[Cite as *Wolf v. E. Liverpool School Dist. Bd. of Edn.*, 2004-Ohio-2479.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

RICHARD WOLF PLAINTIFF-APPELLEE VS. EAST LIVERPOOL CITY SCHOOL DISTRICT BOARD OF EDUCATION, et al. DEFENDANTS-APPELLANTS	)	CASE NO. 03 CO 5 OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Columbiana County, Ohio Case No. 2002 CV 526

JUDGMENT: Reversed in part. Affirmed in part.

APPEARANCES:

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JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: May 12, 2004

WAITE, P.J.

{¶1} This appeal involves a number of issues arising from Ohio's Sunshine Law and from statutory notice provisions governing meetings held by a board of education. The Appellants are the Board of Education of the East Liverpool City School District ("the Board") and school board president Maureen Aronoff ("Aronoff"), who defended against a declaratory judgment action filed by another school board member, Appellee Richard Wolf ("Wolf"). Wolf's complaint alleged that the Board failed to provide proper advance notice of four meetings held in the first half of 2002. The trial court granted Wolf summary judgment with regard to meetings held on February 27, March 8, and April 5, 2002. For the reasons that follow, we must reverse the trial court judgment as to all three meetings. As the parties did not appeal the court's judgment concerning the May 13, 2002, meeting, that aspect of the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

{¶2} Wolf and Aronoff were members of the Board in 2001 and 2002. Mr. Donald Lowe was superintendent of the school district at that time. Mr. Lowe's contract was due to expire on July 31, 2002. Some members of the Board were not planning to renew Mr. Lowe's contract. Mr. Lowe himself had given indications to the Board that he had decided to retire. R.C. 3319.01 requires a board of education to notify the superintendent in writing of its intent not to renew the superintendent's

employment contract. This notice must be given by March 1st of the year that his or her contract expires. If the notice is not given by that time, the contract is automatically renewed for one year.

{¶3} It appears that Aronoff was not aware of this statutory provision until she learned about it during a seminar for school board presidents that she attended on February 9, 2002. The Board took no action on Mr. Lowe's contract at the February 11, 2002, regularly scheduled board meeting. The next regularly scheduled meeting was set for February 25, 2002. Aronoff was unable to attend that meeting due to illness. Aronoff learned the next day that the Board again took no action on Mr. Lowe's contract. Aronoff organized a special board meeting for February 27, 2002, which was the only day available before March 1st on which a quorum could be assembled.

{¶4} Mr. Lowe had earlier informed the Board that Wolf was seriously ill, was having open heart surgery, and would not be attending board meetings in February or March.

{¶5} Wolf was not given written notice of the February 27, 2002, special meeting. Wolf admitted he had actual knowledge that there would be a meeting on February 27, 2002. (11/15/02 Defendants' Motion for Summary Judgment, First Request for Admissions, No. 1.) Aronoff also notified the news media by phone that the Board was holding an emergency meeting on February 27, 2002. (11/15/02 Defendant's Motion for Summary Judgment, Aronoff affidavit.)

{¶6} The Board voted not to renew Mr. Lowe's contract at the February 27, 2002, meeting.

{¶7} The Board held a special meeting on March 8, 2002, to interview potential candidates for the superintendent's position, and held another special meeting on April 5, 2002, to discuss those candidates. The Board subsequently held a regular meeting on May 13, 2002.

{¶8} On June 12, 2002, Wolf filed a complaint for injunctive and declaratory relief in the Columbiana County Court of Common Pleas. Wolf alleged that the four Board meetings discussed above were illegally convened due to violations of R.C. §3313.16 (requiring written notice to each school board member of all special meetings of the board) and R.C. 121.22(F) and (G) (containing Sunshine Law notice requirements for regular, special, and emergency meetings of public bodies).

{¶9} During discovery, Appellants delivered requests for admissions to Wolf pursuant to Civ.R. 36. Wolf failed to timely respond to the requests for admissions.

{¶10} On November 15, 2002, Appellants filed a motion for summary judgment on all issues. Appellants relied in part on Wolf's failure to respond to their requests for admissions. On November 20, 2002, Wolf requested leave to file late responses to the requests for admissions, but the trial court denied the motion because Appellants had already relied on the admissions. (12/3/02 J.E.)

{¶11} On December 3, 2002, Wolf filed a motion for summary judgment, setting forth individual arguments as to each of the four meeting dates. The February 27, 2002, meeting was invalid, according to Wolf, because he did not receive written

notice of the meeting as required by R.C. §3313.16 and because the meeting violated R.C. 121.22. The March 8, 2002, meeting also violated R.C. 3313.16, according to Wolf, because he was not notified of the meeting in writing. The April 5 and May 13, 2002, meetings violated R.C. §121.22(G), according to Wolf, because the Board did not follow the proper procedure for entering into executive session.

{¶12} On December 6, 2002, the Board filed a response to Wolf's motion for summary judgment.

{¶13} On December 16, 2002, the trial court filed a detailed judgment entry dealing with both motions for summary judgment. The court found that Wolf admitted he had actual knowledge of the February 27, 2002, meeting. The court held, though, that R.C. 3313.16 requires written notice of all special meetings of the Board, and is silent concerning the possibility of a board member who has actual notice of the meeting. The court concluded that the meeting violated R.C. 3313.16. The meeting was also found to violate R.C. 122.22(F), which requires a public body to give 24-hour advance notice to the news media of any special meetings unless the meeting is an emergency, in which case the news media are entitled to immediate notification. The court held that there was no emergency to justify calling the February 27, 2002, meeting because the Board could have dealt with the non-renewal of Mr. Lowe's contract during the February 11 and February 25, 2002, meetings. The court held that the February 27, 2002 and March 8, 2002, meetings violated both R.C. 3313.16 and 121.22 and were invalid. The court decided that the April 5, 2002, special meeting violated R.C. 122.22(F) because the Board did not give the news media any notice of

the purpose of the meeting. Finally, the court held that the May 13, 2002, meeting did not violate the law.

