Press Release
July 3, 2018

Arizona Appellate Court Decides Hockey Stick Emails Must Be Released Despite the University's Appeal

One thousand seven hundred and sixty-three days ago, on behalf of its client, the Free Market Environmental Law Clinic, PLLC (FME Law) asked the University of Arizona to hand over public records that would expose to the world the genesis of what some consider the most influential scientific publication of that decade – the Mann-Bradley-Hughes temperature reconstruction that looks like a hockey stick.

The University refused.

On February 26th of this year, and after submissions of legal briefings that now fill two banker's boxes, and three trips to the Appellate Court, the trial court ordered release of the documents, giving the University 90 days to disclose the documents in a word-searchable form. Three days before the deadline, the University filed a motion asking the trial court to "stay" the disclosure of the public records while they appealed the case. In a 13 word decision, the trial court found "the requested relief is not warranted."

The University then asked the Appellate Court for a stay, arguing that once the documents were released, "that genie could not be put back in the bottle," in the event the trial court's decision was reversed.

Yesterday, a mere six days after filing of the final legal brief on the motion for a stay, the Appellate Court issued a seven-word decision: "Motion for Stay Pending Appeal is DENIED." The Appellate Court gave no explanation as to why it denied its motion, but it would likely be one of the reasons offered by FME Law in its brief to the court. A Copy of that brief is attached to this news release. Among other things, this order means the Appellate Court could not conclude that the University would have probable success on the merits of their argument. Nor could they conclude there were "serious questions" remaining to be addressed.

"This decision by the Appellate Court is much more than a small procedural action," said Dr. David Schnare, the member-manager of the Free Market Environmental Law Clinic, PLLC, who is prosecuting this case. "We asked for the full history of the hockey stick graph and much more. We sought the history of the fourth Intergovernmental Panel on Climate Change Report and the discussions among the scientists as they discussed climate papers and the then burgeoning antagonism between climate scientists not of like mind."

Chaim Mandelbaum, Executive Director of FME Law explains, "This case is not over, but we appear to be at the beginning of the end." The University may wish to now appeal to the Arizona

Supreme Court for a stay, an effort attorneys familiar with the case believe would not change the outcome. "This decision does not end the appeal, however," Mr. Mandelbaum stated.

Dr. Schnare described the status of this case and its importance. "We did not take this case only to obtain the history of a very controversial period of time in the climate wars. We also took this case to cast sunlight on how public universities work, how they contribute to the formation of public policy, and how professors behave within the policy arena. Core legal issues remain before the court - particularly about how to protect the research process while still allowing the public to learn how this sector of the government works. The University's appellate brief is due on July 30th, our answering brief is due on September 7th and any reply from the University comes after that. We won't have a final appeals court decision on the merits of this case until late in the year, and then it will be on to the Arizona Supreme Court."

In the meantime, the documents will have to be handed over. Dr. Schnare and his staff will take the first look at those documents. With a doctorate in environmental management and decades of experience in policy formation, he, with the assistance of FME Law staff, will sort these documents, organize them for use by the public and prepare a report on what they contain – so to speak, a chronical of that historic time, based not on cherry picked emails but on the full history as available in the public record. They will then turn over the public records and their report to their client who is expected to make them available to the public.

FME Law is a 501(c)(3) public charity dedicated to be an honest, pro-environmental legal presence that represents clients seeking to hold state and federal governments to the ethical and legal requirements that protect and enhance free market environmentalism. For further information, Contact Chaim Mandelbaum (703) 577-9973, Executive Director of FME Law; or, Dr. Schnare (571) 243-7975, Member-Manager of FME Law, PLLC.

IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

ARIZONA BOARD OF REGENTS, and **TERI MOORE**, in her official capacity as Custodian of Public Records for the University of Arizona, Appellants, vs. **ENERGY & ENVIRONMENT LEGAL INSTITUTE**, Appellee.	2CACV-2018-0092 Pima County Superior Court Cause No. C2013-4963

APPELLEE'S RESPONSE TO PLAINTIFFS' MOTION FOR STAY

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COMES NOW, Appellee Energy & Environment Legal Institute (E&E Legal), by counsel, in Response to ABOR's untimely motion for a stay of the final non-money judgment in the above titled matter.

