DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PETER PINGERELLI, a qualified elector of the State of Arizona, Plaintiff/Appellant, v. DONALD COVEY, Maricopa Country Superintendent of Schools; and BILL MONTGOMERY, Maricopa County Attorney; each in their official capacities, Defendants/Appellees.	1 CA-CV 11-0344 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. LC2011-000122-001

The Honorable John R. Hannah, Jr., Judge

AFFIRMED

Tsontakis Law PC — Phoenix
By Anthony Tsontakis
Attorney for Plaintiff/Appellant

William G. Montgomery, Maricopa County Attorney — Phoenix
By Bruce P. White, Deputy County Attorney
M. Colleen Connor, Deputy County Attorney
Attorneys for Defendants/Appellees

O R O Z C O, Judge

¶1 Plaintiff/Appellant Peter Pingerelli appeals the superior court's order dismissing his amended complaint and denying his motion for summary judgment against Defendant/Appellee Bill Montgomery (County Attorney).[1] Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 The Maricopa County Superintendent of Schools (Superintendent) has the authority to fill a school board vacancy by appointment or special election. Ariz. Rev. Stat. (A.R.S.) § 15-302.A.3 (Supp. 2011).[2] To help him carry out this function, the Superintendent established detailed procedures for the nomination of potential appointees (the Nominating Procedures) to be considered to fill school board vacancies.

¶3 In December 2010, after a school board vacancy developed, the governing school board (Board) for the Peoria

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[1] Pingerelli filed two motions for order to show cause, one against Donald Covey, the Maricopa County Superintendent of Schools, and the second against Bill Montgomery, the Maricopa County Attorney. The superior court treated these pleadings as motions for summary judgment. Pingerelli has abandoned the appeal of the denial of the motion for summary judgment against the Superintendent but appeals the denial of the motion for summary judgment against the County Attorney.

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

Unified School District (PUSD) passed a resolution (the Resolution) to bypass the Superintendent's Nominating Procedures. As a result of the Resolution, the Superintendent made arrangements[3] for a special election to be held on May 17, 2011. In response, the Board rescinded the Resolution and agreed to follow the Superintendent's Nominating Procedures. On January 19, 2011, the Superintendent cancelled the special election.

¶4 Pingerelli sought candidacy in the special election for the vacancy. In a January 27, 2011 email sent to the Superintendent, Pingerelli acknowledged the Superintendent had cancelled the election but contested whether the Superintendent had such authority. Instead of immediately pursuing a legal remedy to prevent the Superintendent from cancelling the election, however, Pingerelli continued collecting signatures on his nomination petitions, which he attempted to deliver to the Superintendent on February 14, 2011. The Superintendent refused to accept the petitions.

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[3] Whether the Superintendent "called" the special election was hotly contested below. Pingerelli's lawsuit was premised on his belief that the Superintendent had no authority to cancel a special election, once the election has been called. The Superintendent and County Attorney agreed, but maintained the Superintendent never "called" an election. The superior court ruled the Superintendent had called the election but that under the circumstances presented here, the Superintendent had the authority to cancel the special election.

¶5 Two weeks later, Pingerelli filed – but did not serve – a lawsuit against the Superintendent seeking a court order compelling the Superintendent to hold the special election on May 17. Nine days after that, Pingerelli amended the complaint to seek an additional order mandating that the County Attorney compel the Superintendent to hold the special election. Pingerelli served the lawsuit on March 9, 2011, more than forty-one days after acknowledging the election had been cancelled.

¶6 On March 30, 2011, the superior court dismissed the amended complaint and denied Pingerelli's motions for summary judgment against both public officials, holding that Pingerelli was not entitled to relief because: (1) his claims were barred by the doctrine of laches; and (2) the Superintendent had the authority to cancel a special election, even if such authority was not specifically enumerating by statute. Pingerelli timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101.A.1 (Supp. 2011).

DISCUSSION

¶7 On appeal, Pingerelli asserts the superior court erred in holding that it could not issue a writ of mandamus to compel the County Attorney to initiate *quo warranto* proceedings against the Superintendent.

¶8 In response, the County Attorney argues the appeal is moot and, in the alternative, that Pingerelli's claims are barred by the doctrine of laches, that the superior court did not abuse its discretion in holding the claims were barred by the doctrine of laches, and that Pingerelli waived any argument regarding laches by failing to raise the issue in his opening brief.

