2d 780, 793 (¶51) (Miss. 2004). However, in this case, it is apparent from comments by Judge Steckler that he possessed a basic scepticism

towards Appellant's lawsuit. Judge Steckler's references to the fact that his wife held positions with two (2) non-profit organizations, reflect his basic bias against Mr. Kinney's lawsuit. They reflect his underlying negative attitude.

Given Judge Steckler's comments, Mr. Kinney had little, if any, chance of prevailing. Appellant does not challenge Judge Steckler's decision not to allow Appellant to elicit testimony by the Judge's wife at the hearing regarding recusal. That testimony was not necessary. Judge Steckler expressed his own bias, independent of any opinions held by Judy Steckler.

Despite ultimately rejecting the substance of Mr. Kinney's Motion for Recusal, Judge Steckler in his Opinion and Order Denying Motion to Recuse states that Mr. Kinney's Motion could have been dismissed because he filed the Motion through M.E.C. rather than filing it directly with Judge Steckler. Nevertheless, despite making this observation, Judge Steckler ruled on the merits of Mr. Kinney's Motion.

Appellant will address this technical objection to his Motion for Recusal in the event that the Lower Court's comment might negatively impact Appellant's Motion. Rule 16A of the Mississippi Rules of Civil Procedure states that motions seeking recusal of judges shall be governed by procedure set forth either in the Uniform Rules of Circuit and County Court Practice, or, as in this case, the Uniform Rules of Chancery Court Practice. Both Rule 16A and the Uniform Rules of Chancery Court Practice employ language to the effect that Motions for Recusal shall be "filed with the trial judge." However, as approved by this Court, the Harrison County Chancery Court operates within the Mississippi Electronic Courts (M.E.C.) filing system. Rule 5(b)(2) specifically states as follows:

“Electronic Court System Service: How Made. Where a court has, by local rule, adopted the Mississippi Electronic Court System, service which is required or permitted under these rules shall be made in conformity with the Mississippi Electronic Court System procedures.”

Under the Mississippi Electronic Courts Administrative Procedures, Section 5, the only documents which are mandated not to be filed under the Court’s electronic notice facilities are “sealed cases.” Under Section 5A4, motions for recusal are not exempted from electronic filing. Section 5A4 specifically identifies commitment proceedings, adoption proceedings, youth court proceedings, expungements and petitions for waiver of consent to abortion as “sealed cases.” Motions for recusal are not listed under Section 5A4. Filing a recusal motion through M.E.C. is in effect filing with the trial judge, just as filing through the M.E.C. constitutes service on a party or a party’s attorney under Rule 5 M.C.R.P.

IV. THE LOWER COURT ERRED BY GRANTING INTERVENTION TO MISSISSIPPI ASSOCIATION OF PLANNING AND DEVELOPMENT DISTRICTS

The lower court granted the Motion to Intervene filed by Mississippi Association of Planning and Development Districts pursuant to Rule 24(a)(2) of the Mississippi Rules of Civil Procedure, as a matter of right. Appellant submits that the lower court erred in granting intervention to Mississippi Association of Planning and Development Districts, whether as a matter of right or as permissive intervention under Rule 24(b).

Intervention as a Matter of Right

Under Rule 24(a) anyone may intervene as a matter of right where a statute confers an unconditional right to intervene or when the applicant claims an interest relating to the property

or transaction and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Appellant does not challenge the timeliness of the Motion to Intervene filed by Mississippi Association of Planning and Development Districts.

Here, Mississippi Association of Planning and Development Districts failed to show that as a separate entity, Mississippi Association of Planning and Development Districts had a legally protectable "interest" in Mr. Kinney's lawsuit. Also, MAPDD failed to show that its "interest" could not be "adequately represented" by the original Defendant, Southern Mississippi Planning and Development District, Inc.

Mississippi Rule 24 is patterned after Rule 24 of the Federal Rules of Civil Procedure and thus it is instructive to look at both state and federal cases in determining whether or not the lower court should have granted intervention to Mississippi Association of Planning and Development Districts. In determining whether or not an applicant has an actual interest in the subject litigation, courts have held that the movant must show that it has "a direct, or substantial, legally protectable interest in the action, meaning that the interest be one which the substantive law recognizes as belonging or being owned by the applicant." See *In Re: Lease Oil Anti-Trust Litig.*, 570 F. 3d 244, 250 (5th Cir. 2009), also see *Burgess v. City of Gulfport*, 814 So. 2d 149, 153 (¶15) (Miss. 2002) (Citizens had no "colorable interest" in the subject matter of the litigation.)

Appellant's lawsuit was not directed at any aspect of MAPDD as an entity unto itself.

Any claim of interest by MAPDD is derivative with MAPDD claiming that it is the “representative organization” of the ten (10) planning and development districts in Mississippi. However, MAPDD cannot show that its interest is such that MAPDD itself “will either gain or lose by the direct legal operation and effect of the judgment.” *Defenders of Wildlife v. Jackson*, 284 F.R.D. 1, 6 (D.D.C. 2012) affirmed in part, appeal dismissed in part sub nom. See *Defenders of Wildlife v. Perciasepe*, 714 F. 3d 1317 (D.C. Cir. 2013).

