

**IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE**

COLETTE MCNALLY,

Plaintiff/Appellant,

vs.

SUN LAKES HOMEOWNERS  
ASSOCIATION #1, INC., an Arizona non-  
profit corporation,

Defendant/Appellee.

COURT OF APPEALS  
CASE NO.: 1 CA-CV-15-0744

MARICOPA COUNTY  
SUPERIOR COURT  
CASE NO. CV2014-009496

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**APPELLANT'S REPLY BRIEF**

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## INTRODUCTION

The Association frames the issue presented for review as follows:

“Whether the trial court abused its discretion in denying Plaintiff’s Application for a Preliminary Injunction compelling the Association to permit Plaintiff to attend executive sessions of the Association’s Board of Directors where Plaintiff admitted that, prior to being excluded, she intentionally revealed information discussed during executive session, and if permitted to return, she would do so again.”

Answering Brief, p. 17 – Issue Presented For Review.

The entire premise of the Association’s position that Ms. McNally “intentionally revealed information discussed during executive session” is false and there is nothing in the record to support this premise. As discussed in Ms. McNally’s Opening Brief, the Board did not discuss the contents of the Martens E-Mail in executive session, investigate the truth of the Martens E-Mail in executive session, or even have a copy of the Martens E-Mail in executive session. Opening Brief, p. 42 citing McNally Direct T22:10-12; T22:23-23:6; T24:17-23; Schwartz Cross T78:22-24; T79:23-80:22; App. 26-27. The Board simply resolved “not deal with it.” App. 26-27. During the open meeting, Ms. McNally did not reveal whatever limited discussions that were held about the e-mail in executive session and the Association fails to give one example of same. McNally Direct T24:17-23; T27:1-10.

Based on the Association’s false premise, the Association argues that

it “had no choice” but to screen Ms. McNally from executive sessions and had authority to do so because Ms. McNally would not pledge to keep everything discussed in executive session confidential even if doing so violated the Open Meeting Law. The Association also argues that Ms. McNally did not suffer harm being screened and that the trial court properly ignored the Association’s rampant violations of the Open Meeting Law. The Association misrepresents the facts and ignores numerous facts of record that undermine its arguments.

For instance, the Association argues that the sanction was proper because Ms. McNally disclosed the confidential Martens E-Mail to the community. However, the Association completely ignores President Schwartz’ admission raised in the Opening Brief that the Martens E-Mail was not confidential. Opening Brief, pp. 41-42 citing T78:9-21. How can the Association possibly argue that it “had no choice” but to sanction Ms. McNally for disclosing the Martens E-Mail without once mentioning President Schwartz’ unequivocal admission that the e-mail was not confidential to begin with?

The Association also supports its false premise by arguing that Ms. McNally’s reading of the Martens E-Mail subjected the Association to a potential defamation claim from those implicated in the e-mail. Again, the Association remained silent regarding President Schwartz’ admission raised

in Ms. McNally's Opening Brief *that the Association paid counsel to threaten Ms. McNally with defamation but not Ms. Martens*. Opening Brief, pp. 16-17, 44-46 citing T81:4-12.

As for the Association's argument that Ms. McNally is not sustaining injury missing executive sessions and is actually "benefitting" from the screening, this argument also ignores critical facts. True to form, the Association ignores President Schwartz' admissions that anything involving finances is discussed in executive session. The Association also ignores Treasurer Cournoyer's admission that consensus on financial matters is reached in executive session. Additionally, the Association ignores its own executive session minutes proving all the important matters that are improperly discussed in executive session that Ms. McNally is forced to miss. Opening Brief, pp. 18-19 citing T96:13-98:10 (Treasurer Cournoyer's admission), pp. 21-25 citing T82:3-13 (President Schwartz' admission.) She is hardly "benefitting" being left out of these important meetings.