¶9 The County Attorney also contends that quo warranto proceedings are only appropriate to challenge someone who is unlawfully holding an office. Because the Superintendent is not unlawfully holding the office, according to the County Attorney, a writ of mandamus to initiate quo warranto proceedings would not be appropriate in this case.

Mandamus

¶10 "Mandamus is an extraordinary remedy issued by a court to compel a public officer to perform an act which the law specifically imposes as a duty." *Bd. of Educ. v. Scottsdale Educ. Ass'n*, 109 Ariz. 342, 344, 509 P.2d 612, 614 (1973) (declining to issue a writ of mandamus to compel a school district to follow a collective bargaining agreement). Mandamus is only appropriate when the applicant has an immediate and complete legal entitlement to the act and the law requires that the public officer perform the act. *Id.* Even then, when the

applicant has shown an absolute right to the requested act, it is still within the discretion of the court to grant mandamus relief. *Brewer v. Burns*, 222 Ariz. 234, 242, ¶ 41, 213 P.3d 671, 679 (2009).

¶11 Pingerelli asks us to issue a writ of mandamus to compel the County Attorney to initiate quo warranto proceedings against the Superintendent pursuant to A.R.S. §§ 12-2021 (2003), -2042 (2003). Mandamus is the appropriate relief when two conditions are met: (1) the performance sought to be compelled is a ministerial act specifically required of the office by law, or the performance is a discretionary act and it clearly appears "that the officer has acted arbitrarily and unjustly and in the abuse of discretion"; and (2) there is no other "plain, speedy and adequate remedy at law." *Rhodes v. Clark*, 92 Ariz. 31, 34-35, 373 P.2d 348, 350 (1962) (citations and internal quotation marks omitted). Thus, "if the action of a public officer is discretionary that discretion may not be controlled by mandamus." *Collins v. Krucker*, 56 Ariz. 6, 13, 104 P.2d 176, 179 (1940).

¶12 At oral argument on appeal, Pingerelli requested that quo warranto proceedings be initiated to investigate whether the Superintendent abused his discretion in cancelling the election once it was called. Pingerelli, however, had other speedy and

adequate methods to obtain judicial review of the Superintendent's decision to cancel the election. For example, if Pingerelli had filed a timely special action to enjoin the Superintendent from cancelling the election, then we would have had the opportunity to evaluate whether the cancellation was an abuse of his discretion and, if so, could have reinstated the election.

¶13 Pingerelli's delays in initiating this action and his failure to bring a timely special action preclude us from reviewing whether the Superintendent abused his discretion. Thus, because Pingerelli had alternative, adequate remedies at law of which he failed to make use, mandamus is inappropriate. *See Morris v. Woolery*, 103 Ariz. 392, 393, 442 P.2d 839, 840 (1968) (holding that mandamus was inappropriate where the applicant did not pursue administrative remedies).

The Appeal Is Moot

¶14 In addition to seeking mandamus relief, Pingerelli's appeal is moot because it is impossible for us to provide Pingerelli the remedy he seeks. "A case becomes moot when an event occurs which would cause the outcome of the appeal to have no practical effect on the parties." *Sedona Private Prop. Owners Ass'n v. City of Sedona*, 192 Ariz. 126, 127, ¶ 5, 961 P.2d 1074, 1075 (App. 1998). May 17, 2011 has come and gone,

and it is too late to hold the special election for the Board position on that date. Additionally, the Superintendent has appointed a new Board member to fill the PUSD Board vacancy.

¶15 In fact, the lawsuit was moot when the superior court held the hearing on March 30, 2011.[4] Arizona law is well-established that an election case becomes moot at the point when ballots must be printed so that early and absentee voting begins on time and to ensure that voters are not disenfranchised. *See, e.g., Korte v. Bayless,* 199 Ariz. 173, 174-75, ¶ 3, 16 P.3d 200, 201-02 (2001) (finding lawsuit filed eight weeks before deadline for mailing of publicity pamphlets not barred by laches); *Kromko v. Superior Court*, 168 Ariz. 51, 57, 811 P.2d 12, 18 (1991) ("disputes concerning election and petition matters must be initiated and heard in time to prepare the ballots for absentee voting to avoid rendering an action moot");

[4] In deciding that Pingerelli's claims were barred by laches, the superior court's analysis implicated issues that are equally applicable to an analysis on the issue of mootness. Without invoking mootness, the superior court found that Pingerelli filed his lawsuit too late because the time to send the ballots to the printer had already passed, stating: "The horse is out of the barn and pretty far down the road." The superior court further noted that if Pingerelli had brought the lawsuit in late January when he discovered that the Superintendent cancelled the special election, his lawsuit would have been timely. Thus, the superior court concluded, Pingerelli's claims were barred by the doctrine of laches because he failed to act more swiftly. We find the court's analysis equally applicable to the issue of mootness.

