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Franklin County Legal Journal
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CATHERINE M. DUSMAN, Plaintiff v. BOARD OF DIRECTORS OF CHAMBERSBURG AREA SCHOOL DISTRICT, Defendant

Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch,
Civil Action – Declaratory Judgment No. 2014-1969

HOLDING: The Board of Chambersburg Area School District's failure to hold an "open meeting" to vote on whether to appeal is a violation of the Sunshine Act because, under Section 708(c) of the Act, "[o]fficial action on discussions held pursuant to subsection (a)" must take place at an "open meeting." Therefore, the Board of Chambersburg Area School District (the "Board") is prohibited from undertaking an appeal from future court decisions without a formal vote of the Board at an "open meeting" authorizing or ratifying such appeal.

HEADNOTES

Preliminary Objections

1. The Board has waived any objection to improper pleading, the impropriety being Dusman's filing of a summary judgment motion before "the relevant pleadings [were] closed[]" pursuant to Pa.R.C.P. No. 1034(a). To avoid waiver, the Board must have timely objected to this impropriety. Altoona Regional Health System v. Schutt, 100 A.3d 260, 267 & n. 5 (Pa. Super. Ct. 2014) (holding that to avoid waiver, respondent must make timely objection to improper pleadings).

Jurisdiction

2. The Court has jurisdiction to declare actions of the Board invalid under the Sunshine Act pursuant to Section 7532 of the Declaratory Judgments Act.

3. The Court has jurisdiction to render declaratory judgments and discretion to enjoin the Board under Sections 713 and 715 of the Sunshine Act.

Mootness

4. "[T]he mootness doctrine requires an actual case or controversy to be extant at all stages of a proceeding, and an issue may become moot during the pendency of an appeal due to an intervening change in the facts of the case[.]" Pilchesky v. Lackawanna Cty., 88 A.3d 954, 964 (Pa. 2014).

5. However, the Pennsylvania Supreme Court "has repeatedly recognized two exceptions to the mootness doctrine: (1) for matters of great public importance and (2) for matters capable of repetition, which are likely to elude review." Id. (citing Rendell v. State Ethics Comm'n, 983 A.2d 708, 719 (Pa. 2009)).

6. The high court has found "this exception applicable where a case involves an issue that is important to the public interest or where a party will suffer some detriment without a court decision." Id. at 964-65 (citing Commonwealth, Dep't of Envtl. Prot. v. Cromwell Twp., Huntingdon Cty., 32 A.3d 639, 651-52 (Pa. 2011)).

Sunshine Act

7. The plaintiff is "charged with the burdens of proof and persuasion to establish a violation of the 1998 Sunshine Act." Kennedy v. Upper Milford Twp. Zoning Hearing Bd., 834 A.2d 1104, 1121 (Pa. 2003).

8. "The Sunshine Act should be read broadly in order to accomplish its important objective of allowing the public to witness deliberations and actions of public agencies." Lee Publications, Inc. v. Dickinson Sch. of Law, 848 A.2d 178, 188 (Pa. Commw. Ct. 2004).

Standard of Review of Motion for Summary Judgment

9. When a party seeks summary judgment, a court shall enter judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery. A motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law. In considering the merits of a motion for summary judgment, a court views the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Finally, the court may grant summary judgment only when the right to such judgment is clear and free from doubt. Gallagher v. GEICO Indemnity Co., 201 A.2d 131, 136-37 (Pa. 2019) (citations and internal quotation marks omitted).

Previous Decisions as Controlling or as Precedents

10. Decisions of federal courts inferior to the United States Supreme Court are not binding on Pennsylvania courts, "especially where the question is one of Pennsylvania law." Vicari v. Spiegel, 989 A.2d 1277, 1284 n.9.

Sunshine Act

11. A school board is an "agency" under the Sunshine Act that may be sued in its own name. Morning Call, Inc. v. Bd. of Sch. Directors of the Southern Lehigh Sch. Dist., 642 A.2d 619, 620 (Pa. Commw. Ct. 1994); Hain, 641 A.2d at 662.

Statutory Interpretation

12. When a term in a statute is not defined, the court resorts to the Statutory Construction Act of 1972, a law dictionary, and a standard dictionary, in that order, to interpret it. Cogan House Twp. v. Lenhart, 197 A.3d 1264, 1268 (Pa. Commw. Ct. 2018) (citation omitted).

Insurance Policy

13. A court may properly resolve the construction of an insurance policy as a matter of law when deciding a motion for summary judgment. Auto Ins. Co. v. Berlin, 991 A.2d 327, 331 (Pa. Super. Ct. 2010) (citation omitted).

Sunshine Act

14. Board's decision to appeal created a "financial or pecuniary obligation" in terms of the expense of costs and attorney's fees, whether covered by insurance or not, and co-pays or self-insured retention, and is therefore, "official action."

15. Board's decision to appeal is "official action" because it committed the Board "to a

particular course of conduct."

16. In answering novel questions under the Sunshine Act, appellate courts sometimes look to our sister states for persuasive authority. *See*, *e.g.*, Reading Eagle Co., 627 A.2d at 307 (citing Mississippi Supreme Court case for "best rationale for requiring specificity" in interpreting subsections (a)(4) and (b) of "executive sessions" section of Act). Verdini v. First Nat. Bank of Pennsylvania, 135 A.2d 616, 619 n.5 (Pa. Super. Ct. 2016) (persuasive authority).

Public Records

17. An appeal is "part of the permanent record of a case" and thus, is "squarely within the category of public judicial records[]" that are accessible to the public. In re 2014 Allegheny Cty. Investigating Grand Jury, 223 A.3d 214, 229 (Pa. 2019).

Appearances:

J. McDowell Sharpe, Esquire, *Counsel for Plaintiff*

Michael I. Levin, Esquire, *Counsel for Defendants*

Paul J. Cianci, Esquire, *Counsel for Defendants*

OPINION OF COURT

Before Meyers, P.J.

Before the Court is Plaintiff's, Catherine Dusman ("Dusman"), *Motion for Summary Judgment*. Dusman argues that the Chambersburg Area School District's appeal of a court decision is "official action" under the Sunshine Act that should have occurred at an "open meeting." For the reasons that follow, we agree. Specifically, we find that the Board of Chambersburg Area School District's failure to hold an "open meeting" to vote on whether to appeal is a violation of the Sunshine Act because, under Section 708(c) of the Act, "[o]fficial action on discussions held pursuant to subsection (a)" must take place at an "open meeting." Therefore, the Board of Chambersburg Area School District (the "Board") is prohibited from undertaking an appeal from future court decisions without a formal vote of the Board at an "open meeting" authorizing or ratifying such appeal.

FACTUAL & PROCEDURAL HISTORY

The issue here is whether, under the Sunshine Act,[1] the Board was

1 Act of October 15, 1998, P.L. 729, No. 93, § 1 *et seq*., 65 Pa.C.S. §§ 701-716.

required to vote to appeal a court decision at an "open meeting"[2] following an "executive session"[3] at a "special meeting"[4] on May 7, 2014 (the "Special Meeting"). This Special Meeting preceded the Chambersburg Area School District's (the "School District")[5] and the Board's May 8, 2014 appeal of the Court's April 28, 2014 Order[6] granting Catherine Dusman's, Plaintiff here, *Motion for Peremptory Judgment* in the separate mandamus action, *Dusman I*,[7] (the "Mandamus Peremptory Judgment Order").

FACTUAL HISTORY:

First Executive Session (May 7, 2014)

The Board held a Special Meeting on May 7, 2014, at which eight of nine Board directors, and therefore a quorum,[8] were present, including President Kim Amsley-Camp and Robert Floyd. *P's Ex. 1*. Also present at the Special Meeting were, among others, CASD's Superintendent Joseph Padasak, CASD's Solicitor Jan Sulcove, and Counsel for CASD, Michele Mintz and Michael Levin (via telephone). *P's Ex. 1*, N.T. 55. The Board went into an "executive session" shortly thereafter, the session lasting about two hours (the "First Executive Session"). *P's Ex. 1*. Following the First Executive Session, Board President Amsley-Camp announced:

> The Board met in Executive Session with legal counsel to discuss its options related to the court's decision of April 28th.[9] The board is not yet in a position to discuss the matter publicly as it pertains to personnel and litigation matters. However, the board would like to assure the public that we are moving forward in the best interest of the school district and all parties involved.
>
> There will be no further comments and the meeting is

2 "Open meeting" is a defined term under the Sunshine Act that will be reproduced in our Discussion.

