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**COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION**

Triplett Chapel of Peace, LLC., :
Plaintiff, : CASE NO. 11CVH-08-10270
-vs- : **JUDGE SERROTT**
Ohio Board of Embalmers and Funeral Directors, :
Defendant. :

**AMENDED DECISION AND FINAL JUDGMENT ENTRY
AND
NOTICE OF FINAL APPEALABLE ORDER**

Rendered this 16th day of February, 2012

SERROTT, JUDGE.

I. Preliminary Statement

On August 17, 2011, Plaintiff Triplett Chapel of Peace, LLC filed a Verified Complaint for Violations of Ohio Open Meeting Law & Declaratory Judgment against Defendant Ohio Board of Embalmers and Funeral Directors (the “Funeral Board”). Plaintiff is the successor business of the Marlan J. Gary Funeral Home. This lawsuit arose out of the Funeral Board’s decision denying Plaintiff’s application to operate as “Marlan J. Gary Funeral Home, Chapel of Peace.”

In the declaratory judgment claim, set forth in Count Two of the Complaint, Plaintiff sought a declaration that Ohio law authorized continued use of the Gary Funeral Home name for a twenty-four month period. Plaintiff further sought injunctive relief to that effect. The matter came before the Court for an injunction hearing on August 29, 2011 and September 9, 2011. The Court resolved the claim in favor of the Funeral Board, orally rendering Findings of Fact and Conclusions of Law on the record on September 9, 2011, which were journalized September 22, 2011. Plaintiff represents that it does not intend to pursue a trial on the merits on this claim, having

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no additional evidence to present. Based upon the evidence previously submitted and the Findings of Fact and Conclusions of Law, the Court renders final judgment in favor of the Funeral Board and against Plaintiff on Count Two of the Complaint.

In Count One of the Complaint, Plaintiff alleged the Funeral Board violated Ohio's Open Meeting Act, set forth in R.C. 121.22. The parties have filed cross-motions for summary judgment. For the reasons that follow, the Court finds that no genuine issue exists as to any material fact. A review of the filed depositions, testimony adduced at the previous hearing, and application of the relevant law establish the statutory violation and Plaintiff's entitlement to judgment on this claim as a matter of law.

II. STANDARD OF REVIEW

Under Civ. R. 56, summary judgment is proper when "(1) [n]o genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327 (1977). Trial courts should award summary judgment with caution, being careful to resolve doubts and construe evidence in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 360 (1992). Nevertheless, summary judgment is appropriate where a party fails to produce evidence supporting the essentials of its claim. *Wing v. Anchor Media, Ltd. of Texas*, 59 Ohio St.3d 108, paragraph three of the syllabus (1991).

III. LEGAL ANALYSIS

A. Ohio's Open Meetings Act R.C.121.22

The Ohio Open Meetings Act requires public bodies to conduct meetings in the open subject to public attendance. All matters to be deliberated and voted upon are to take place in

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public unless a specific exception exists under the statute. *See* R.C. 121.22(G); *See also Tobacco Use Prevention & Control Foundation Board v. Boyce*, 185 Ohio App.3d 707 (10th Dist. 2009). R.C. 121.22(A) provides that the Open Meetings Act “*shall be liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law.*”

The Funeral Board is undisputedly a “public body” for purposes of the statute. Plaintiff filed an application for approval of a funeral home license utilizing, in part, the prior owner’s name. The application came before the Funeral Board for official business on August 16, 2011 and was to be deliberated and voted upon at that official meeting.

In dispute is whether the Funeral Board properly went into executive session pursuant to R.C. 121.22(G)(3), which permits executive private session for “conference with an attorney for the public body concerning disputes involving the public body that are “*the subject of pending or imminent court action.*” Plaintiff contends the Funeral Board impermissibly “deliberated” in executive session concerning its license application, and section (G)(3)’s exception did not apply because there was no “pending or imminent court action.” Importantly, the Funeral Board claims no other basis for its executive session. Thus, this case turns on the issue of whether “deliberations” occurred in executive session as opposed to a discussion of “pending or imminent” court action concerning Plaintiff’s licensure application.

