IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY R. SCHMIDT,
Appellant,
vs.
BOB LARKIN, AN INDIVIDUAL; AND WASHOE BOARD OF COUNTY COMMISSIONERS,
Respondents.

No. 51191

FILED

APR 08 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court summary judgment in an Open Meeting Law matter. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

BACKGROUND

Appellant Gary R. Schmidt attended an August 28, 2007, meeting of the Washoe Board of County Commissioners. Near the beginning of this meeting, Schmidt participated in "public comment" regarding approval of the meeting's agenda.[1] During his address, Schmidt stated that he "oppose[d] the approval of the agenda because this Board, through the chair, or at least the chair, practices an unwritten, uncodified and un-Washoe Board of County Commission approved ad hoc applause rule." At that point, respondent Bob Larkin, then Chairman of the Washoe Board, interrupted Schmidt and asked whether Schmidt had any comment regarding the approval of the agenda. Schmidt replied that he was opposing approval of the agenda because his concerns addressed a

[1]Two other individuals, Sam Dehne and Guy Felton, provided public comment prior to Schmidt.

rule that was not printed on the agenda and that "[t]he attorney general's office and the open meeting law state that you must clearly state rules on the agenda related to public comments." Larkin then stated again that Schmidt's comments were not regarding the agenda. After Schmidt again asserted that his comments were regarding the approval of the agenda, Larkin instructed a deputy to remove Schmidt from the meeting.

Schmidt thereafter filed a complaint in the district court seeking a declaration that his ejection from the meeting constituted a violation of the Open Meeting Law, that Larkin be enjoined from committing further such violations of the Open Meeting Law, that the actions taken by the Washoe Board at the August 28, 2007, meeting be declared void, and that Schmidt be awarded attorney fees and costs. The district court subsequently granted a motion to dismiss filed by respondents, finding that (1) the Washoe Board, as a whole, cannot be held liable for Larkin's ruling regarding Schmidt; (2) the undisputed facts indicated that Schmidt's conduct merited his removal from the meeting; (3) NRS 241.037 does not provide an individual with the right to sue for injunctive relief; and (4) no actions taken by the Washoe Board would be declared void because there was no Open Meeting Law violation. This appeal followed.

First, as a preliminary matter, we note that if in resolving a motion to dismiss, matters outside the pleadings are presented to and not excluded by the district court, the motion should be treated as one for summary judgment. NRCP 12(b)(5); Schneider v. Continental Assurance Co., 110 Nev. 1270, 1271, 885 P.2d 572, 573 (1994). Here, as the district court's conclusion that Schmidt's conduct merited his removal from the meeting suggests that it reviewed either the transcript or video recording

of the August 28, 2007, meeting, we elect to treat the challenged order as one granting summary judgment.

## DISCUSSION

We review a district court order granting summary judgment de novo. Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law. Id. The pleadings and other proof must be construed in a light most favorable to the nonmoving party, id., but once the movant has properly supported the summary judgment motion, the nonmoving party may not rest upon general allegations and conclusions and must instead set forth specific facts demonstrating the existence of a genuine issue of material fact for trial. Id. at 731, 121 P.3d at 1031; NRCP 56(e).

Subject to statutory exception, "all meetings of public bodies must be open and public, and all persons must be permitted to attend any meeting of these public bodies." NRS 241.020(1). A person who "willfully disrupts a meeting to the extent that its orderly conduct is made impractical," however, may be removed from an open meeting. NRS 241.030(4)(b). The attorney general's interpretation of Nevada's Open Meeting Law statutes is not binding on the courts. See University System v. DR Partners, 117 Nev. 195, 203, 18 P.3d 1042, 1048 (2001). In order to comply with the spirit of the Open Meeting Law, this court "strictly construes all exceptions to the Open Meeting Law in favor of openness." Attorney General v. Nevada Tax Comm'n, 124 Nev. ___, ___, 181 P.3d 675, 680 (2008).

Whether Schmidt's conduct merited ejection

Schmidt contends that his conduct at the August 28 meeting did not warrant his ejection as he was properly at the podium, was

addressing an issue concerning the agenda,[2] and was not exceeding the time he had been allotted. Schmidt also argues that both his speech and demeanor were not disruptive and that the meeting was not disrupted.

Respondents, however, quote an attorney general's opinion providing that an ejection from a meeting "is not an 'action' by the Board subject to review under the Open Meeting Law." Respondents also contend that Schmidt was willfully disruptive, noting that Schmidt pointed his finger at Larkin, spoke over Larkin, referred to Larkin as "alleged chair," and progressively raised his voice during the exchange. Respondents assert that Schmidt's removal was necessary to de-escalate the situation and allow orderly conduct of the meeting to resume.

Having reviewed the briefs and the record on appeal, and in particular the DVD recording of the August 28, 2007, meeting, we conclude that the district court erred in determining that no factual dispute existed as to whether Schmidt's removal from the meeting was merited. See Wood, 121 Nev. at 729, 121 P.3d at 1029. Rather, a review of the recording indicates that a genuine issue of material fact exists regarding whether Schmidt's conduct constituted a willful disruption of the meeting "to the extent that its orderly conduct [was] made impractical." NRS 241.030(4)(b); Wood, 121 Nev. at 729, 121 P.3d at 1029. Because a rational fact-finder could have concluded that Schmidt's

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[2]Schmidt asserts that there is an attorney general's opinion providing that any rule that limits or restricts public comment must be clearly articulated on the agenda. Schmidt contends that applause is a form of public comment. Thus, he argues that his comments on a rule limiting applause from the public only to when the commissioners applaud, properly addressed the agenda.

removal was not merited, the district court erred in finding this fact undisputed and granting summary judgment. See Wood, 121 Nev. at 731, 121 P.3d at 1031.

Whether the entire Washoe Board is properly a party

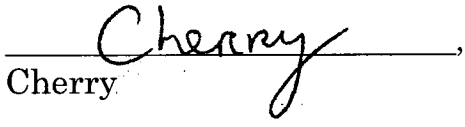
Schmidt additionally challenges the district court's determination that the Washoe Board is not properly named as a defendant in his complaint. Schmidt argues that the Washoe Board is a proper party in this action. Respondents, however, contend that there is no basis to include the Washoe Board as a party to this action. Based on the arguments presented by the parties, and the nature of Schmidt's claims, we conclude that Schmidt may list the Washoe Board as a party in his complaint. We note, for instance, that at least a portion of Schmidt's complaint seeks relief against the Board as a whole.

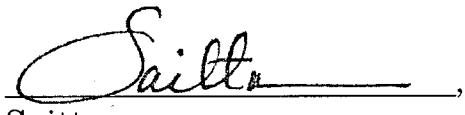
Whether Schmidt may seek injunctive relief

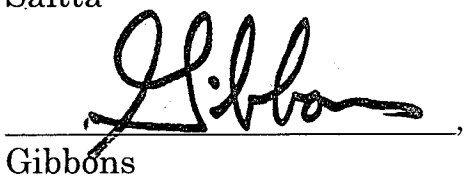
Schmidt additionally argues that the district court erred in determining that injunctive relief is not an available remedy for individuals under NRS 241.037. Respondents disagree, and offer an interpretation of NRS 241.037(2) that they contend limits actions for injunctive relief to the attorney general. As we have recently determined that an individual may seek injunctive relief under NRS 241.037(2), see Stockmeier v. State, Department of Corrections, 124 Nev. ___, ___, 183 P.3d 133, 136 (2008), we agree with Schmidt that he may pursue his claim for injunctive relief under that statute.

Accordingly, we conclude that the district court erred in granting respondents summary judgment, and we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[3]


Cherry, J.


Saitta, J.


Gibbons, J.

cc: Hon. Jerome Polaha, District Judge
Glade L. Hall
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick/
Civil Division
Washoe District Court Clerk

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[3]In light of our resolution of this matter, we need not address Schmidt's remaining arguments on appeal. Additionally, we deny Schmidt's request for attorney fees on appeal, as he makes no salient arguments in support of that request. See Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that because the appellant did not present relevant authority and cogently argue his position on appeal, this court would not consider his appellate contentions).