3 The Sunshine Act defines "executive session" as "[a] meeting from which the public is excluded, although the agency may admit those persons necessary to carry out the purpose of the meeting." 65 Pa.C.S. § 703.

4 The Sunshine Act defines "special meeting" as "[a] meeting scheduled by an agency after the agency's regular schedule of meetings has been established." 65 Pa.C.S. § 703.

5 When referring to both the Board and the School District, the Court will use "CASD."

6 Issued by then-President Judge, now-Senior Judge, Douglas W. Herman.

7 This action is docketed in the Franklin County Prothonotary at 2013-2085, and is the subject of Dusman v. Bd. of Directors of Chambersburg Area Sch. Dist. and Chambersburg Area Sch. Dist., 113 A.3d 362 (Pa. Commw. Ct. 2015). *See* Dusman v. Bd. of Directors of Chambersburg Area Sch. Dist. and Chambersburg Area Sch. Dist., 123 A.3d 354, 356 (Pa. Commw. Ct. 2015) (describing mandamus action as *Dusman I*). For ease, we will refer to the instant declaratory judgment action as *Dusman II*.

8 1 Pa.C.S. § 1905(b) provides that "[a] majority of any board . . . shall constitute a quorum."

9 This decision being the Court's Mandamus Peremptory Judgment Order entered on April 28, 2020 in *Dusman I*.

adjourned.

Id. The Board adjourned the Special Meeting moments later. *Id*. The Board did not take any vote in public on whether to appeal the Mandamus Peremptory Judgment Order. N.T. 18. CASD appealed the Court's Mandamus Peremptory Judgment Order the next day, May 8, 2014.

The next morning, May 9, 2014, Annette Rhea emailed Board Director Robert Floyd. *P's Ex. 6*. Her email read, in part:

> Subject: Sunshine Act
>
> . . .
>
> [O]n Thursday[,] May 8, 2014[,] an appeal was filed on a matter. Executive sessions are for deliberations. How would the district's solicitor be directed to file an appeal if no decision was rendered and no vote was done publicly?

Id. To which, Superintendent Padasak, three days later, on May 12, 2014, replied:

> Mr. Floyd asked me to respond to your concern upon his behalf..
>
> The answer is there is no legal rule that requires the Board to take a public vote to take the appeal..
>
> . The Board's actions last Wednesday Evening regarding the appeal were legal and proper.

Id.

Later Executive Sessions

The Board subsequently held "executive sessions" on May 14, 2014 (the "Second Executive Session") and May 28, 2014 (the "Third Executive Session") during which, for purposes of Dusman's *Motion for Summary Judgment*, the Board *did not* ratify CASD's May 8, 2014 appeal of the Mandamus Peremptory Judgment Order. N.T. 19.

PROCEDURAL HISTORY:

The procedural history is quite extensive and necessary to recite.

Temporary and Preliminary Injunction

On May 29, 2014, Dusman filed her *Complaint* (and *Motion for Preliminary Injunction*) seeking a declaratory judgment and injunctive relief. The same day, the Court entered an Order, *inter alia*, temporarily enjoining

CASD from taking further formal action to prosecute its appeal of the Mandamus Peremptory Judgment Order and setting a hearing on Dusman's *Motion for Preliminary Injunction* for June 2, 2014 (the hearing being the "Preliminary Injunction Hearing" and the order being the "Temporary Injunction Order"). Prior to the Preliminary Injunction Hearing, the Board filed its *Answer to Plaintiff's Motion for Preliminary Injunction and New Matter* (with Notice to Plead); attached thereto as Exhibit "A" was CASD's insurance policy with Old Republic Insurance Company ("Old Republic") (the "Insurance Policy").[10] Dusman did not file a reply to it. The Board also filed its *Brief in Opposition to Motion for Preliminary Injunction*.

At the Preliminary Injunction Hearing, the Court received evidence and heard testimony from CASD's Superintendent Joseph Padasak, Catherine Dusman, CASD's Solicitor Jan Sulcove, and the Board's witness, Attorney Michael King.[11] Following the hearing, the Court dictated an Order from the bench that, *inter alia*, extended the Temporary Injunction Order until the Court concluded its review of the parties' written argument (this being the "Preliminary Injunction Order," docketed on June 9, 2014). Dusman filed her *Brief in Support of Preliminary Injunction* on June 9, 2014 to which the Board filed a *Reply Brief* to on June 12, 2014.

Notice of Appeals

On June 5, 2014, the Board filed a *Notice of Appeal* appealing the Temporary Injunction Order. On June 9, 2014, the Court directed the Board to file a concise statement of errors complained of on appeal as to the Board's first notice. Subsequently, the Board filed a second *Notice of Appeal* on June 11, 2014 appealing the Preliminary Injunction Order. On June 17, 2014, the Court then directed the Board to file a concise statement of errors complained of on appeal as to the Board's second notice. Recognizing that the Court lacked jurisdiction due to the appeals, the Court on June 17, 2014 filed a *Memorandum of Decision* to reflect what the Court's intentions were had the appeal not been filed.[12]

10 We reproduce the relevant portions of the Insurance Policy in our Discussion & Analysis, *infra*.

11 The Board presented King's testimony as to the practice of school law in Pennsylvania. N.T. 64. King is an attorney practicing in the state with over thirty years of experience in the subject. *See D's Ex. 3* (King's CV). We did not accept King as an expert witness on the issue before us, as the issue is the Court's to decide as a matter of law. N.T. 64. Nonetheless, we summarize King's testimony here as the Board relies on it in its written argument. As to a school board voting in public to authorize an appeal, King testified that it was "certainly not the practice and certainly not something that's done as a matter of routine." N.T. 67. Additionally, King testified that in his professional opinion, the Sunshine Act did not "mandate that school boards take formal action in an open meeting in order to authorize an appeal of any kind of adjudication or legal manner." N.T. 69-70.

12 In full, the Court explained:

> The Court presumes that [D]efendants have not filed a Notice of Appeal to non-appealable interlocutory Orders and, therefore, this Memorandum of Decision has no force and effect because the Court does not now have jurisdiction to enter any further Order on the Preliminary Injunctive Relief. Nonetheless, we file this Memorandum so the record reflects what the Court's intentions were had the appeal not been filed. This Memorandum is not intended to be a full and formal Opinion of the Court on all the issues raised by the parties and the Court has

Preliminary Objections

Also on June 17, 2014, the Board filed *Preliminary Objections (*and a *Memorandum in Support* thereof) to Dusman's *Complaint*. The Court never ruled on these *Preliminary Objections*. However, we find that the Board has waived any objection to improper pleading and that are we free to proceed to ruling on Dusman's instant *Motion for Summary Judgment*.[13]

Dusman II Appeal

The Board filed its respective concise statement of errors complained of on appeal on June 27, 2014 and July 7, 2014. The Court transmitted its Pa.R.A.P. Rule 1925(a) Opinion and the record to the Commonwealth Court on August 19, 2014. The Commonwealth Court consolidated both appeals. On July 31, 2015, the Commonwealth Court in *Dusman II* entered an Order and Opinion reversing this Court's Temporary Injunction Order and Preliminary Injunction Order. The Commonwealth Court held, *inter alia*, that this "Court lacked any jurisdiction, under the Rules of Appellate Procedure or the Sunshine Act, to influence [the Commonwealth] Court's docket and to control whether and to what extent an appellant may 'prosecute' an appeal before [the Commonwealth Court]." 123 A.3d 354, 362. In addition, the Commonwealth Court left open the issue before us now, the Commonwealth Court stating that it did not consider "the merits of whether the Board violated the Sunshine Act during the May 7, 2014 executive session and the related question of whether the District is required, under the Sunshine Act, to authorize appeals by Board vote at a public meeting." Id. at 362 n.5.

Trial Court

After *Dusman II*, Dusman unsuccessfully petitioned the Pennsylvania Supreme Court for allowance of appeal, the high court denying the petition on March 1, 2016. The Franklin County Prothonotary received the file back in April 2016. Following inactivity on the case until the summer of 2018,[14] this Court entered an order on October 31, 2018

not included the usual citations to the pertinent law.
Id. at 2 (italics removed).

