IN THE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

THE MISSISSIPPI FREE PRESS AND NICK JUDIN	**APPELLANTS**
v.	**NO. 25CH1:23-cv-00041 G2023-041 T/1**
THE MISSISSIPPI HOUSE OF REPRESENTATIVES, SPEAKER PHILIP GUNN, AND THE HOUSE REPUBLICAN CAUCUS OF THE MISSISSIPPI HOUSE OF REPRESENTATIVES.	**APPELLEES**

BRIEF OF APPELLANTS

I. INTRODUCTION

This case is a de novo appeal brought pursuant to Miss. Code 25-41-15 from a decision of the Mississippi Ethics Commission in response to an Open Meetings Act (OMA0 complaint of the Mississippi Free Press (MFP) and MFP reporter Nick Judin. The MFP and Judin complained that the House Republican Caucus violated the OMA by preventing Judin and all members of the press and public from attending Caucus meetings. The Commission described their claim, which was contained in an original complaint and a supplemental complaint, as follows:

> The supplemental complaint incorporates all the allegations of the original complaint and explicitly alleges "the Caucus's membership is composed of a majority of the members of the Mississippi House of Representatives, which is a public body, and these meetings contain a quorum of the House. The meetings include discussions and deliberations regarding legislation coming before the Mississippi House of Representatives." The supplemental complaint also quotes a news story from a separate publication alleging "'[t]he weekly closed-door Republican caucus meetings are usually the first place rank-and-file House Republicans are informed of details about major policies that Gunn and a handful of other House leaders determine privately. In the caucus meetings, Gunn asks the group of Republicans for support.'"

[Doc. 4 at 86 (Admin. Rec., Ethics Commission Final Order of Dismissal at 1)].

Although the hearing officer concluded that the Mississippi House of Representatives was a "public body" under the Open Meetings Act and that any Caucus meetings containing a quorum of the House that discussed legislation should be open under the Act, the Ethics Commission itself dismissed the complaint and the supplemental complaint by deciding that the Mississippi House of Representatives did not meet the definition of a "public body" in the Act. [Doc. 4 at 78-84 (preliminary report and recommendation); 86-90 (final order of dismissal)]. Accordingly, the Commission concluded that the Caucus was not covered under the Act even when a quorum of the members of the House gathers in a Caucus meeting and discusses legislation.[1]

This appeal follows. Section 25-41-15 specifically provides that "[i]n any such appeal the chancery court shall conduct a de novo review." Because the appeal is de novo, this brief will not address the Ethics Commission's reasoning but instead will discuss the issues anew. These are all issues of law and therefore no evidentiary hearing is necessary.[2]

As explained in the remainder of this brief, the House of Representatives is a public body under the OMA because it is a "policymaking entity . . . of the State of Mississippi," Miss. Code § 25-41-3(a) (1972), and when a quorum of the House gathers in Caucus meetings and discusses matters "that lead to formation and determination of public policy," the meetings "are required to be open to the public." *Mayor of City of Columbus v. Commercial Dispatch*, 234 So. 3d 1236, 1239 (Miss. 2017) (*quoting Hinds Cty. Bd. of Supervisors v. Common Cause of Mississippi*, 551

[11] The Commission also ruled that the Caucus itself was not a "public body" under the Act. The Appellants had never contended it was. Instead, their complaint was that the House itself was a "public body" and that when the Caucus meetings contained a quorum of the House, the OMA required that they be open to the public and the press.

[2] We have labeled this document as the "Brief of Appellants" since this case is here on an appeal from the Ethics Commission. But if the Court believes that, due to the requirement of de novo review, it should be treated more like an original civil case, we request that this be considered a motion for summary judgment.

So. 2d 107, 110 (Miss. 1989)). It follows, of course, that if the Caucus meetings contain less than a quorum of the House, or if they are purely social events that discuss no legislation or other public business, they need not be open. But the issue in this appeal is whether they must be open when they contain a quorum and discuss public business.

This brief first discusses whether the House is a "public body" under the OMA and then addresses whether the Caucus meetings are "meetings" as defined in the OMA.

II. THE HOUSE OF REPRESENTATIVES IS A PUBLIC BODY

a. The House is a Policymaking Entity that Falls Within the Definition of Public Bodies

The Open Meetings Act defines "Public Body" as "any executive or administrative board, commission, authority, council, department, agency, bureau, or *any other policymaking entity*, or committee thereof, of the State of Mississippi, or any political subdivision or municipal corporation of the state, whether the 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." Miss. Code § 25-41-3(a) (1972). (emphasis added).