E&E Legal opposes Appellants' Motion on two bases. First, the motion is time-barred and this Court does not have jurisdiction to consider the motion. Second, the Trial Court has already made factual findings that addressed the need for a stay and, having found them lacking, this Court will not find those findings clearly erroneous.

Procedural Posture

On September 5, 2013, E&E Legal filed a special action in the Pima County Superior Court against the Arizona Board of Regents and Ms. Teri Moore, public records coordinator for the University of Arizona. The action challenged the University of Arizona's refusal to turn over certain records requested by E&E legal in 2011 and 2012. After multiple hearings, an Appellate Decision regarding the need for balancing of equities under the *Mathews* test, subsequent hearings and decisions, a second Appellate order requiring clarification of the Trial Court decision, and another, subsequent, Trial Court hearing, the Trial Court entered its final judgment under Rule 54(c) on February 26, 2018. In so doing, the Trial Court "considered the pleadings and argument of counsel, reviewed the documents filed under seal submitted by the Arizona Board of Regents [hereinafter, "ABOR"

or "the University"] and reviewed its earlier rulings and those of the Court of Appeals" and then granted E&E Legal's motion for enforcement of non-money judgments. ABOR was given 90 days to disclose the documents. Three days before ABOR was required to produce the public records they had been ordered to disclose, they filed in the trial court a motion to stay the proceedings which the Trial Court denied. They now bring a motion for staying disclosure of the documents they have been ordered to produce.

ARGUMENT

I. The Stay Motion is Time-Barred.

The Trial Court entered its final judgement under Rule 54(c) of the Arizona Rules of Civil Procedure on February 26, 2018. The question now arises whether a motion for a stay made to the Appellate Court is properly before the Court in light of the fact that the necessary prior motion for a stay at the Trial Court was made 87 days after entry final judgment and 61 days after Notice of Appeal was filed. It is not.

The long-standing rule, articulated in *Castillo* and adopted by the Supreme Court in *Continental* makes clear that "[w]hen a party files a notice of appeal from a final judgment, it 'generally divests the trial court of jurisdiction to proceed except in furtherance of the appeal.'" *Castillo v. Indus. Comm'n*, 21 Ariz. App. 465, 467 (1974), *and see*, *Continental Casualty Co. v. Industrial Comm'n*, 111

Ariz. 291, 295 (1974) ("we take a step further and adopt the rationale of the Court of Appeals, Division One, Department B, as set forth in the case of *Castillo v. Industrial Commission*."). While there are some exceptions to this rule, none of them apply to the facts of this case. See Rules of Civil Procedure for the Superior Courts of Arizona, Rules 60 & 62.

ABOR was put on notice that they needed to file a motion for a stay in the Trial Court in a timely fashion. See, Petitioner's Motion for Enforcement of the Nonmoney Judgments, pp. 4 & 6 (noting that Plaintiffs expected "the inevitable motion for a stay," and, citing to A.R.C.A.P. Rule 7(c) "A party requesting a stay from an appellate court under this Rule must first request the stay in the superior court."). Despite this clear notice that they needed to file a timely motion for a stay, ABOR did not file such a motion.

Having failed to timely move the Trial Court for a stay, under Appellate Rule 7(c), they have waived their opportunity to obtain a stay from the Appellate Court. ABOR slept on their rights.

II. Stay of Disclosure is Inappropriate

The fact of an appeal, on its own, is not sufficient to automatically stay an enforcement order. A "final judgment . . . is not stayed after being entered, even if an appeal is taken." 16 A.R.S. Rule 62(a). Where the judgment is against the state,

the only automatic exclusion to Rule 62(a) is for "Money Judgments".[1]

After the Court denied the Rule 59 motion, ABOR had but one means to avoid production of the documents under an enforcement order – a timely request from the trial court to stay the production order. See, A.R.C.A.P. Rule 7(c) ("A party requesting a stay from an appellate court under this Rule must first request the stay in the superior court.")

