

**IN THE COURT OF APPEALS OF OHIO**

SEVENTH APPELLATE DISTRICT  
MAHONING COUNTY

STATE EX REL. BRIAN M. AMES,

Relator-Appellant,

v.

MAHONING COUNTY BOARD OF ELECTIONS ET AL.,

Respondents-Appellees.

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**OPINION AND JUDGMENT ENTRY**  
**Case No. 23 MA 0037**

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Civil Appeal from the  
Court of Common Pleas of Mahoning County, Ohio  
Case No. 22 CV 1528

**BEFORE:**

Mark A. Hanni, Cheryl L. Waite, Carol Ann Robb, Judges.

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**JUDGMENT:**

Affirmed in part, Reversed in part, Remanded.

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Brian M. Ames, *Pro se*, Relator-Appellant and

*Atty. Gina DeGenova*, Mahoning County Prosecutor, *Atty. Linette Stratford* and *Atty. Jacqueline M. Johnston*, Assistant Prosecuting Attorneys, Mahoning County Prosecutor's Office, for Respondents-Appellees.

Dated: December 20, 2023

**HANNI, J.**

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{¶1} Relator-Appellant, Brian M. Ames (Appellant), pro se, appeals the February 8, 2023 judgment of the Mahoning County Court of Common Pleas granting a Civ. R. 12(B)(6) motion to dismiss his case filed against Respondents-Appellees, Mahoning County Board of Elections and David J. Betras, Sandra A. Barger, Robert L. Aurandt, and Joyce Kale-Pesta in their official capacities as members of the Board of Elections (collectively Appellees). For the following reasons, we affirm the trial court’s judgment in part and reverse in part.

{¶2} On August 29, 2022, Appellant, as a taxpayer, filed a verified complaint in mandamus, declaratory judgment action, and an injunction request for enforcement of the Open Meetings Act, R.C. 121.22 (OMA) against Appellees. Appellant alleged that in four board of elections sessions, Appellees entered into executive sessions for subject matter that was not specifically excepted under the OMA. He identified the sessions held on September 7, 2021, February 12, 2022, April 14, 2022, and August 22, 2022.

{¶3} Appellant averred that the meeting minutes for September 7, 2021 reflected that a member of the public presented evidence protesting the granting of a liquor permit petition, and Appellees went into executive session for reasons not excepted under the OMA. Appellant attached a copy of a portion of those meeting minutes.

{¶4} Appellant further alleged that Appellees violated the OMA by entering into executive session “to discuss personnel and county policy” during the February 12, 2022 meeting and invited the Assistant Prosecutor into the meeting. Appellant attached a copy of a portion of those meeting minutes.

{¶5} He also averred that the April 14, 2022 meeting minutes showed that Appellees violated R.C. 121.22 by entering into executive session “to discuss personnel matters.” Appellant attached the entirety of these meeting minutes.

{¶6} Appellant cited a YouTube link to a video of Appellees’ August 22, 2022 meeting and alleged that it showed Appellees violating R.C. 121.22 by going into executive session “to seek legal counsel.”

{¶17} Appellant contended that none of the identified executive sessions were held for a matter specifically excepted by R.C. 121.22 and the public was excluded from these sessions. He asserted that each session constituted a separate OMA violation.

{¶18} In the second count of his complaint, Appellant asserted that the meeting minutes for the identified meetings violated R.C. 121.22(C) and R.C. 149.43 because they were “barebones” summaries, rather than full and accurate minutes. He averred that the executive sessions and the content of those sessions were not mentioned in the minutes. He alleged that each failure to promptly prepare and file full and accurate minutes constituted a separate violation of R.C. 121.22 and R.C. 149.43.

{¶19} Appellant requested that the court find that Appellees violated the OMA and issue a mandatory injunction enjoining it to comply with R.C. 121.22 as mandated by R.C. 121.22(I)(1). He also requested that the court order Appellees to pay him a \$500 civil forfeiture as required under R.C. 121.22(I)(2)(a) for each violation, as well as his costs and reasonable attorney fees. He further requested that the court declare invalid all resolutions, rules or actions taken in those executive meetings pursuant to R.C. 121.22(H), and order Appellees to correct the meeting minutes.

{¶10} On November 18, 2022, Appellees filed a Civ. R. 12(B)(6) motion to dismiss Appellant’s complaint. Appellees asserted that each of the identified executive sessions was for a legally permissible reason or was a legally permissible gathering that was not subject to the OMA. Appellees contended that Appellant failed to overcome his burden to show that it acted outside of its duties. Appellees noted the presumption of regularity afforded when conducting ordinary duties and asserted that Appellant did not overcome that presumption.

{¶11} Appellees asserted that the September 7, 2021 minutes established that after an individual presented arguments and evidence protesting a liquor option petition, it moved to enter into executive session “to confer with Ms. Sharon Hackett, Assistant Prosecutor, our legal counsel.” Appellees contended that R.C. 121.22(G)(3) allows public bodies to enter into executive session to confer with legal counsel about disputes of the public body that are the subject of pending or imminent court action. Appellees also maintained that it was acting in a quasi-judicial manner and therefore was not subject

to the OMA when it entered into executive session to discuss the protest matter with legal counsel.

{¶12} Appellees asserted that the executive session entered into at the February 12, 2022 meeting was to confer with legal counsel and nothing in the minutes suggested that any action or deliberation was made as a result of discussion during this time. Appellees submitted that it may enter into executive session to discuss personnel matters under R.C. 121.22(G)(1).

{¶13} Appellees contended that the executive session held during the April 14, 2022 meeting was also to discuss personnel matters as permitted by R.C. 121.22.

{¶14} Appellees asserted that it entered into executive session on August 22, 2022 to consult with legal counsel. Appellees noted that before the motion to enter into executive session, it discussed issues relating to the liquor options, stated that it would be asking legal questions about issues relating to those options, and would potentially discuss the nominating petitions of two candidates.

{¶15} Appellees asserted that since Appellant provided the website on YouTube for the August 22, 2022 meeting, the court could refer to the YouTube videos of the other meetings that he identified. Appellees contended that the videos of those meetings supported its position as to each of the executive sessions.

