

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

STATE OF OHIO ex rel. ROSS HARDIN,	:	
	:	CASE NOS. CA2011-05-045
Relator-Appellee/Cross-Appellant,	:	CA2011-06-047
	:	
- vs -	:	<u>OPINION</u>
	:	6/11/2012
	:	
CLERMONT COUNTY BOARD OF ELECTIONS, et al.,	:	
	:	
Respondents-Appellants/ Cross-Appellees.	:	

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2009CVH1969

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W. HENDRICKSON, V.J.

{¶ 1} Respondent-appellant and cross-appellee, the Clermont County Board of

Elections (the Board), appeals a decision of the Clermont County Court of Common Pleas finding that the Board violated the Ohio Open Meetings Act (OMA) when it convened into executive session during a public meeting in 2009. The Board also appeals a decision of the trial court ordering the Board to pay \$41,335.50 in attorney fees for its violation of OMA. Relator-appellee and cross-appellant, Ross Hardin, appeals a decision of the trial court finding that the Board did not violate OMA when it convened into executive session during a public meeting in 2008.

{¶ 2} On September 21, 2009, Hardin filed a complaint against the Board and its members, Rick Combs, Paul Campbell, Richard Ferenc, and David Lane, alleging they had violated OMA when they convened into executive session during a public meeting on August 26, 2008, and on July 23, 2009. The complaint alleged that on both occasions, the Board improperly entered into executive session under the guise of meeting with legal counsel even though there was no pending or imminent court action involving the Board. Hardin sought a declaratory judgment that the Board and its members had violated OMA, an injunction to compel the Board to comply with OMA, civil forfeiture of \$500, and court costs and attorney fees.

{¶ 3} Hardin subsequently filed an amended complaint adding board member Timothy Rudd as a party-respondent and alleging that on 18 occasions between October 2007 and November 2009, the Board violated OMA when it convened into executive session for the purpose of discussing "personnel matters." The complaint reiterated its allegation that the executive sessions on August 26, 2008, and July 23, 2009, violated OMA and sought a declaratory judgment, injunctive relief, civil forfeiture of \$500 per violation, court costs and attorney fees.

{¶ 4} The Board subsequently admitted that its 18 executive sessions "for personnel

matters" violated OMA. The Board's admission was included in the parties' joint stipulation of facts filed on August 10, 2010. The following day, a hearing was held before the trial court. The facts surrounding the two challenged executive sessions from August 26, 2008, and July 23, 2009, are as follows:

{¶ 5} In August 2008, a petition was circulated within the village of Amelia, Clermont County, Ohio seeking to surrender the corporate powers of the village pursuant to R.C. 703.20. On August 19, 2008, the petition was transmitted to and filed with the Board in order for the Board to check the validity of the signatures on the petition and to report back to the village the number of valid signatures as determined by the Board. That same day, the director of the Board requested legal advice from Mary Lynne Birck, a Clermont County assistant prosecuting attorney, regarding the petition. The Board also sought guidance from the Ohio Secretary of State.

{¶ 6} On August 26, 2008, the Board held a regularly-scheduled public meeting; present were board members Rudd, Combs, Campbell, and Lane. During the course of reviewing questionable signatures on the petition seeking to dissolve the village, the Board convened into executive session "to seek Legal Counsel." The executive session started at 11:10 a.m. and ended at 11:25 a.m. Elizabeth Mason, a Clermont County assistant prosecuting attorney and counsel for the Board, was present at the executive session; the general public was excluded from the session. Upon resuming its public meeting, the Board continued to review the petition and concluded it contained 312 valid signatures (316 valid signatures are required).

{¶ 7} Subsequently, at 11:34 a.m., Curt Hartman, legal counsel for the Amelia Residents for Fiscal Responsibility and Pam Barker, filed with the Board a "Protest Regarding Petition to Surrender Corporate Powers of Amelia." The following month, during its regular

public meeting, the Board reviewed its prior determination of the number of valid signatures on the petition and determined that it only contained 299 valid signatures.

{¶ 8} The other challenged executive session occurred in July 2009 during a public meeting of the Board. Sometime before that meeting, an individual named Gregory Conrad filed a petition with the Board to be a candidate for municipal clerk of courts. On July 16, 2009, Hardin filed a protest with the Board against Conrad's petition. The board director notified the board members of the protest filed against Conrad's petition.

