DIVISION ONE
FILED: 08/07/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

BRADLY ELLICO, Plaintiff/Appellant, v. HACKBERRY ELEMENTARY SCHOOL DISTRICT NO. 3 OF MOHAVE COUNTY GOVERNING BOARD; LAURIE LAWSON, Governing Board President; NAOMI BARGHOLZ, Governing Board Member; WILLIAM FLANAGAN, Special Investigator; EMMETT BROWN, acting Hackberry Administrator, Defendants/Appellees.	)	No. 1 CA-CV 10-0769 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Mohave County

Cause No. CV 2009-01666

The Honorable Charles W. Gurtler, Jr., Judge

AFFIRMED

Law Office of Gary L. Lassen, PLC — Tempe
By Gary L. Lassen
Attorneys for Plaintiff/Appellant

Gust Rosenfeld, PLC — Phoenix
By Robert D. Haws
Karl H. Widell
Attorneys for Defendants/Appellees

O R O Z C O, Judge

¶1 Bradly Ellico, an administrator/principal formerly employed by the Hackberry Elementary School District (District), appeals the trial court's judgment partially denying his requested injunctive and monetary relief. For the following reasons, we affirm.

BACKGROUND

¶2 The District, acting through its governing board (Board), hired Ellico as an administrator/principal for a three-year term beginning July 1, 2008. Relations between Ellico, individual Board members, and parents of District students became strained. At a special public meeting held March 13, 2009, the Board voted to hire Ms. Miller as its attorney to provide advice on starting an investigation into written complaints it had received from parents about Ellico. Prior to the meeting, Board member Lawson personally delivered a letter to Ellico notifying him that he would be the subject of a discussion regarding administrative leave. At the meeting, the Board immediately proceeded into executive session to seek advice from Miller regarding placing Ellico on administrative leave. The Board reconvened and voted two-to-one to place Ellico on non-disciplinary paid administrative leave pending the investigation's outcome. The Board again adjourned to executive session with Miller and Mr. Flanagan, an investigator from the

Mohave County Attorney's Office. The Board reconvened and authorized Flanagan to conduct the investigation. Flanagan's investigation eventually resulted in a statement of charges to terminate Ellico that was adopted by the Board on November 10, 2009.

¶3 Meanwhile, Ellico commenced this action in Maricopa County and served the Board members and the interim administrator/principal with the complaint on June 10, 2009. In addition to Board members Lawson and Bargholz and interim administrator Brown (collectively, with Flanagan, Defendants), the complaint named the State Board of Education, the State of Arizona and the Superintendant of Public Instruction (collectively, the State) as defendants. After the court granted the State's motion to dismiss as to the State only, venue was changed to Mohave County on June 24, 2009. At that time, Ellico had several motions pending, including an application for a temporary restraining order seeking to enjoin the Board from proceeding with a pre-termination hearing on the statement of charges against Ellico, a motion to disqualify Defendants' counsel, and the Defendants' joinder in the State's motion to dismiss. After hearing oral argument on January 8, 2010, the court denied Ellico's motion to disqualify counsel.[1]

[1] The transcripts from this hearing are not in the record on appeal.

¶4 On August 5, 2009, Defendants moved to dismiss. Before the court ruled on the motion, and before it ruled on Defendant's joinder to the State's motion to dismiss, Ellico amended his complaint on January 29, 2010 to add a claim of "Tortious Interference with Contract Against Individuals." Thus, the amended complaint set forth the following claims:[2]

> Count One: Violation of Open Meeting Law;
>
> Count Two: Breach of Contract;
>
> Count Three: Arizona Constitutional Rights Violations, Including Due Process;
>
> Count Four: Waste, Violation of the Provisions of Title 15, and Breach of Fiduciary Duties;
>
> Count Five: Defamation/False Light;
>
> Count Six: Tortious Interference with Contract Against Individuals;
>
> Count Seven: Special Action;
>
> Count Eight: Declaratory Judgment-Contract Construction;
>
> Count Nine: Declaratory Judgment-Statutory Rights Against the Board; and
>
> Count Ten: Intentional Infliction of Emotional Distress

[2] Ellico also added the third board member, Mauldin, as a defendant. Mauldin, the board member who voted not to place Ellico on leave, was subsequently dismissed from this case pursuant to Arizona Rule of Civil Procedure 41(a). According to the record, it appears that the claims in the amended complaint were identical to those in the original complaint except for the addition of the tortious interference claim.