{¶14} Wolf's motion for summary judgment was granted with respect to the meetings of February 27, March 8, and April 5, 2002, and the trial court declared all actions taken at those meetings to be a nullity. The court enjoined the Board from acting on any resolutions taken at those meetings. The court granted the Board's motion for summary judgment with respect to the May 13, 2002, meeting, but nullified any action taken at the meeting that may have arisen out of actions taken at the three meetings found to be invalid.

{¶15} Although the trial court deferred the determination of attorney fees, this issue was subsequently decided on December 30, 2002.

{¶16} Appellants filed a timely notice of appeal on January 14, 2003.

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR

{¶17} Appellants' first, second and third assignments of error are as follows:

{¶18} "The Columbiana County Court of Common Pleas ('Trial Court') erred in granting the Motion for Summary Judgment of Plaintiff/Appellee Richard Wolfe [sic] ('Appellee') and denying the Motion for Summary Judgment of Defendants/Appellants East Liverpool City School District Board of Education and Maureen Aronoff ('Appellants') regarding whether Appellants gave the news media proper notice of the February 27, March 8 and April 5, 2002 meetings under O.R.C. §121.22(G).

{¶19} "The Trial Court erred in granting Appellee's Motion for Summary Judgment and denying Appellants' Motion for Summary Judgment regarding whether

Appellants properly entered executive session during the April 5, 2002 meeting under O.R.C. §121.22(G).

{¶20} "The Trial Court erred in granting Appellee's Motion for Summary Judgment and denying Appellants' Motion for Summary Judgment regarding whether Appellants gave Appellee proper notice of the February 27 and March 8, 2002 special meetings under O.R.C. §3313.16."

{¶21} For the sake of clarity, we will reorganize Appellants' arguments on appeal so that each of the three board meetings is treated separately. Appellants' three assignments of error all deal with the trial court's decisions to sustain or overrule the parties' motions for summary judgment. An appellate court conducts a de novo review of a trial court's decision to grant a motion for summary judgment, using the same standards as the trial court as set forth in Civ.R. 56(C). *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Summary judgment is properly granted where the moving party demonstrates that: "(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." *Welco Industries, Inc. v. Applied Cos.* (1993), 67 Ohio St.3d 344, 346, 617 N.E.2d 1129, quoting *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶22} Once the moving party meets this initial burden, the opposing party bears a reciprocal burden in responding to the motion. *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 526 N.E.2d 798. Under Civ.R. 56(E), "a nonmovant may not rest on the mere allegations or denials of his pleading but must set forth specific facts showing that there is a genuine issue for trial." *Chaney v. Clark Cty. Agricultural Soc., Inc.* (1993), 90 Ohio App.3d 421, 424, 629 N.E.2d 513. The nonmoving party must produce evidence on any issue for which that party bears the burden at trial. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264; *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265.

{¶23} When ruling on a motion for summary judgment, the trial court may only review evidence properly submitted in accordance with Civ.R. 56(C). *State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.* (1995), 72 Ohio St.3d 94, 97, 647 N.E.2d 788. Civ.R. 56(C) prescribes the specific types of evidence to be considered in support of a motion for summary judgment, namely, "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact," timely filed in the action.

{¶24} A court should grant summary judgment with caution, resolving all doubts against the moving party. *Osborne v. Lyles* (1992), 63 Ohio St.3d 326, 333, 587 N.E.2d 825. Summary judgment is appropriate if, after construing the evidence in a light most favorable to the opposing party, there exists no genuine issue of material fact and reasonable minds can only conclude that the moving party is entitled to

judgment as a matter of law. *State ex rel. The V. Cos. v. Marshall* (1998), 81 Ohio St.3d 467, 473, 692 N.E.2d 198.

The February 27, 2002 Board Meeting

{¶25} The trial court held that the February 27, 2002, meeting violated both R.C. §3313.16 and R.C. §121.22(F). We will first consider the requirements of R.C. 3313.16, which states:

{¶26} "A special meeting of a board of education may be called by the president or treasurer thereof or by any two members, by serving a written notice of the time and place of such meeting upon each member of the board at least two days prior to the date of such meeting. Such notice must be signed by the official or members calling the meeting. For the purpose of this section, service by mail is good service."

{¶27} Appellants argue that actual notice of a special board meeting constitutes a waiver of the written notice requirement. Based on Appellee's failure to respond to Appellants' requests for admissions, and the trial court's refusal to allow Appellee to file late responses, Appellee has admitted he had actual notice of the February 27, 2002, board meeting, as well as notice of the meetings on March 8 and April 5, 2002.