{¶16} Appellees further asserted attorney-client privilege regarding the sessions in which it sought the assistance of legal counsel. It submitted that attorney-client privileged communications fall under R.C. 121.22(G)(5)'s allowance of executive session for "matters required to be kept confidential by federal law or regulations or state statutes."

{¶17} Finally, Appellees asserted that its meeting minutes were legally sufficient. It maintained that the minutes met the requirements set forth in *White v. Clinton County Board of Commissioners*, 76 Ohio St.3d 416, 424, 1996-Ohio-380, 667 N.E.2d 1223, because they contained "sufficient facts and information to permit the public to understand and appreciate the rationale behind the relevant public body's decision."

{¶18} In his reply brief, Appellant asserted that he had the initial burden of production and persuasion to prove that R.C. 121.22 was violated when he filed his complaint. He stated that he met the burden by showing that the meetings occurred, the public was excluded from the executive sessions, reasonable notice was not given, and

minutes were not prepared and posted for public inspection. He contended that once he met this burden, the burden shifted to Appellees to produce evidence that the executive sessions fell under one of the exceptions in R.C. 121.22(G). Appellant indicated that if Appellees met that burden, the burden would shift back to him to show that the exceptions claimed by Appellees did not apply or were invalid.

{¶19} Appellant further maintained that when determining the motion to dismiss, the court could not rely on allegations outside of the complaint. Appellant contended that he did not need to provide documentation with his complaint and the court could not consider documentation, such as meeting minutes or videos, in deciding the motion to dismiss. Appellant also asserted that Appellees were not entitled to a presumption of regularity because Civ. R. 12(B)(6) requires the court to make inferences in his favor.

{¶20} On December 1, 2022, Appellees filed a notice of supplemental authority, citing the Ohio Supreme Court’s decision in *State ex rel. Hicks v. Clermont County Board of Commissioners*, 171 Ohio St.3d 593, 2022-Ohio-4237, 219 N.E.3d 894. Appellees asserted that the Court was asked to adopt the burden-shifting standard set forth by the Twelfth District in *State ex rel. Hardin v. Clermont County Board of Elections*, 12th Dist. 2012-Ohio-2569, 972 N.E.2d 115, which required a public body to prove that it entered into executive session for a proper purpose once a complaint was filed alleging a violation of the OMA.

{¶21} Appellees submitted that the Ohio Supreme Court declined to adopt the *Hardin* burden-shifting analysis and held that a plaintiff must prove a violation of the OMA and a public body is not required to prove that no violation had occurred. Appellees concluded that Appellant’s complaint in this case was based upon the *Hardin* burden-shifting and contained mere allegations without supporting evidence. Appellees emphasized that the *Hicks* Court discussed a public body’s presumption of regularity while carrying out its duties. Appellees stated that the Court held that this presumption was related to the burden of proof because the burden of production remained on the plaintiff to overcome the presumption and prove that a violation occurred.

{¶22} Appellant filed a brief in opposition to the notice of supplemental authority, moved for sanctions under Civ. R. 11, and moved to strike the notice. He cited Ohio Supreme Court Rules of Practice which prohibited supplemental briefing and asserted

that Appellees’ notice was a motion in that it requested that his complaint be dismissed with prejudice based upon new authority. He also cited Civ. R. 6(C)(1) and asserted that Appellees’ notice was untimely.

{¶23} On December 8, 2022, Appellant filed a notice of supplemental authority, stating that he would be relying upon the Ohio Supreme Court’s recent decision in *State ex rel. Ames v. Baker, Dublikar, Beck, Wiley & Mathews*, 170 Ohio St.3d 239, 2022-Ohio-3990, 210 N.E.3d 518. There, the Ohio Supreme Court held that the appellate court erred by misapplying the standard for reviewing a Civ. R. 12(B)(6) motion to dismiss. *Id.* at ¶ 18. The Court found that the Eleventh District had properly stated that under Civ. R. 12(B)(6), it was required to presume the truth of the appellant’s complaint allegations that no attorney-client privileged information was shown on invoices. *Id.* at ¶ 17. However, the Court held that the Ohio appellate court misapplied the standard when it concluded that the invoices contained privileged information. *Id.*

{¶24} On February 8, 2023, the trial court in the instant case issued a judgment entry granting Appellees’ Civ. R. 12(B)(6) motion to dismiss Appellant’s complaint. The court set forth the Civ. R. 12(B)(6) standard and cited caselaw holding that, “a trial court may not rely on allegations or evidence outside of the complaint, but can only review the complaint and dismiss the case if it appears beyond a doubt that the plaintiff can prove no set of facts entitling it to recover.” (Feb. 8, 2023 J.E. at 4, citing *State ex rel. Fuqua v. Alexander*, 79 Ohio St.3d 206, 207, 680 N.E.2d 985 (1997)).

{¶25} The court also cited *State ex rel. Washington v. D’Apolito*, 156 Ohio St.3d 77, 2018-Ohio-5135, 123 N.E.3d 947 (quoting *NCS Healthcare, Inc. v. Candlewood Partners, L.L.C.*, 160 Ohio App.3d 421, 2005-Ohio-1669, 827 N.E.2d 797, ¶ 20 (8th Dist.)) for support that it could consider documents that Appellant attached to the complaint or incorporated within it. The court noted that it was not required to accept allegations as true when documents attached to the complaint contradict them. *Id.*, citing *State ex rel. Edwards v. Toledo City School Dist. Bd. of Edn.*, 72 Ohio St.3d 106, 108-109, 647 N.E.2d 799 (1995).

{¶26} The trial court further cited *Hicks v. Clermont County Board of Commissioners*, 171 Ohio St.3d 593, 2022-Ohio-4237, 219 N.E.3d 894, to hold that it is the plaintiff who must prove a violation of the OMA and the public body does not have to

prove the absence of a violation, as previously required. The court further noted that a presumption of regularity attached to meetings when no evidence shows to the contrary.

{¶27} Addressing the September 7, 2021 meeting, the court relied upon the meeting minutes that Appellant attached to his complaint. The court held that Appellees acted lawfully by entering into executive session because it was acting in a quasi-judicial capacity to deliberate after evidence was presented at a protest hearing. The court also held that the attorney-client privilege attached to the session as Appellees sought legal counsel after the protest hearing. The court held that Appellant failed to meet his initial burden of pleading facts on which relief could be granted.