Bd. of Supervisors v. Superior Court, 103 Ariz. 502, 504-05, 446 P.2d 231, 233-34 (1968) (finding election cases moot because lawsuits were filed too late to allow the trial courts to render decisions in time to print and distribute absentee ballots); *Rapier v. Superior Court*, 97 Ariz. 153, 155-56, 398 P.2d 112, 113 (1964) (election contest moot where decision not made in time for absentee voting, even without taking into consideration a reasonable time for printing the ballots). Thus, "to avoid the problem of mootness, actions must be brought in sufficient time to allow the court to make a decision before absentee ballots must be printed." *Korte,* 199 Ariz. at 174, ¶ 3, 16 P.3d at 201.

¶16 Here, the defendants presented evidence that the ballot files had to be transferred to the printer no later than March 25, 2011 to ensure the ballots were printed in time for absentee voting. Neither party informed the superior court of the exigent circumstances related to the printing of the ballots. For that reason, the hearing was not held until five days after the March 25 "drop-dead" date. Thus, the case was moot when the hearing was held on March 30, 2011.

¶17 Even assuming some flexibility would allow the printer to include the names of candidates for the PUSD Board on the ballot if submitted shortly after March 25, 2011, no other

candidates had submitted nomination petitions to secure a space on the ballot because the Superintendent had cancelled the election. For all of these reasons, Pingerelli's case was moot at the time of the hearing below, and is moot on appeal.

¶18 Courts do not generally consider moot issues unless they are either of "great public importance or are capable of repetition yet evading review." *Slade v. Schneider*, 212 Ariz. 176, 179, ¶ 15, 129 P.3d 465, 468 (App. 2006). Pingerelli does not suggest that either exception applies here.[5]

¶19 Nevertheless, we are inclined to view the question regarding whether a county school superintendent has the authority to cancel a special election to be a matter of statewide concern. Assuming the next claimant acts promptly, however, in the event this narrow issue arises again, it will not necessarily evade review on the merits. *See Sedona Private Prop. Owners Ass'n*, 192 Ariz. at 128, ¶ 11, 961 P.2d at 1076 (holding initiative issue is not one that evades review). Indeed, this case could have been decided on its merits if Pingerelli had not waited to file his lawsuit and the superior court had known of the exigent circumstances regarding the

[5] Pingerelli argues that the mootness issue has no application to his claim against the County Attorney. We disagree, for the reasons stated here and below.

ballot printing deadline. We thus find Pingerelli's appeal to be moot.

Laches

¶20 The superior court held that Pingerelli was not entitled to any relief on the ground of laches. Pingerelli does not address the laches issue in his opening brief.[6] Instead of articulating his position in his reply brief, he maintains that the issues of laches and mootness are only applicable to his claim against the Superintendent and are irrelevant to his claim against the County Attorney. We disagree.

¶21 Pingerelli admits that both claims arise out of the same facts but asserts that the relief sought against one is "wholly independent" of the relief sought against the other. This, however, is irrelevant. In count one of the amended complaint, Pingerelli sought a court order compelling the Superintendent to hold the May 17, 2011 special election. In count two, he sought a court order compelling the County Attorney to force the Superintendent to hold the election in May. We do not see, and Pingerelli does not explain, why the doctrine of laches (and mootness) would bar the first claim

[6] Issues not clearly raised in appellate briefs are deemed waived. *Childress Buick Co. v. O'Connell,* 198 Ariz. 454, 459, ¶ 29, 11 P.3d 413, 418 (App. 2000).

against the Superintendent and not the second claim seeking identical relief through the County Attorney.[7] Because the superior court held that the doctrine of laches barred both claims and we conclude that Pingerelli waived this argument on appeal, and Pingerelli's appeal fails for this reason as well.

CONCLUSION

¶22 For the above stated reasons, we affirm the order of the trial court.

/S/
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PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/
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PHILIP HALL, Judge

/S/
_____
JOHN C. GEMMILL, Judge

[7] It is not the role of the appellate court to decipher and develop arguments not clearly presented by a party. *See Nationwide Res. Corp., v. Massabni* 134 Ariz. 557, 565, 658 P.2d 210, 218 (App. 1982).