{¶28} The first case cited by Appellants in support of their argument is *Indian Hill Exempted Village School Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Edn.* (1952), 64 Ohio Law Abs. 371, 108 N.E.2d 387. The *Indian Hill* court held that the written notice requirement of R.C. 3133.16 was waived because each of the five members of the

board of education had actual notice, since they attended the meeting. Appellants also cite *Cleveland City School Dist. v. Cleveland Teachers Union* (1980), 68 Ohio App.2d 540, 427 N.E.2d 540, which excused the written notice requirement because all board members were present at the meeting. Appellee argues that he did not attend the February 27, 2002, board meeting, rendering the holdings of these two cases inapplicable. Although the cases cited by Appellants support the general notion that the written notice provision in R.C. 3313.16 may be waived, Appellee is correct that they are not precisely on point with the facts of the instant case.

{¶29} Appellants attempt to provide more general support for their argument by citing *Edens v. Barberton Area Family Practice Ctr.* (1989), 43 Ohio St.3d 176, 539 N.E.2d 1124. Appellants cite *Edens* for the proposition that actual notice controls over a general written notice provision in a statute. We do not interpret *Edens* in this fashion. The issue in dispute in *Edens* was whether written notice was effective when mailed or only when the notice was received. Id. at 180. The *Edens* court held that, when applying a statute that does not specify how a written notice should be given, the written notice is effective upon receipt and not upon the date of mailing. Id. This holding has no bearing on the instant case.

{¶30} Thus, we are left with a general rule that written notice may be waived, and a defaulted admission on Appellee's part that he had actual knowledge of the February 27, 2002, special meeting. The significance of Appellee's actual notice in this situation is that it tends to show he was not prejudiced by the lack of written notice because he could have acted on his actual knowledge and attended the meeting.

Errors which occur in administrative proceedings that are not prejudicial to the substantial rights of the parties do not constitute reversible error on appeal. See, e.g., *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87, 94, 706 N.E.2d 1255; *Clayman v. State Med. Bd. of Ohio* (1999), 133 Ohio App.3d 122, 128-129, 726 N.E.2d 1098. Appellee has not alleged and certainly not shown that he was prejudiced by the procedural failure to send written notice. There is further evidence in the record that Appellee could not attend the February 27th meeting, and that he would not be attending any meetings due to illness. All of these factors demonstrate that any error in failing to send Appellee a written notice was harmless as to the February 27, 2002, meeting.

{¶31} The trial court also based its decision to grant summary judgment on a violation of a section of the Sunshine Law contained in R.C. 121.22(F), which states:

{¶32} "(F) Every public body, by rule, shall establish a reasonable method whereby any person may determine the time and place of all regularly scheduled meetings and the time, place, and purpose of all special meetings. A public body shall not hold a special meeting unless it gives at least twenty-four hours' advance notice to the news media that have requested notification, except in the event of an emergency requiring immediate official action. In the event of an emergency, the member or members calling the meeting shall notify the news media that have requested notification immediately of the time, place, and purpose of the meeting."

{¶33} The purpose of the Sunshine Law is contained in R.C. 121.22(A):

{¶34} "(A) This section 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."

{¶35} According to R.C. 121.22(H), any resolution, rule or other formal action taken by a public body that does not conform to the requirements of R.C. 121.22, or that does not qualify as a valid exception to R.C. 121.22, is invalid.

{¶36} There is no question that the Board is a "public body" subject to R.C. 121.22.

{¶37} The dispute in this appeal is whether the February 27, 2002, meeting was a valid emergency meeting, and as such, was exempt from the requirement of notification of the news media 24 hours in advance. Appellants argue that R.C. 121.22 does not define "emergency," and they could find no Ohio caselaw that directly reviewed the issue at hand. Appellee cites to a Seventh District case dealing with the rules for a public body to enter into an executive session, which is a distinct issue unrelated to the assignments of error here. See *Staley v. St. Clair Twp. Bd. of Trustees* (Dec. 15, 1987), 7th Dist. No. 87-C-44.

{¶38} Appellants' detailed discussion of the Nebraska case of *Meyer v. Bd. of Regents of the Univ. of Nebraska* (1993), 1 Neb.App. 893, 510 N.W.2d 450, is instructive. *Meyer* involved meetings held by the Board of Regents of the University of Nebraska dealing with the employment status of the president of the university, Dr. Ronald Roskens. The Board of Regents held meetings on May 12, June 23, and July 21, 1989, to discuss personnel matters involving Dr. Roskens. Id. at 894-895, 510

N.W.2d 450. Dr. Roskens had stated both publicly and privately that he intended to resign. The Board of Regents was hoping for a definitive answer from Dr. Roskens concerning his tenure in office in the three weeks following July 22, 1989. Dr. Roskens was traveling to Japan and Minnesota during that time period. On July 31, just prior to his trip to Minnesota, he presented a proposal to the chairperson of the Board of Regents, and the chairperson decided to convene an emergency meeting to consider the proposal. Id. at 895-896, 510 N.W.2d 450. The Board of Regents held the emergency meetings, approved Dr. Roskens' proposal and hired an interim president. Mr. Dan Meyer filed an action against the Board of Regents based, in part, on the grounds that the July 31, 1989, session was not an emergency under Nebraska's open meeting laws. The trial court found no violation of the open meeting laws and the judgment was upheld on appeal.

{¶39} Although there are many similarities between the *Meyer* case and the case sub judice, it would seem that the facts of the instant case present an even more compelling case that an emergency existed than in *Meyer*. In *Meyer*, the Board of Regents was under no statutory or specific deadline for resolving the employment status of Dr. Roskens. In the instant case, the Board was under a statutory deadline for deciding whether or not to renew the superintendent's contract. R.C. §3319.01. In *Meyer,* the Board of Regents met over a series of months before deciding that an emergency session was necessary. In the instant case, Board President Aronoff discovered the statutory requirement concerning the superintendent's employment

situation only three weeks before the deadline. Furthermore, Board President Aronoff was not able to attend the originally scheduled meeting due to illness.