{¶28} The court also found that Appellant failed to plead or prove that Appellees discussed personnel matters at the February 12, 2022 meeting. The court acknowledged that before entering executive session to discuss a personnel matter under R.C. 121.22(G)(1), a public body must state with particularity the type of personnel matter to be discussed before doing so. The court held that “it is apparent from the motion that the Mahoning County Respondents did not intend to discuss a personnel matter. Instead, they were seeking information and legal counsel from the Assistant Prosecutor present that related to policies that related to personnel and the county.” (emphasis in original).

{¶29} Regarding the April 14, 2022 meeting, the court held that Appellant’s evidence provided “an incomplete picture” of the procedures followed by Appellees at the meeting. Quoting the Ohio Supreme Court’s holding in *State ex rel. Long v. Cardington Village Council*, 92 Ohio St.3d 54, 59, 748 N.E.2d 58, 64 (2001), the court found that it could review contemporaneous video “to fill in the blanks” and determine whether proper procedures were followed. The court held that the video of the meeting appeared to show that legal counsel was present during the entire meeting and was consulted at various times. The court found that the logical conclusion was that the executive session was used to consult legal counsel as well. The court further held that Appellant failed to meet his burden of alleging or establishing that Appellees entered into executive session improperly with legal counsel or took any inappropriate action as a result of discussions or deliberations in executive session.

{¶30} Concerning the August 22, 2022 meeting, the trial court held that Appellees acted in a quasi-judicial capacity and were allowed to consult with legal counsel in

executive session. The court held that Appellant failed to meet his initial burden to plead facts upon which relief could be granted.

{¶31} After reviewing the meeting minutes attached to Appellant’s complaint, the court addressed Appellant’s second count and held that the minutes were sufficient under R.C. 121.22(C). The court also denied Appellant’s motion to strike Appellees’ notice of supplemental authority and request for sanctions. The court held that Appellant failed to meet his initial burden of pleading facts upon which relief could be granted.

{¶32} Appellant filed a notice of appeal and raises one assignment of error with subparts. The sole assignment of error states the following:

**The trial court committed reversible error by considering the sufficiency of the evidence in a departure from the Civ. R. 12(B)(6) legal standards.**

{¶33} Appellant submits that the court departed from the Civ. R. 12(B)(6) standard when it considered the sufficiency of the evidence. He refers to the trial court’s paragraph in its judgment entry entitled “C. No Evidence of Wrongdoing Has Been Pled” as an example. He asserts that notice pleading under Civ. R. 8(A) does not require evidence to accompany a complaint and a trial court is not to weigh evidence in determining a Civ. R. 12(B)(6) motion.

{¶34} Appellant contends that the trial court erred by finding that Appellees entered into the September 7, 2021 executive session to deliberate in a quasi-judicial capacity. He asserts that he did not allege this in his complaint and the meeting minutes do not support such a finding. He submits that the court incorrectly held that R.C. 121.22(G)(3) and (5) applied to allow public bodies to enter into executive sessions to seek legal counsel for certain purposes, including disputes that are the subject of pending or imminent court action or matters required to be kept confidential under state statutes or federal law. Appellant contends that no party argued that the executive session was held for these purposes.

{¶35} Appellant further asserts that the court erred in determining that it was apparent that Appellees entered into the February 12, 2022 executive session to discuss

personnel and county policies with counsel, and not personnel matters. He submits that R.C. 121.22(G) does not allow executive sessions for such matters.

{¶36} As to the April 14, 2022 meeting, Appellant complains that the court sought out its own evidence in “filling in the blanks” by watching the meeting video and concluding that because legal counsel was present during the meeting, it logically followed that Appellees used the executive session to consult with legal counsel.

{¶37} Appellant asserts that the court misstated his complaint allegation as to the August 22, 2022 executive session. He contends that the court summarized his complaint as alleging that Appellees entered the August 22, 2022 executive session to deliberate on a protest hearing. Appellant refers to his complaint allegation that Appellees held an impermissible executive session after they made a motion to go into executive session to seek legal counsel.

{¶38} As to meeting minutes, Appellant asserts that the court made an incredulous finding by stating that the portions of the meeting minutes that he provided were legally sufficient evidence of compliance with Ohio law. He submits that the court erred by finding that he failed to attach the entire meeting minutes as he was not required to submit the entirety of meeting minutes or any minutes whatsoever to his complaint.

{¶39} Appellees respond that we conduct a de novo review of a Civ. R. 12(B)(6) motion ruling and the court correctly found that Appellant’s complaint failed to sufficiently plead that it violated any provision of the OMA. Appellees note that a Civ. R. 12(B)(6) motion tests the sufficiency of the complaint and a court cannot rely upon any outside evidence in ruling on the motion. Appellees contend that the trial court did not weigh the evidence in dismissing the case under Civ. R. 12(B)(6) and a court may consider documents attached to or incorporated into a complaint when determining a Civ. R. 12(B)(6) motion.

{¶40} Appellees also note that the burden of proof in a mandamus action is on the relator, the burden remains on the party asserting a violation of the OMA, and the public body enjoys a presumption of regularity within the execution of their ordinary duties under the OMA.

{¶41} Appellees assert that the September 7, 2021 executive session was a quasi-judicial hearing and not a meeting under R.C. 121.22 subject to the OMA. It further

contends that it does not have to use “magic words” like “judicial” or “deliberate” in meetings before entering into executive session. Appellees submit that the minutes clearly showed that it entered into executive session to consider a protest against a petition and to confer with legal counsel.

{¶42} Appellees assert that R.C. 121.22(G)(3) allows conferences with legal counsel in executive session about disputes that are the subject of pending or imminent court action and considering a decision about a protest hearing contemplates court action because someone will oppose its decision. Appellees further cite R.C. 121.22(G)(5), which allows executive sessions for matters to be kept confidential under state statute, which includes the attorney-client privilege. Appellees identify cases holding that the OMA does not apply when a public body meets with counsel for legal advice.

{¶43} Appellees contend that the executive session held on February 12, 2022 was permissible under R.C. 121.22(G)(1) and (G)(5) because it involved a discussion of personnel and county policies with legal counsel.