13 The record does not reflect the reason for this inaction. We note there was an approximate 22-month period from the filing of the Board's *Preliminary Objections* in June 2014 to the Franklin County Prothonotary receiving the file back in April 2016, following the Commonwealth Court's Opinion on appeal on July 31, 2015 (*Dusman II*) and the Pennsylvania Supreme Court's denial of Dusman's Petition for Allowance of Appeal on March 1, 2016.
Specifically, we find that the Board has waived any objection to improper pleading, the impropriety being Dusman's filing of a summary judgment motion before "the relevant pleadings [were] closed[]" pursuant to Pa.R.C.P. No. 1034(a). To avoid waiver, the Board must have timely objected to this impropriety. Altoona Regional Health System v. Schutt, 100 A.3d 260, 267 & n. 5 (Pa. Super. Ct. 2014) (holding that to avoid waiver, respondent must make timely objection to improper pleadings). The Board did not raise this objection in its *Answer to Plaintiff's Motion for Summary Judgment*, *Memo of Law Opposing MSJ*, or otherwise. Thus, any objection the Board may have had with Dusman's filing of a summary judgment motion being procedurally improper because the Board's *Preliminary Objections* were not yet ruled upon is waived. Relatedly, we note that the Board did not file an answer to Dusman's *Complaint*.

14 On July 2, 2018, the Court notified the parties of its intent to terminate the case and remove from the docket due

ordering the parties to forthwith file motions in support of the relief sought. Then, on April 24, 2019, this Court held a Status Conference where the Court ordered (the order docketed April 25, 2019) that the parties shall have until September 9, 2019 to file dispositive motions if alternative dispute resolution was not utilized. Dusman filed her *Motion for Summary Judgment* on September 9, 2019 and *Brief in Support* on October 31, 2019. The Board filed an *Answer to Plaintiff's Motion for Summary Judgment* on October 9, 2019 and a *Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment* on November 14, 2019. We then held oral argument on Dusman's *Motion for Summary Judgment* on December 5, 2019.

DISCUSSION & ANALYSIS

We state our jurisdiction to enter a permanent injunction against the Board. Then we find that we may proceed to the merits of the case because this case meets an exception to the mootness doctrine. Next, we find that the Board may properly be sued in its own name under the Sunshine Act. Finally, we hold that the decision to appeal the Mandamus Peremptory Judgment Order is "[o]fficial action on discussions held pursuant to subsection (a)" that should have taken place at an "open meeting." § 708(c). Thus, the Board failing to do so violated the Sunshine Act.

I. COURT'S JURISDICTION

We begin with the Court's jurisdiction to entertain Dusman's action under the Declaratory Judgments Act, 42 Pa.C.S. §§ 7531-7541, and the Sunshine Act. Dusman originally sought, *inter alia*, a declaratory judgment declaring invalid action taken by the Board at the First Executive Session and an injunction enjoining the Board from holding any further "executive sessions" that discuss legal services rendered to the School District. However, on her *Motion for Summary Judgment*, Dusman moves this Court to permanently enjoin the Board from appealing a court decision without a formal vote of the Board authorizing or ratifying such appeal.[15]

The Court has jurisdiction to declare actions of the Board invalid under the Sunshine Act pursuant to Section 7532 of the Declaratory Judgments Act. Pub. Op. v. Chambersburg Area Sch. Dist., 654 A.2d 284, 286, 289 (Pa. Commw. Ct. 1995); Hain v. Sch. Directors of Reading Sch. Dist., 641 A.2d 661, 662-664 (Pa. Commw. Ct. 1994). We also have jurisdiction to render declaratory judgments and discretion to enjoin the Board under Sections 713 and 715 of the Act because Dusman sued within

to inactivity pursuant to 39th Jud. Dist. R. Jud. Adm. 1901. Dusman filed a statement of intention to proceed a month later. On October 30, 2018 the parties filed a stipulation to remove the case from November 2, 2018 call of the list.

15 Thus, we do not consider here the legal services issue with respect to the Second and Third Executive Sessions.

30 days of the May 2014 meetings on May 29, 2014 and Franklin County is where the Board is located and where the acts complained of occurred.[16] Trib Total Media, Inc. v. Highlands Sch. Dist., 3 A.3d 695, 697, 703 (Pa. Commw. Ct. 2010); Reading Eagle Co. v. Council of City of Reading, 627 A.2d 305, 306-307 (Pa. Commw. Ct. 1993).

II. MOOTNESS

The Board urges us to deem this matter moot due to the disposition in *Dusman I* of CASD's appeal of the Mandamus Peremptory Judgment Order, that appeal triggering Dusman's instant challenge under the Sunshine Act. Specifically, the Board contends that although the issue here is capable of repetition, it is not *likely to evade review*. *Memo of Law Opposing MSJ* at 5. Additionally, the Board contends that the issue here, while, important, is not *one of great importance*. *Id*. at 6.

"[T]he mootness doctrine requires an actual case or controversy to be extant at all stages of a proceeding, and an issue may become moot during the pendency of an appeal due to an intervening change in the facts of the case[.]" Pilchesky v. Lackawanna Cty., 88 A.3d 954, 964 (Pa. 2014). However, the Pennsylvania Supreme Court "has repeatedly recognized two exceptions to the mootness doctrine: (1) for matters of great public importance and (2) for matters capable of repetition, which are likely to elude review." Id. (citing Rendell v. State Ethics Comm'n, 983 A.2d 708, 719 (Pa. 2009)). The high court has found "this exception applicable where a case involves an issue that is important to the public interest or where a party will suffer some detriment without a court decision." Id. at 964-65 (citing Commonwealth, Dep't of Envtl. Prot. v. Cromwell Twp., Huntingdon Cty., 32 A.3d 639, 651-52 (Pa. 2011)).

Dusman argues that we should still address the issue, although technically moot, and directs our attention to Pub. Op. v. Chambersburg Area Sch. Dist., 654 A.2d 284 (Pa. Commw. Ct. 1995). 654 A.2d at 287 (addressing issue even though moot because "situation is capable of being repeated and of continuing to escape review"). We agree, and find that case, as well as the authority cited therein, controlling, as courts addressed the issue despite it being technically moot. *See* Consumers Educ. and Protective Ass'n v. Nolan, 368 A.2d 675, 681 (Pa. 1977); Cumberland Publishers, Inc. v. Carlisle Area Bd. of Sch. Directors, 646 A.2d 69, 69 n.1 (Pa. Commw. Ct. 1994). Similarly, the issue before us is important to the public interest given the import of our decision on the Board as well as the public. Moreover, there is no guarantee that if we declined to decide the issue, now, a situation arising under similar circumstances would be addressed by a later court,

16 For this reason, Dusman also has standing to bring her suit. *See* §§ 713, 715.

and, would, thus, evade review. Thus, we proceed to the merits.

III. SUNSHINE ACT

The question before the Court is whether under the Sunshine Act the Board is required to vote on appealing a court decision at an "open meeting." If such an appeal is "official action," and is not excepted or excluded from the Sunshine Act, then the answer is yes. The plaintiff is "charged with the burdens of proof and persuasion to establish a violation of the 1998 Sunshine Act." Kennedy v. Upper Milford Twp. Zoning Hearing Bd., 834 A.2d 1104, 1121 (Pa. 2003). "The Sunshine Act should be read broadly in order to accomplish its important objective of allowing the public to witness deliberations and actions of public agencies." Lee Publications, Inc. v. Dickinson Sch. of Law, 848 A.2d 178, 188 (Pa. Commw. Ct. 2004).

A. Standard of Review

The Court's standard of review governing motions for summary judgment is as follows:

> When a party seeks summary judgment, a court shall enter judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery. A motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law. In considering the merits of a motion for summary judgment, a court views the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Finally, the court may grant summary judgment only when the right to such judgment is clear and free from doubt.

Gallagher v. GEICO Indemnity Co., 201 A.2d 131, 136-37 (Pa. 2019) (citations and internal quotation marks omitted).