Notwithstanding the Association's omissions of these critical facts, the Association's argument that Ms. McNally has "benefitted" from the screening is absurd because it suggests that Ms. McNally only filed this action to be vindictive. Ms. McNally is an elderly retired nun of limited means who takes her directorship seriously. She filed this action because the Board has violated the Open Meeting Law for years by discussing improper

matters in executive session. Consequently, she is left uninformed and cannot properly carry out the directorship duties that the voters elected her to perform. Ms. McNally cannot get back the executive sessions that she is forced to miss and is continuing to suffer irreparable injury for each missed executive session.

The Association's intentional refusal to address unfavorable facts and the Association's other fanciful arguments supporting its position that "it had no choice" to screen Ms. McNally can only lead to the conclusion that the Association screened Ms. McNally because she would not swear allegiance to violate the Open Meeting Law with the rest of the Board. The screening was simply a means to rid the Board of the one director who "blew the whistle."

To be clear, Ms. McNally has never once said that she will disclose all matters discussed in executive session. She is fully committed to honoring the Open Meeting Law and maintaining confidentiality over those matters that are properly discussed in executive session. On the other hand, the Board seeks to turn the Open Meeting Law on its ear by forcing Ms. McNally to swear that she will never disclose any matters discussed in executive session or even disclose that the Board is violating the Open Meeting Law. The Association screened Ms. McNally for allegedly breaching her duty of loyalty to the Association. Answering Brief, p. 8.

However, the Association fails to recognize that Board members cannot honor their duty of loyalty to the Association if they are forced to take an oath promising not to disclose their fellow Board members' intentional violations of Arizona law that harm the Association.

The Open Meeting Law is a permissive statute which provides that board members can discuss all matters during open meetings if they so choose. A.R.S. § 33-1804(A). It also requires Board members to err on the side of being open. A.R.S. § 33-1804(E). The Association's position that "it had no choice" based on Ms. McNally's refusal to take an oath of silence directly conflicts with the legislative intent of the Open Meeting Law.

For these reasons and those discussed below, Ms. McNally has demonstrated a likelihood of success on the merits and has suffered severe and irreparable harm. Furthermore, the trial court erred not considering the Open Meeting Law violations and putting a stop to them.

### **LEGAL ARGUMENT**

#### **I. MS. MCNALLY HAS ESTABLISHED A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS**

##### **A. Ms. McNally Did Not Violate A.R.S. §§ 33-1804 or 1805.**

The Association argues without legal support that it had no choice but to screen Ms. McNally from executive sessions because she had disclosed confidential information and said that she would do so again. Answering

Brief, pp. 19-20. The Association also contends that the Martens E-Mail “was plainly within the scope of A.R.S. § 33-1805(b)(5) and that Ms. McNally breached her duties to the Association for disclosing this confidential document during an open meeting. Thus, Ms. McNally cannot satisfy the “likelihood of success” element.

The Association’s position relies upon a complete distortion of the facts and a misunderstanding of the Open Meeting Law. At the outset, the Martens E-mail was not “plainly within the scope of A.R.S. § 33-1805(b)(5).” That section permits the following to be withheld from disclosure:

5. *Records* relating to the job performance of, compensation of, health records of or specific complaints against an individual employee of the association or an individual employee of a contractor of the association who works under the direction of the association.

A.R.S. § 33-1805(b)(5). (Emphasis added).

The Martens’ E-mail is not an Association “record.” The Martens E-mail is an unprivileged e-mail that a former employee sent to Ms. McNally and three homeowners who were not on the Board. Indeed, President Schwartz testified that Ms. McNally could have sent the Martens E-Mail to the community but that once she gave it to him, it became “board business” (i.e., a confidential Association record). T78:9-15. He testified as follows:

Q. And isn't it true that you acknowledge that if Ms. McNally received the email from Ms. Martens and simply sent it to the community that that would have been okay?

A. That would have been okay, but once it was turned over to the Board and requested to be put in executive session, that's when it became board business.

T78:9-15.