{¶44} Appellees assert that the executive session on April 14, 2022 was proper because it was used to consult with legal counsel. Appellees note that Appellant complains that the trial court reviewed the YouTube video of the meeting, yet he cited to the videos and provided the court with the link to them. Appellees cite to *State ex rel. Long v. Cardington Village Council*, 92 Ohio St.3d 54, 57, 2001-Ohio-130, 748 N.E.2d 58, where the Ohio Supreme Court considered audiotapes of meetings but ultimately chose not to use them because some parts were inaudible. Appellees conclude that the link that Appellant provided to the meeting does not support his allegation that they improperly entered into executive session.

{¶45} As to the August 22, 2022 session, Appellees contend that Appellant mischaracterized the reason for the executive session as seeking legal counsel. They note that Appellant cited the video link for the meeting to the court, and it showed that they entered into executive session to deliberate on a protest hearing and meet with counsel. They submit that this was a quasi-judicial matter and the OMA did not apply.

{¶46} Appellees further assert that the meeting minutes complied with R.C. 121.22(C). Appellees note that Appellant failed to attach the entire meeting minutes from the September 7, 2021 meeting as he attached pages 1-3 of 62 pages, and he failed to

attach all notes from the February 12, 2022 meeting by attaching only pages 1-2 of 11 pages. Appellees submit that even the minutes that Appellant did attach showed compliance with Ohio law. Appellees contend that meeting minutes do not have to be explicit about the meetings' contents, but they must provide sufficient facts and information to allow the public to understand the rationale behind its decisions.

{¶47} Appellant correctly asserts that a notice pleading under Civ. R. 8(A) is all that is required to state a claim and Ohio is a notice-pleading state. See *Wells Fargo Bank, N.A. v. Horn*, 142 Ohio St.3d 416, 2015-Ohio-1484, 31 N.E.3d 637, ¶ 13. Notice pleading under Civ. R. (8)(A) requires “a short and plain statement of the claim.”

{¶48} While a plaintiff is not required to prove his case in the complaint, a Civ.R. 12(B)(6) motion tests the sufficiency of the complaint. *State ex rel. Hanson vs. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 1992-Ohio-73, 605 N.E.2d 378. For a trial court to dismiss a complaint under Civ.R. 12(B)(6), it “must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery.” *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus, following *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); see also *LeRoy v. Allen, Yurasek & Merklin*, 114 Ohio St.3d 323, 2007-Ohio-3608, 872 N.E.2d 254, ¶ 14. The court cannot grant a motion to dismiss as long as a set of facts exist consistent with the plaintiff's complaint that would allow him to recover. *Ransom v. Erie Ins. Co.*, 2022-Ohio-3528, 198 N.E.3d 546, ¶ 13 (7<sup>th</sup> Dist.).

{¶49} Appellate courts review a trial court's ruling on a Civ. R. 12(B)(6) de novo, accept the plaintiff's material allegations in the complaint as true, and draw all reasonable inferences in favor of the nonmoving party. *Kirk Excavating & Constr. Co., Inc. v. RKJ Ents., L.L.C.*, 2018-Ohio-3735, 108 N.E.3d 1278, ¶ 11 (7<sup>th</sup> Dist.), citing *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 8. However, the court need not accept as true any unsupported and conclusory legal propositions advanced in the complaint. *Morrow v. Reminger & Reminger Co. L.P.A.*, 183 Ohio App.3d 40, 2009-Ohio-2665, 915 N.E.2d 696, ¶ 7 (10<sup>th</sup> Dist.).

{¶50} In order to be entitled to a writ of mandamus, Appellant must establish the following by clear and convincing evidence: (1) a clear legal right to the requested relief, (2) a clear legal duty on the part of Appellees to provide it, and (3) the lack of an adequate

remedy in the ordinary course of the law. *State ex rel. Waters v. Spaeth*, 131 Ohio St.3d 55, 2012-Ohio-69, 960 N.E.2d 452, ¶ 6, 13. Appellant requested the writ of mandamus only as to the meeting minutes, seeking to have them accurately reflect the meetings. In any event, a Civ. R. 12(B)(6) motion also tests the sufficiency of a mandamus complaint and the materials that are incorporated into it. See *State ex rel. Blachere v. Tyack*, 2023-Ohio-781, 210 N.E.3d 960, ¶ 11 (10th Dist.) (citations omitted).

{¶51} Interestingly, Appellant attached materials to his complaint, but he asserts that neither the trial court nor this court may review these materials in considering Civ. R. 12(B)(6). Appellant attached the Record of Proceedings of the Meeting Minutes of the Mahoning County Board of Elections dated September 7, 2021, February 12, 2022, and April 14, 2022. He identified these records as exhibits to his complaint and he refers to them in this appeal. He also cited a YouTube site for the August 22, 2022 videotaped meeting in his complaint.

{¶52} We find that the court properly considered these materials and we shall consider them as well. A Civ.R. 12(B)(6) motion tests “the sufficiency of the complaint and the materials incorporated into it.” *State ex rel. Ames v. Baker, Dublikar, Beck, Wiley & Mathews*, 170 Ohio St.3d 239, 2022-Ohio-3990, 210 N.E.3d 518, citing *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992); *State ex rel. Peoples v. Schneider*, 159 Ohio St.3d 360, 2020-Ohio-1071, 150 N.E.3d 946, ¶ 9. Accordingly, “items properly incorporated therein must be accepted as true.” *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 280, 649 N.E.2d 182 (1995) (in a Civ.R. 12(B)(6) review, the court considered the news column and press release that were “attached to and incorporated by reference to her complaint”).

{¶53} The trial court relied on the Ohio Supreme Court’s ruling in *State ex rel. Hicks v. Clermont County Board of Commissioners*, 171 Ohio St.3d 593, 2022-Ohio-4237, 219 N.E.3d 894, provided by Appellees via a notice of supplemental authority. As discussed above, in that case, the Court held that the burden of production remains with the party alleging an OMA violation and that burden does not shift to the public body to show the absence of a violation. *Id.* at ¶ 18, 19. The plaintiff shoulders the burden of proving a violation and a presumption of regularity attaches to a public body’s executive sessions. *Id.* at ¶ 21, 22.