{¶40} In the matter before us, the trial court concluded that the February 27, 2002, meeting was not an emergency because the subject matter of the meeting could have been handled at two previous board meetings. The trial court correctly attempted to determine the common usage for the undefined term “emergency” contained in R.C. 121.22(F). The process of judicial interpretation of a statute involves, "reading undefined words and phrases in context and construing them in accordance with the rules of grammar and common usage." *State ex rel. Portage Lakes Edn. Assn., OEA/NEA v. State Emp. Relations Bd.*, 95 Ohio St.3d 533, 2002-Ohio-2839, 769 N.E.2d 853, ¶36. A common dictionary definition of “emergency” is, “an unexpected situation or sudden occurrence of a serious and urgent nature that demands immediate attention.” American Heritage Dictionary (2d College Ed.1922) 448.

{¶41} The trial court, though, went beyond this common definition and attempted to apply a concept of emergency comparable to that found in tort law, in which the sudden emergency defense is not available if the party asserting the defense is at fault in creating the emergency. *Zehe v. Falkner* (1971), 26 Ohio St.2d 258, 263, 55 O.O.2d 489, 271 N.E.2d 276. Under this view, the Board could have theoretically resolved the issue of Mr. Lowe's contract any number of times prior to February 27, 2002. The Board, therefore, would have been at fault in creating their own emergency. We cannot approve of this interpretation by the trial court.

{¶42} The only possible support for such a view may be found in the Eleventh District Court of Appeals case of *Neuvirth v. Bd. of Trustees of Bainbridge Twp.* (June 29, 1981), 11th Dist. No. 919. The entire discussion of this issue in *Neuvirth* takes up a mere two sentences:

{¶43} "The court held the meeting[s] were not emergencies since there was evidence the matters could have been scheduled at any time in the preceding two or three months. The defendants could not postpone considering the matter until the last minute and then claim an emergency." Id. at *1.

{¶44} The *Neuvirth* case gives no factual or analytical context for its conclusion, and we see no reason to rely on *Neuvirth* in reviewing the instant case.

{¶45} We are concerned that the trial court's definition of emergency under R.C. §121.22(F) would violate the doctrine of the separation of powers. "The principle of separation of powers is embedded in the constitutional framework of our state government. The Ohio Constitution applies the principle in defining the nature and scope of powers designated to the three branches of the government. *State v. Warner* (1990), 55 Ohio St.3d 31, 43-44, 564 N.E.2d 18, 31. See *State v. Harmon* (1877), 31 Ohio St. 250, 258. It is inherent in our theory of government ' "that each of the three grand divisions of the government, must be protected from the encroachments of the others, so far that its integrity and independence may be preserved. * * *" ' *S. Euclid v. Jemison* (1986), 28 Ohio St.3d 157, 159, 28 OBR 250, 252, 503 N.E.2d 136, 138, quoting *Fairview v. Giffee* (1905), 73 Ohio St. 183, 187, 76 N.E. 865, 866." *State v. Hochhausler* (1996), 76 Ohio St.3d 455, 463, 668 N.E.2d 457.

{¶46} Under the trial court's interpretation, a court has the power to dictate to an executive branch agency that the agency cannot declare an emergency meeting if it was at all possible to accomplish the work of that emergency session at an earlier time. According to this view, it would be practically impossible to declare an emergency meeting that would be valid under R.C. 121.22(F), because almost every act can theoretically be performed at an earlier time. If we adopt this definition of emergency we would, in essence, be outlawing procrastination in all public offices and organizations. Although eradicating procrastination may be a noble goal, it is not a function of the courts to dictate to the other branches of government how they follow through with the work that is their public duty to accomplish. A school board, a city council, or a county board of commissioners must be the entity primarily responsible for determining its own emergencies. We are keenly aware that there may be situations in which a public body calls an emergency session as a pretext for avoiding public scrutiny of their actions. Nevertheless, we would be overstepping our judicial authority if we essentially eliminated the right of a school board, or any other public body, to rely on its own discretion in determining what is and what is not an emergency.

{¶47} The parties are in agreement as to the facts. Board president Aronoff determined that the non-renewal of Mr. Lowe's contract was an emergency because of the fast approaching statutory deadline contained in R.C. 3319.01. Although she expected the Board to deal immediately with the matter of Mr. Lowe's contract, she was not there to pursue it personally. Aronoff only discovered the statutory deadline

on or about February 9, 2002. Aronoff did not attend the first two board meetings that took place in February of 2002 because she was attending a seminar and subsequently became ill. She then called an emergency meeting for the only available day that a quorum could be convened. If these facts are true (and we must assume that they are for purposes of summary judgment) there was ample evidence in the record to show that the alleged emergency was not a pretext for avoiding public scrutiny of the subject matter of the February 27, 2002, board meeting.

{¶48} Based on the analysis above, there were no material issues of fact in dispute concerning the application R.C. 121.22. Appellee submitted nothing to dispute Appellants' version of the facts and nowhere does he present evidence that Appellants' version was mere pretext. The trial court incorrectly applied the law regarding emergency meetings when it granted summary judgment to Appellee, as to the validity of the February 27, 2002 meeting. Because there are no material facts in dispute and Appellants were entitled to judgment as a matter of law, we sustain Appellants' first and third assignments of error with respect to the February 27, 2002, board meeting and grant summary judgment to Appellants.

