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 Attorneys Defendant/Appellee  
 Sun Lakes Homeowners Association #1, Inc.

**IN THE COURT OF APPEALS**

**IN AND FOR THE STATE OF ARIZONA**

**DIVISION ONE**

COLETTE McNALLY,	)	Case No. 1 CA-CV 15-0744
	)	
Plaintiff/Appellant,	)	Maricopa County Superior Court
	)	Case No. CV2014-009496
v.	)	
	)	<b>DEFENDANT/APPELLEE</b>
SUN LAKES HOMEOWNERS ASSOCIATION	)	<b>SUN LAKES HOMEOWNERS</b>
#1, INC., an Arizona non-profit	)	<b>ASSOCIATION #1, INC.'S</b>
corporation,	)	<b>RESPONSE TO</b>
	)	<b>PLAINTIFF/APPELLANT'S MOTION</b>
Defendant/Appellee.	)	<b>TO EXPEDITE APPEAL PURSUANT</b>
	)	<b>[To] ARCAP 3(a)</b>
	)	

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Defendant/Appellee Sun Lakes Homeowners Association #1, Inc. (“the Association”) respectfully requests that the Court deny Plaintiff/Appellant’s Motion to Expedite Appeal Pursuant [to] ARCAP 3(a) (“Motion to Expedite”). Plaintiff’s

assertion that she is suffering severe and irreparable harm is not supported by any evidence, record or otherwise. Her multiple attempts to obtain this Court's review without providing a complete transcript of the entire proceeding below is prejudicial to the interests of justice. Any danger that Plaintiff's claims will be mooted by the passage of time while she pursues this appeal is the result of her own delay.

#### **I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiff/Appellant is a Sun Lakes homeowner who is currently serving her second elected term on the Association's Board of Directors. (*See* IR 48-51, at Sec. II, Stipulations of Material Fact and Law at ¶¶ 6-10, 20.) Plaintiff's current term on the Board ends in February 2017, and the Association's bylaws prohibit Plaintiff from seeking a third term on the Board. (*See id.* at ¶¶ 22-23.) The Association has been screening Plaintiff from participating in executive sessions of the Association's Board of Directors since September 2013, due to conduct that the Association alleges violated Plaintiff's duties of loyalty and confidentiality as a Director. (*See id.* at p. 1, l. 25 - p. 2, l. 4 & Sec. II, ¶¶ 11-19.)

Plaintiff initiated this case in July 2014, asserting claims against the Association for declaratory/injunctive relief, breach of contract, defamation, false light, and punitive damages. (*See id.* at p. 2, ll. 5-7; IR 1.) In December 2014, Plaintiff filed a motion for summary judgment seeking to restore her "right" to participate in executive

sessions. (*See* IR 15.) After briefing, the trial court denied Plaintiff's motion. (*See* IR 27.)

Two months later, Plaintiff filed an application for a preliminary injunction, seeking to "compel[] the Association to allow her to participate in executive sessions while this case is progressing." (*See* IR 33-34, at p. 2, ll. 10-11.) After allowing the parties to conduct some preliminary discovery, the trial court conducted an evidentiary hearing on August 12, 2015, at the conclusion of which it issued a ruling from the bench denying Plaintiff's application for preliminary injunction. (*See* IR 56.)

Following the evidentiary hearing, the trial court referred the matter to Alternative Dispute Resolution, and a settlement conference was set for October 26, 2015, before a settlement judge *pro tempore*. (*See id.*; IR 58.) Although A.R.S. § 12-2101(A)(5)(b) authorizes immediate appeal of a denial of an injunction, Plaintiff waited until September 29, 2015, to request entry of an appealable order. (*See* IR 61.) In the meantime, three days prior to the settlement conference, Plaintiff filed a Petition for Special Action with this Court, purporting to seek review of the trial court's denial of a preliminary injunction under Rule 1, Ariz. R. Proc. Spec. A. This Court declined jurisdiction. (*See McNally v. Sun Lakes Homeowners Ass'n #1, Inc.*, No. 1 CA-SA 15-0274, Order Declining Special Action Jurisdiction, 10/26/15.)

The parties proceeded to a settlement conference on October 26, 2015, but were unable to reach a settlement. At the conclusion of the settlement conference, the settlement judge advised undersigned counsel that Plaintiff wanted to know if the Association would stipulate to an expedited appeal. Undersigned counsel informed the settlement judge that the Association would consider any stipulation that Plaintiff wanted to propose. Undersigned counsel heard nothing further from Plaintiff's counsel concerning the matter before Plaintiff filed her Motion to Expedite.<sup>1</sup>

The trial court issued a signed order denying Plaintiff's Application for Preliminary Injunction on October 27, 2015. (*See* IR 62.) Plaintiff filed her Notice of Appeal on October 28, 2015. On November 9, 2015, Plaintiff filed a Notice of Transcript Order, by which she gave notice that she had ordered only a portion of the transcript of the trial court's evidentiary hearing on her Application for Preliminary Injunction. (*See* IR 65.) The next day, November 10, 2015, Plaintiff filed her Motion to Expedite Appeal.

The Association filed a motion to require Plaintiff to provide a transcript of the entire evidentiary hearing. (*See* IR 66.) Plaintiff responded, giving notice of her refusal to order the entire transcript. (*See* IR 67.) The trial court granted the

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<sup>1</sup> Under the circumstances, Plaintiff's counsel's avowal that he has "made a good faith effort to secure a stipulation from opposing counsel to an expedited briefing schedule" is, at best, an overstatement. (Motion to Expedite at p. 2.)

