NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
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PHILIP G. URRY,CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DANIEL J. DERIENZO,	No. 1 CA-CV 09-0323
Plaintiff/Appellant,	DEPARTMENT C
v.	**MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
YAVAPAI COUNTY; YAVAPAI COUNTY BOARD OF SUPERVISORS; CHIP DAVIS; LORNA STREET; ARIZONA STATE PERSONNEL BOARD,	
Defendants/Appellees.	

Appeal from the Superior Court in Yavapai County

Cause No. CV 2005-1113

The Honorable Roland J. Steinle III, Judge

AFFIRMED

The Law Offices of Robert M. Cook, P.L.L.C. — Yuma
By Robert M. Cook
Attorney for Plaintiff/Appellant

Jellison Law Offices, P.L.L.C. — Phoenix
By James M. Jellison
Attorneys for Defendants/Appellees
Yavapai County, Yavapai County Board of Supervisors, Chip Davis, and Lorna Street

Ridenour Hienton & Lewis, P.L.L.C. — Phoenix
By Jeffrey A. Bernick
Attorneys for Defendant/Appellee
Arizona State Personnel Board

S W A N N, Judge

¶1 Daniel J. DeRienzo ("Appellant") appeals from the trial court's grant of summary judgment in favor of Yavapai County, Yavapai County Board of Supervisors, Chip Davis, Lorna Street and the Arizona State Personnel Board (collectively, "Appellees"). He claims that he was wrongly discharged from his employment with the County in retaliation for his revelation of alleged misconduct in the management of the jails. Because the only evidence upon which Appellant relied in support of his claim was subject to the attorney-client privilege, it was inadmissible. We therefore affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In October 2003, Appellant was one of several attorneys who signed and submitted a Petition for Writ of Habeas Corpus on behalf of Yavapai County Jail inmates. The petition alleged that the conditions of confinement within the Yavapai County Jail were dangerous and overcrowded, leading to inmate violence. The Petition named G.C. "Buck" Buchanan, the Yavapai County Sheriff, as a respondent.

¶3 In September 2004, Appellant, who was the Yavapai County Public Defender, requested that the Yavapai County Board of Supervisors (the "Board") allow his appeals attorney, Mr. Jensen, to work from home. The Board unanimously denied the

request.[1] On September 20, 2004, Appellant requested the Board's approval to hire a newly admitted attorney in an "Attorney Journey" position.[2] The Board unanimously voted to hire the attorney at the "Attorney Entry" grade -- not the "Attorney Journey" grade. Appellant hired the new attorney at the "Attorney Entry" level and eight days later he promoted her to the "Attorney Journey" position.

¶4 On October 4, 2004, the Board convened to discuss Appellant's employment in an executive session. On October 13, 2004, during a special session, the Board voted unanimously to terminate Appellant's employment.[3]

¶5 Thereafter Appellant was discharged from his position as the Yavapai County Public Defender. Appellant filed a wrongful termination complaint with the Arizona State Personnel Board, claiming that the Board terminated his employment for an improper purpose. Appellant contended that the Board engaged in a prohibited personnel practice, in violation of A.R.S. § 38-531 *et seq*., when it fired him. Specifically, Appellant maintained that his discharge was in retaliation for his participation in

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[1] Two weeks later, Mr. Jensen was still telecommuting.

[2] "Attorney Journey" is an advanced-level position, whereas "Attorney Entry" is an entry-level position.

[3] Appellant had notice of the meeting, but did not attend.

the filing of the habeas petition that alleged "deplorable jail conditions" and "racial profiling."

¶6 The Arizona State Personnel Board dismissed Appellant's complaint. Appellant then appealed to the superior court, and the court granted Appellees' motion to dismiss for failure to file a notice of claim.[4] That decision was appealed to this court, and we vacated the superior court's orders and remanded the case to the lower court for further proceedings. *See DeRienzo v. Yavapai County*, 1 CA-CV 06-0546 (Ariz. App. Mar. 22, 2007) (mem. decision).