The March 8, 2002 Board Meeting

{¶49} Appellants argue that the trial court granted summary judgment as to the March 8, 2002, special meeting on grounds that were not raised in Appellee's complaint or motion for summary judgment. The only argument raised by Appellee in support of his motion for summary judgment was that he was not given proper notice pursuant to R.C. 3313.16. We have already determined that Appellee had actual

notice of the meeting, and that he did not assert or prove any prejudice to him from the lack of written notice. Appellee did not allege any other impropriety in the March 8, 2002, meeting, and therefore, the trial court erred in granting summary judgment to Appellee and in overruling Appellants' motion for summary judgment with respect to the March 8, 2002, meeting.

The April 5, 2002 Board Meeting

{¶50} Appellants point out that the only rationale that Appellee has set forth for invalidating the April 5, 2002, meeting was that the Board did not follow the proper procedure for entering into executive session. R.C. 121.22(G) governs the proper procedure and subject matter of an executive session under the Sunshine Law:

{¶51} "(G) Except as provided in division (J) of this section, the members of a public body may hold an executive session only after a majority of a quorum of the public body determines, by a roll call vote, to hold an executive session and only at a regular or special meeting for the sole purpose of the consideration of any of the following matters:

{¶52} "(1) To consider the appointment, employment, dismissal, discipline, promotion, demotion, or compensation of a public employee or official, * * *"

{¶53} Appellee has not pointed to any evidence that would indicate a violation of R.C. 121.22(G). In fact, Appellee's own evidence confirms the proper subject matter of the meeting, which was to consider the candidates for the new superintendent's position. (12/3/02 Motion for Summary Judgment, Attachment, Summary of Executive Session of April 5, 2002.) The burden of proof was on

Appellee to provide evidence and point to those documents in the record, as permitted by Civ.R. 56(C), that demonstrated that there were no issues of material fact in dispute and that judgment should be granted as a matter of law. Appellee did not meet this burden, and it was inappropriate to grant summary judgment to Appellee with regard to the April 5, 2002, meeting.

{¶54} Appellants, however, did present evidence that Appellee had written notice of the meeting, had actual knowledge of the meeting, that he attended the meeting, that the purpose of the meeting was to discuss candidates for the superintendent position, and that the news media was notified of the meeting more than 24 hours prior to the meeting. Appellee failed to rebut any of these facts in his response to Appellants' motion for summary judgment. The party opposing summary judgment has a burden to respond by referencing specific facts contained in the materials properly submitted for summary judgment pursuant to Civ.R. 56(C). Appellee did not meet this burden, and summary judgment should have been granted to Appellants with respect to the April 5, 2002, meeting, as well.

{¶55} Based on our analysis above, we sustain Appellants' first three assignments of error.

FOURTH ASSIGNMENT OF ERROR

{¶56} "The Trial Court erred in awarding Appellee a civil forfeiture, and his costs and attorney fees."

{¶57} The trial court ordered Appellants to pay a civil forfeiture of $500, to pay all court costs, and to pay $2,389.50 in attorney fees, all pursuant to R.C. 121.22(I)(2)(a). The following sections of R.C. 121.22(I) are relevant to this issue:

{¶58} "(I)(1) Any person may bring an action to enforce this section. An action under division (I)(1) of this section shall be brought within two years after the date of the alleged violation or threatened violation. Upon proof of a violation or threatened violation of this section in an action brought by any person, the court of common pleas shall issue an injunction to compel the members of the public body to comply with its provisions.

{¶59} "(2)(a) If the court of common pleas issues an injunction pursuant to division (I)(1) of this section, the court shall order the public body that it enjoins to pay a civil forfeiture of five hundred dollars to the party that sought the injunction and shall award to that party all court costs and, subject to reduction as described in division (I)(2) of this section, reasonable attorney's fees. The court, in its discretion, may reduce an award of attorney's fees to the party that sought the injunction or not award attorney's fees to that party if the court determines both of the following:

{¶60} "(i) That, based on the ordinary application of statutory law and case law as it existed at the time of violation or threatened violation that was the basis of the injunction, a well-informed public body reasonably would believe that the public body was not violating or threatening to violate this section;

{¶61} "(ii) That a well-informed public body reasonably would believe that the conduct or threatened conduct that was the basis of the injunction would serve the

public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct."

{¶62} Because we are reversing the trial court's decision to grant summary judgment to Appellee on all issues related to R.C. 121.22, we must also reverse the civil forfeiture, court costs and attorney fees awarded pursuant to R.C. §121.22(I).

CONCLUSION

{¶63} Appellants have demonstrated that summary judgment was improperly granted to Appellee regarding the three board meeting dates that are under review. Appellants have also shown that summary judgment should have been granted in their favor with respect to these meetings. We reverse the summary judgment that was granted to Appellee, including the issuing of an injunction, with respect to the board meetings of February 27, 2002, March 8, 2002, and April 5, 2002. We also reverse the trial court's decision to overrule Appellants' motion for summary judgment concerning the meetings held on these dates and grant summary judgment in Appellants' favor as to these three meetings. The civil forfeiture, court costs and attorney fees assessed against Appellants are also reversed. None of the parties have challenged the trial court's ruling with respect to the May 13, 2002, board meeting, thus, this aspect of the decision remains valid.

Donofrio, J., concurs.

DeGenaro, J., concurs in part and dissents in part; see concurring in part and dissenting in part opinion.

DeGenaro, J., concurring in part and dissenting in part.