{¶54} As Appellant notes, *Hicks* involved a summary judgment motion and not a Civ. R. 12(B)(6) motion. The Twelfth District had affirmed the trial court’s granting of summary judgment in favor of the plaintiff alleging violations of the OMA. *Id.* at ¶ 5. The appellate court held that once the plaintiff alleged that a meeting occurred and the general public was excluded during the meeting, the burden shifted to the public body to produce evidence that the meeting fell within one of the R.C. 121.22(G) exceptions. *Id.* If this occurred, the burden then shifted back to the plaintiff to show that the exception claimed by the public body was not applicable or valid. *Id.* The Ohio Supreme Court reversed this determination and held that no construction of the OMA could change the rule that it is the plaintiff’s burden to prove the violations. *Id.* at ¶ 1.

{¶55} The instant case, however, involves a dismissal under Civ. R. 12(B)(6), not a summary judgment motion. At this point, Appellant is not required to provide evidence to prove his claims. He is only required to plead or show facts that sufficiently allege a violation of the OMA and which may entitle him to recover for the alleged violations. At this stage, we must also presume that Appellant’s factual allegations are true, to the extent not contradicted by the meeting minutes attached to the complaint. *Hicks* does not alter the standard under Civ. R. 12(B)(6).

{¶56} Considering that standard, R.C. 121.22(A) requires that public officials conduct official actions and deliberate on official business in open meetings, unless the subject matter is excepted by law. R.C. 121.22(C) requires that the public body prepare, file and maintain meeting minutes and allow public inspection of said minutes.

{¶57} R.C. 121.22(G) provides in relevant part that a public body may hold an executive session “for the sole purpose of the consideration of any of the following matters:”

- (1) To consider the appointment, employment, dismissal, discipline, promotion, demotion, or compensation of a public employee or official, or the investigation of charges or complaints against a public employee, \* \* \*;
- (3) Conferences with an attorney for the public body concerning disputes involving the public body that are the subject of pending or imminent court action\* \* \*;

(5) Matters required to be kept confidential by federal law or regulations or state statutes\* \* \*;

If a public body holds an executive session to consider any of the matters listed in divisions (G)(2) to (8) of this section, the motion and vote to hold that executive session shall state which one or more of the approved matters listed in those divisions are to be considered at the executive session. \* \* \*

{¶58} R.C. 121.22(H) provides that rules or formal actions not adopted in an open meeting are invalid unless adopted in an open meeting of the public body. It further states that a rule or formal action that is “adopted in an open meeting that results from deliberations in a meeting not open to the public is invalid unless the deliberations were for a purpose specifically authorized in division (G) or (J) of this section and conducted at an executive session held in compliance with this section.”

{¶59} R.C. 121.22(I) provides that an individual may file an action to enforce the OMA, and the court may issue an injunction for the public body to comply with the OMA if the individual proves a violation. R.C. 121.22(I)(2) states that if the trial court issues an injunction, it shall order the public body to pay a civil forfeiture of five hundred dollars, court costs, and attorney's fees.

{¶60} Reviewing the complaint and the relevant law, the trial court erred in this case by granting Appellees’ motion to dismiss Appellant’s claims regarding the executive sessions held during the February 12, 2022, April 14, 2022, and August 22, 2022 meetings. The trial court also erred by granting the motion to dismiss Appellant’s claims regarding the meeting minutes as to all of the identified meetings.

#### **September 7, 2021 Meeting**

{¶61} The September 7, 2021 minutes identify Appellees Betras, Barger, and Kale-Pesta as board members in attendance at the board meeting, but not Appellee Aurandt. (Exhibit 1 to Comp.). The minutes state that Mark Munroe (Chairman of the Board of Elections at the time), notified Appellees at the meeting that an individual protested a liquor option petition submitted by a winery that Appellees previously approved for the general election ballot. The minutes reflect that the individual presented

protest arguments and exhibits to the approved permit. The minutes then state that, “the Board decided to go into Executive Session to confer with Ms. Sharon Hackett, Assistant Prosecutor, our legal counsel.”

{¶62} Based on our review, the trial court correctly concluded that Appellant failed to plead facts upon which relief could be granted as to this session. However, the reasons that the court relied upon for this conclusion are incorrect.

{¶63} The trial court held that Appellees could enter into executive session because it was exercising quasi-judicial authority, which allowed public bodies to move into executive session to deliberate. (J.E. at 6). The court cited *State ex rel. Miller v. Hamilton County Board of Elections*, 165 Ohio St.3d 13, 2021-Ohio-831, 175 N.E.3d 486, and *TBC Westlake, Inc. v. Hamilton County Bd. of Revision*, 81 Ohio St.3d 58, 62, 689 N.E.2d 32 (1998) for the holding that Ohio law permits public bodies to enter into executive session to exercise “their quasi-judicial powers.” The court reasoned that Appellees exercised quasi-judicial authority to deliberate on the protest, which allowed it to enter into executive session to do so. The court also held that R.C. 121.22(G)(3) and (5) allowed Appellees to exercise the right to legal counsel in executive session and Appellant failed to establish that Appellees waived their attorney-client privilege.

{¶64} *Miller* involved the Ohio Supreme Court’s determination on a relator’s writ of prohibition. *Id.* at ¶ 35. The elements for granting a writ of prohibition are that the board or public body must have exercised quasi-judicial authority, it must have had the authority to do so, and the relator must not have an adequate remedy in the ordinary course of law. *Id.* at ¶ 20. Miller filed the writ to prevent the board of elections from placing an individual’s name on the ballot for the candidacy of mayor.

{¶65} In reviewing the writ of prohibition, the Court cited cases discussing the various circumstances in which a board of elections exercises its quasi-judicial authority. *Id.* at ¶ 24, 25 (citing cases). The Court also cited to the secretary of state’s election manual, which advised that boards of elections are acting in a quasi-judicial capacity in resolving a protest. *Id.* The Court held that the board acted in a quasi-judicial capacity under R.C. 3501.39(A)(2) in resolving the protest, had the authority to do so, and did not abuse its discretion by rejecting the protest. *Id.* at ¶ 34.