B. "Agency"

Before we reach this question, however, the Board preliminarily argues that "[t]he Board cannot be sued in its own name because state law allows suits against school districts as political subdivisions, but not against school boards." *Memo of Law Opposing MSJ* at 4 (citations omitted). The Board cites to the unreported federal district court case of Glickstein v. Neshimany Sch. Dist., No. CIV A. 96-6236, 1997 WL 660636 (E.D. Pa. Oct. 22, 1997) and its progeny. The Board also relies on Section 213 of the Public School Code of 1949 (the "School Code"),[17] that section we note

17 Act of Mar. 10, 1949, P.L. 30, No. 14, 24 P.S. § 2-213 reads:

> Right to Sue and be Sued.--Each school district shall have the right to sue and be sued in its corporate name.

having since been suspended pursuant to the provisions of the Constitution of 1968, Article V, Section 10(c). *See* Pa.R.C.P. No. 2125.

We are not bound or persuaded by either authority.[18] Rather, we find ample support that a school board *may* be sued in its own name under the Sunshine Act. First, the Act provides that common pleas courts "shall have original jurisdiction of actions involving other [non-State] agencies[.]" § 715. Section 703 of the Act defines "agency" as a "school board." § 703. Second, school boards have been sued in their own name under the Act. *See* Morning Call, Inc. v. Bd. of Sch. Directors of the Southern Lehigh Sch. Dist., 642 A.2d 619, 620 (Pa. Commw. Ct. 1994); Hain, 641 A.2d at 662. Therefore, we find Dusman's suit against the Board proper.

C. Relevant Sections of the Sunshine Act

The Sunshine Act provides that "[o]fficial action and deliberations . . . by an agency shall take place at a meeting open to the public unless" the meeting is closed to the public under some exception. § 704. Here, the parties disagree on the interpretation of the "executive session" exception in Section 708[19] and the confidentiality exclusion in Section 716. We lay out these sections as well as how they have been interpreted.

First, Section 708(a)(4) provides that an agency may hold an executive session:

> (4) To consult with its attorney or other professional advisor regarding information or strategy in connection with litigation or with issues on which identifiable complaints are expected to be filed.

§ 708(a)(4). In Reading Eagle Co., the Commonwealth Court interpreted the predecessor of this subsection, containing identical language, with respect to subsection (b).[20] 627 A.2d at 306-07. The issue there was what specificity was required by the agency when announcing its reason for

> Any legal process against any school district shall be served on the president or secretary of its board of school directors.

18 Even if Glickstein were reported, we would not be bound by it because decisions of federal courts inferior to the United States Supreme Court are not binding on Pennsylvania courts, "especially where the question is one of Pennsylvania law." Vicari v. Spiegel, 989 A.2d 1277, 1284 n.9.

19 There is no dispute that the Board held the First Executive Session for a proper purpose under subsection (a)(4). *P's Brief in Support of SJ* at 2 ("The [First Executive Session] . . . was proper on its face . . . ."). The parties also do not dispute the "procedure" of the First Executive Session as delineated in subsection (b).

20 Subsection (b) provides:

(b) Procedure.--The executive session may be held during an open meeting or at the conclusion of an open meeting or may be announced for a future time. The reason for holding the executive session must be announced at the open meeting occurring immediately prior or subsequent to the executive session. If the executive session is not announced for a future specific time, members of the agency shall be notified 24 hours in advance of the time of the convening of the meeting specifying the date, time, location and purpose of the executive session.

§ 708(b).

holding an "executive session." Id. at 306. The court held that the agency must announce, as to any litigation the agency was involved in, the court name, parties, and docket number, despite litigation being a stated purpose for which the agency may hold a private "executive session" Id. In so holding, the court elucidated its rationale:

> Section 8 of the Sunshine Act is an acknowledgement that the public would be better served in certain matters if the governing body had a private discussion of the matter prior to a public resolution. Litigation is one of those issues, because if knowledge of litigation strategy, of the amount of settlement offers or of potential claims became public, it would damage the municipality's ability to settle or defend those matters and all the citizens would bear the cost of that disclosure. Section 8, however, requires that even though it is in the public interest that certain matters be discussed in private, the public has a right to know what matter is being addressed in those sessions.

Id. at 306-07. We understand this rationale to be that although the agency has an interest in conducting its discussions of the litigation in private, the Sunshine Act still requires there to be some level of transparency in how the agency operates. In Reading Eagle Co., that transparency was the disclosure of specific litigation information.

Second, the limitation in Section 708(c) provides:

> **(c) Limitation.-- Official action on discussions held pursuant to subsection (a)** shall be taken at an open meeting. Nothing in this section or section 707 (relating to exceptions to open meetings) shall be construed to require that any meeting be closed to the public, nor shall any executive session be used as a subterfuge to defeat the purposes of section 704 (relating to open meetings).

§ 708(c) (emphasis added). This limitation clearly requires that certain agency activity take place at a public "open meeting" (*i.e.*, "[o]fficial action on discussions held pursuant to subsection (a)") despite the agency being able to hold a private "executive session" for a purpose stated in subsection (a). *See*, *e.g.,* Sovich v. Shaughnessy, 705 A.2d 942, 946 (Pa. Commw. Ct. 1998) ("Nevertheless, regardless of what is *discussed* by an agency in private, if the agency fails to return to the open meeting to vote on a course of official *action,* the agency has violated section 4 of the Sunshine Act.") (emphasis in original)); Preston v. Saucon Valley Sch. Dist., 666 A.2d 1120, 1123 (Pa. Commw. Ct. 1995) (stating that although agency voted "in conference," agency "never ratified that decision by voting . . .

as mandated by Section 8(c) of the Sunshine Act"); Keenheel v. Com., Pennsylvania Securities Comm'n, 579 A.2d 1358, 1361 (Pa. Commw. Ct. 1990) (finding agency violated Sunshine Act when it "failed to return to open meeting [following an executive session] in order to vote on whether or not to enter into the agreement[]").

And third, Section 716 excludes the following entirely from the Sunshine Act:

> All acts and parts of acts are repealed insofar as they are inconsistent with this chapter, excepting those statutes which specifically provide for the confidentiality of information. Those deliberations or official actions which, if conducted in public, would violate a lawful privilege or lead to the disclosure of information or confidentiality protected by law, including matter related to the investigation of possible or certain violations of the law and quasi-judicial deliberations, shall not fall within the scope of this chapter.

§ 716. This exclusion has applied to a borough failing to vote and adopt charges against a police chief at an "open meeting" where the district attorney was then investigating the non-issuance of citations for DUI charges and the borough voted at an "open meeting" to suspend and demote the chief. In re Blystone, 600 A.2d 672, 675 (Pa. Commw. Ct. 1991) (quoting following language—"which, if conducted in public, would violate a lawful privilege or lead to the disclosure of information or confidentiality protected by law, including matter related to the investigation of possible or certain violations of the law"— pertaining to investigating possible law violations).

D. "Official Action"

Our appellate courts and the Pennsylvania Supreme Court have not answered whether an agency's decision to appeal is "official action" requiring a vote at an "open meeting."

The Sunshine Act defines "[o]fficial action" as:

(1) Recommendations made by an agency pursuant to statute, ordinance or executive order.

(2) The establishment of policy by an agency.

(3) The decisions on agency business made by an agency.

(4) The vote taken by any agency on any motion, proposal, resolution, rule, regulation, ordinance, report or order.

§ 703.

Only the third and fourth definitions are potentially relevant. In the third definition, "agency business" is further defined as "[t]he framing,

preparation, making or enactment of laws, policy or regulations, the creation of liability by contract or otherwise or the adjudication of rights, duties and responsibilities, but not including administrative action.[21]" § 703. We are not aware of any caselaw interpreting the "creation of liability by contract or otherwise" language.

Similar language to that of the fourth definition of "official action" has been interpreted in Pub. Op. 654 A.2d at 287. Particularly, the term "resolution" in the predecessor to Section 705 (then Section 275), concerning the recording of votes.[22] Id. The court interpreted "resolution" as used in that section to be "'a proposal pertaining to some matter that is presented to an official body for consideration and, if adopted by vote, becomes the formal expression of the opinion or will of the official body on that matter.'" Id. at 287 & n.6 (quoting Black's Law Dictionary 1178 (5th ed. 1979)) (citing 1 Pa.C.S. § 1903(a)). Ultimately, the court held that "[b]ecause the vote on the resolution to appoint [the director] to fill the vacancy on the [b]oard was not publicly cast, it violated section 5 of the Sunshine Act." Id. at 288.