{¶ 9} On July 23, 2009, the Board held a regularly scheduled public meeting; present were board members Combs, Campbell, Ferenc, and Lane. During the meeting, Combs asked the board director why an executive session was on the agenda. The director explained that Birck, an assistant prosecuting attorney and counsel for the Board, wanted to discuss a legal matter with the Board in executive session prior to moving forward, to wit, the protest Hardin had filed against Conrad's petition.

{¶ 10} Subsequently, the Board convened into executive session to "discuss a possible pending legal matter." At this point in time, Hartman (who was representing Hardin) asked for further clarification as to why the Board was going into executive session. Birck stated it was a legal matter as Hartman had threatened legal action against the Board. The executive session subsequently started at 2:12 p.m. and ended at 2:35 p.m. Birck was present at the executive session; the general public was excluded from the session. Upon resuming its public meeting, the Board announced it would hold a hearing on Hardin's protest on July 30, 2009.

{¶ 11} Subsequently, at 2:40 p.m., Hartman filed with the Board a "Praecipe for Issuance of Subpoenas Ad Testificandum." The praecipe requested the Board to subpoena three individuals so that they would testify at the July 30, 2009 protest hearing. On the eve of

the protest hearing, Birck and Hartman exchanged e-mails regarding the issuance of subpoenas. In one of his e-mails, Hartman wrote, "Naturally, if the board fails to comply with its legal obligations, litigation will necessarily ensue."

{¶ 12} On December 3, 2010, the trial court found that (1) the Board's 18 executive sessions convened to discuss "personnel matters" violated OMA, (2) the August 26, 2008 executive session did not violate OMA, and (3) the July 23, 2009 executive session violated OMA. The trial court issued an injunction ordering the Board to comply with OMA at its future public meetings, and specifically to comply with R.C. 121.22(G). The court ordered the Board to pay a \$500 civil forfeiture for both OMA violations and court costs to Hardin. On May 13, 2011, the trial court ordered the Board to pay \$41,335.50 in attorney fees to Hardin. The trial court declined to reduce the attorney fees award under R.C. 121.22(I)(2).

{¶ 13} The Board appeals, raising seven assignments of error. Hardin cross-appeals, raising one assignment of error. The assignments of error and cross-assignment of error will be addressed out of order.

{¶ 14} OMA, as set forth in R.C. 121.22, seeks to prevent public bodies from engaging in secret deliberations on public issues with no accountability to the public. *Cincinnati Enquirer v. Cincinnati Bd. of Edn.*, 192 Ohio App.3d 566, 2011-Ohio-703, ¶ 9 (1st Dist.). Under the act, public officials are required "to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law." R.C. 121.22(A). R.C. 121.22(C) likewise requires "[a]ll meetings of any public body * * * to be public meetings open to the public at all times." Thus, OMA requires public bodies to deliberate public issues in public.

{¶ 15} However, if specific procedures are followed, public officials may discuss certain sensitive information privately in an executive session. *Tobacco Use Prevention &*

Control Found. Bd. of Trustees v. Boyce, 185 Ohio App.3d 707, 2009-Ohio-6993, ¶ 64 (10th Dist.). An executive session "is one from which the public is excluded and at which only such selected persons as the board may invite are permitted to be present." *Thomas v. Bd. of Trustees*, 5 Ohio App.2d 265, 268 (7th Dist.1996). R.C. 121.22(G) lists seven matters that a public body may consider in executive session. The exceptions contained in R.C. 121.22(G) are to be strictly construed. *In re Removal of Kuehnle*, 161 Ohio App.3d 399, 2005-Ohio-2372, ¶ 93 (12th Dist.). Relevant to this appeal are the exceptions contained in R.C. 121.22(G)(3) and (5).

{¶ 16} Assignment of Error No. 5:

{¶ 17} THE COURT ERRED AS A MATTER OF LAW IN HOLDING THAT RELATOR DID NOT HAVE THE BURDEN OF PROVING A VIOLATION OF THE OMA IN ORDER TO BE GRANTED INJUNCTIVE RELIEF AGAINST THE BOARD.