{¶64} While I agree with the majority's decision regarding the meeting held on March 8, 2002, I respectfully dissent from its decision regarding the meetings on February 27, 2002, and April 5, 2002.

{¶65} The Board gave the news media less than twenty-four hours notice of the February 27th meeting. The only time this is acceptable is if the meeting is held in an emergency situation. The reason the meeting was necessary was because the Board failed to address an important issue at previous meetings. Since the meeting was necessitated by the Board's own neglect rather than circumstances beyond its control, the trial court properly concluded that the situation was not an emergency. Because the Board violated the Sunshine Law by not giving proper notice of this meeting to the news media, the trial court properly awarded Wolf a civil forfeiture from the Board. Accordingly, I would affirm the trial court's decision granting Wolf summary judgment regarding the February 27, 2002 meeting and the civil forfeiture and award.

{¶66} The record contains conflicting evidence regarding whether the Board properly entered executive session at the April 5th meeting. Since the record contains conflicting evidence, there is a genuine issue of material fact and the issue cannot be decided on summary judgment. Accordingly, I would reverse the trial court's decision to grant summary judgment to Wolf regarding this date and would remand this matter for further proceedings regarding the April 5th meeting.

Sunshine Law

{¶67} The purpose of Ohio's Sunshine Law is "to enable any member of the general public to seek enforcement of the statute when public officials circumvent the public's right to observe public officials as they conduct official business." *State ex rel. Mason v. State Emp. Relations Bd.* (1999), 133 Ohio App.3d 213, 218. Both parties concede that the school board is a public body subject to this statute pursuant to R.C. 121.22(B)(1). R.C. 121.22(F) provides the manner in which a public body must notify the public of a special meeting.

{¶68} "A public body shall not hold a special meeting unless it gives at least twenty-four hours' advance notice to the news media that have requested notification, except in the event of an emergency requiring immediate official action. In the event of an emergency, the member or members calling the meeting shall notify the news media that have requested notification immediately of the time, place, and purpose of the meeting." Id.

{¶69} The term "special meeting" is not defined in R.C. 121.22, but it means any meeting other than a regularly scheduled meeting. *Katterhenrich v. Fed. Hocking Local School Dist. Bd. of Edn.* (1997), 121 Ohio App.3d 579, 587. If a public body does not comply with R.C. 121.22(F), then any action it takes at the special meeting in question is invalid. R.C. 121.22(H).

{¶70} In this case, the facts leading up to the February 27th meeting regarding the notice given to the media are undisputed. Aronoff, the school board president, testified that on February 9, 2002, she learned the school board would have to vote to non-renew the superintendent's contract before March 1, 2002, in order to accept his retirement/resignation. The school board held regular meetings on February 11 and February 25, 2002. The school board did not address whether to non-renew the superintendent's contract at either the February 11th or 25th meetings. Aronoff did not attend the February 25th meeting and learned on February 26th that the board did not vote on whether to non-renew the superintendent's contract at the previous day's meeting. After Aronoff found this out, she called an emergency special meeting for the next day to vote on that matter since that was the only day she could assemble a quorum of the school board before March 1st. She gave the media less than twenty-four hours notice of that special meeting.

{¶71} Since the facts are undisputed, the resolution of whether the school board gave the statutorily required notice of the February 27th meeting to the news media depends upon what R.C. 121.22(F) means by "emergency". Defining words in a statute is a matter of statutory construction, subject to de novo review as a matter of law. *Kemo v. St. Clairsville* (1998), 128 Ohio App.3d 178, 183. Accordingly, it is a particularly appropriate matter for summary judgment.

{¶72} As the majority states, when a court is interpreting a statute, it must read "'undefined words and phrases in context and construe them in accordance with the rules of grammar and common usage.'" Id. at ¶40, quoting *State ex rel. Portage Lakes Edn. Assn., OEA/NEA v. State Emp. Relations Bd.*, 95 Ohio St.3d 533, 2002-Ohio-2839, ¶36. Since the word "emergency" is undefined, we must look to the common usage of the term. And it is defined as "an unforeseen combination of circumstances or the resulting state that calls for immediate attention." Merriam-Webster's Collegiate Dictionary (10th Ed. 1998), 377. Although this definition of "emergency" is different than that adopted by the majority, they are practically the same. See Opinion at ¶40.

{¶73} The facts in this case clearly and unambiguously demonstrate that there was no emergency on February 27, 2002, as the word is commonly used. Accordingly, that meeting was not an emergency meeting. The fact that the Board had failed to non-renew the superintendent's contract was neither an "unforeseen combination of circumstances or the resulting state that calls for immediate attention" nor "an unexpected situation or sudden occurrence of a serious and urgent nature that demands immediate attention." Aronoff knew that the March 1st deadline was approaching. The need to address the superintendent's contract before that deadline was neither unforeseen, unexpected, nor sudden. Instead, the situation arose from the school board's failure to non-renew the superintendent at previous meetings, a matter which is in the sole control of the school board itself.

{¶74} The majority refuses to follow the Eleventh District's decision in *Neuvirth v. Bainbridge Twp. Bd. of Trustees* (June 29, 1981), 11th Dist. No. 919, where it held that a public body "could not postpone considering the matter until the last minute and then claim an emergency", arguing that the Eleventh District "gives no factual or analytical context for its conclusion." Opinion at ¶44. But the reason for its conclusion is obvious. A situation is not an emergency if it is not an "unexpected situation" or an "unforeseen combination of circumstances." When a public body must address a situation by a certain date and fails to do so, then the situation is completely expected and foreseeable.