Additionally, a decision that commits an agency "to a particular course of conduct" has been found to be "official action." *Compare* Preston, 666 A.2d at 1123 (finding addendum entered into between board and superintendent to be "official action" since addendum committed board to increasing superintendent's salary and benefits) *with* Morning Call, Inc., 642 A.2d at 623-24 (finding reduction in number of superintendent candidates from 5 to 3 *not* to be "official action" because what occurred before final vote on specific candidate was mere discussion).

Heidelberg Twp. v. Heidelberg Twp. Zoning Hearing Bd., 106 York 26 (June 10, 1992), attached to Dusman's *Complaint*, appears to be the only Pennsylvania case addressing the issue of whether an appeal constitutes "official action," although we are not bound by it. There, the township appealed a zoning hearing board's decision. Id. at 1-2.[23] The township authorized the appeal at an "executive session" but, admittedly, never adopted or ratified it an "open meeting." Id. at 1. Interpreting the limitation in subsection (c) for "executive sessions," the court found that it "clearly mandates that '[o]fficial action[']on discussions held pursuant to

21 The Board does not argue that a decision to appeal is "administrative action" as defined in Section 703. We agree.

22 Section 705 contains identical language to the then-in-effect Section 275. Section 705 provides:

> In all meetings of agencies, the vote of each member who actually votes on any resolution, rule, order, regulation, ordinance or the setting of official policy must be publicly cast and, in the case of roll call votes, recorded.

§ 705. The issue in Pub. Op. was whether a board's secret paper ballot procedure for filling a director vacancy used at an "open meeting" constituted a "resolution" that must be "publicly cast" so that the public was informed of each director's vote. 654 A.2d at 287. The board used a procedure where directors marked a paper ballot as to their desired candidate but their individual votes were not made public. Id.

23 This opinion is not paginated so we designate the pages as the opinion is reproduced to us over three pages.

sub-section(a) shall be taken at an open meeting." Id. at 2. Thus, the court found that the township violated the Sunshine Act. Id. We note, though, that the court there did not consider Section 716.

E. Parties' Arguments

The Board argues that it was not required to vote on a decision to appeal at "open meeting" while Dusman argues that the Board was. We summarize their arguments below.

The Board's Argument

Most of the Board's argument comes from the effect, if any, of the Insurance Policy, which we turn to now. We reproduce the relevant portions of the Insurance Policy as follows:[24]

> DECLARATIONS
>
> . . . .
>
> SECTION I – INSURANCE COVERAGES[.] INSURING AGREEMENTS
>
> . . . .
>
> DEFENSE AND SUPPLEMENTARY PAYMENTS
>
> WE shall have the right and duty to defend any SUIT against the INSURED seeking damages for LOSS . . . . WE shall have the right, but not a duty, to appeal any judgment.
>
> *CASD000006*.
>
> . . . .
>
> SCHOOL LEADERS' LEGAL LIABILITY APPLICATION[.] THIS APPLICATION WILL BE ATTACHED TO AND BECOME PART OF YOUR POLICY
>
> . . . .
>
> [SECTION] VI. COVERAGE REQUESTED
>
> . . . .

24 We cite to the CASD00000*X* Bates numbering for reference rather than the Insurance Policy page numbers.

C. Self Insured Retention claim: **X** $10,000

Self Insured Retention for Non-Monetary each claim: **X** $10,000

CASD000027.

. . . .

NON-MONETARY DEFENSE COSTS ENDORSEMENT (PRIMARY AND QUOTA SHARE SELF INSURED RETENTION)

SELF INSURED RETENTION PER CLAIM: [$]15,000

3. The INSURED shall pay the SELF INSURED RETENTION per CLAIM stated above. In addition, the INSURED shall pay 20% of the total LOSS ADJUSTMENT EXPENSE per CLAIM in excess of the SELF INSURED RETENTION until the amount paid by both the INSURED and US, in excess of the SELF INSURED RETENTION per CLAIM, is $125,000. The INSURED shall pay all LOSS ADJUSTMENT EXPENSE in excess of OUR per CLAIM limits and aggregate limits shown in paragraph 4.

4. We will pay 80% of the total LOSS ADJUSTMENT EXPENSE per CLAIM in excess of the SELF INSURED RETENTION per CLAIM stated above, but not more than $100,000 for any one CLAIM or more than $250,000 in the aggregate for the POLICY PERIOD.

CASD00033.

Answer to Plaintiff's Motion for Preliminary Injunction and New Matter, Exhibit "A". Principally, the Board argues that "the School District could not make the decision to appeal . . . because the decision to appeal was the right of the School District's insurance company, Old Republic . . . . [and that] [e]ven if the School District had taken a public vote and decided not to appeal, its decision would have been overturned by Old Republic because it retained the sole right to file an appeal." *Memo of Law Opposing MSJ* at 8 (citing to the Defense and Supplementary Payments subsection of the Insurance Coverages section of the Insurance Policy's Declarations page, at *CASD000006*).

The rest of the Board's argument is as follows. One, there is no authority that "the taking of an appeal constitutes the creation of liability by contract." *Id*. at 7. Moreover, the Board argues that an appeal cannot create

liability "where an insurance company is paying for the legal defense (as was the case here) or in the rare but possible circumstance where counsel handles an appeal *pro bono*." *Id*. at 7 (parenthetical in original). Two, the attorney-client privilege embodied in Section 716 includes "instructions to legal counsel, including the filing of appeals[,]" relying exclusively on In re Blystone. *Id*. at 7, 9. And three, the testimony of its witness, Attorney King, who opined at that "'a school board voting in public to authorize an appeal is 'certainly not the practice and certainly not something that's done as a matter of routine[]'" and that "the Sunshine Act does not 'mandate that school boards take formal action in an open meeting in order to authorize an appeal of any kind of adjudication or legal matter.'" *Id*. at 9 (citing N.T. 67, 69-70).

Dusman's Argument

Dusman argues for her interpretation as follows. One, as to the Board's Insurance Policy, Dusman argues that the Insurance Policy has not been proven to show that an appeal can be taken without a Board vote and that no evidence was entered showing that One Republic had in fact demanded an appeal. *P's Brief in Support of SJ* at 9. Even so, Dusman continues, insurance contract provisions cannot overcome a statutory requirement. *Id*. Two, under Preston, 666 A.2d at 1123, Dusman argues that the Board committed CASD to the "particular course of conduct" of prosecuting its appeal of the Mandamus Peremptory Judgment Order. *Id*. at 3. In particular, the prosecution committed CASD to spend public funds in terms of costs, attorney's fees, deductibles, or co-pays, whether the Insurance Policy covered certain expenses or not. *Id*. Three, the decision to appeal created "liability by contract or otherwise" because CASD was now liable for those prosecution expenses. *Id*. Thus, the decision to appeal constituted "official action" as defined through "agency business." *Id*. Four, under Pub. Op., 654 A.2d at 287, "the appeal itself demonstrates the expression and the will of CASD on the matter, never expressed publically[;]" therefore, the Board's decision to appeal is a "resolution." *Id*. at 3-4. Thus, because a "vote taken by any agency on any . . . resolution" is "official action," and the Board's decision to appeal constitutes a "resolution," the Board's decision to appeal should have been voted upon in public at an "open meeting." *Id*. Lastly, Dusman relies on Heidelberg Twp.

F. Court's Analysis

We agree with Dusman and find that the Board's decision to appeal is "[o]fficial action on discussions held pursuant to subsection (a)" that should have occurred at an "open meeting." Therefore, the Board violated the Sunshine Act when it failed to do so. We explain why below.

(i)

"Official action" as defined through "agency business" is "the creation of liability by contract or otherwise." Instructive in determining this phrase is the Commonwealth Court's manner of interpreting the term "resolution" in Pub. Op. 654 A.2d at 287-88 (utilizing 1 Pa.C.S. § 1903(a), law dictionary, and legislative findings and declarations in Section 702 of Sunshine Act).[25] The common and approved usage[26] of "liability" is:

> 1. The quality, state, or condition of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment <liability for injuries caused by negligence>. — Also termed legal liability; subjection; responsibility. Cf. FAULT.
>
> 2. (often pl.) A financial or pecuniary obligation in a specified amount;

Black's Law Dictionary (11th ed. 2019).

Here, the Board's decision to appeal created a "financial or pecuniary obligation" in terms of the expense of costs and attorney's fees, whether covered by Old Republic or not, and co-pays or "deductibles."[27] That is, if Old Republic did in fact cover costs and attorney's fees, as Superintendent Padasak testified, *N.T.* 21, we find there was still the co-pay and "deductible" to be paid, as stated in the Insurance Policy, at *CASD000027*, *CASD00033*, and as testified to by Superintendent Padasak, *N.T.* 22-23. Moreover, the Board failed to present any evidence that the "deductible" was exhausted for a submitted claim under *Dusman I* or that CASD would not have to make any co-payment. Thus, the Board's decision to appeal created a "financial or pecuniary obligation" whether or not Old Republic covered the costs and attorney's fees of the appeal.

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25 This phrase is not defined in the Act nor is there caselaw on it; thus, we resort to the Statutory Construction Act of 1972, a law dictionary, and a standard dictionary, in that order, to interpret it. Cogan House Twp. v. Lenhart, 197 A.3d 1264, 1268 (Pa. Commw. Ct. 2018) (citation omitted).

26 Section 3 of the Statutory Construction Act states in pertinent part:

> Words and phrases shall be construed according to rules of grammar and according to their common and approved usage; but technical words and phrases and such others as have acquired a peculiar and appropriate meaning or are defined in this part, shall be construed according to such peculiar and appropriate meaning or definition.

1 Pa.C.S. § 1903(a).

27 Technically, the term here is self-insured retention rather than deductible. *See* Insurance Policy at *CASD000027*, *CASD00033*. "'Self insurance is best compared to the familiar "deductible" amount referenced in most insurance policies[] [and] [i]t is common knowledge to anyone who has ever filed an insurance claim subject to same that the deductible must be exhausted before the [insurer's] liability . . . begins.'" Kleban v. Nat'l Union Fire Ins. Co. of Pittsburgh, 771 A.2d 39, 43 (Pa. Super. Ct. 2001) (on self-insured retention insurance provision) (quoting In re: Amatex Corp., 107 B.R. 856, 872 (Bankr. E.D. Pa. 1989)).

We may properly resolve the construction of the Insurance Policy as a matter of law when deciding a motion for summary judgment. Auto Ins. Co. v. Berlin, 991 A.2d 327, 331 (Pa. Super. Ct. 2010) (citation omitted).

Finding the Board's decision to appeal to be "official action" because the decision creates a "financial or pecuniary obligation" is consistent with the Legislature's purpose in enacting the Sunshine Act. Included in the Act are the Legislature's findings and declarations, which read:

> (a) Findings.--The General Assembly finds that the right of the public to be present at all meetings of agencies and to witness the deliberation, policy formulation and decisionmaking of agencies is vital to the enhancement and proper functioning of the democratic process and that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society.
>
> (b) Declarations.--The General Assembly hereby declares it to be the public policy of this Commonwealth to insure the right of its citizens to have notice of and the right to attend all meetings of agencies at which any agency business is discussed or acted upon as provided in this chapter.

§ 702. The Pennsylvania Supreme Court has acknowledged these findings and declarations. Kennedy v. Upper Milford Twp. Zoning Hearing Bd., 834 A.2d 1104, 1113 n.22 (Pa. 2003) ("The principal stated purpose of the 1998 Sunshine Act and of open meeting statutes generally is to improve the quality of democratic institutions by increasing the knowledge of the electorate as to the critical issues faced by their elected representatives and appointed officials."). *See also* Schenck v. Twp. of Center, Butler County, 975 A.2d 591, 592 n.1 (Mem) (Pa. 2009) (Saylor, J. dissenting from dismissal of appeal as improvidently granted, joined by Castille, C.J.) (stating underlying policy considerations of the Sunshine Act as "promoting governmental transparency by favoring disclosure and permitting public access to official information").

Specifically, finding the decision to appeal to be "official action" effectuates the Legislature's declaration that the Commonwealth's public policy is "to insure the right of its citizens . . . the right to attend all meetings of agencies at which any **agency business** is discussed or **acted upon** as provided in this chapter." § 702(b) (emphasis added). The relief Dusman seeks here is to mandate that the Board vote on a decision to appeal at an "open meeting." In other words, that the public has the right to attend a meeting of the Board during which any "agency business is . . . acted upon[,]" § 702, a right that we find reflected in Section 708(c)'s limitation that "[o]fficial action on discussions held pursuant to subsection (a) shall be taken at an open meeting." § 708(c).

(ii)

The decision to appeal is also "official action" because it commits the Board "to a particular course of conduct." This is so whether the finances of an appeal are considered or not.

When first articulating the *course-of-conduct* standard in Morning Call, Inc., the court found that the board reducing the number of superintendent candidates from five to three by vote in an "executive session" was not "official action" because "the Sunshine Act envisions that such a vote is a necessary component of the discussion that precedes true official action, especially where there is a need for privacy in considering candidates." 642 A.2d at 623. That is, the court distinguished the board's "actions to reduce the field of candidates" from the board's "vote to hire a specific individual as superintendent[]" finding only that the latter must be at an "open meeting." Id. at 623, 625. By contrast, in Preston, the court found that the board privately entering into an agreement with a superintendent "commit[ted] the board to a particular course of conduct[,]" that being the increase of the superintendent's compensation, and thus, was "official action." 666 A.2d at 1123. Like Morning Call, Inc., though, the Preston court distinguished the board's private discussions of employment matters under subsection (a) from "the final vote on those matters [that] must be taken at a public meeting[]" under subsection (c). Id. Therefore, the court held that while the board voted for the agreement, the board "never ratified that decision by voting on [it] at a public meeting as mandated by Section 8(c) of the Sunshine Act[]" and thus, violated the Act. Id.

The similarities and differences between Morning Call, Inc. and Preston are illustrative here because they highlight when certain agency action at an "executive session" (or otherwise) becomes a "particular course of conduct" that must take place at an "open meeting." Both boards in those cases were permitted to operate in private, up to a point. In Morning Call, Inc., that point was not until the board voted to hire a specific superintendent candidate meaning that the board's prior reduction of the number of candidates at an "executive session" was proper. In Preston, the board was permitted to operate in private only to "discuss employment matters [of the superintendent] in a private executive session[.]" 666 A.2d at 1123. However, once the board decided to enter into an agreement with the superintendent that committed the board to increasing his salary and benefits, the board was required to do so at an "open meeting."

Similarly, here, the Board was permitted to discuss the *Dusman I* litigation in private with counsel, up to a point. However, once the Board made a decision as to how it was ultimately going to proceed (*i.e.*, appeal), it was required to do so by voting at an "open meeting" because the Board

committed itself to a "particular course of conduct." Unlike in Morning Call, Inc., the Board was not merely reducing its options from more to less (both being plural) as to how it would proceed after the Mandamus Peremptory Judgment Order. Rather, it decided that CASD would appeal the Order, a singular and final "course of conduct."[28]

This holding is consistent with our Legislature's stated findings and declarations, for the reasons before stated. § 702. It is consistent with how our precedent, including Preston, has interpreted the limitation in subsection (c). *See* Sovich, 705 A.2d at 946 ("Nevertheless, regardless of what is *discussed* by an agency in private, if the agency fails to return to the open meeting to vote on a course of official *action,* the agency has violated section 4 of the Sunshine Act.") (emphasis in original)); Keenheel, 579 A.2d at 1361 (finding agency violated Act when it "failed to return to open meeting [following an executive session] in order to vote on whether or not to enter into the agreement[]"). *Cf.* Cumberland Publishers, Inc., 646 A.2d at 71 (holding that "process by which the vacancy was filled and the qualifications of the applicants for the vacancy were properly conducted in executive session" while noting that "pursuant to Section 8(c), 65 P.S. § 278(c), the vote on [applicant's] appointment was conducted at an open meeting").

This holding is also in accord with the rationale expressed in Reading Eagle Co., where the court held that an agency having an "executive session" under subsection (a)(4) must still publicly announce certain litigation information. 627 A.2d at 306-07. We understood this rationale to be that the Sunshine Act required some level of transparency in how any agency operates despite the agency having an interest in privately discussing its litigation. Here, that transparency is the public vote of the Board as to how it would ultimately proceed in litigation; a fact made public by CASD filing the appeal not less than twenty-four hours later. In that sense, requiring the Board to vote at an "open meeting" beforehand is unlike the "absurd" scenario described by the Commonwealth Court—where litigation information could be protected the evening of a municipal meeting but accessed the next morning through a description of litigation-related legal services in an invoice[]"—because the Board's filing of the appeal *is* itself public. *See* Schenck v. Twp. of Center, Butler Co., 893 A.2d 849, 854 (Pa. Commw. Ct. 2006).

28 We note that while a decision to appeal is not a school board action where a majority vote is required under Section 5-508 of the School Code, 24 P.S. § 5-508, we do not find that non-requirement dispositive here because courts analyze alleged Sunshine Act violations separately from Section 5-508 issues. *See* Morning Call, Inc., 642 A.2d at 270-71 (analyzing Act violation then "[c]onfirming that analysis" under Section 5-508); Preston, 666 A.2d at 1122-23 (considering Section 5-508 issue then analyzing "course of conduct" Act standard as articulated in Morning Call, Inc.). *Cf.* Pub. Op., 654 A.2d at 288 (analyzing Act violation then considering other School Code section issue). Moreover, the Board did not make this argument in its *Answer to Plaintiff's Motion for Summary Judgment*, *Memo of Law Opposing MSJ*, or at oral argument. Additionally, our jurisdiction of alleged Sunshine Act violations is independent from the School Code. *See* § 715.

Lastly, the Commonwealth Court has instructed that "[t]he Sunshine Act should be read broadly in order to accomplish its important objective of allowing the public to witness deliberations and actions of public agencies." Lee Publications, Inc. v. Dickinson Sch. of Law, 848 A.2d 178, 188 (Pa. Commw. Ct. 2004). Requiring the Board to vote on the decision to appeal at an "open meeting" comports with such a reading because it allows the public to witness the actions of the Board in committing itself "to a particular course of conduct." This is true whether we consider the commitment from a financial perspective, the expenses, at a minimum, being co-pays and "deductibles" of the appeal. Or whether we consider the commitment from the perspective that the Board committed itself, in private, to the "particular course of conduct" of moving forward with the *Dusman I* litigation by appealing. *Cf.* Pub. Op., 654 A.2d at 288 (finding improper board's secret paper ballot procedure used at "open meeting" because public prevented from "fulfilling its vital role in a democratic society" of holding board members accountable for their actions where procedure could allow board to conduct official business in silence by secretly passing notes back and forth until a decision is reached and then claim procedure was before "witnessing" public).

(iii)

We find further support for this holding in Heidelberg Twp. and opinions of our sister states. Although Heidelberg Twp. is not binding on us, it is the only Pennsylvania case that has considered the question before us now. The court there found that the township was required to adopt or ratify a decision to appeal at an "open meeting," relying on its statutory interpretation of the limitation on "executive sessions" in subsection (c), an interpretation we agree with. Id. at 2.

Additionally, in answering novel questions under the Sunshine Act, our appellate courts sometimes look to our sister states for persuasive authority. *See*, *e.g.*, Reading Eagle Co., 627 A.2d at 307 (citing Mississippi Supreme Court case for "best rationale for requiring specificity" in interpreting subsections (a)(4) and (b) of "executive sessions" section of Act). Verdini v. First Nat. Bank of Pennsylvania, 135 A.2d 616, 619 n.5 (Pa. Super. Ct. 2016) (persuasive authority).

This question was considered by the Court of Appeals of Arizona, Arizona's intermediate appellate court, in Johnson v. Tempe Elementary Sch. Dist. No. 3 Governing Bd., 20 P.3d 1148 (Ariz. Ct. App. 2000). Specifically, it considered whether, under its Public Meetings law,[29] a school district governing board's decision to appeal a ruling by the trial court, related to

29 A.R.S. § 38-431 *et seq*.

the board terminating a teacher, constituted "legal action"[30] where the board made the decision to appeal at an executive session and not in public. 20 P.3d at 1148-49. Arizona's Public Meetings law is similar to our Sunshine Act in that A.R.S. § 38-431.03 provides that a "public body may hold an executive session" for the purpose of: discussing or consulting with its attorneys for legal advice, § 38.431-03(A)(3), or "to consider its position and instruct its attorneys regarding [its] . . . position . . . in pending or contemplated litigation[,]" § 38.431-03(A)(4). Further, the statute proscribes that "[l]egal action involving a final vote or decision shall not be taken at an executive session[.]" § 38.431-03(D). Existing precedent there provided that "once the members of the public body commence any discussion regarding the merits of enacting the legislation or what action to take based upon the attorneys' advice, the discussion moves beyond the realm of legal advice and must be open to the public." 20 P.3d at 1150 (citing City of Prescott v. Town of Chino Valley, 803 P.2d 891, 896 (Ariz. 1990)). The court also looked to sister states on the issue, finding support in an extensive opinion by the court in Houman v. Mayor & Council of the Borough of Pompton Lakes, 382 A.2d 413, 425-28 (N.J. Super. Ct. Law. Div. 1977).

Ultimately, the Johnson court held that the decision to appeal was "legal action," explaining:

> we cannot extend the "legal advice" and "pending litigation" exceptions to include a final decision to appeal. Section 431.03(A)(3)-(4) limits executive sessions to "discussion or consultation," in contrast to the "collective decision" or "commitment" that comprises "legal action." § 38–431(2). While A.R.S. section 38–431.03(A)(3)(4) permits board members privately to discuss or consult with their attorneys concerning legal advice or pending litigation, section 38–431.03(C) prohibits holding such executive sessions for taking any legal action involving a final vote or decision. **A decision to appeal transcends "discussion or consultation" and entails a "commitment" of public funds. Therefore, once the Board finished privately discussing the merits of appealing, the open meeting statutes required that board members meet in public for the final decision to appeal.**

20 P.3d at 1151 (emphasis added). *Cf*. Berry v. Bd. of Governors of Registered Dentists of Oklahoma, 611 P.2d 628, 632 (Okla. 1980) ("We find that executive sessions may be held between a public body and its attorney

30 "'Legal action' is defined as 'a collective decision, commitment or promise made by a majority of the members of a public body pursuant to the constitution, their charter or bylaws or specified scope of appointment or authority, and the laws of this state.' A.R.S. § 38–431(2)." Johnson v. Tempe Elementary Sch. Dist. No. 3 Governing Bd., 20 P.3d 1148, 1150 (Ariz. Ct. App. 2000).

to discuss litigation where disclosure of the matter discussed would seriously impair the proceeding. However, when it is decided to file suit and initiate proceedings against a party, the vote must be publicly case and recorded.").

We find Johnson persuasive because it recognizes that while a public body may conduct private sessions for legitimate purposes, there still comes a point when that body's ultimate decision on those private sessions is subject to an open, public meeting. We find this recognition reflected in our own authorities of the Legislature, the Pennsylvania Supreme Court, and the Commonwealth Court. *See* 65 Pa.C.S. § 702; Kennedy, 834 A.2d at 1113 n.22 (Pa.); Schenck, 975 A.2d at 592 n.1 (Mem) (Pa.) (Saylor, J. dissenting from dismissal of appeal as improvidently granted, joined by Castille, C.J.) Lee Publications, Inc., 848 A.2d at 188 (Pa. Commw. Ct.); Reading Eagle Co., 627 A.2d at 307-08 (Pa. Commw. Ct.). Namely, that the Sunshine Act requires some level of transparency in how any agency operates despite the agency having an interest in discussing its litigation in private. Here, this transparency is the requirement that the Board vote on a decision to appeal at an "open meeting."

(iv)

Section 716 of the Sunshine Act does not alter our holding. Citing Section 716 and In re Blystone, the Board argues that requiring a vote to appeal to occur at an "open meeting" would lead to the disclosure of information protected by attorney-client privilege. Moreover, the Board contends that Section 716 "was expressly written to exempt public actions with regard to instructions to legal counsel, including the filing of appeals." *Memo of Law Opposing MSJ* at 9. Dusman counters that "[a] vote on whether to appeal would have only made the process transparent[]" and that [t]he vote itself does not distribute any information outside of CASD's intention of filing a public notice of appeal." *P's Brief in Support of SJ* at 8.

We agree with Dusman. We do not read Section 716 so broadly to include a decision or instruction to appeal nor do we find that In re Blystone compels us to hold that the Board's decision to appeal is protected by attorney-client privilege.