The issue is whether "executive or administrative" modifies "any other policymaking entity." A prepositive modifier, such as "executive or administrative," applies to the entire series only where the items in the series have a parallel construction. BLACK'S LAW DICTIONARY 1574 (Bryan A. Garner Ed., 10th 2009). When the statutory language includes a repeated determiner before subsequent elements or phrases, that determiner signals a break in the series. Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 148 (2012) ("The typical way in which syntax would suggest no carryover modification is that a determiner (a, the, some, etc.) will be repeated before the second element.") (*citing*

United States v. Pritchett, 470 F. 2d 455, 459 (D.C. Cir. 1972)). Here, the determiner "any" is repeated before the phrase "other policymaking entity": "*any* executive or administrative board, commission, authority, council, department, agency, bureau, or *any* other policymaking entity." MISS. CODE § 25-41-3 (1972). (Emphasis added). Thus, while "executive or administrative" modifies "board," "commission," "authority," "council," "department," "agency," and "bureau," it does not modify "other policymaking entity."

Had the Legislature intended otherwise, it would not have inserted the second "any" in the definition, leaving the statute to govern only "any executive or administrative board, commission . . . or other policymaking entity." But the Legislature did insert the second "any," thus indicating that "executive or administrative" does not modify "other policymaking entity."

Courts have applied this syntactic rule to similar statutory provisions. The court in *Oxbow Construction v. Eighth Judicial District Court* did so when interpreting the definition of "constructional defect" in a Nevada statute. 335 P.3d 1234, 1241 (Nev. 2014). The statute defined "constructional defect" as "a defect in the design, construction, manufacture, repair or landscaping of a new residence, of an alteration of or addition to an existing residence, or of an appurtenance and includes, without limitation, the design, construction, manufacture, repair or landscaping of a new residence, of an alteration of or addition to an existing residence, or of an appurtenance." Nev. Rev. Stat. 40.615. The question before the court was whether an appurtenance had to be "new" under the statutory definition—that is, whether "new" modified any element in the phrase other than the word it directly preceded. The court held that it did not.

> [I]n NRS 40.615, "new" only precedes "residence," raising the question of whether it modifies any other elements in the phrase. "The typical way in which syntax would suggest no carryover modification is that a determiner (*a, the, some,* etc.) will be repeated before the second element. . . ." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 148 (2012). Applying this syntactic rule to NRS 40.615, the determiner "a/an" is repeated before each subsequent element; i.e., "a new residence, an

> alteration of or addition to. . . , or . . . an appurtenance." Accordingly, while "new" modifies "residence," it does not modify "alteration," "addition," or "appurtenance."

Id. at 1241.

In *United States ex rel. Vaughn v. United Biologics, L.L.C.*, the Fifth Circuit noted that the "typical way to break the series is to insert a determiner." 907 F.3d 187, 195 (5th Cir. 2018). The court held that the Legislature's inclusion of the determiner "their" in a False Claims Act provision signaled the prepositive modifier did not modify both elements of the provision. The provision at issue in *Vaughn* stated: "The [FCA] action [brought by the relator] may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." United argued that the modifier "written" applied to both "consent" and to "reasons for consenting," so it was entitled to a written explanation for the consent the relators' motion received. The Fifth Circuit disagreed, calling United's proposed reading "incorrect and awkward," and finding that the attachment of "their" to "reasons" made clear that "written" was intended to modify only "consent" and not "reasons." *Id.*

Courts have applied that same rule to postpositive modifiers, and have confirmed that "any" is a determiner that can signal a break in the series. *See, e.g., Teva Pharmaceuticals USA, Inc. v. Sandhu*, 291 F. Supp. 3d 659, 673 (E.D. Pa. 2018) (noting that when a "determiner, such as 'any,' is repeated at the beginning of the second series, the syntax suggests that the postpositive modifier does not operate to modify both series," and also stating that "appearing a second time in the definition, 'any' signal[ed] the beginning of a second series.").

The OMA's definition of "public body," in which the determiner "any" is repeated, is subject to the same construction. Thus, "executive or administrative" does not modify "other policymaking entity."

The legislative purpose set out in Section 25-41-1 confirms our reading. The Mississippi Supreme Court has relied on this statement of purpose in its cases interpreting the OMA, declaring "openness in government" to be the "public policy of this State." *Mayor & Alderman v. Vicksburg Printing & Publ'g Co.*, 434 So.2d 1333, 1336 (Miss. 1983). Thus, "while the exceptions to the statute are to be construed narrowly, the statute is to be construed liberally to keep public meetings open." *Gannett River States Publ'g Corp., Inc. v. City of Jackson*, 866 So.2d 462, 469 (Miss. 2004). Under a liberal construction, and as already explained, the words "executive or administrative" do not modify or limit "any other policymaking entity . . . of the State of Mississippi."