"Arizona courts have applied to such stay requests the traditional criteria for the issuance of preliminary injunctions." *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 410-411, 132 P.3d 1187, 1190-1191 (2006), (citing, *Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1991). Because the Trial Court has already made findings against ABOR that eviscerate the necessary and essential basis for obtaining injunctive relief, ABOR cannot succeed in obtaining a stay.

The party seeking a preliminary injunction is obligated to establish four traditional equitable criteria. The traditional equitable criteria for granting preliminary injunctive relief are: (1) a strong likelihood of success on the merits;

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[1] "*Nonmoney Judgments*. If a judgment other than a money judgment is entered against the State of Arizona or one of its agencies or political subdivisions, the judgment is not automatically stayed upon the filing of an appeal. If a court grants a stay of such a judgment, it may not require a bond, obligation, or other security." 16 A.R.S. Rule 62(e)(2); and see, *Kelley v. Arizona Dep't of Corrections*, 154 Ariz. 476, 480 (1987).

(2) the possibility of irreparable injury to the plaintiff if the requested relief is not granted; (3) a balance of hardships favoring the [moving party]; and (4) advancement of the public interest (in certain cases). See, *Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990), citing, *Justice v. National Collegiate Athletic Asso.*, 577 F. Supp. 356, 363-64 (1983). In applying these four criteria,

> "the moving party may 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. Shoen,167 Ariz. at 63, 804 P.2d at 792 (quoting Justice v. Nat'l Collegiate Athletic Ass'n,577 F. Supp. 356, 363 (D. Ariz. 1983)). The greater and less reparable the harm, the less the showing of a strong likelihood of success on the merits need be. Conversely, if the likelihood of success on the merits is weak, the showing of irreparable harm must be stronger.

Smith v. Ariz. Citizens Clean Elections Comm'n, 212 Ariz. at 411. In applying these two principles, however, "[t]hese principles generally do not allow the court to grant a preliminary injunction without some showing of a possibility of irreparable injury." *Shoen v. Shoen*, 167 Ariz. at 63.

Because the relevant evidence necessary to meet this burden of proof has already been considered by the Trial Court during its consideration of the underlying decisions under the *Mathews* balancing and related analysis under other relevant public records law, the Appellate Court does not make a *de novo* finding on these fact questions, but rather considers whether the Trial Court's findings reflect an abuse of discretion, *i.e.* that these findings are clearly erroneous.

> Granting or denying a preliminary injunction is within the sound discretion of the trial court, and its decision will not be reversed absent an abuse of that discretion. *Financial Assocs., Inc. v. Hub Properties, Inc.*, 143 Ariz. 543, 545, 694 P.2d 831, 833 (App. 1984). The trial judge's factual findings are reviewed on a clearly erroneous standard. See Rule 52(a), Ariz.R.Civ.P.

Valley Med. Specialists v. Farber, 194 Ariz. 363, 366 (1999).

This Court will not disturb the Trial Court's factual findings "unless they are clearly erroneous, **meaning that they are unsupported by substantial evidence**." *Felder v. Physiotherapy Assocs.*, 215 Ariz. 154, (¶ 72) (App. 2007) (*emphasis added*); *see also Associated Aviation Underwriters v. Wood*, 209 Ariz. 137, 171 (¶ 107) (App. Div 2. 2004). "Substantial evidence is evidence which would permit a reasonable person to reach the trial court's result." Gravel Res. v. Hills, 217 Ariz. 33, ¶ 14, 170 P.3d 282, 287 (App. 2007). **If reasonable people "might differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered substantial."** *Ariz. Chuck Wagon Serv., Inc. v. Barenburg*, 17 Ariz. App. 235, 236 (1972) (*emphasis added*).

The Trial Court has already made findings that there is no possibility of irreparable injury and that the balance of hardships tip in favor of E&E Legal. It has ruled that "Disclosure of the subject documents is not contrary to the interests of the State of Arizona"; and, "the subject matter of the documents has become available to the general public". Ruling, November 30, 2017. We review each.