{¶75} The record does not indicate that the Board intentionally tried to circumvent the public's right to observe its decision over whether to non-renew the superintendent. But as a practical matter, the manner in which it handled the situation did just that. The Board first learned of the superintendent's intent to retire/resign in the fall of 2001. On February 9, 2002, the Board's president learned that the Board had to non-renew the superintendent's contract in order to accept his retirement. The Board held numerous meetings after finding out about the superintendent's decision to retire/resign and held two regular meetings after its president found out about the Board's obligation to specifically non-renew the superintendent's contract. But the Board failed to address the issue at any of those meetings. Instead, through its own neglect, it failed to consider the matter until it was almost too late.

{¶76} The majority laments the fact that this interpretation of the statute will make it "practically impossible to declare an emergency meeting that would be valid under R.C. 121.22(F)" and worries that adopting this interpretation would "outlaw procrastination in all public offices and organizations. Opinion at ¶46. First of all, this is a false statement. It is easy to contemplate situations which may call for emergency action by a public body like a school board. For instance, if a school superintendent is arrested for drug trafficking and accused of selling those drugs to students, then a school board may want to take emergency measures to relieve him of his duties. Likewise, if a teacher or athletic coach was arrested and accused of improper sexual relations with a student, then a school board may want to take emergency measures. Anyone who watches the news or reads the newspaper has heard of incidents like these.

{¶77} Thankfully, these kinds of emergency situations are rare. But so is any situation which needs action so immediately that the public body cannot give twenty-four hours notice of its meeting. Nevertheless, history has shown that the possibility does exist. The fact that the General Assembly wisely recognized the possibility that a situation could be an emergency does not mean that we must sanction a public body's liberal interpretation of whether or not a situation is an emergency.

{¶78} Furthermore, our recognition that this is not an emergency does not prevent, or even criticize, procrastination. If a public body does not wish to address a situation at the earliest possible moment, then it need not do so. There is nothing in R.C. 121.22 which requires a public body to address any and all issues at the soonest possible moment or at the first possible meeting. A public body may decide to delay taking a particular action for any reason or no reason at all. If a public body chooses not to take an action at a regularly scheduled meeting, it may take that action at a special meeting. The only thing that the statute requires is that the public body gives twenty-four hours notice before that meeting.

{¶79} If we sanction these actions by granting summary judgment to the school board, then we circumvent and ignore the purpose of the Sunshine Law. We cannot "enable any member of the general public to seek enforcement" of the public's right to observe public officials as they conduct official business if we allow public officials to circumvent that right by waiting until the last minute to conduct that business when the public officials had numerous opportunities to conduct official business sooner. It does not matter whether or not the Board intentionally circumvented the public's right to know. The fact remains that it is the Board's own failure to deal with an issue in a timely manner that created the alleged "emergency". Because the Board did not deal with this issue at the proper time, the public was denied the opportunity to observe the school board as it conducted its official business. I cannot ignore the purposes of the Sunshine Law merely because I believe that the Board accidentally violated that law.

{¶80} The reason the majority fails to make this obvious conclusion is because it is concerned that this conclusion will "violate the doctrine of the separation of powers." Opinion at ¶45. But what the majority fails to understand is that its decision violates that doctrine by granting the judicial power to interpret statutes to the other branches of government.

{¶81} "The United States Constitution does not impose the doctrine of separation of powers on the states." *Mayor of Philadelphia v. Educational Equality League* (1974), 415 U.S. 605, 615. But "the doctrine of separation of powers is 'implicitly embedded in the entire framework of those sections of the Ohio Constitution

that define the substance and scope of powers granted to the three branches of state government.'" *State ex rel. Bray v. Russell* (2000), 89 Ohio St.3d 132, 134, quoting *S. Euclid v. Jemison* (1986), 28 Ohio St.3d 157, 158-159. This doctrine arises from "the general principle that a grant of general powers to any department constitutes of itself an implied exclusion of all other departments from the exercise of such powers." *Fairview v. Giffee* (1905), 73 Ohio St. 183, 188. It "recognizes that the executive, legislative, and judicial branches of our government have their own unique powers and duties that are separate and apart from the others." *State v. Thompson* (2001), 92 Ohio St.3d 584, 586. Its purpose is "to create a system of checks and balances so that each branch maintains its integrity and independence." Id.

{¶82} The majority believes that both we and the trial court are overstepping our bounds if we "dictate to an executive branch agency that the agency cannot declare an emergency meeting if it was at all possible to accomplish the work of that emergency session at an earlier time." Opinion at ¶46. It believes that "[a] school board, a city council, or a county board of commissioners must be the entity primarily responsible for determining its own emergencies. * * * [W]e would be overstepping our judicial authority if we essentially eliminated the right of a school board, or any other public body, to rely on its own discretion in determining what is and what is not an emergency." Id.

{¶83} This belief is flawed because it confuses the various roles of the different branches of government. "'That which distinguishes a judicial from a legislative act is that the one is a determination of what the existing law is, in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of future cases falling under its provisions.'" *Zanesville v. Zanesville Tel. & Tel. Co.* (1900), 63 Ohio St. 442, 453, quoting Cooley, Const. Lim. 108. In contrast, "[t]he executive power is defined as the power to execute the laws of the State." *In re Metzenbaum* (1970), 26 Ohio Misc. 47, 48.