{¶66} The Court did not hold in *Miller* that executive session was permissible under the OMA when the board acts in a quasi-judicial capacity. Rather, the Ohio Supreme Court has held that some board of elections proceedings are quasi-judicial hearings, and are not subject to the OMA requirements. See *State ex rel. Ross v. Crawford Cty. Bd. of Elections*, 125 Ohio St.3d 438, 2010-Ohio-2167, 928 N.E.2d 1082. In *Ross*, the Court examined R.C. 121.22 and held that the definition of “meeting” under R.C. 121.22(B)(2) was different than the meaning of “hearing.” *Id.* at ¶ 20. The Court held that the proceeding held by the board regarding challenges to a voter’s eligibility to vote was a quasi-judicial hearing and therefore not a meeting subject to the OMA or any of its exceptions for entering into an executive session. *Id.* at ¶ 27. The Court referred to *TBC Westlake, Inc. v. Hamilton County Bd. of Revision*, 81 Ohio St.3d 58, 62, 689 N.E.2d 32 (1998), where it held that “the Sunshine Law [R.C. 121.22] does not apply to adjudications of disputes in quasi-judicial proceedings.” *Id.* at ¶ 25.

{¶67} A quasi-judicial proceeding involves a “justiciable dispute requiring evaluation and resolution. Implicit in this concept is the exercise of discretion.” *Rossford Exempted Village School Dist. v. State Bd. of Edn.*, 45 Ohio St.3d 356, 359, 544 N.E.2d 651 (1989). “The Supreme Court has further indicated that quasi-judicial proceedings require notice, hearing, and the opportunity for introduction of evidence.” *Electronic Classroom of Tomorrow v. Ohio State Bd. of Edn.*, 2018-Ohio-716, 108 N.E.3d 124, ¶ 20 (10<sup>th</sup> Dist.), citing *Union Title Co. v. State Bd. of Edn.*, 51 Ohio St.3d 189, 191, 555 N.E.2d 931 (1990).

{¶68} R.C. 4301.33, *et seq.*, outlines the board of elections’ procedure for a hearing on a protest to a liquor option permit. It requires that the protest be in writing and set forth specific objections, a filing timeline, and the scheduling of a hearing by the board of elections with notice given to permit holders and the protestor. It further requires the board to hear the protest and determine whether the permit is valid or invalid.

{¶69} The meeting minutes in the instant case demonstrate that Appellees were engaged in a quasi-judicial proceeding because the protestor presented arguments and evidence against the liquor option permit to Appellees and Appellees sought to confer with legal counsel and deliberate on the protest. Since Appellees were acting in a quasi-judicial capacity in conjunction with this protest hearing, compliance with the OMA and its

exceptions to entering into an executive session were not required. Accordingly, Appellant cannot present facts or support for a claim that Appellees violated the OMA on September 7, 2021.

{¶70} Thus, while the trial court correctly found that Appellant could not provide facts or support for his claim of an OMA violation for this date, the court held that an exception to the OMA applied to allow Appellees to enter executive session. However, it is apparent that the OMA does not apply, as this was a quasi-judicial hearing and not a meeting.

{¶71} The trial court also held that Appellees could enter the executive session under R.C. 121.22(G)(3) and (5) based on the attorney-client privilege. The court found that Appellant failed to prove that Appellees had waived its right to seek legal counsel and also failed to plead or provide support for an allegation that Appellees deliberated or took any action outside of these permissible acts.

{¶72} The applicable exceptions to the OMA pursuant to R.C. 121.22(G) state that public bodies may enter into executive session for the following reasons:

(3) Conferences with an attorney for the public body concerning disputes involving the public body that are the subject of pending or imminent court action; \* \* \*

(5) Matters required to be kept confidential by federal law or regulations or state statutes.

{¶73} In this case, the protest identified in the meeting minutes involved no pending court action, and none was imminent, although Appellees assert a likelihood of court action always exists when protests are decided. As to the statutory and common law attorney-client privilege, the Eleventh District Court of Appeals held that R.C. 121.22(G)(3) and (5) contain the only attorney-client privileges that may be asserted by a public body under the OMA exceptions. *State ex rel. Ames v. Brimfield Twp. Bd. of Trustees*, 2019-Ohio-5311, 150 N.E.3d 412, ¶ 27 (11<sup>th</sup> Dist.). The court held that “[t]o hold otherwise would render meaningless the specific exception set forth in R.C. 121.22(G)(3). Therefore, the trial court erred when it applied a separate, common law privilege to the Board's communications outside of the exceptions contained in R.C.

121.22(G).” *Id.* The Eleventh District ruled identically in *Ames v. Rootstown Twp. Bd. of Trustees*, 2019-Ohio-5412, 151 N.E.3d 37, ¶ 36 (11<sup>th</sup> Dist.).

{¶74} The Eleventh District agreed with the Twelfth and First District Courts of Appeal who held the same. The First District explained in *State ex rel. Cincinnati v. Hamilton County Commrs*, 1st Dist. Hamilton No. C-010605, 2002-Ohio-2038, \* 5, that “R.C. 121.22(G)(5) allows the public body to enter executive session to discuss matters that they are *legally bound* to keep from the public.” The appellate court went on to state that “the General Assembly, in limiting the circumstances in which such a discussion can be held in executive session, has required a partial waiver of the privilege by the client-public body.” *Id.*, quoting Reechi & Peroski, *Government in the Sunshine: Open Meeting Legislation in Ohio*, 37 Ohio St.L.J. 497, 509–510 (1976). The court explained that “R.C. 121.22(G)(5) refers to matters that are ‘required’ to be kept confidential. The commissioners, however, are under no legal duty to assert the attorney-client privilege to keep confidential every discussion that they may have with the prosecuting attorney. \* \* \*” *Id.*

{¶75} Appellees were not required to state an OMA exception in order to enter into private discussion or deliberation as to the protest before it on September 7, 2021. While the trial court erred in its reasons to dismiss Appellant’s claims concerning this session, Appellant cannot establish a right to relief under the OMA because Appellees were not subject to the OMA in its quasi-judicial hearing.

#### **February 12, 2022 Meeting**

{¶76} The trial court erred by finding that Appellant failed to sufficiently plead his allegation that Appellees improperly entered into executive session at this meeting. The court determined that Appellant failed to provide evidence that Appellees discussed personnel matters, waived its right to seek legal counsel, or took any action based upon discussions in that session.