Assuming that the lower court had found that Southern Mississippi Planning and Development District, Inc. was a public agency, the Mississippi Association of Planning and Development Districts would not have gained or lost any legal right as a result of such a judgment. MAPDD would still be in a position in which it could continue to support both Southern Planning and Development District, Inc. as well as the additional nine (9) planning and development districts represented by MAPDD. As noted *supra*, finding that planning and development districts are public agencies would not necessarily change their structure as nonprofit corporations or the structure of their governing bodies. Planning and development districts are already “public agencies” for purposes of state audit and only governmental officials are eligible to serve on their governing boards.

Further, in terms of intervention as a matter of right, MAPDD failed to show that its “interest” could not be adequately represented by the original Defendant, Southern Mississippi Planning and Development District, Inc.

In *Bush v. Viterna*, 740 F. 2d 350, 355 (5th Cir. 1984), the Fifth Circuit Court of Appeals stated where a “party seeking intervention has the same ultimate objective as the party to the suit,

a presumption arises that its interests are adequately represented, against which the petitioner must demonstrate adversity of interests, collusion, or non-feasance.” There was no argument below based on adversity of interests, collusion or non-feasance. Further, the lower court failed to find that there was any factual basis to conclude that South Mississippi Planning and Development District could not adequately represent the interest of MAPDD or that their claims or defenses were different in any respect whatsoever. Further, a review of the record below clearly establishes that MAPDD failed to take any position that was different from Southern Mississippi Planning and Development District or even elaborated or amplified positions taken by Southern Mississippi Planning and Development District. The lower court could point to not one (1) issue in which there was a difference between MAPDD and Southern Mississippi Planning and Development District.

Permissive Intervention

Rule 24(b)(2) allows permissive intervention when the perspective intervenors claim a defense and the main action involves common questions of law or fact. The decision to permit intervention pursuant to Rule 24(b) is left to the sound discretion of the district court. See *Bush*, 740 F. 2d at 359.

In this case, the lower court, having granted intervention as a matter of right, did not discuss permissive intervention. However, Appellant would submit that had the lower court rejected intervention as a matter of right, permissive intervention would not have been a viable alternative. One of the key factors under Rule 24(b) is “whether the intervention will unduly delay or prejudice the adjudication or the rights of the original parties.” There can be little

question that in this case, Appellant's right to adjudicate the issues he brought before the lower court was prejudiced by the addition of Mississippi Association of Planning and Development Districts. While MAPDD essentially brought nothing new to the Court, in terms of the development of the issues before the Court and took no position different from that of Southern Mississippi Planning and Development District, the mere presence of MAPDD required Plaintiff to respond to additional briefs, arguments, motions and other proceedings which made the case more difficult in terms of time and expense. See *Bush* at 359. Again, considering the fact that Mississippi Association of Planning and Development Districts was adequately represented by Southern Mississippi Planning and Development Districts, there would have been no basis for permissive intervention had the lower court considered the same.

CONCLUSION

Appellant submits that this Honorable Court should reverse the decision of the Lower Court and find that South Mississippi Planning and Development District is a public agency subject to Mississippi's Public Records Act, the State's procurement laws, Mississippi's Open Meetings laws and Ethics in Government laws, Mississippi laws regarding the salaries and compensation of public officials and laws pertaining to the removal of office holders from public office, the Lower Court having acknowledged that South Mississippi Planning and Development District is subject to laws regarding auditing by the State Auditor.

Alternatively, Appellant requests that this Court reverse the Lower Court's decision and remand this case for a full trial on the merits.

Respectfully submitted,

s/MICHAEL ADELMAN, ESQ.

MICHAEL ADELMAN, ESQUIRE
ADELMAN & STEEN, L.L.P.
POST OFFICE BOX 368
HATTIESBURG, MS 39403-0368
(601) 544-8291; (601) 544-1421 (FAX)
MS BAR NO. 1153

COUNSEL FOR APPELLANT,
HENRY W. KINNEY

CERTIFICATE OF SERVICE

This is to certify that I, Michael Adelman, attorney for Appellant, Henry W. Kinney, have served the above and foregoing **BRIEF OF APPELLANT, HENRY W. KINNEY** *via* using this Court's MEC system, in which notification will automatically be provided to the following counsel of record:

Hugh D. Keating, Esq.
Je'Nell Blum, Esq.
Dukes, Dukes, Keating & Faneca, P.A.
Post Office Drawer W
Gulfport, MS 39502

James W. Herring, Esq.
Herring, Long & Crews, P.C.
Post Office Box 344
Canton, MS 39046

Further, I hereby certify that I have mailed *via* the United States Postal Service the document to the following:

Honorable Sanford R. Steckler
Post Office Box 659
Gulfport, MS 39506

This, the 26th day of October, A.D., 2015.

s/MICHAEL ADELMAN, ESQ.

MICHAEL ADELMAN, ESQUIRE
ADELMAN & STEEN, L.L.P.
POST OFFICE BOX 368
HATTIESBURG, MS 39403-0368
(601) 544-8291; (601) 544-1421 (FAX)
EMAIL: adelst33@aol.com
MS STATE BAR NO. 1153

ATTORNEY FOR PLAINTIFF, HENRY W. KINNEY