{¶84} "Absent an express constitutional provision, the general provision vesting only judicial power in the courts created by the Constitution must be observed." *City of Columbus v. Anderson* (1985), 27 Ohio App.3d 307, 309. "The administration of

justice by the judicial branch of the government cannot be impeded by the other branches of the government in the exercise of their respective powers." *State ex rel. Johnston v. Taulbee* (1981), 66 Ohio St.2d 417, paragraph one of the syllabus. Under the Ohio Constitution, "courts 'possess all powers necessary to secure and safeguard the free and untrammeled exercise of their judicial functions and cannot be directed, controlled or impeded therein by other branches of the government.'" *Thompson* at 586, quoting *State ex rel. Johnston v. Taulbee* (1981), 66 Ohio St.2d 417, paragraph two of the syllabus.

{¶85} "'The interpretation of the laws is the proper and peculiar province of the courts.'" *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 493, quoting The Federalist No. 78. And "it is a judicial function to hear and determine a controversy between adverse parties, to ascertain the facts, and, applying the law to the facts, to render a final judgment." *Fairview* at 190.

{¶86} The majority proposes that we defer to the Board's interpretation of R.C. 121.22(F) so it can "rely on its own discretion" in determining whether or not it has violated that statute. The majority does not point to any constitutional provision indicating that we must or should defer to a public body's interpretation of a statute because none exists. Likewise, it does not point to a statutory provision providing for that deference because none exists. But even if such a statutory provision did exist, we could not follow it since it would be giving judicial powers to public bodies. The Ohio Constitution only grants that power to the courts and a statute which grants it to public bodies would be unconstitutional. *Jemison* at 163; see also *Sheward* at 475.

{¶87} A school board, like any public body, is a creature of the legislature and it must obey the statutes the legislature puts in place to regulate its behavior. *Brown v. Monroeville Local School Dist. Bd. of Edn.* (1969), 17 Ohio App.2d 1, 3-4. As a creature of statute, a school board has "no more authority than what has been conferred on them by statute or what is clearly implied therefrom." *Wolf v. Cuyahoga Falls City School Dist. Bd. of Edn..* (1990), 52 Ohio St.3d 222, 223. R.C. 121.22(F) regulates the Board's behavior and its authority to be the entity primarily responsible

for interpreting what the General Assembly meant when it drafted R.C. 121.22(F) is not conferred and cannot be implied from any statute.

{¶88} I cannot concur in the majority's analysis because it is our job to judge whether or not the Board violated R.C. 121.22(F). To do so, we must determine whether or not there was an emergency at the time of the "emergency meeting". We cannot abandon our responsibilities by relying on the Board's discretion to determine what it thinks is an emergency. "Clearly, when a case is properly before the court for review and final determination, we as judges are not at liberty to ignore our obligations." *DeRolph v. State* (2001),93 Ohio St.3d 309, 328 (Douglas, J., concurring). Accordingly, I would affirm the trial court's conclusion that the Board violated R.C. 121.22(F) by failing to give proper notice of the February 27th special meeting.

Civil Forfeiture

{¶89} Appellants' final assignment of error is based on their belief that they did not violate any aspect of R.C. 121.22. Since I conclude the trial court failed to properly notify the news media of the February 27th meeting, I would find this assignment of error is meritless.

{¶90} R.C. 121.2(I) provides the penalties for violating R.C. 121.22.

{¶91} "(I)(1) Any person may bring an action to enforce this section. An action under division (I)(1) of this section shall be brought within two years after the date of the alleged violation or threatened violation. Upon proof of a violation or threatened violation of this section in an action brought by any person, the court of common pleas shall issue an injunction to compel the members of the public body to comply with its provisions.

{¶92} "(2)(a) If the court of common pleas issues an injunction pursuant to division (I)(1) of this section, the court shall order the public body that it enjoins to pay a civil forfeiture of five hundred dollars to the party that sought the injunction and shall award to that party all court costs and, subject to reduction as described in division (I)(2) of this section, reasonable attorney's fees. The court, in its discretion, may

reduce an award of attorney's fees to the party that sought the injunction or not award attorney's fees to that party if the court determines both of the following:

{¶93} "(i) That, based on the ordinary application of statutory law and case law as it existed at the time of violation or threatened violation that was the basis of the injunction, a well-informed public body reasonably would believe that the public body was not violating or threatening to violate this section;

{¶94} "(ii) That a well-informed public body reasonably would believe that the conduct or threatened conduct that was the basis of the injunction would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct." R.C. 121.22(I).

{¶95} Since I would affirm the trial court's decision to issue an injunction regarding the February 27th meeting, I would also affirm the civil forfeiture since it is mandated by statute.

Executive Session

{¶96} The majority concludes that Wolf failed to point to any evidence which would indicate a violation of R.C. 121.22(G). Thus, it concludes that he failed to bear his burden of proving that there is a genuine issue of material fact regarding whether or not the Board properly entered executive session at the April 5th meeting. I disagree. Although the Board's minutes state that it went into executive session "for the purposes of superintendent search", Wolf's answers to interrogatories state that the Board did not indicate why it was entering executive session before it went into executive session. In addition, Wolf produced a tape recording purporting to be of the April 5th meeting and he argues that tape proves that his allegations are correct. Wolf's evidence conflicts with that produced by the Board on this issue, so there is a genuine issue of material fact on this issue. It was improper for the trial court to grant summary judgment to Wolf on this issue and it is improper for the majority to grant summary judgment to the Board on this issue. Thus, I would remand the matter for further proceedings regarding the April 5, 2002 meeting.