A. <u>There is no possibility of irreparable injury to the plaintiff</u>

As this Court has explained in this case, when the Trial Court conducts the *de novo Mathews* balancing, the express purpose of the balancing is to ensure that the right of inspection does not result in irreparable private or public harm. *See*, Memorandum Decision, (Az. App. Div. 2, December 3, 2015), *or see*, *Energy & Env't Legal Inst. v. Ariz. Bd. of Regents*, 2015 Ariz. App. Unpub. LEXIS 1468. Further, this Court made clear that when conducting this *de novo* review, the Trial Court exercises independent judgment. *Id* at ¶13. The Trial Court made its fact finding regarding irreparable injury in its June 14, 2016, Ruling, [Finding 25]: "AzBOR did not specifically identify any substantial and/or irreparable private or public harm that will result from disclosure of the subject emails." The Trial Court further characterized this finding, stating: "In making this finding, the Court does not ignore the repeated 'chilling effect' concerns raised in the affidavits and in the pleadings. However, the Court concludes that this potential harm is speculative at best." In light of the fact that ABOR, having frequently released many similar documents with no harm, much less irreparable harm, ABOR cannot overcome the clear finding of this Court to now show there would be irreparable harm from disclosure of the documents.

B. <u>There is no strong likelihood of success on the merits</u>

"As an 'irreducible minimum' the plaintiffs must demonstrate 'a fair chance

of success on the merits.' * * * If the plaintiffs are unable to meet this minimum standard and show no chance of success at all on the merits, preliminary injunctive relief is not appropriate, regardless of the balance of relative hardships involved." *Justice v. National Collegiate Athletic Asso.*, 577 F. Supp. 356, 363-64 (1983). ABOR cannot meet this "irreducible minimum".

This Court has already examined the merits of this case finding, that this Court must conduct a *de novo* review (the Mathews balancing) and a review of the documents under the requirements of ARS § 15-1640 (the research exemption). The Judgment at issue in this motion reflects application of those authorities. There is no question of law remaining that has not already been addressed by the Court of Appeals.

ABOR suggests that this Court must examine whether the Trial Court properly implemented ARS § 15-1640. The meaning of that statute is clear on its face and its implementation is merely a fact inquiry. ABOR's appeal can properly only reach the question as to whether this Court's findings are "clearly erroneous".

In its June 14, 2016, Ruling, this Court articulated the competing evidence and held for E&E Legal, thus demonstrating its decision was supported by substantial evidence. (See, findings 20 & 21 and the two paragraphs following the findings.)

E&E Legal argues the issues of law have already been adjudicated by this

Court and the factual findings are not clearly erroneous, thus, ABOR has no basis for arguing it has a strong likelihood of success on the merits.

If there is any remaining question of law, it is as to the meaning of ARS 15-§1640(C) – the meaning of the term "subject matter". Under subparagraph (C), "Any exemption provided by subsection A of this section shall no longer be applicable if the subject matter of the records becomes available to the general public." What constitutes "subject matter" is a factual question the Trial Court addressed. Its finding reflects the parties' alternative views and thus the Trial Court's findings on this element of the § 1640 review is not clearly erroneous.

Even if this Court concluded that interpretation of the term is a question of law, ABOR does not have a strong likelihood of success on the merits as the documents still at issue involve discussions of an international report that is based exclusively of peer-reviewed publish scientific papers; or involve discussions about papers that have long been published. In addition, the remainder of the documents are simply emails between faculty that are not covered by the research exemption in the first place.

C. A balance of hardships favors the plaintiff

Because ABOR cannot establish the possibility of irreparable injury, the balance of hardships cannot tip **sharply** in their favor. As cited above, this serious question/hardship principle generally does not allow the court to grant a

preliminary injunction without some showing of a possibility of irreparable injury. There is no hardship in the absence of irreparable injury. Further, as just explained, there are no serious merits questions remaining, the questions of law having already been addressed by the Court of Appeals. Thus, ABOR cannot succeed under this second argument, having no hardship and no "serious question" left to raise. Nonetheless, we examine the remaining elements, beginning with the balance of hardships.