¶7 On remand, Appellees moved for summary judgment. After oral arguments, the superior court granted Appellees' motion in an unsigned minute entry. More than five months later, Appellant appealed the superior court's ruling. But because the minute entry was unsigned, we suspended the appeal and re-vested jurisdiction in the superior court for entry of a final judgment. Thereafter, the superior court signed its minute entry, and explained its ruling as follows:

> For the reasons stated [in] the Motion, the Court finds that as a matter of law the plaintiff did not provide written disclosure to a public body which is a prerequisite to a ARS 38-531 claim.
>
> As to the second argument, Plaintiff did not produce ***admissible evidence***, by affidavit or

[4] Maricopa County Superior Court Judge Roland Steinle presided by designation of the Presiding Judge of the Yavapai County Superior Court.

> otherwise; i.e. deposition that controverted the "facts" presented by the defendant that the plaintiff was terminated for insubordinate conduct. It is clear under the statute; the Executive Minutes are not admissible. Plaintiff's conclusion as to the wrongful termination in the Statement of Facts in Support of the Summary Judgment depends on ***inferences drawn*** from Executive Minutes which would not be admissible at trial. Without the Executive Session minutes, the Response contains mere conclusions and legal arguments that the plaintiff was wrongfully terminated by the defendants. It is plaintiff's burden to establish that there is sufficient ***available admissible evidence*** to justify a trial. Accordingly, the plaintiff has failed to satisfy the burden that there is a genuine issue of fact which would justify a trial.

(Emphases in original.)

¶8 After the superior court submitted the signed minute entry to this court, we reinstated this appeal.[5]

DISCUSSION

I. *SUBJECT MATTER JURISDICTION*

¶9 As a preliminary matter, we address our jurisdiction to consider this appeal. Citing to *Sarwark v. Thorneycroft*, 123 Ariz. 1, 596 P.2d 1173 (App. 1979), *aff'd*, 123 Ariz. 23, 597 P.2d 9 (1979), Appellees argue that this court is without jurisdiction to consider this matter because A.R.S. § 38-352 limits the review of an administrative board's decision to the superior court. This argument fails to account for the whole statutory scheme governing administrative review.

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[5] Appellees contend that this appeal is untimely because it was filed months after the *unsigned* minute entry. The procedural history described above amply illustrates the flaw in this argument, and we reject it without further discussion.

¶10 Pursuant to A.R.S. § 12-913 (2003), "[t]he final decision, order, judgment or decree of the superior court [in a matter involving administrative review] entered in an action to review a decision of an administrative agency may be appealed to the supreme court." This statute was enacted before the Court of Appeals was established in 1964, and pursuant to A.R.S. §§ 12-120.21, -913, and -2101, this court has appellate jurisdiction in such cases. *See Ariz. Podiatry Ass'n v. Dir. of Ins.*, 101 Ariz. 544, 547-48, 422 P.2d 108, 111-12 (1966).

II. *COMPLIANCE WITH A.R.S. § 38-531 ET SEQ.*

¶11 A.R.S. § 38-531 *et seq.* (2001) provide protection for employees who disclose information of public concern against reprisal from their employers. A.R.S. § 38-532 sets forth the elements of a protected disclosure:

> B. The disclosure by an employee to a *public body* alleging a violation of law, mismanagement, gross waste of monies or abuse of authority *shall be in writing* and shall contain the following information:
>
> 1. The date of the disclosure.
>
> 2. The name of the employee making the disclosure.
>
> 3. The nature of the alleged violation of law, mismanagement, gross waste of monies or abuse of authority.
>
> 4. If possible, the date or range of dates on which the alleged violation of law, mismanagement, gross waste of monies or abuse of authority occurred.

(Emphases added.) Pursuant to A.R.S. § 38-531(4), the term "public body" includes "the attorney general, the legislature, the governor, a federal, *state or local law enforcement agency*, the county attorney, the governing board of a community college district or school district, the board of supervisors of a county or an agency director." (Emphasis added.)

¶12 Appellees argue that Appellant does not qualify for protection under the statute because he failed to demonstrate that he made a written "disclosure" in the manner contemplated by the statute. Appellant counters that he properly disclosed his allegations when he filed a Petition for Writ of Habeas Corpus in court on October 14, 2003.

¶13 Appellees seek a ruling that the habeas petition was not submitted to a "public body" as defined in A.R.S. § 38-531(4) because the term does not expressly include either a federal or state court. Even assuming *arguendo* that a federal or state court does not constitute a public body, G.C. "Buck" Buchanan, the Yavapai County Sheriff, was a named party in the petition. Because the Sheriff is a person in charge of the local law enforcement agency -- a public body as defined in A.R.S. § 38-531(4) -- we conclude that the petition facially qualifies for protection under the statute.[6]

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[6] Appellees also argue that because Appellant was acting in a representative capacity and not in his personal capacity when he

III. *DISCLOSURE OF EXECUTIVE SESSION MINUTES*

¶14 Appellant argues that the superior court erred when it concluded that the executive session minutes were inadmissible. According to Appellant, had those minutes been ruled admissible, and had the trial court given him the benefit of all reasonable inferences, the motion for summary judgment should have been denied. We disagree.

¶15 "A communication between a client and his attorney is considered confidential, and therefore privileged, if 'the communication [was] made in the context of the attorney-client relationship and [was] maintained in confidence.'" *Alexander v. Superior Court (State)*, 141 Ariz. 157, 162, 685 P.2d 1309, 1314 (1984) (citation omitted); *accord* A.R.S. § 12-2234(B) (communication is privileged between an attorney and a government entity if done for the purpose of providing legal advice to the entity). Our *in camera* inspection of the minutes

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disclosed the allegations, the petition does not comply with the requirements of A.R.S. § 38-532. But the statute is silent in this regard, and "[i]t is the rule of statutory construction that courts will not read into a statute something which is not within the express manifest intention of the Legislature as gathered from the statute itself, and similarly the court will not inflate, expand, stretch or extend the statute to matters not falling within its expressed provisions." *Patches v. Indus. Comm'n*, 220 Ariz. 179, 182, ¶ 10, 204 P.3d 437, 440 (App. 2009) (citation omitted). "Any extension of the reach of the statute" to include the requirement that an employee must act on his own behalf when disclosing allegations pursuant to A.R.S. § 38-531 *et seq.* "must be accomplished by the legislature, not the courts." *Id.*

reveals that the communication between the Board and its attorney reflected in the executive session minutes was made for the purpose of receiving and dispensing legal advice. We do not hold that executive session minutes are *per se* inadmissible in every instance. But the attorney-client privilege serves as a bar to admissibility regardless of the form in which those communications are preserved. The minutes of the executive session that documented the privileged communication were therefore inadmissible to support Appellant's claim -- not because they reflect the substance of the executive session, but because they are independently protected by A.R.S. § 12-2234.

¶16 While the attorney-client privilege "protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981). Therefore, Appellant could have moved pursuant to Ariz. R. Civ. P. 56(f) for a continuance to permit discovery to determine whether members of the Board discharged Appellant for an impermissible reason. The record does not indicate that Appellant made such a request, and Appellant does not argue on appeal that evidence other than the minutes was submitted to the superior court in an attempt to defeat Appellees' motion for summary judgment. Accordingly, we find no error in the superior

court's conclusion that Appellees were entitled to summary judgment, as there were no genuine issues of fact.[7]

CONCLUSION

¶17 For the foregoing reasons, we affirm.

/s/
PETER B. SWANN, Judge

CONCURRING:

/s/
MARGARET H. DOWNIE, Presiding Judge

/s/
DONN KESSLER, Judge

[7] Appellant cites to A.R.S. § 38-431.07(C) and argues that justice demands that the trial court admit the minutes of the executive session as evidence. Section 38-431.07(C) provides, in part, that "*[i]n any action brought pursuant to this section challenging the validity of an executive session*, the court may review in camera the minutes of the executive session, and if the court in its discretion determines that the minutes are relevant and that justice so demands, the court may . . . admit in evidence part or all of the minutes." (Emphasis added.) A.R.S. § 38-431.07(C), however, is inapplicable because Appellant did not bring an action challenging the validity of the executive session. Instead Appellant disputes the validity of the outcome of the session -- his discharge, and the reason for it.