¶5 In support of these claims, Ellico alleged the Board failed to properly place the investigation regarding Ellico's purported wrong-doing on the agenda for the March 13 meeting. *See* Arizona Revised Statutes (A.R.S.) section 38-431.02.A (2011).[3] He also alleged the Board unlawfully adjourned into executive sessions at the March 13 meeting and that Board members Lawson and Bargholz acted with "the express intent to deprive the public of information" to place him on leave. *See* A.R.S. §§ 38-431.02.B, -431.07.A (2011). As a result of these improprieties, Ellico argued the actions taken by the Board at the March 13 meeting were "null and void." *See* A.R.S. § 38-431.05.A (2011). Moreover, Ellico alleged he was deprived of his property interest in continued employment without notice of the "scope and purpose of the investigation . . . until . . . November 10, 2009."

¶6 For relief, Ellico demanded his attorney fees and costs, "general damages," and reinstatement to his employment. He further demanded that the Board be enjoined from "advancing the statement of charges" pending resolution of the open meeting law claims or until Lawson and Bargholz are removed from office, resign or sign a consent judgment. Finally, in support of his special action claim, Ellico requested punitive damages against

[3] We cite the current version of the applicable statute when no revisions material to this decision have since occurred.

Lawson individually based on her alleged "vengeful and malicious conduct."

¶7 On February 9, 2010, the court addressed the motion to dismiss and dismissed all counts in the original complaint except for the claims relating to alleged violations of state open meeting laws and due process claims, to the extent those causes of action were bases for equitable or injunctive relief.[4] The rationale for the court's dismissal orders included Ellico's failure to exhaust administrative remedies and comply with the notice of claims statute. The court also granted Ellico's application for temporary restraining orders pending an evidentiary hearing.

¶8 On March 3, 2010, Defendants moved to dismiss the amended complaint. The court addressed the motion on June 9,

[4] The court also deemed that "Default Judgments" against Lawson, Bargholz, Brown, and Flanagan were actually "Entries of Default" improperly signed by the court clerk against defendants pursuant to Arizona Rule of Civil Procedure 55(a) because, although Defendants had not filed answers, none were required due to Defendants' joinder in the State's pending motion to dismiss. *See* Ariz. R. Civ. P. 12(a)(3)(A) (if defendant moves to dismiss before answer is due, answer not due until ten days after court denies the motion). Accordingly, the court vacated the "Default Judgments." The court also denied Ellico's motion for partial summary judgment because Ellico filed the motion before Defendants' answers were due and, in any event, Lawson's and Bargholz's intent was a matter to be determined by the finder of fact.

2010 and, consistent with its February 9 orders, dismissed all counts except Counts One and Three.[5]

¶9 On June 14 and 15, 2010, the court conducted a two-day preliminary injunction hearing at which Flanagan, Mauldin, Lawson, Bargholz, and Brown testified. Two District employees who worked with Ellico and the Board also testified. On July 22, 2010, the court issued a detailed decision and found that the public notice regarding the March 13 meeting facially violated state open meeting law because the agenda referred to an "employee" who may be placed on unpaid administrative leave without identifying Ellico specifically. *See* A.R.S. § 38-431.02.H (agendas must list *specific* matters to be discussed) (emphasis added). The court concluded, however, that the violation was merely technical because Ellico knew he was the subject of the noticed meeting, the vote to place Ellico on leave occurred in a public meeting, and the agenda was properly and timely posted. Moreover, recognizing the equitable nature of the relief sought in this case, the court noted that Ellico's "actions . . . precluded the Board from having the issue addressed in a properly noticed general meeting of the Board."[6]

---

[5] The court, however, dismissed any damage claims arising out of Counts One and Three.

[6] Lawson testified that Ellico refused her previous requests to place the parents' written complaints on regular meetings'

The court additionally found that Board president Lawson did not intend to violate the open meeting laws, and Lawson and Bargholz would not be fair and impartial decision-makers at Ellico's pre-termination hearing.

¶10 With respect to Ellico's due process claims, the court did not find any violation based on Ellico's unawareness of the specific charges against him from March 2009, when he was placed on leave, until November 2009, when the Board adopted formal charges. The court observed that Ellico currently had notice of the allegations and would have an opportunity to respond at the future disciplinary hearing, which had been "pushed back significantly because of [this litigation]."

¶11 Based on these findings, the court enjoined the District and Board, specifically Lawson and Bargholz, from taking part in Ellico's pre-termination hearing. Instead, the court ordered the matter to be considered by an impartial hearing officer and ordered the Board to complete a minimum of two hours of training in open meeting laws. The court denied Ellico's remaining demands for relief. Specifically, the court found that awarding statutory monetary damages would not be meaningful because § 38-431.07.A requires that the civil penalties awarded be deposited into the general fund of the

---

agendas, thus she did not ask him to do so with respect to the agenda for the March 13 meeting.

public body concerned, and thus "the Board would simply be writing a check to itself to place back into its general fund."