While ABOR is not injured and thus cannot claim a hardship, E&E Legal's failure to receive the documents in a timely fashion has caused hardship that is now heightened because of events now unfolding in Washington, D.C. E&E Legal has been an active participant in national and international debate over climate science and policy and the role of academic scientists in policy formation (including issues beyond climate science). E&E Legal argues from fact rather than supposition and uses historical records to support its arguments. The failure to obtain the records sought in this matter creates an insurmountable hardship on E&E Legal when discussing the utility of the Intergovernmental Panel on Climate Change (IPCC) processes – processes discussed in detail in the withheld documents.

This hardship has been ongoing for a lengthy time. The original records request was lodged fully seven years ago. This case at law has been ongoing for

nearly five years. A stay of document production would further delay delivery of public records for many more months and conceivably an additional year. This further delay is particularly harmful to E&E Legal.

The Administrator of the U.S. Environmental Protection Agency has announced that the Agency will undertake a "red team-blue team" review of climate science in January of 2018. This effort will require consideration of the validity and utility of past IPCC reports and the means through which they were prepared; and, their independence and utility for simple adoption by the EPA as a basis for rulemaking. It will also require consideration of the performance of various scientists on policy matters, including scientists whose emails are within the withheld collection E&E Legal now seeks. E&E Legal faces significant hardship in participating in the EPA efforts if it is unable to obtain the withheld documents and share the factual information expected to be found therein, when participating in the red team – blue team exercise. Thus, time is of the essence with regard to obtaining these documents. Failure to obtain them immediately erases E&E Legal's ability to significantly contribute on this highly important national debate. As well, it further deprives the public of the benefit of this long-sought, long-withheld information, as next addressed.

D. <u>Advancement of the public interest.</u>

The Trial Court addressed the question as to how the public interest is

affected by disclosure of the public records at issue in this matter, finding "that this potential harm is speculative at best, and does not overcome the presumption favoring disclosure of public records containing information about a topic as important and far-reaching as global warming and its potential causes." Ruling, June 14, 2016. This Court also recognized the importance of this presumption favoring disclosure, citing to longstanding decisions that find "[t]he law evinces the state's 'open access' policy toward public records and exists to allow citizens 'to be informed about what their government is up to.'" Memorandum Decision at ¶ 9 (*citations omitted*), (Az. App. Div. 2, December 3, 2015), *or see*, *Energy & Env't Legal Inst. v. Ariz. Bd. of Regents*, 2015 Ariz. App. Unpub. LEXIS 1468, 2015 WL 7777611.

CONCLUSION

The Trial Court addressed each of these points in its findings regard disclosure of the public records. The Trial Court's balancing of the harms resulted in a final judgment finding for the Petitioner E&E Legal and ordering disclosure of the documents. Regardless of the fact that the motion for a stay is not timely, this Court has no reason to find the Trial Court's factual findings regarding the possibility of irreparable injury to the plaintiff if the requested relief is not granted; a balance of hardships not favoring ABOR; or advancement of the public interest favoring disclosure to be clearly erroneous. To succeed in its Motion to Stay,

ABOR must "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. *Shoen*,167 Ariz. at 63. ABOR cannot show a possibility of irreparable injury and cannot show the balance of hardships tip **sharply** in their favor. Thus, they cannot meet the requirements for a stay and Appellees argue this Court should deny the motion.

Date: June 11, 2018

Energy & Environment Legal Institute
By Counsel
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CERTIFICATE OF SERVICE

I certify that on the 11th of June, 2018, I served the above Response to the Motion for a Stay on counsel of record by electronic mail addressed as follows:

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NOTICE OF INTENT TO CLAIM ATTORNEY'S FEES

Pursuant to Arizona Rules of Civ. App. Proc., Rule 21, Appellee gives notice of an intent to claim attorneys' fees incurred on appeal. This claim for fees is authorized by A.R.S. §39-121.02(B).

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