An unprivileged e-mail does not suddenly become a confidential Association record simply by being given to the Board. The e-mail is no different than a statement from the Association's landscaper to a group of homeowners regarding the landscaper witnessing the Association's mason stealing construction equipment. If one of those homeowners asks the Board to investigate the landscaper's statement, are the landscaper's statements now confidential? Of course not.

The Association completely ignores President Schwartz' admission where he improperly believes that documents magically become cloaked in privilege when they pass through executive session. T78:9-15. Since the Martens E-Mail is not a confidential Association "record" under A.R.S. § 33-1805, the Association's entire argument that it had no choice but to screen Ms. McNally from executive sessions fails.

Furthermore, the executive session minutes and testimony prove that Ms. McNally did not reveal the Association's decision that it would not take action on the Martens E-mail. All Ms. McNally did was read an

unprivileged, public e-mail that had already been circulated through the community.

The fact of the matter is that the Association has punished Ms. McNally for being a whistleblower and for refusing to agree to violate the Open Meeting Law with the rest of the Board. As proven by the testimony of President Schwartz, the testimony of Treasurer Cournoyer and as proven by the Association's own executive session minutes, which the Association is now shying away from as being unreliable, the Board openly admits to violating the Open Meeting Law.

President Schwartz clearly testified:

Q. And isn't it your position that anything involving finances is to be discussed in executive session?

A. I'm going by – yes, it is.

T82:6-9.

Corroborating President Schwartz' admission, Treasurer Cournoyer admitted that the Board even reaches consensus on financial matters in executive session. She testified as follows:

Q. Why was this discussed in executive session?

A. Well, as I said, this was a discussion and it clearly says here that it is understood that the pro shop, lounge remodel will be brought as an agenda item for the community meeting on November 19, 2013.

Q. Right. And in the sentence before that it says that today we'd like to reach a consensus. Did you see that?

A. Uh-huh.

T97:15-23.

The Association turns a blind eye to these admissions and its own executive session minutes proving the Board's habitual violations of the Open Meeting Law. See e.g., App. 48-52 - Board discussing enforcement of Code of Conduct; App. 75-77 – Board discussing ability to inspect homes before they can be purchased and sold; App. 107-108 – Board discussing 2013 Reserve Contribution and 60 Day Cash on Hand Policy, audit results and eliminating positions; App. 124 – Board discussing 2015 budget issues.

Just because Ms. McNally decided to stand by her principles rather than take an oath to violate the Open Meeting Law with the rest of the Board, the Board has chosen to punish her. Public policy should not condone a rule-breaking Board forming the majority to trample upon the rights of the minority board members simply because that minority board member refuses to break the law with the rest of the board.

The Board has this all backwards. Ms. McNally is not the one violating A.R.S. §§ 33-1804 and 1805. There is no presumption that everything discussed in executive session is secret and there is no law giving the Board carte blanche authority to take whatever action it wants to insure such secrecy. In fact, A.R.S. § 33-1804(A) only permits (and does not require) certain narrowly defined categories to be discussed in executive

session and the expressly defined policy encourages board members to err in favor of discussing matters openly. A.R.S. § 33-1804(E).

**B. The Association Has Failed To Demonstrate That Ms. McNally Violated The Open Meeting Law By Reading The Martens E-Mail Or By Any Other Conduct For That Matter.**

The Association argues that it had “no choice” but to screen Ms. McNally from executive sessions because she has a history of disclosing confidential executive session information. Clearly, the Association’s opinion regarding what is “confidential” should be taken with a grain of salt.

Specifically, the Association states that Ms. McNally was removed once for disclosing confidential financial information to non-Board members and that the Association was forced to settle a claim on her behalf for breaching a confidentiality agreement between the Association and a former employee. Answering Brief pp. 4-5. Neither of these matters involved violating the Open Meeting Law or disclosing executive session communication. Indeed, the Association’s position with regard to these instances underscores its misunderstanding of the Open Meeting Law.