¶12 Final judgment was entered September 10, 2010, and this timely appeal followed. We have jurisdiction pursuant to A.R.S. § 12-2101.A.5(b) (Supp. 2011).

DISCUSSION

¶13 On appeal, Ellico lists nine issues for our consideration. However, he fails to adequately develop his arguments in a manner sufficient for us to conclude that the trial court committed reversible error. With respect to the issue regarding the Defendants' failure to file an answer, he fails to develop any argument whatsoever. Ellico does not argue that the court's findings lack an evidentiary basis, and he does not argue that the court erred as a matter of law in partially denying injunctive relief or monetary damages. Instead, he simply reiterates the underlying merits of his case, and he appears to generally object to orders made by the trial court.[7]

[7] Appellees respond that Ellico's objections to the injunction orders are moot because the open meeting law training ordered by the court has already occurred, and Ellico has accepted payment from the Board representing a buyout of his employment contract. The record shows that Defendants' counsel informed the court of these developments on October 22, 2010. We need not decide whether the judicial doctrine of mootness should apply here because we dispose of this appeal on other grounds. To the extent this decision does address the court's injunctive orders, the mootness doctrine does not prevent us from doing so. *Big D Constr. Corp. v. Court of Appeals*, 163 Ariz. 560, 562-63, 789 P.2d 1061, 1063-64 (1990) (Arizona's

Moreover, Ellico's amended brief not only contains misrepresentations of the record, but it fails in many respects to otherwise comport with the Arizona Rules of Civil Appellate Procedure (ARCAP), which is especially troubling because this court struck his initial opening brief for failure to comply with those rules. *See* ARCAP 13(a)6 (requiring appellant to present significant arguments, set forth his or her position on the issues raised, and include citations to relevant authorities, statutes, and portions of the record). Further, Ellico requests relief that is improper in civil appellate practice. For example, he asks that we impose sanctions on Bargholz and Lawson and order them removed from their respective Board positions.

¶14 Nevertheless, we consider two assertions of error. One issue is whether the court erred in denying Ellico's motion to disqualify counsel. We review disqualification of counsel for an abuse of discretion. *Amparano v. ASARCO, Inc.*, 208 Ariz. 370, 376, ¶ 19, 93 P.3d 1086, 1092 (App. 2004). No abuse of discretion occurs if the trial court's ruling has a reasonable basis. *Id*.

---

constitution has no "cases or controversies" provision; rather, "our reluctance to consider a moot or abstract question is solely a matter of prudential or judicial restraint.").

¶15 Ellico appears to assert that the court was required to grant his motion because of a conflict of interest among the Board and its members Lawson and Bargholz.[8] *See* Ariz. R. Sup. Ct. 42, ER 1.7 ("Conflict of Interest: Current Clients"). Ellico, however, does not have standing to challenge Defendants' choice of counsel unless Ellico himself was counsel's past or current client. *State ex rel. Romley v. Superior Court*, 181 Ariz. 378, 380, 891 P.2d 246, 248 (App. 1995) ("Generally, only a client or a former client has standing to challenge legal representation on grounds of conflict of interest."). Ellico does not allege that he has ever had an attorney-client relationship with defense counsel, and he does not argue that this case presents such an "extreme circumstance[]" that would otherwise permit him to challenge defense counsel's representation. *See id.* The court therefore had a reasonable basis to deny Ellico's motion to disqualify and no abuse of discretion occurred.[9]

---

[8] Ellico also seems to argue that he was entitled to disqualify counsel based on some improper use of public monies to pay for representation. He does not point us to anything in the record that shows public monies were used for such a purpose.

[9] The record is silent as to the court's rationale for denying Ellico's motion. However, we may affirm on any basis. *See Watson v. Apache County*, 218 Ariz. 512, 517, ¶ 23, 189 P.3d 1085, 1090 (App. 2008) (noting that an appellate court may affirm on any basis supported by the record).

¶16 Ellico also argues that his due process rights were violated because he was placed on "indefinite lengthy administrative leave with pay." In support, he cites *Zavala v. Ariz. State Pers. Bd.*, 159 Ariz. 256, 766 P.2d 608 (App. 1987), and *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). Neither *Zavala* nor *Loudermill*, however, stand for the proposition that paid administrative leave pending an investigation – regardless of its length of time – amounts to a due process violation. In fact, those cases support the Board's action here. *Zavala*, 159 Ariz. at 263, 766 P.2d at 615 ("We recognize that the obligation to provide a pre-termination hearing does not preclude an employer who 'perceives a significant hazard in keeping the employee on the job' from suspending the employee immediately with pay pending the provision of the hearing." (quoting *Loudermill,* 470 U.S. at 544-45)). Furthermore, Ellico's approximate eight-month leave for investigation purposes cannot be held unconstitutionally lengthy per se under *Loudermill* because that case found that a *nine*-month adjudication in a school district employee termination proceeding was not a per se due process violation. *Loudermill*, 470 U.S. at 547. As *Loudermill* recognizes, and as is applicable here, merely setting forth the timeline of the challenged proceedings "coupled with the assertion that nine months is too