As background, testimony from the injunction hearing established Plaintiff was taking over the funeral home operated by Marlan J. Gary. Mr. Gary’s funeral home license was in the process of being suspended for having cremated the wrong remains of a deceased child. Plaintiff acquired the Gary Funeral Home shortly before Mr. Gary’s license was suspended. Plaintiff wanted to incorporate the “Gary” name in its application and license for operation of the funeral home,

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contending it had the right to the continued use of the “Gary” name pursuant to the Funeral Board’s regulations and custom and practice.

Plaintiff’s application for the continued use of the “Gary” name was the matter considered by the Funeral Board on August 16, 2011. The uncontroverted testimony and minutes of the Funeral Board establish that, in considering Plaintiff’s application, the Funeral Board voted to adjourn into executive session “to enter into deliberations concerning license issue #1 (Plaintiff’s Application) to discuss the application of Marlan J .Gary Funeral Home with legal counsel.”¹ (Funeral Board Minutes; Jennifer Baugess deposition, p. 27). The minutes do not reflect, or state, that Plaintiff’s application subjected the Board to “pending or imminent court action.”

R.C. 121.22(G) requires a public body’s minutes to “state which one or more of the approved matters listed (in the statute) are to be considered at the executive session.” A failure to comply with this notice provision is a violation of the statute in and of itself, even if the public body retires to executive session for what is ultimately determined to be a legitimate purpose. *See Weisbarth v. Geauga Park District* Eleventh Dist. No. 2007-G-2780, 2007-Ohio-6728, at ¶¶19-20 (a case ironically cited by the Funeral Board as standing for the proposition that failing to properly move for executive session is a “technical violation.”)² In the case at bar, the Funeral Board, as a matter of law, violated the “notice” provision of R.C. 121.22. This violation alone renders the Funeral Board liable for a civil forfeiture, an injunction compelling future compliance with R.C. §121.22, and a potential award of attorney fees to Plaintiff.

The next issue before the Court is whether the Funeral Board also violated R.C. 121.22 by entering into executive session to “deliberate” on Plaintiff’s application. Again, the Funeral Board

¹ One Funeral Board Member, a lawyer, voted against going into executive session because she believed the Board’s Motion to go into executive session was not supported by the statute. (Linda Betzer deposition, pp. 15-17).

² In the *Weisbarth* case, the Court ruled that it was a violation for a Board to go into executive session without having the minutes reflect a specific statutory reason for the executive session. The Court entered an injunction against further violation and ordered a \$500.00 civil forfeiture and remanded for consideration of attorney fees.

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contends the purpose of the executive session was to obtain legal advice concerning “pending or imminent” court action, which is an authorized exception to the Act.

The Tenth District Court of Appeals has provided clear guidance in reviewing the appropriateness of a state board entering into executive session for legal advice concerning “pending or imminent court action.” See *Tobacco Prevention*, supra, at ¶¶70-73. *Tobacco Prevention* mandates a finding in this case that the Funeral Board violated R.C. 121.22 by “deliberating” on Plaintiff’s application and by entering into executive session when there was no “pending or imminent court action.”

In *Tobacco Prevention*, the appellate court ruled that a motion to enter into executive session “to consider confidential legal matters” violated the notice requirement in R.C. 121.22(G)(3). Id. at ¶70. The appellate court noted that such a broad statement, if accepted as proper notice, “would render the express [statutory] requirement that the matters the board intended to discuss in executive session were the subject of ‘pending or imminent court action’ meaningless.”

Here, the Funeral Board’s minutes reflecting it went into executive session to discuss the application of Marlan J. Gary Funeral Home with legal counsel do not comply with the above statutory requirements. The minutes suffer the same defects noted in *Tobacco Prevention*. “Discussing the application,” and, to use the Board’s own words in the minutes, “to enter into deliberations concerning the licensure issue,” is not a statutorily authorized basis for proceeding into executive session and is a direct violation of the Open Meetings Act. The Funeral Board argues the wording of the notice is not that important and that “deliberations” never took place. Such a claim is disingenuous and not supported by the testimony of its members and others present in the executive session. The language used to proceed with the executive session is strong

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evidence the Funeral Board did intend to discuss and deliberate upon Plaintiff's licensure application. If this were not true, why would the minutes reflect that was the sole reason the Funeral Board went into executive session? Presumably the Funeral Board's minutes are accurate, and therefore, its members believed they were entering into executive session to discuss and deliberate upon Plaintiff's application. Moreover, the testimony of the Funeral Board members and Jennifer Baugess, its administrative assistant, support the conclusion that the Funeral Board did in fact discuss and deliberate on the "pros and cons" of Plaintiff's license application.