{¶77} As to the executive session, the meeting minutes provided that:

Ms. Kale Pesta moved to go into Executive Session to discuss personnel and county policy, inviting in the Assistant Prosecutor, seconded by Ms. Barger.

{¶78} The trial court found that under R.C. 121.22(B)(1), a public body may convene an executive session to discuss personnel matters. Citing *Keystone Committee v. Switzerland of Ohio School District Board of Education*, 2016-Ohio-4663, 67 N.E.3d 1, ¶ 26 (7<sup>th</sup> Dist.), the court noted that when a public body does so, it must “state with particularity what type of personnel matter will be discussed.” The trial court found in the instant case that it was “apparent from the motion that Appellees did not intend to discuss a personnel matter. Instead, they were seeking information and legal counsel from the Assistant Prosecutor present that related to **policies** that related to personnel and the county.” [emphasis in original].

{¶79} The Ohio Supreme Court has held that R.C. 121.22(G)(1) is violated when a public body uses “general terms like ‘personnel’ and ‘personnel and finances’ instead of one or more of the specified statutory purposes.” *State ex rel. Long v. Cardington Village Council*, 92 Ohio St.3d 54, 59, 748 N.E.2d 58 (2001). R.C. 121.22(G)(1) provides the following exceptions for a public body to enter into executive session: (1) appointment, (2) employment, (3) dismissal, (4) discipline, (5) promotion, (6) demotion, or (7) compensation of a public employee or official, and (8) the investigation of charges or complaints against a public employee, official, licensee, or regulated individual.

{¶80} The trial court erred by dismissing Appellant’s claims regarding this executive session. The trial court inserted its own interpretation of the minutes’ description to enter into executive session for “personnel and county policy.” The court speculated that Appellees did not discuss personnel or personnel matters, but rather personnel policy. The court stated that it was “apparent” Appellees “did not intend to discuss a personnel matter.” The minutes reflect that the board may have moved into executive session to discuss personnel and to discuss county policy. Or they may have entered into executive session to discuss personnel policy and county policy. Either interpretation is possible.

{¶81} The motion to move into executive session did not appear to state the type of personnel discussion the board intended to have, so that a member of the public could determine if it was to discuss personnel policy or involved any of the excepted matters suitable to enter into executive session.

{¶82} As to the assertion of attorney-client privilege, it does not appear at this early stage that it can be determined whether the assistant prosecutor was “invited” into executive session for legal advice or counsel under the required R.C. 121.22(G)(3) or (5) exceptions.

{¶83} Accordingly, the trial court erred in its dismissal pursuant to Civ. R. 12(B)(6) of Appellant’s claim concerning the February 12, 2022 executive session.

**April 14, 2022 Meeting**

{¶84} The trial court also erred by granting Appellees’ motion to dismiss Appellant’s claim as to this executive session. The meeting minutes indicate that:

Ms. Kale-Pesta moved to go into Executive Session at 2:06 PM to discuss personnel matters, seconded by Ms. Barger.

{¶85} The minutes show that rollcall was held and the motion carried to enter the executive session. Ms. Kale-Pesta moved to come out of executive session and that motion carried as well.

{¶86} However, no further information is provided in the attachments to the complaint. R.C. 121.22(G)(1) is violated when a public body uses “general terms like ‘personnel’ and ‘personnel and finances’ instead of one or more of the specified statutory purposes.” *Long*, 92 Ohio St.3d 54, 59, 748 N.E.2d 58 (2001).

{¶87} Citing *Long*, the trial court also watched the videotaped meeting “to fill in the blanks” to determine whether Appellees followed the proper procedures. The court found that because legal counsel appeared to be present throughout the entire meeting and was consulted at times, “[i]t logically follows that [Appellees] also used this executive session to seek legal counsel.” The court was required, however, to view any assertions in the complaint in favor of Appellant. It did not.

{¶88} Even though the court appropriately viewed this meeting, the trial court erred by holding that it “logically” followed that counsel’s presence during the meeting led to a conclusion that the executive session was for purposes of consulting legal counsel. In any event, the complaint does raise sufficient claims under R.C. 121.22(G)(3) or (5), as explained above, to withstand dismissal at this stage and the trial court erred in this regard.

### **August 22, 2022 Meeting**

{¶89} The trial court found that Appellant failed to meet his burden of pleading facts upon which relief could be granted as to the August 22, 2022 meeting. Appellant alleged that Appellees improperly entered into executive session during this meeting to deliberate on a protest matter and to meet with legal counsel. Citing *Miller and Westlake*, the court found this was a protest hearing and reiterated its holding as to the September 7, 2021 meeting that Boards of Election sit in quasi-judicial authority in presiding over protest hearings and they may deliberate outside of open session in such matters. The trial court also held that Appellees could confer with legal counsel in private and Appellant could not show that Appellees waived its privilege.

{¶90} Appellant did not attach the minutes of this meeting to this complaint. However, he cited to the video for the meeting via a YouTube website. Since this was incorporated into his complaint, the trial court did not err by watching the video. Moreover, we reviewed this video as well.

{¶91} At approximately 29:25 in the video, Appellees discussed issues relating to certifying petitions filed in numerous precincts for liquor permits. Mr. McCabe describes an issue with one of the petitions and Appellee Betras asks if the issue constitutes a fatal flaw as to certifying the petition. (Video at 29:29). He then requests that a member raise a motion to move into executive session to confer with legal counsel. (Video at 31:53). Appellees appear to enter into executive session at 32:08 as the public is asked to leave and the assistant prosecutor is asked to stay. The video then skips and continues chronologically with what appears to be the public session. Appellees thereafter proceed to discuss the various petitions, certifying some and disqualifying others in the open meeting.

{¶92} The trial court incorrectly stated in its decision that Appellant argued that Appellees impermissibly entered into executive session to deliberate on a protest hearing. Appellant did not allege this in his complaint.

{¶93} Further, the trial court erred when it found Appellees possessed quasi-judicial authority in a protest hearing and thus were not subject to the OMA exceptions. A protest hearing was not held. Rather, Appellees reviewed petitions for liquor option permits and petitions for candidates wishing to run for office for certification purposes.