long to wait, does not state a claim of a constitutional deprivation." *Id.*

¶17 Additionally, our independent review of the record reveals no abuse of discretion in the court's orders regarding injunctive relief. *See Shoen v. Shoen*, 167 Ariz. 58, 62, 804 P.2d 787, 791 (App. 1990) (order denying a preliminary injunction is reviewed for clear abuse of discretion). The court's findings are supported by the evidence and the court did not err in applying those findings when it fashioned the appropriate remedies in this case. *See Ahwatukee Custom Estates Mgmt. Ass'n v. Turner*, 196 Ariz. 631, 635, ¶ 9, 2 P.3d 1276, 1280 (App. 2000) ("An injunction is an equitable remedy which allows the court to structure the remedy so as to promote equity between the parties." (quoting *Scholten v. Blackhawk Partners*, 184 Ariz. 326, 331, 909 P.2d 393, 398 (App. 1995) (supplemental opinion))).

¶18 Addressing in particular the denial of injunctive relief for open meeting law violations, we find there was no violation of the open meeting laws when the Board failed to specifically name Ellico on the agenda. We defer to the trial court's factual findings unless they are clearly erroneous, but we review the court's legal conclusions de novo. *Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, 47, ¶ 9, 156 P.3d 1149, 1152 (App. 2007).

¶19 The trial court concluded that the agenda for the March 13 meeting facially violated the open meeting laws but the violation was merely technical and did not render the Board's actions void because the spirit of the open meeting laws was not violated. *See Karol v. Bd. of Educ. Trustees*, 122 Ariz. 95, 98, 593 P.2d 649, 652 (1979) (holding that technical violations do not nullify public meetings when the violation has no prejudicial effect on the complaining party and the meeting complies with the spirit of the open meeting laws).

¶20 The policy behind the open meeting laws is "to open the conduct of the business of government to the scrutiny of the public and to ban decision-making in secret." *Karol*, 122 Ariz. at 97, 593 P.2d at 651. "A meeting held in the spirit of this enunciated policy is a valid meeting." *Id.* Here, the court's findings show that the Board subjected its decision-making process to the scrutiny of the public. Specifically, the court found that the Board provided notice to Ellico that he was the employee to be discussed at the March 13 meeting; the meeting was set in light of the public's letter requesting that the Board address issues with Ellico's performance and the public was notified of the purpose of the March 13 hearing at the March 12 hearing; the agenda for the March 13 hearing was properly posted; and the Board voted in an open meeting.

¶21 Furthermore, A.R.S. § 38-431.02.I provides that notice of executive sessions are required to include only a general description of the matters to be considered and the agenda need not contain information that would "compromise the legitimate privacy interests of a public officer, appointee, or employee." On this record, the agenda's reference to Ellico as an "employee" who may be placed on administrative leave provided sufficient public notice.

¶22 Because we conclude the Board did not violate the open meeting laws when it omitted Ellico's name from the agenda, the trial court did not err in denying injunctive relief for the alleged open meeting law violations. *See Rancho Pescado, Inc. v. Nw. Mut. Life Ins. Co.*, 140 Ariz. 174, 178, 680 P.2d 1235, 1239 (App. 1984) ("[W]e will affirm the trial court's decision if it is correct for any reason.").

¶23 Finally, we address both parties' request for attorney fees on appeal. Because he did not prevail, Ellico is not entitled to his fees or costs. Pursuant to ARCAP 25 and A.R.S. § 12-349.A (2003), we grant Appellees their taxable costs and an amount of reasonable fees[10] subject to compliance with ARCAP 21.

[10] The record reveals that Ellico commenced and continued this litigation primarily for delay or harassment, and he unreasonably expanded the proceedings by seeking to disqualify opposing counsel. Further, his brief unreasonably failed to comply with ARCAP 13(a). Even after his opening brief was

According to the discretion afforded us by § 12-349.B, we allocate Appellee's fee award equally among Ellico and his counsel, Gary L. Lassen.

CONCLUSION

¶24 For the reasons stated above, the trial court's judgment is affirmed.

/S/
PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/
PHILIP HALL, Judge

/S/
JOHN C. GEMMILL, Judge

struck for failure to comply with ARCAP, his subsequent brief did not comply with ARCAP.