The Tenth District has succinctly summarized the legal definition of "deliberate." Tobacco Prevention at ¶72. The appellate court stated that deliberations involve more than mere fact finding and include the "weighing and examining of reasons for and against a course of action." *Id.* A public body or board deliberates when there is an "exchange of views" and the pros and cons of a proposed action are discussed. *Id.*

In the matter at hand, the Court has carefully reviewed the transcript testimony of the witnesses, Board members, and others. The Court finds Plaintiff accurately summarized the testimony of the Board members and other witnesses in its Reply Memorandum. The Court also finds Plaintiff's summary of the following testimony to be accurate.

- The Funeral Board members expressed their opinions...whether to approve or deny Plaintiff's application. (Baugess, depo., p. 25).
- The Funeral Board's discussions on the application were the same discussions held in open session for other applicants. (Thomas Fleming deposition, p. 45).
- The Funeral Board discussed the details of the application and whether it complied with Ohio law. (Malik Hubbard deposition, p. 19).
- The Funeral Board was "trying to come to a conclusion" and decide whether to approve or disapprove the application. (Eric Anderson deposition, pp. 20-21).

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- The Funeral Board discussed several details of the application (including what the proper name should be for the funeral home) and “what does the law say and how does it pertain to this situation.” (Ty Marsh deposition, pp. 13-14).
- The Funeral Board discussed “what the funeral home legally could be and not be named” and whether the name was allowed “according to the Board’s rules and statutes.” (Lisa Bruns deposition, pp. 10, 14, 18-19).
- The Funeral Board discussed whether the name on the application could be utilized. (Pamela Williams-Briggs deposition, pp. 18-19, 37-38).
- The Funeral Board “hashed out what was before us” and were “raising questions amongst themselves” about the application. (Robert Carter deposition, pp. 32, 34-35)
- The Funeral Board discussed whether Marlan J. Gary’s name was appropriate and whether Plaintiff’s name should be included in the application. (John Primm deposition, p. 25).

Funeral Board member Ty Marsh even expressed his opinion that the Application was a “scam” to circumvent Mr. Gary’s license suspension. (Baugess depo., p. 15). This opinion was also shared and discussed by the other members. (Bruns, depo., pp. 12-13).

This testimony establishes beyond dispute that the pros and cons of Plaintiff’s application were weighed and discussed. The statute mandated that these discussions and deliberations take place in public. Public discussions would have enabled Plaintiff to respond to some of the alleged concerns or perceived problems with granting the application.³ At a minimum, the Open Meetings Act and due process should allow an applicant notice and an opportunity to respond to why his or her application is being denied. Conducting deliberations in private deprives the applicant of that

³ After denial of Plaintiff’s application, Plaintiff was entitled to written notice of the proposed denial and the right to a due process hearing. *See* R.C. 119.07; R.C. 119.09; and O.A.C. 4717-7-02, the Funeral Board’s own regulation, providing the same requirement. Most Boards employ hearing officers who conduct due process evidentiary hearings. Here the Board apparently never sent the R.C. 119.07 notice. Nor did the Board argue in this case that Plaintiff failed to exhaust administrative remedies with regard to the Declaratory Judgment Claim. The board obviously was not conducting “quasi judicial” deliberations in this case because Plaintiff had not been afforded a §119.07 notice and opportunity for a hearing.

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fundamental right. Private deliberations also deprive the public and any interested party from understanding the reasons for a particular action. Boards and public bodies regulate many important professions and determine issues of great import and of public interest. Boards have a great deal of authority and discretion. Board members are typically appointed by the Governor or other authorities. Because Board members are not elected by the public, the need for accountability is critically important.