The Open Meeting Law states that the Board may discuss limited matters in closed meetings including: 1) legal advice / confidential settlement terms; 2) pending/contemplated litigation; 3) personal

information about a homeowner or Association employee; 4) job performance of an employee; and 5) member appeals. A.R.S. § 33-1804.

Ms. McNally did not violate the Open Meeting Law by discussing the budget with a former board member who was experienced with reading complex budget material. The budget material is financial information that does not fit into any of the aforementioned categories. See also A.R.S. § 33-1805. Like the Martens E-Mail, the budget material did not suddenly become privileged simply because it was (improperly) distributed in executive session. Since the budget was not privileged, Ms. McNally did not violate the Open Meeting Law discussing the budget with a former Board member. Indeed, the Board did not remove Ms. McNally from the Board for violating the Open Meeting Law but only because she reviewed the budget “with the wrong person.” T15:1-7.

As for the claim that the Association settled on her behalf for allegedly breaching a confidentiality agreement with a former employee, Ms. McNally never disclosed the terms of the agreement and the Association has failed to proffer any evidence to the contrary. This appears to be just another example of the Association taking liberty with its definition of “confidential” in order to justify its improper sanction. Therefore, the Association has failed to identify one instance of Ms. McNally breaching executive session privilege.

**C. Ms. McNally's Proclamation That She Will "Not Agree To Do What Is Wrong" Does Not Prohibit Her From Establishing A Likelihood Of Success On The Merits.**

Notwithstanding the Association's failure to identify any violations of the Open Meeting Law by Ms. McNally to support its position that she habitually discloses executive session information, the Association believes that its lynchpin is Ms. McNally's admission that she will disclose executive session information if she determines that it should be discussed in an open meeting. Just as the Association misinterprets the Open Meeting Law, it has misinterpreted Ms. McNally's statements. As opposed to the Association that ignores its own admissions and shies away from its own executive session minutes claiming that the minutes are unreliable hearsay, Ms. McNally embraces her statements and believes that the Association's repeated citations to her testimony does not damage her position but actually strengthens it.

The Association cites the following excerpts from Ms. McNally's testimony:

Q. So if I understand what you're telling me, your answer is that, no, you will not agree to keep the contents of an executive session confidential?

A. I will not agree to do what is wrong. Okay. So if they are discussing something that should be discussed in an open meeting, it should be discussed in an open meeting. I have learned now what to do, which is to say time out. Let's consider this. But, I mean, I have gotten my education bit by

bit. I wasn't born knowing everything that has to be done on a board. I've been studying year after year, taking two courses a year, to make sure that I make the right decision.

Q. And if, in your opinion, the right decision is that what's being discussed in executive session should not be discussed in executive session but should be discussed in an open session of the board –

A. I will bring it to their attention.

Q. In the open session?

A. Not necessarily. I would bring it right there and then, if I were allowed to be in the executive session.

Q. And if they persisted with their wrong – in your opinion, their wrong headed view of it –

A. If it's doing harm to anybody in the community, I would have to bring it out in the open.

T85:1-86:2.

Continuing this refrain, Ms. McNally testified as follows:

Q. And you told me that if the board was discussing something in executive session, that in your opinion should be discussed in an open meeting, you would first bring it to their attention?

A. Right.

Q. And then if they persisted and you felt like – and you felt like it was doing harm to the community, you would bring it out in the open?

A. That is correct.

THE COURT: I assume that's still your position today?

A. Yes. If it was in violation of the open meeting laws, it has to be dealt with in the open.

T54:2-14.

Ms. McNally never wavered in her testimony that she would follow the law. She continued:

Q. Ms. McNally, if you were placed back on and allowed in executive session, would you follow the law?

A. Of course.

Q. And did you ever indicate that you would refuse to follow the law?

A. No, in no way.

T146:10-15.

Ms. McNally does not run from her statements. There is no doubt that Ms. McNally intends to follow the law.

Coupling Ms. McNally's dedication to following the law with the Association's complete failure to identify any instances where Ms. McNally violated the Open Meeting Law *by disclosing executive session discussions or documents properly subject to the Open Meeting Law*, where is the risk of improper disclosure that the Association is so concerned with?