We note first the relevant standards for invoking the attorney-client privilege:

> Pennsylvania law imposes a shifting burden of proof in disputes over disclosure of communications allegedly protected by attorney-client privilege. The party invoking a privilege must initially "set forth facts showing that the privilege has been properly invoked; then the burden shifts to the party seeking disclosure to set forth facts showing

> that disclosure will not violate the attorney-client privilege, *e.g.*, because the privilege has been waived or because some exception applies." *Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1266 (Pa.Super. 2007) (citations omitted), *aff'd*, 605 Pa. 468, 992 A.2d 65 (2010). Accordingly, "[i]f the party asserting the privilege does not produce sufficient facts to show that the privilege was properly invoked, then the burden never shifts to the other party, and the communication is not protected under attorney-client privilege." *Id.* at 1267.

Newsuan v. Republic Services Inc., 213 A.3d 279, 284 (Pa. Super. Ct. 2019) (quoting Custom Designs & Mfg. Co. v. Sherwin-Williams Co., 39 A.3d 372, 376 (Pa. Super. Ct. 2012)).

Here, we find that the Board has not "'set forth facts showing that the privilege has been properly invoked[.]'" Id. Therefore, the Board's decision or instruction to appeal "'is not protected under-attorney client privilege.'" Id. The Board does not explain how or why a decision to appeal or an instruction to counsel to appeal qualifies as privileged information. Nor does it cite to any authority other than In re Blystone as support for its position.

First, while the court in In re Blystone did analyze Section 716 and found it applicable to the circumstances there, the Board does not argue in what way the court's holding is applicable here. The Board makes no argument how the circumstances here are at all similar to the circumstances In re Blystone. That is, how a borough's failure to vote and adopt charges against a police chief where the district attorney was currently investigating the facts underlying the basis for the charges against the chief *and* where the borough voted to suspend and demote the chief at an "open meeting" is similar to this case's circumstances. In addition, although we do not read Section 716 to require that there be an "investigation of possible or certain violations of the law" for that section to apply, that provision is relevant to any argument that Section 716 should apply under In re Blystone. This is because in In re Blystone, the court found Section 716 applicable because of the district attorney's ongoing investigation. *See* 600 A.2d at 675.

Here, the Board did not vote to appeal, vote on its intent to appeal, or vote on anything arguably comparable to a borough's suspension or demotion of a police chief, at any "open meeting," whether before or after the First Executive Session or the May 8, 2014 appeal. Additionally, there was no ongoing investigation related to *Dusman I* before or at the time of the First Executive Session or the appeal. Thus, there is no basis to argue that Section 716 is applicable here under In re Blystone. Moreover, nowhere in

the court's opinion does the court state or imply that it is applying Section 716 because the borough's failure to vote and adopt charges qualifies for protection from disclosure under attorney-client privilege. Therefore, we find the Board's reliance on In re Blystone misplaced.

Second, we disagree with the Board's contention that Section 716 "was expressly written to exempt public actions with regard to instructions to counsel, including the filing of appeals." In particular, that Section 716 excludes instructions to counsel. The Board does not direct us to any authority that supports that proposition nor do we find any. In fact, our research shows authorities that hold that a client's instruction to counsel is *not* protected by attorney-client privilege.[31] Although none of those authorities dealt with a client's instruction to counsel to appeal, we find them to be persuasive here. This is because an instruction to appeal necessarily requires that counsel both act on it, by filing the appeal, and communicate the instruction to third parties, by way of filing the appeal. An appeal is "part of the permanent record of a case" and thus, is "squarely within the category of public judicial records[]" that are accessible to the public. In re 2014 Allegheny Cty. Investigating Grand Jury, 223 A.3d 214, 229 (Pa. 2019). Thus, we reject the Board's argument that Section 716 "was expressly written to exempt . . . instructions to counsel [to file appeals]."[32]

(v)

Finally, the Board's argument that Old Republic may have exercised its right to file the appeal does not alter our holding that the Board was required to vote on the decision to appeal at an "open meeting." We first find that the Board offered no evidence that Old Republic had in fact exercised that right or demanded that CASD file the appeal.

Second, even if Old Republic had, that does not absolve the Board of its duty to conduct "official action" at an "open meeting" pursuant to the Sunshine Act. To hold otherwise would be tantamount to holding that a private agreement can supersede the statutory requirements of the Sunshine Act, legislation whose stated purpose is "insur[ing] the right of its citizens . . . to attend all meetings of agencies at which any agency business is . . . acted upon." § 702. This, the court will not do. *Cf.* Mid Valley Sch. Dist. V. Warshawer, 33 Pa. D. & C. 5th 272, 2013 WL 10256081 at *11 (2013)

31 *See* Schein v. N. Rio Arriba Elec. Co-op, Inc., 932 P.2d 490, 495 (N.M. 1997) ("[T]he [attorney-client] privilege does not preclude discovery of the instructions given to the attorney by the client[.]"); Peters v. Wallach, 321 N.E.2d 806, 809 (Mass. 1975) ("Communications between an attorney and his client are not privileged, though made privately, if it is understood that the information communicated is to be conveyed to others.") (citations omitted)); Walker v. Am. Ice Co., 254 F. Supp. 736, 739 (D.D.C. 1966) ("[T]he rule as to privileged communications does not exclude evidence as to the instructions or authority given by the client to his attorney to be acted upon by the latter.") (citations omitted)); Willard C. Beach Air Brush Co. v. General Motors Corp., 118 F. Supp. 242, 244 (D.N.J. 1953) *judgment aff'd* 214 F.2d 664 (Mem) (3rd Cir. 1954) (holding "client's grant of authority to attorney to settle" is not privileged because "this [information] must be communicated to the other party to the settlement and is thus not confidential[]")
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32 We also note there is no evidence that the Board sought to revoke its instruction to counsel to file the appeal.

("[T]he discovery restriction advocated by the District is nothing more than a private agreement to limit discovery as per the AAA Rules, and the public access directives of the RTKL [Right-to-Know Law, 65 P.S. §§ 67.101-67.304] supersede any such contractual proscription[.]") (citing E.B. v. Woodland Hills Sch. Dist., No. 10-0442, 2011 WL 705224 at *1 (W.D. Pa. Feb. 20, 2011)). This is especially so where the private agreement excludes a principal party—here, the public, because the Insurance Policy is between CASD and Old Republic. Therefore, even if Old Republic did exercise its right to appeal the Mandamus Peremptory Judgment Order, a fact not proven, we reject the Board's argument that such an arrangement would somehow relieve the Board of its duty to take "official action" at an "open meeting" pursuant to the Sunshine Act. *Cf.* § 708(c) ("[N]or shall any executive session be used as a subterfuge to defeat the purposes of section 704 (relating to open meetings).").[33]

CONCLUSION

Dusman's *Motion for Summary Judgment* is **GRANTED**. The Board is prohibited from undertaking an appeal from future court decisions without a formal vote of the Board at an "open meeting" authorizing or ratifying such appeal.

ORDER OF COURT

AND NOW THIS 19th day of June, 2020, upon review of Plaintiff's *Motion for Summary Judgment* filed September 9, 2019, the record, oral argument, and the applicable law,

IT IS HEREBY ORDERED that Plaintiff's *Motion for Summary Judgment* is GRANTED. It is further ordered that Defendant is prohibited from undertaking an appeal from future court decisions without a formal vote of the Board at an "open meeting" authorizing or ratifying such appeal.

This Order is pursuant to the attached Opinion.

Pursuant to Pa.R.C.P. 236, the Prothonotary shall give written notice of the entry of this Order, including a copy of this Order, to each party, and shall note in the docket the giving of such notice and the time and manner thereof.

33 In addition, requiring that the Board vote at an "open meeting," despite the Insurance Policy, is not an intrusion on the privacy of independent corporations who happen to have contractual relations with a Sunshine Act agency, as feared by the Commonwealth Court in Lee Publications, Inc. 848 A.2d at 188-89 ("[A]n interpretation and application of the definition of "agency" that encompasses private corporations in contractual relationships with PSU, is inconsistent with the language of the Act."). This is because the requirement to vote is on the Board, not Old Republic. While we acknowledge that it may be prudent for the Board to acknowledge if its insurance carrier holds the ultimate say in appealing a court decision (or has exercised that right), we do not now decide if the Board must. We also do not attempt to decide the outcome of a scenario where the Board votes against taking an appeal, but its insurance carrier exercises its right to do so. There is no indication whatsoever that such a scenario occurred here.