Because the House is plainly a policymaking entity of the State of Mississippi, it is a "public body" covered by the Open Meetings Act. Accordingly, the House Republican Caucus meetings must be open if they contain a majority of the House members and therefore constitute a quorum.

b. <u>Section 25-41-7 Supports a Reading of Section 25-41-3(a) That Includes the House of Representatives</u>

The OMA provides for certain circumstances under which public bodies can hold closed meetings ("executive sessions"). Those circumstances include "[a]ny body of the Legislature which is meeting on matters within the jurisdiction of that body." Miss. Code § 25-41-7(4)(e) (1972). Of course, the primary bodies of the Legislature are the House and the Senate. If the OMA did not cover the House and the Senate, that exception likely would have read "any *committee* of the legislature." The use of the words "[a]ny body of the Legislature" confirms that that OMA includes the House.

According to rules of statutory construction, the provisions of a text should be interpreted in a way that renders them compatible, not contradictory. Scalia & Garner, READING LAW

180 (Harmonious-Reading Canon). Justice Antonin Scalia and his co-author Bryan Garner observe that this imperative is "more categorical than most other canons of construction because it is invariably true that intelligent drafters do not contradict themselves." *Id.* Thus, the language in Section 25-41-7(4)(e) identifying "[a]ny body of the Legislature" as the relevant entity—not just committee of the Legislature"—supports a broader reading of Section 25-41-3 that includes the House. This more expansive reading would ensure these two provisions of the OMA are consistent in both meaning and scope.

III. WHEN THE HOUSE REPUBLICAN CAUCUS CONVENES AND DISCUSSES PUBLIC POLICY, THE GATHERING CONSTITUTES A "MEETING"

The OMA defines "meeting" as "an assemblage of members of a public body at which official acts may be taken upon a matter over which the public body has supervision, control, jurisdiction, or advisory power . . . ." MISS. CODE § 25-41-3 (1972). The Mississippi Supreme Court has interpreted this definition expansively, holding that it covers "all the deliberative stages of the decision-making process that lead to formation and determination of public policy." *Bd. of Trustees*, 478 So. 2d at 278 (quotation marks omitted). Only "purely social"[3] or "impromptu"[4] meetings are exempted from the Act. *See id.*; *Gannett River States Publ'g Corp.*, 866 So. 2d at 469. If the Caucus has a purely social gathering, it need not be a "meeting" under the OMA. But if the gathering includes discussions of public policy, it would be.

a. <u>Because the House Republican Caucus May Perform "Official Acts," Its Meetings Are Covered by the Open Meetings Act.</u>

[3] The court in *Board of Trustees* found that a luncheon between the Board and the student body presidents of the colleges and universities was not a purely social affair, pointing to the fact that a written program was distributed and that discussions were conducted that pertained to "formation of public policy." 478 So.2d at 278. A meeting of the House Republican Caucus, by the court's definition, would not be a "purely social" gathering.

[4] The court in *Gannett River States Publishing Corp.* provided an example of an impromptu meeting: "the Jackson City Council might decide to charter a bus to take all of them, but only them, to a college football game out of town. On that trip, the bus driver might ask them when some topic will be heard by the council. A short exchange might follow between the council members before the topic turns to something else." 866 So. 2d at 469. A meeting of the House Republican Caucus is hardly analogous to the court's example of a brief, spur-of-the-moment interaction.

The Mississippi Supreme Court has interpreted "official acts" to include any "action relating to formation and determination of public policy." *Bd. of Trustees*, 478 So. 2d at 278. It has also indicated that the body is not required to vote at the meeting for it to be subject to the Act. *See, e.g., Mayor of City of Columbus v. Commercial Dispatch*, 234 So. 3d 1236, 1241 (Miss. 2017) (holding two subquorum gatherings of the Columbus City Council were meetings subject to the Act because "[t]he gatherings were for the express goal of discussing city business," even though neither meeting involved taking votes). In fact, the court's interpretation of "official acts" is so broad that only "purely social functions" are exempted from the Act's provisions. *Bd. of Trustees*, 478 So. 2d at 278. Meetings of the House Republican Caucus generally are not "purely social events"—rather, they are "assemblage[s] of members of a public body," during which acts "relating to formation and determination of public policy" occur. *Id.* Accordingly, House Republican Caucus meetings are subject to the OMA except for any that are purely social.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, this Court should hold that all meetings of the House Republican Caucus that include a quorum of the membership of the Mississippi House of Representatives and that are not purely social must comply with the Open Meetings Act be open to the press and the public.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing was filed on MEC, which served copies on all counsel of record, this 10th day of September, 2023.

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