As the Association's general counsel recognized, Board members owe a duty of loyalty to the Association. App. 39. As opposed to the other Board members who are breaching their duty of loyalty to the Association, Ms. McNally has embraced her duty of loyalty to the Association by repeatedly testifying that she intends to follow the law. By violating the Open Meeting Law with the rest of the Board, she would also be breaching

her duty of loyalty to the Association and arguably inviting litigation from homeowners to compel compliance with the Open Meeting Law.

Since Ms. McNally has not violated the Open Meeting Law, Ms. McNally has established a strong likelihood of success on the merits.

**D. There Is No Arizona Law That Allows Elected Board Members To Unilaterally Usurp Their Fellow Elected Directors' Democratically Conferred Rights.**

The Association makes several strained arguments to support its position that it was legally authorized to screen Ms. McNally from executive sessions. Each is without merit.

The Association argues that it created a committee that excluded Ms. McNally from participating in executive sessions pursuant to A.R.S. § 10-3825. Answering Brief, p.20. There is no evidence in the record that the Association ever formed such a committee pursuant to A.R.S. § 10-3825. There were no minutes about the formation of such a committee. There is no record of the Association circulating a notice to the community that it would now call executive sessions a “committee” or notice of a vote to preclude Ms. McNally from these committee meetings. In fact, the Association never claimed that it formed such a committee at trial. See Transcript, generally. Despite this lack of evidentiary support, the Association now argues that it formed such a committee.

Nevertheless, A.R.S. § 10-3825 does not contemplate giving the

Board authority to essentially remove a fellow elected director from office. Although the HOA's expert tried to support his position that the Association had authority to screen Ms. McNally from executive sessions by "backing into a de facto committee" pursuant to A.R.S. § 10-3825 (T125:5-130:19), the trial court properly refused to entertain this baseless argument. T167:2-5. No committee was established pursuant to A.R.S. § 10-3825 and that statute should not be interpreted to allow board members to disenfranchise a minority board member.

The Association further argues that it had authority to screen Ms. McNally from executive sessions because the Association's Bylaws authorize the Board "[t]o exercise all financial, legal, ... and any other power granted under the laws of the State of Arizona." Answering Brief, p.21. The Association's interpretation of this clause to mean that it has absolute authority to arbitrarily disenfranchise fellow elected board members without due process is flawed and supports Ms. McNally's argument that the sanction was illegal because there are no "powers granted under the laws of the State of Arizona" giving boards the power to usurp the privileges of a fellow elected director without due process.

Although Ms. McNally relied on law outside this jurisdiction in her Opening Brief to support her argument that a Board does not have discretion to usurp her democratically conferred rights, the Association does not

disagree with this law. Instead, the Association argues that this Court should ignore the law cited by Ms. McNally because most of those cases deal with the removal of directors and not the screening of directors and are therefore inapplicable. However, the reasoning contained in these cases establishing the fundamental principles of elected officers should not be ignored just because the cases are outside Arizona and do not deal with removal. As argued at length in Ms. McNally's Opening Brief, her screening is tantamount to removal because the Board conducts significant business in executive session outside of her presence.

In addition to the Association's failure to address the cases dealing with the removal of directors, the Association fails to adequately distinguish the one case where it was held that elected directors cannot usurp the rights of their fellow elected directors. The case People ex rel. Muir v. Throop, 12 Wend. 183, 187 (N.Y. 1834) is similar to the instant case in that the board there tried to screen their fellow elected director from the corporation's bank records. The Association tries to distinguish that case on the grounds that Ms. McNally is protected against liability for the conduct of the Association whereas in Throop, that was not the case.

The Association completely misses the implication of Throop. The holding from Throop is that directors cannot unilaterally usurp their fellow elected directors' democratically conferred rights, even if harm could occur,

unless the board has such power to begin with. The underpinning of Throop is even more applicable here because the Association cannot prove harm.

As discussed above, the Association has failed to establish any harm that would occur by allowing Ms. McNally to participate in executive sessions. Nowhere do they discuss one example where Ms. McNally disclosed executive session strategy or a confidential document.

The Association's HOA expert acknowledges that the board's power comes from the Association's governing documents and those powers conferred under Arizona law. T135:3-15. The Board does not have discretion to create authority to act where that authority is not spelled out in the governing documents or Arizona law. Id. Such action is arbitrary and subject to abuse because the action is not based upon established criteria.

The Association argues that Tierra Ranchos Homeowners Ass'n v. Kitchukov, 216 Ariz. 195 (App. 2007) stands for the proposition that the Board has an obligation to act reasonably in the exercise of its powers. That case is inapplicable for two reasons. Tierra Ranchos is a design guidelines enforcement case where this Court held that a board must act reasonably when exercising its discretionary authority to enforce design controls. The instant case does not involve enforcement of documented design guidelines but rather the Board's exercise of discretion *in the absence of documented guidelines or authority*. Without such documented authority, the

Association cannot reach the second element and argue that it reasonably exercised its documented authority.

Nevertheless, even if the Board had such power to sanction Ms. McNally, which Ms. McNally denies, the Board did not act reasonably. The Board's arbitrarily imposed sanction was only supposed to last the remaining six months of her term (September 2013 – February 2014). App. 42 - Executive Session Minutes stating that Ms. McNally was banned from all executive session meetings "for the balance of her term." After the voters had already re-elected her, the Board arbitrarily extended the sanction into Ms. McNally's new term and quintupled the sanction by adding an additional two plus years. The Board's sanction is not based on established criteria and is unreasonable per se.

For these reasons, there is no Arizona law that allows the Board to unilaterally screen Ms. McNally for an arbitrary period of time from executive sessions.

**E. Ms. McNally Has Demonstrated A Strong Likelihood Of Success Because The Association Lacked Authority To Screen Her And Because She Did Not Violate The Open Meeting Law.**

Based upon the foregoing, Ms. McNally has established a strong likelihood of success on the merits. Shoen v. Shoen, 167 Ariz. 58 (App. 1990). She also satisfies the "sliding scale" test in Smith v. Arizona Citizens

Clean Elections Com'n., 212 Ariz. 407 (2006). That test allows a party to establish either “(1) probable success on the merits and the possibility of irreparable injury; or (2) the presence of serious questions and [that] ‘the balance of hardships tip[s] sharply’ in favor of the moving party.” See also Arizona Ass’n of Providers for Persons With Disabilities v. State, 223 Ariz. 6, ¶12, 219 P.3d, 216, 222 (App. 2009).

Since there is no Arizona law that authorized the Board to unilaterally screen Ms. McNally from executive sessions without providing her with due process, Ms. McNally has established a likelihood of success and should be deemed to have succeeded because there is no likelihood of the Association succeeding and upholding its sanction without such authority.

The only apparent law that sheds light on this issue is A.R.S. § 10-3830(D) which suggests that the Association – not Ms. McNally - was obligated to commence an action and prove by clear and convincing evidence that Ms. McNally engaged in wrongful conduct if the Association felt that Ms. McNally was causing severe and irreparable harm. Had the Association filed its own action for injunctive relief to screen Ms. McNally from executive session, she would have been afforded due process and the Association would have been correctly saddled with the burden.

Here, however, the Board took action first and forced Ms. McNally to prove her innocence. How can it be appropriate for the Association to

arbitrarily take action first and shift the burden to Ms. McNally to prove that she did nothing wrong? It that were not bad enough, how can it be appropriate for the Association to arbitrarily extend its improper sanction into Ms. McNally's second term when the Board already passed a resolution stating that the sanction was supposed to end at the conclusion of her first term? Allowing a sanction to stand where due process was withheld and then allowing the sanction to be arbitrarily extended after the community already re-elected Ms. McNally back onto the Board is not authorized under the law.

Since the Association acted without authority, Ms. McNally has established a strong likelihood of success on the merits.

## **II. MS. MCNALLY HAS ESTABLISHED THAT THE SCREENING HAS CAUSED HER INJURY**

The Association argues that Ms. McNally has offered no evidence of harm, that her alleged harm is remediable by damages, and that her delay in pursuing this matter demonstrates lack of harm. These arguments should be rejected.

Ms. McNally is suffering harm being excluded from executive sessions that is not remediable by damages. She was elected on multiple occasions to represent her constituents' rights but the Board continues to deprive Ms. McNally of her democratically conferred right to participate

with the other elected Board members. Consequently, the Board has taken away most of Ms. McNally's entire term if not her entire term by the time this case is over.

The Board conducts significant business in executive sessions that she is not allowed to participate in. The Board discusses financial matters in executive sessions, budgets in executive sessions, and even reaches consensus on financial decisions in executive sessions. For each executive session that she is forced to miss, Ms. McNally is being harmed and cannot adequately represent her constituents' interests. This harm can only be remediated with an injunction.

As for allegations of delay, Ms. McNally has pursued this claim in a diligent manner. If anything, the Association caused some delay by carrying over her sanction into her second term when it was supposed to end at the conclusion of her first term.

Here, Ms. McNally filed her complaint after she won re-election and after the Association confirmed that it would continue its sanction for as long as she was on the Board. Ms. McNally then took discovery and promptly filed a motion for summary judgment. EIR 15. Once this motion and her motion for reconsideration was denied, Ms. McNally promptly filed her Application for Preliminary Injunction. EIR 33-34. She then took additional discovery in preparation of the evidentiary hearing and after her

request for a preliminary injunction was denied, promptly filed a Petition for Special Action and thereafter, this appeal.

Unlike the Association with its unlimited budget, Ms. McNally is a retired nun and an elderly volunteer of limited means. Had the Association filed its own application for relief early on during her first term and resolved this issue, Ms. McNally would not have been forced to spend her own money for nearly two years now fighting for her democratically conferred rights. She did not delay and she has been significantly harmed by the Association's unauthorized sanction.

### **III. THE ASSOCIATION'S OTHER MYRIAD ARGUMENTS SUPPORTING THE SANCTION SHOULD BE REJECTED**

The Association's argument that the hardship weighs in its favor should be rejected. The Association's only argument for alleging that the hardships tip in its favor is upon the speculation that it has already incurred expenses removing Ms. McNally from the Board. The Association cannot claim hardship based on action that it never had authority to perform in the first place. There is absolutely no hardship allowing Ms. McNally to participate in executive session. If the Association follows the law and discusses only those limited issues in executive session that the Open Meeting Law allows, it has nothing to fear. As discussed above, the hardship sharply tips in Ms. McNally's favor because she cannot get back

the executive session meetings that she misses. Each session missed is another missed opportunity to perform her duties as an elected director.

The Association also argues that the sanction was proper because Ms. McNally disregarded the advice of the Association's general counsel. Answering Brief, p.28. However, the Association ignores the fact that President Schwartz met with the Association's general counsel without Ms. McNally's presence and she was not privy to the advice he gave. T41:5-17. Notwithstanding the foregoing, Ms. McNally did not disclose the Association's strategy apparently conveyed by its general counsel that the Association "would do nothing" about the Martens E-Mail.

The Association further argues that Ms. McNally is not entitled to injunctive relief because she subjected the Association to a potential defamation claim and therefore has "unclean hands." As discussed in Ms. McNally's Opening Brief, the Association's excuse for sanctioning Ms. McNally based on the threat of defamation was a pretext to punish her. The Association hired and paid for defamation counsel to threaten Ms. McNally and did not pursue Ms. Martens who authored the e-mail in question.

Notwithstanding the foregoing, the allegations contained in the Martens E-Mail were proven true. After being instructed that some people claimed the allegations were false and being reminded that she was under oath, Jeannie Martens testified as follows:

Q. And you understand that there was some controversy over your email?

A. Yes.

Q. And you understand that some people said the allegations in the email were false?

A. Yes.

Q. But as you stand here today under oath and before the court, you continue to assert that everything in that email is true and correct?

A. Absolutely.

T62:3-12.

The Association had plenty of opportunities to challenge Ms. Martens' testimony both during her deposition and at trial. However, the Association did not call Mr. Warrell or Ms. Laird as witnesses. Ms. McNally presumes that the Association did not call Ms. Laird because she did not appear credible at her deposition. See Laird Deposition Transcript.

The Association's utter silence in its Answering Brief regarding Ms. Martens' testimony that her e-mail was true and regarding Ms. McNally's argument that the Association paid for Warrell and Laird's defamation counsel speaks volumes. Ms. McNally does not have "unclean hands."

#### **IV. THIS COURT SHOULD OVERTURN THE SANCTION BASED ON PUBLIC POLICY**

The Association makes several unfounded arguments that public policy requires the sanction to be upheld. Each argument lacks merit.

The Association argues that Ms. McNally's disclosure of the Martens E-mail contravenes public policy. Answering Brief, p.27. Specifically, the Association asserts that the Martens E-mail was confidential and that Ms. McNally has repeatedly violated executive session secrecy in the past and will not hesitate to do so again. Answering Brief, p.27.

As discussed above, the Martens E-mail is not an Association "record" and is not confidential. The e-mail was disseminated to homeowners in the Association prior to being addressed in executive session.

As for the Association's allegation that Ms. McNally has repeatedly violated executive session secrecy, this bald assertion only underscores the common theme that the Association values secrecy over following the Open Meeting Law. As set forth in Ms. McNally's Statement of Facts, there is a history of majority Board members removing minority Board members. Board members have been removed for allegedly violating the Open Meeting Law for being too open, while others have been removed for being too secretive. The fact that the Association sanctioned Ms. McNally in the past for discussing a budget with a former director demonstrates just how unreasonable the Association is when it comes to arbitrarily sanctioning fellow board members.

Ms. McNally did not violate the Open Meeting Law and her reading

of the Martens E-mail did not violate public policy. On the other hand, the Association's hiding of this e-mail from the community and penchant for sanctioning Board members who refuse to take their oath of allegiance to violate the law contravenes public policy.

**V. THE TRIAL COURT SHOULD HAVE CONSIDERED THE ASSOCIATION'S VIOLATIONS OF THE OPEN MEETING LAW**

The Association argues that the executive session minutes and evidence of open meeting violations were irrelevant to the limited issues before the trial court at the evidentiary hearing. The Association also argues that the executive session minutes are hearsay and may not accurately reflect what was discussed in executive sessions. These arguments are without merit.

Notwithstanding the fact that the executive session minutes are the "best evidence," are business records outside of hearsay, and are the Association's own documents, this case was always about Open Meeting Law violations and these violations were directly relevant to support Ms. McNally's reasoning why she would never consider taking an oath of silence and violate the law with impunity with the rest of the Board.

Nevertheless, the executive session minutes and the testimony of President Schwartz and Treasurer Cournoyer regarding Open Meeting Law violations were directly relevant to the evidentiary hearing because these

violations demonstrate the content of what the Association improperly discusses in executive sessions and proves the harm that Ms. McNally is suffering by being excluded therefrom.

Since the executive session minutes were directly relevant to Ms. McNally's claim and were properly before the court, there was no discernable reason why a court sitting in equity and with broad discretion to enter an injunction would ignore these violations and not enjoin them. Since the trial court refused to consider the Open Meeting Law violations and put a stop to them, the trial court committed error.

### **CONCLUSION**

Based upon the foregoing, Ms. McNally respectfully requests that the trial court's ruling be reversed and that this case be remanded back to the trial court for the entry of an injunction consistent with this Court's ruling.

**RESPECTFULLY** submitted on this 25<sup>th</sup> day of March, 2016.

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