Association's motion on November 20, 2015, finding that providing this Court with a full transcript of the evidentiary hearing is necessary and in the interest of justice.

(*See* IR 68.)

**II. PLAINTIFF HAS NOT ESTABLISHED GOOD CAUSE AND THAT EXPEDITING HER APPEAL WOULD BE IN THE FURTHERANCE OF JUSTICE**

Plaintiff argues, and the Association agrees, that this Court has discretion to expedite its procedures on appeal. *See* ARCAP 3(a). However, this Court requires Plaintiff to show good cause to expedite, and that doing so would be in the furtherance of justice. *See id.*; *Schaefer v. Duhamel*, 65 Ariz. 385, 390 (1947). Plaintiff attempts to make this showing by analogy to appeals involving election matters, in which this Court frequently expedites an appeal “in view of the broad public interest and the time pressures occasioned by the pending general election which would make the question moot absent immediate appellate disposition.” *Turley v. Bolin*, 27 Ariz. App. 345, 347 (1976). The basis for expediting appeals in election matters has been codified in statute and by rule. *See* ARCAP 10. The rule is applicable only to such cases. *See id.* at Cmt. 1.

This case does not involve an election or even a matter of public interest. It involves the internal governance of a private entity under a wholly unique set of factual circumstances involving a governing Board member who openly flouted her duties to the Association under A.R.S. §§ 33-1804(A) & 1805(B), and has stated her

intention to do so again if she believes the circumstances warrant such conduct. (*See* IR 48-51, at Sec. II, ¶¶ 11-17; IR 19-25, Exh. A at p. 85, l. 15-p. 86, l. 2.)

Plaintiff's bald assertion that the Association is inflicting severe and irreparable harm on Plaintiff by screening her from executive sessions of the Board is demonstrably false. The Association began screening Plaintiff from receiving confidential and privileged information of the Association during her first term on the Board. Despite the screening, Plaintiff was elected to a second term on the Board. (*See* IR 48-51, at Sec. II, ¶¶ 10, 19-20.) Plaintiff has stated that the screening makes her a more effective Board member, which may explain why she waited nearly two years to seek an injunction. (*See* IR 19-25, Exh. A at its Exh. 11.)

The sole factual basis for Plaintiff's Motion to Expedite is her assertion that an appeal processed according to the usual procedures is unlikely to conclude before her current term as a Board member ends, so that her claim for injunctive relief "will largely become a moot point." (Motion to Expedite at p. 7.) However, Plaintiff's claim for injunctive relief is coupled with claims for declaratory relief and damages, including punitive damages and attorney's fees. (*See* IR 1.) Even assuming that the trial court's denial of an injunction – and this Court's review of that denial for an abuse of discretion – becomes "a moot point" through the passage of time involved in this interlocutory appeal, Plaintiff's claims for declaratory relief and damages

remain pending.

Moreover, that Plaintiff's claim for an injunction "will be in danger of becoming moot" is purely a function of Plaintiff's own choices and litigation strategy. (Motion to Expedite at p. 2.) The Association began screening Plaintiff from executive sessions in September 2013, but Plaintiff waited until July 2014 to file her complaint, and she waited until April 2015 to seek a preliminary injunction. The trial court issued its ruling denying injunctive relief from the bench on August 12, 2015, but Plaintiff waited seven weeks before requesting that the trial court enter a formal, appealable order. (*See* IR 61.) Plaintiff's lack of diligence is not good cause, and expediting her appeal is not in furtherance of justice.

### **III. EXPEDITING PLAINTIFF'S APPEAL WILL PREJUDICE THE ASSOCIATION AND THIS COURT**

Plaintiff's Motion to Expedite does not include a proposed schedule for expediting procedures related to her appeal. "The appellant can expedite the appeal process simply by completing more quickly such procedures as the designation and transmittal of the transcript, payment of fees, and filing of briefs." Ariz. Appellate Handbook Vol. 1-A, § 3.12.6.

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Here, Plaintiff ordered only a portion of the transcript of the trial court's evidentiary hearing on her Application for Preliminary Injunction, and forced Defendant to move the trial court for an order requiring Plaintiff to order the full transcript. (*See* IR 67.) The delay caused by Plaintiff's failure to timely order the entire transcript of the evidentiary hearing on her request for injunctive relief may result in an extension of the briefing schedule under ARCAP 11.1(d)(2).

Moreover, Plaintiff's failure to timely order the entire transcript of the evidentiary hearing, while at the same time seeking to expedite her appeal of the outcome of that proceeding, is prejudicial to the Association and to this Court. The fact that Plaintiff served the Association with a Petition for Special Action does nothing to alleviate this prejudice, because Plaintiff's Petition for Special Action also failed to include a complete transcript of the evidentiary hearing on her Application for Preliminary Injunction. Plaintiff's conduct following the August 12, 2015 evidentiary hearing undermines her claims of urgency and hampers the ability of all parties and the Court to act expeditiously in furtherance of this appeal.

#### **IV. CONCLUSION**

For all the foregoing reasons, the Association respectfully requests that the Court deny Plaintiff's Motion to Expedite Appeal Pursuant [to] ARCAP 3(a).

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RESPECTFULLY SUBMITTED this 30th day of November, 2015.

**GRASSO LAW FIRM, P.C.**

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