By requiring proceedings and deliberations to occur publically, the Open Meetings Act helps ensure that a Board is accountable for its actions. A violation of the Act is therefore troubling and should not be dealt with lightly. The General Assembly provided that a violation of the Act subjects a public body to an injunction, a civil penalty, and attorney fees. These harsh enforcement mechanisms enforce the important public policy holding public bodies accountable for their decision making processes. The Ohio Supreme Court also has recognized this important public policy consideration when it wrote the following:

[o]ne of the strengths of American government is the right of the public to know and understand the actions of their elected representatives. This includes not merely the right to know a government body's final decision on a matter, but the ways and means by which those decisions were reached." *White v. Clinton Cty. Bd. Of Comms.*, 76 Ohio St. 3d 416, 419,667 N.E. 2d 1223 (1996).

Here, the Funeral Board not only deliberated, but arrived at a decision, even if no vote was taken in executive session. The testimony of Attorney T. Scott Gilligan, who represented Plaintiff at the meeting, reflects the Funeral Board came out of executive session and voted without any further real deliberation. (T. Scott Gilligan deposition, pp. 22, 36, 48-49). Even if discussions took place in open session following the executive session, the issue had already been discussed and

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opinions exchanged privately. The decision had been made in executive session to deny Plaintiff's application even if no formal vote was taken.

It would be next to impossible to prove that a public body reached a decision in executive session unless a formal vote was taken. However, in reviewing the testimony of the Board members, it is clear that individual members had decided the issue while discussing it in private. The tenor and content of the private deliberations clearly indicate Board members had made up their minds on the issue. (See e.g. Bruns, depo., pp. 12-13, testimony that Board members thought the Plaintiff's application was a "scam" or attempt to circumvent, the suspension of Mr. Gary's, license). As in the *Tobacco Prevention* case, the Funeral Board violated the Act by "deliberating in executive session upon matters it was required to discuss in open session." *Id.* at ¶74. Therefore, Plaintiff has established that the Funeral Board's private deliberations "caused" the denial of its license application, satisfying the requirement of "causation" set forth in *Tobacco Prevention*. *Id.*

Finally, the Funeral Board claims that, regardless of the wording of the motion to adjourn to executive session, it nonetheless went into executive session to discuss "pending or imminent court action" because two lawyers appeared on behalf of Plaintiff advocating the application. This argument is patently fatuous and not supported by any case law. Court action is "pending or imminent" if a lawsuit has been commenced, or is on the "point of happening," or a "reasonable prospect." See *State ex rel. Cincinnati Enquirer v. Hamilton County Commissioners*, First Dist. No. C-01065, 2002-Ohio-2038; *Greene County Guidance Center, Inc. v. Green-Clinton County Mental Health Board*, 19 Ohio App.3d 1, 5 (2nd Dist.1984).

The mere appearance of attorneys advocating on behalf of Plaintiff's application could not in any manner be construed to establish that a lawsuit was imminent or even a "reasonable prospect." Plaintiff's application had neither been approved nor denied when the Funeral Board

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went into executive session. The attorneys had not threatened a lawsuit, and this was the first time the application had been before the Funeral Board. Unlike the *Greene* case relied upon by the Funeral Board, there had been no ongoing bitter two year controversy with threats of litigation. If a Board were permitted to draw the conclusion that litigation was imminent any time an attorney appeared before a public body, every state board would have a convenient excuse to adjourn into executive session. To sustain the Funeral Board's claim on this point would render R.C. 121.22(G)(3) meaningless.

The threat of litigation must be real and not imagined, or contrived, after the fact to justify an otherwise unlawful executive session. Moreover, there is simply no testimony by any Board member that the threat of litigation was imminent or even discussed in executive session. Had the Funeral Board truly been concerned about imminent court action or litigation, why didn't its minutes express that potential imminent litigation was the reason for the executive session? Again, presumably, when a Board member makes a motion to go into executive session, the stated grounds for the motion are in fact the real reasons for the executive session.