Unlike the September 7, 2021 meeting, this meeting did not involve a protest hearing. The certification and disqualification of petitions did not require notice or hearing. In the video cited in the complaint, Appellee Betras specifically stated that a protest hearing would be scheduled at a later date as to at least one of the petitions.

{¶94} The trial court also found that Appellees were permitted to meet with legal counsel in private and Appellant did not meet his burden of pleading facts upon which relief could be granted as to this executive session. Again, as outlined with regard to the September 7, 2021 meeting, the exceptions to the OMA under R.C. 121.22(G) state that public bodies may enter into executive session for:

(3) Conferences with an attorney for the public body concerning disputes involving the public body that are the subject of pending or imminent court action; \* \* \*

(5) Matters required to be kept confidential by federal law or regulations or state statutes.

{¶95} There is no pending or imminent court action involved in the August 22, 2022 meeting despite Appellee Betras's reference to the possibility of court action in the future. As to the statutory and common law attorney-client privilege, the Eleventh District Court of Appeals has held that the only attorney-client privilege that supports entering into executive session under the OMA are those enumerated in R.C. 121.22(G)(3) and (5). *Ames v. Brimfield Twp. Bd. of Trustees*, 2019-Ohio-5311; at ¶ 27; *Ames v. Rootstown Twp. Bd. of Trustees*, 2019-Ohio-5412, at ¶ 36.

{¶96} Accordingly, the trial court erred by dismissing Appellant's claim of an OMA violation during the August 22, 2022 executive session on the basis that Appellant has failed to state a claim on which to base relief.

{¶97} In sum, we find merit to Appellant's assignment of error asserting that the trial court erred in dismissing his OMA claims as to the February 12, 2022, April 14, 2022, and August 22, 2022 executive sessions on Civ. R. 12(B)(6) grounds.

{¶98} We find no merit to Appellant's assignment of error asserting an OMA violation occurred during the September 7, 2021 meeting.

### **Failure to Prepare Full and Accurate Meeting Minutes**

**{¶99}** As part of his sole assignment of error, Appellant also contends that Appellees failed to prepare full and accurate meeting minutes of the September 7, 2021, February 12, 2022, and April 14, 2022 meetings. He asserts that the meeting minutes from these meetings are “barebones” and do not comply with R.C. 121.22(C). He limited his request for mandamus relief, seeking for the court to order Appellees to correct the inaccurate minutes.

**{¶100}** R.C. 121.22(C) states that “[t]he minutes of a regular or special meeting of any public body shall be promptly prepared, filed, and maintained and shall be open to public inspection. The minutes need only reflect the general subject matter of discussions in executive sessions authorized under division (G) or (J) of this section.” The Ohio Supreme Court has held that mandamus is a proper remedy to compel a public body to prepare, file, maintain, and allow access to, full and accurate meeting minutes under the OMA. *State ex rel. Ames v. Portage Cty. Bd. of Commrs.*, 165 Ohio St.3d 292, 2021-Ohio-2374, 178 N.E.3d 492, ¶ 21.

**{¶101}** “[F]ull and accurate minutes must contain sufficient facts and information to permit the public to understand and appreciate the rationale behind the relevant public body's decision.” *State ex rel. Long v. Cardington Village Council*, 92 Ohio St.3d 54, 58, 2001-Ohio-130, 748 NE.2d 58, quoting *White v. Clinton Cty. Bd. of Commrs.*, 76 Ohio St.3d 416, 424, 1996-Ohio-380, 667 N.E.2d 1223. The Ohio Supreme Court held in *State ex rel. Hicks v. Clermont County Board of Commissioners*, 2022-Ohio-4237, ¶ 17, that “the only thing that the public body is required to record in its executive-session minutes is the statutorily permitted reason for the executive session.”

**{¶102}** While Appellant attached September 7, 2021 and February 12, 2022 meeting minutes to his complaint, these attachments do not contain the entirety of the minutes for each meeting. Further, there are no August 22, 2022 minutes attached to the complaint. Accordingly, the trial court could not conclude from these attachments whether the minutes of these meetings complied with R.C. 121.22(C).

**{¶103}** We therefore hold that it was premature of the trial court to grant Appellees’ motion to dismiss Appellant’s claim concerning insufficient meeting minutes of the September 7, 2021, February 12, 2022, and the August 22, 2022 sessions.

{¶104} Appellant attached the entirety of the April 14, 2022 meeting minutes to his complaint. However, these minutes do not appear to sufficiently state the reason for entering the executive session under R.C. 121.22(G)(3) or (5). Hence, these minutes may fully support Appellant’s contentions.

**CONCLUSION**

{¶105} In sum, we affirm the trial court judgment dismissing Appellant’s OMA claim as to the September 7, 2021 session for failure to state a claim.

{¶106} We reverse the trial court’s judgment dismissing Appellant’s claims of OMA violations as to the executive sessions held during the February 12, 2022, April 14, 2022, and August 22, 2022 board of elections sessions as these allegations do state claims that, if proven, may provide relief.

{¶107} We reverse the trial court’s judgment dismissing Appellant’s insufficient meeting notes claims for the September 7, 2021, February 12, 2022, April 14, 2022, and August 22, 2022 board of elections meetings and executive sessions. These assertions by Appellant are also sufficient to withstand a Civ. R. 12(B)(6) challenge.

Waite, J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the sole assignment of error is sustained in part, overruled in part, and remanded.

It is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, dismissing Appellant's claims of Open Meetings Act violations on September 7, 2021 is affirmed. The judgment of the Court of Common Pleas of Mahoning County, Ohio, dismissing Appellant's claims of Open Meetings Act violations from executive sessions held during board of elections meetings on February 12, 2022, April 14, 2022, and August 22, 2022 is reversed. The judgment of the Court of Common Pleas of Mahoning County, Ohio, dismissing Appellant's claims of meeting minutes violations from executive sessions held during board of elections meetings on September 7, 2021, February 12, 2022, April 14, 2022, and August 22, 2022 is reversed. This matter is remanded on these claims for further proceedings according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellees.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

**NOTICE TO COUNSEL**

**This document constitutes a final judgment entry.**