{¶ 18} Assignment of Error No. 6:

{¶ 19} THE COURT ERRED AS A MATTER OF LAW IN HOLDING THAT RESPONDENT BOARD HAD THE BURDEN OF PROVING THAT IT HAD NOT VIOLATED THE OMA IN ORDER FOR AN INJUNCTION NOT TO BE ISSUED AGAINST IT.

{¶ 20} At the heart of both assignments of error is the Board's claim that the trial court improperly placed the ultimate burden of proof on the Board by requiring the Board to prove it did not violate OMA. On appeal, as it did below, the Board asserts that under R.C. 121.22 and as the person seeking injunctive relief, Hardin has the burden to prove OMA was violated. Hardin asserts that the Board has the burden to prove its executive sessions fall under one of the exceptions in R.C. 121.22(G).

{¶ 21} In its decision, the trial court found that:

This court finds the most prudent approach is that which places the burden of proving an exception upon the public body. The

exceptions set forth in R.C. 121.22(G) are just that, *exceptions* to the [OMA's] requirement that all meetings of public bodies be open to the public. Therefore, it logically follows that if the public body chooses to go into executive session and that decision is later challenged, then it should be the public body which should demonstrate that one of the exceptions applies. Once the relator has demonstrated that a meeting of the majority of the members of a public body occurred and that the general public was excluded from that meeting, the burden should be upon that public body to demonstrate that one of the exceptions set forth in R.C. 121.22(G) is applicable.

(Emphasis sic.)

{¶ 22} An individual seeking injunctive relief has the burden of proof. *See State ex rel. Stern v. Butler*, 7th Dist. No. 98-JE-54, 2001 WL 1155821 (Sept. 26, 2001); *State ex rel. Sigall v. Aetna*, 45 Ohio St.2d 308 (1976) (a party seeking injunctive relief has the burden of proving a clear right to such relief). R.C. 121.22(I)(1), in turn, provides in relevant part that "[a]ny person may bring an action to enforce this section. * * * Upon proof of a violation or threatened violation of this section in an action brought by any person, the court of common pleas shall issue an injunction to compel the members of the public body to comply with its provisions."

{¶ 23} The term "burden of proof" is a composite burden that "encompasses two different aspects of proof: the burden of going forward with evidence (or burden of production) and the burden of persuasion." *Chari v. Vore*, 91 Ohio St.3d 323, 326 (2001). "The term 'burden of production' tells a court which party must come forward with evidence to support a particular proposition, whereas 'burden of persuasion' determines which party must produce sufficient evidence to convince a judge that a fact has been established." 29 American Jurisprudence 2d, Evidence, Section 171 (2012). "The burden of persuasion never leaves the party on whom it is originally cast." *Id.* Thus, what shifts is "the burden of going forward with the evidence, rather than the actual burden of proof. The burden which rests

upon the plaintiff, to establish the material averments of his or her cause of action * * *, never shifts." 42 Ohio Jurisprudence 3d, Evidence and Witnesses, Section 84 (2012).

{¶ 24} Applying all of the foregoing to the case at bar, we hold that the party who files a complaint alleging a violation of OMA has the ultimate burden to prove OMA was violated (or was threatened to be violated) by a public body. That is, the party asserting a violation of OMA has the burden of persuasion by a preponderance of the evidence. *State ex rel. Hardin Cty. Publishing Co. v. Hardin Mem. Hosp.*, 3rd Dist. No. 6-02-04, 2002 WL 31323400, *3 (Oct. 18, 2002) (the person asserting a violation of OMA bears the burden of proving the violation occurred by a preponderance of the evidence); *Barnes v. Sandy Twp. Bd. of Trustees*, 5th Dist. No. CA-8377, 1991 WL 122343 (June 25, 1991). The burden of persuasion never leaves the party who is alleging a violation of OMA.

{¶ 25} Accordingly, in an action brought under R.C. 121.22, the plaintiff or relator initially carries his or her burden by showing that a meeting of the majority of the members of a public body occurred and that the general public was excluded from that meeting. Once the plaintiff or relator demonstrates the above, the burden then shifts to the public body to produce or go forward with evidence that the challenged meeting fell under one of the exceptions of R.C. 121.22(G). After the public body comes forward with such evidence, the burden then shifts to the plaintiff or relator to come forward with evidence that the exception claimed by the public body is not applicable or valid. If the plaintiff or relator cannot show that the exception is inapplicable or invalid, he has failed to prove the public body violated OMA, that is, he has failed to meet his burden of proof. If, on the other hand, the plaintiff or relator can show that the exception is not applicable or not valid, he has met his burden of proof.