For all the reasons set forth above, the Court finds by clear and convincing evidence that the Funeral Board committed two distinct violations of the Open Meetings Act. Specifically, the Funeral Board's Motion to enter into executive session violated R.C. 121.22(G), and the Funeral Board violated R.C. 121.22(H). The Court finds that no genuine issue exists as to any material fact and that Plaintiff is entitled to judgment as a matter of law. R.C. 121.22 (H) and (I) provide as remedies for a violation: injunctive, relief, costs, and a civil penalty of \$500.00 for each violation payable to the party seeking the injunction and relief. Therefore, the Court issues the following ORDERS:

1. The Funeral Board is hereby enjoined from meeting in executive session unless it complies with the notice provisions of R.C. 121.22(G), and the Funeral Board

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is enjoined from deliberating on any issue in executive session that is not expressly permitted by the statute or judicial decisions interpreting the statute.

2. The Funeral Board is ordered to pay \$1000.00 as a civil penalty to the Plaintiff as a forfeiture pursuant to R.C. 121.22 (I)(2)(a);
3. The Funeral Board is also ordered to pay reasonable attorney fees related to Count One pursuant to R.C. 121.22(I)(2)(a) and the costs of this action.

B. Attorney Fees and Costs

On February 13, 2012, the Court conducted an evidentiary hearing on the issue of attorney fees and costs to be awarded to Plaintiff. The Funeral Board stipulated that the hourly fee amounts charged by Plaintiff's counsel were reasonable rates, but disputed that the total amount of attorney fees being claimed related to Count One of the Complaint for violation of the Open Meetings Act. The Funeral Board contends that much of the time expended related to the declaratory judgment claim, upon which it, and not the Plaintiff, prevailed. Plaintiff's counsel presented direct testimony, submitted billings, and was subject to cross-examination.

Plaintiff requested fees totaling \$30,084.75 and costs of \$3,355.17. (Plaintiff's Hearing Ex.

3). Having considered the testimony and Exhibits, the Court hereby awards Plaintiff the sum of \$22,816.65 in attorney fees and costs of \$3,105.17. These amounts were calculated as follows. From the time of filing of the Complaint on August 17, 2011 to the conclusion of the injunction hearing on September 9, 2011, Plaintiff's counsel spent time on both of the pled causes of action. However, the majority of the hearings and issues during this time frame related to Count Two for declaratory judgment. The Court ruled against Plaintiff on this claim on September 9, 2011. Therefore, the Court discounted all legal fees billed through September 9, 2011 by sixty percent, awarding forty percent of the fees billed during this timeframe, for a total of \$5,364.90.

After September 9, 2011, all attorney fees related to the Open Meetings Act cause of action. Those fees totaled \$16,671.75. The Court also awarded four hours of fees for preparation

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and attendance for the attorney fees hearing, reflecting an additional \$780.00. The total award of attorneys fees is therefore \$22,816.65. The Court awards costs in the amount of \$3,105.17; representing litigation expenses, including transcript fees and filing costs. The Court declined to award Plaintiff its licensing application fee as he would have incurred that expense regardless of the violation of the Open Meetings Act.

Based on the foregoing, final judgment is rendered in favor of Plaintiff on Count One of its Complaint, and it is entitled to the relief set forth above. Judgment is rendered in favor of the Funeral Board on Count Two. Any outstanding court costs shall be assessed against the Funeral Board. Pursuant to Civ. R. 58(B), the Clerk of Courts is hereby directed to serve upon all parties notice of and the date of this judgment.

IT IS SO ORDERED.

Copies to:

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Franklin County Court of Common Pleas

Date: 02-16-2012
Case Title: TRIPLETT CHAPEL PEACE LLC -VS- OHIO STATE BOARD
EMBALMERS & FUNERAL DIRECTO
Case Number: 11CV010270
Type: DECISION/ENTRY

It Is So Ordered.

A handwritten signature in cursive script, "Mark Serrott", is written over a circular official seal. The seal is partially obscured by the signature and contains some illegible text around its perimeter.

/s/ Judge Mark Serrott

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Court Disposition

Case Number: 11CV010270

Case Style: TRIPLETT CHAPEL PEACE LLC -VS- OHIO STATE BOARD
EMBALMERS & FUNERAL DIRECTO

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes