

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 57342

FILED

FEB 10 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *T. Malone*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment in an open meeting law action. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

BACKGROUND AND PROCEDURAL HISTORY

Previously, in a separate appeal, this court entered an order setting aside a district court summary judgment in the underlying proceedings. See Schmidt v. Larkin, Docket No. 51191 (Order of Reversal and Remand, April 8, 2009). Our 2009 reversal and remand order concluded that dismissal of appellant Gary R. Schmidt's complaint challenging his removal from an August 28, 2007, meeting of the Washoe Board of County Commissioners as an open meeting law violation was error, because the question of whether Schmidt's behavior at the meeting justified his removal was a disputed issue of material fact that precluded summary judgment. See id.

After the remand, the district court conducted a two-day bench trial over the allegations set forth in Schmidt's complaint. During this

trial, the district court took testimony from both Schmidt and respondent Bob Larkin, who, while acting as the chairman of the Washoe Board, had directed that Schmidt be removed from the meeting. Thereafter, the district court entered its written decision, which included the following findings of fact.

During the August 28, 2007, Washoe Board meeting, Schmidt, lawfully at the podium at a time reserved for public comment regarding approval of the meeting's agenda, objected to the meeting's agenda because it did not notice a rule Schmidt believed was being implemented by Chairman Larkin limiting public applause. Contrary to Schmidt's allegations, however, neither Chairman Larkin nor the Washoe Board utilized this unacknowledged applause rule that Schmidt was concerned about. While Schmidt had been allotted two minutes to provide his public comment on the agenda, within 45 seconds of Schmidt's address, Chairman Larkin interrupted Schmidt to inform him that his concerns were not on topic. Schmidt disagreed, responding that he thought his comments, regarding approval of what he viewed as an insufficient agenda, were on topic. Chairman Larkin again interjected, reiterating his view that Schmidt was off topic. At this point, Schmidt talked over Chairman Larkin, raising his voice. Chairman Larkin then responded by calling a recess and ordering that Schmidt be removed from the meeting. Relatedly, the district court also found that Schmidt had failed to establish a history of wrongful removals by Chairman Larkin or the Washoe Board and did not establish any proof that the Washoe Board might wrongfully remove anyone in the future.

Based on its finding that there was no unacknowledged ad hoc applause rule and its determination that Schmidt's responses to Chairman Larkin could be considered rude and indicate that Schmidt would not abide by the meeting's rules of decorum, the district court concluded that Chairman Larkin's ejection of Schmidt from the meeting was justified and that there was no open meeting law violation. Schmidt has now appealed.

DISCUSSION

The parties' arguments

On appeal, Schmidt argues that the district court's rendition of the facts, summarized above, is not supported by substantial evidence. Schmidt further argues that the district court applied the wrong legal analysis in reviewing the facts to determine whether Chairman Larkin reasonably believed that Schmidt intended to disrupt the meeting. According to Schmidt, that standard would require the Chairman to read Schmidt's mind. Schmidt also contends that the district court erred in admitting only a DVD containing a redacted version of the Washoe Board meeting but denying a subsequent request to admit a DVD with a fuller recording of the meeting. Schmidt asserts that this extended-version DVD includes the two public speakers prior to Schmidt who, Schmidt argues, were, unlike him, liberally permitted to stray off topic.

In response, respondents argue that the district court's decision denying Schmidt the relief sought in his complaint should be affirmed. Respondents argue for this result on the basis that the district court lacked subject matter jurisdiction over this dispute once it granted summary judgment to respondents on Schmidt's request to void actions taken at the meeting by the Washoe Board regarding the county manager.

More specifically, respondents argue that the open meeting law only permits lawsuits from the general public on a limited basis, and that none of Schmidt's claims, post summary judgment, met the criteria.¹ Respondents also contend that the district court properly excluded the extended-version DVD, as Schmidt did not seek its admission until the end of the first day of the two-day trial. Respondents further argue that the district court's findings of fact and corresponding conclusions of law are supported by the record and should be upheld. Schmidt has also filed a reply brief that reiterates points made in his opening brief and addresses the arguments respondents raise in their answering brief.

Standard of review

This court reviews a district court's factual findings for an abuse of discretion and will not set aside those findings unless they are clearly wrong or not supported by substantial evidence. NOLM, LLC v.

¹Somewhat confusingly, however, respondents, near the end of their answering brief, nevertheless expressly concede that the open meeting law permitted Schmidt to pursue injunctive relief.

As respondents' subject matter jurisdiction argument is internally contradictory, arguing both that the district court lacked jurisdiction but subsequently conceding that the district court had jurisdiction over this matter since Schmidt had the right to pursue injunctive relief, and based on our review of Schmidt's complaint, we reject respondents' assertions regarding a lack of jurisdiction. See Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (noting that this court need not consider an issue not cogently argued); see also Stockmeier v. State, Dep. of Corrections, 124 Nev. 313, 318, 183 P.3d 133, 136 (2008) (determining that an individual may seek injunctive relief under the open meeting law).

County of Clark, 120 Nev. 736, 739, 100 P.3d 658, 660-61 (2004). Legal conclusions, however, are reviewed de novo. Attorney General v. Board of Regents, 119 Nev. 148, 153, 67 P.3d 902, 905 (2003). Trial courts have “considerable discretion” in determining the admissibility of evidence. Thomas v. Hardwick, 126 Nev. ___, ___, 231 P.3d 1111, 1117 (2010).

Analysis

Nevada’s open meeting law, NRS 241.020(1), states that “[e]xcept as otherwise provided by specific statute, all meetings of public bodies must be open and public, and all persons must be permitted to attend any meeting of these public bodies.” See also Schmidt v. Washoe County, 123 Nev. 128, 159 P.3d 1099 (2007) (applying the open meeting law to the Washoe Board) (abrogated on other grounds by Buzz Stew LLC v. City of Las Vegas, 124 Nev. 224, 181 P.3d 670 (2008)). Further, this court has held that meetings of public bodies must be open “whenever possible” to comply with the spirit of the open meeting law. See Attorney General v. Nevada Tax Comm’n, 124 Nev. 232, 239, 181 P.3d 675, 680 (2008). Nevertheless, the open meeting law does not “[p]revent the removal of any person who willfully disrupts a meeting to the extent that its orderly conduct is made impractical.” NRS 241.030(4)(b).

Having reviewed the parties’ briefs and the record on appeal, we affirm the district court’s order. A key factual finding made by the district court was that the “applause rule” that constituted the focus of Schmidt’s public comments did not exist. This finding was supported by testimony provided by Chairman Larkin, after he was reminded that he was under oath, that there was no such applause rule. We conclude that this finding is supported by substantial evidence. See Winchell v. Schiff,

124 Nev. 938, 944, 193 P.3d 946, 950 (2008) (explaining that substantial evidence is that which “a reasonable mind might accept as adequate to support a conclusion”). A second significant factual finding of the district court was that Schmidt, in his exchange with Chairman Larkin, raised his voice and talked over the Chairman, to the point of becoming rude. From reviewing the DVD of the Washoe Board meeting contained in the appellate record, and applying this court’s deference to the district court as the finder of fact, we conclude that this finding is also supported by substantial evidence. *Id.*; see also *NOLM, LLC*, 120 Nev. at 739, 100 P.3d at 660-61 (explaining that a district court’s factual findings will not be set aside unless they are clearly wrong).

Taken together, the facts that Schmidt was raising a non-issue, and doing so in a rude manner, support the district court’s determination that Schmidt, as an individual, willfully disrupted the Washoe Board meeting “to the extent that its orderly conduct [was] made impractical.” NRS 241.030(4)(b). Accordingly, Schmidt’s removal from the Washoe Board meeting was not precluded by the open meeting law. *Attorney General*, 119 Nev. at 153, 67 P.3d at 905 (explaining that this court reviews the district court’s legal conclusions de novo). We reject as meritless Schmidt’s contention that the district court did not properly frame the analysis.

Finally, regarding Schmidt’s challenge to the district court’s decision not to admit the more complete DVD of the Washoe Board’s meeting, as Schmidt waited until after the first day of trial, which included the testimony from Chairman Larkin, we conclude that the district court acted within its discretion in denying the request to admit

the different DVD at that late juncture. Thomas, 126 Nev. at ___, 231 P.3d at 1117 (noting the district court's "considerable discretion" in determining the admissibility of evidence).

Thus, for the reasons set forth above, we

ORDER the judgment of the district court AFFIRMED.²

Cherry, J.
Cherry

Pickering, J.
Pickering

Hardesty, J.
Hardesty

cc: Hon. Jerome Polaha, District Judge
Gary M. Pakele
Washoe County District Attorney/Civil Division
Washoe District Court Clerk

²To the extent that Schmidt's briefing raises arguments not specifically identified and addressed in this order, we have reviewed them and conclude that they either lack merit or, given our conclusion that Schmidt did not establish at trial a violation of the opening meeting law, need not be reached.