{¶ 26} In the case at bar, Hardin filed a complaint alleging a violation of OMA and

sought injunctive relief. As a result, he had the ultimate burden of proving OMA was violated by the Board. Once he showed that the Board convened into an executive session during its regular public meeting and that the general public was excluded from the executive session, the burden shifted to the Board to go forward with evidence that the executive session fell under R.C. 121.22(G).

{¶ 27} In requiring the Board to demonstrate that one of the exceptions in R.C. 121.22(G) applied, the trial court properly imposed the burden of production on the Board. Contrary to the Board's assertion, in so doing, the trial court did not hold that Hardin was relieved from proving OMA was violated before being granted injunctive relief, nor did the trial court require the Board to prove it did not violate OMA in order for an injunction not to be issued against it.

{¶ 28} The Board's fifth and sixth assignments of error are overruled.

{¶ 29} Assignment of Error No. 1:

{¶ 30} THE LOWER COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE BOARD WAS NOT ACTING IN ITS QUASI-JUDICIAL ROLE WHEN DETERMINING THE POSSIBLE ISSUANCE OF SUBPOENAS TO COMPEL WITNESSES TO APPEAR AT A PROTEST HEARING.

{¶ 31} Assignment of Error No. 2:

{¶ 32} THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT RESPONDENT BOARD CANNOT RECEIVE LEGAL ADVICE FROM ITS COUNSEL IN EXECUTIVE SESSION UNLESS LITIGATION IS PENDING OR IMMINENT.

{¶ 33} Assignment of Error No. 3:

{¶ 34} THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT R.C. 121.22(G)(5) DOES NOT APPLY TO THE ATTORNEY-CLIENT PRIVILEGE.

{¶ 35} Assignment of Error No. 4:

{¶ 36} THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT RESPONDENT BOARD HAD THE BURDEN OF PROVING BY DIRECT EVIDENCE THAT RELATOR THREATENED LITIGATION IN ORDER TO PROVE THAT COURT ACTION INVOLVING THE PUBLIC BODY WAS "IMMINENT."

{¶ 37} Cross-Assignment of Error No. 1:

{¶ 38} THE TRIAL COURT ERRED IN CONCLUDING THAT THE BOARD AND THE BOARD MEMBERS DID NOT VIOLATE THE OPEN MEETINGS ACT WITH RESPECT TO THE EXECUTIVE SESSION HELD ON AUGUST 28, 2011. [sic]

{¶ 39} The Board argued below that the executive sessions of August 26, 2008, and July 23, 2009, did not violate OMA because both fell under R.C. 121.22(G)(3) and/or (G)(5). The Board further argued that because it was acting in a quasi-judicial capacity during the July 23, 2009 executive session, the session was not a meeting for purposes of R.C. 121.22 and therefore was not subject to the open meeting requirements under OMA.

{¶ 40} In its decision, the trial court found that the exception under R.C. 121.22(G)(5) did not apply to either executive session. The trial court found that the August 26, 2008 executive session did not violate OMA because during that session, the Board only "received general legal advice as to the process and methodology for dealing with a petition to dissolve a village's corporate powers." As such, the August 26, 2008 executive session did not involve actual deliberations of public business, was strictly of an investigative and information-seeking nature, and fell outside the scope of R.C. 121.22.

{¶ 41} By contrast, the trial court found that while the Board received general advice as to the process regarding a protest to a candidacy petition during the July 23, 2009 executive session, it also received advice with regard to, and deliberated on, Hartman's

request for the issuance of subpoenas. As a result, the July 23, 2009 executive session went beyond a mere investigative session. The trial court next rejected the Board's claim it was acting in a quasi-judicial capacity when it went into executive session to discuss the procedures regarding the protest hearing.

{¶ 42} Finally, the trial court held that the exception in R.C. 121.22(G)(3) did not apply to the July 23, 2009 executive session because (1) it was not convened to discuss a pending court action, (2) there was no direct evidence Hartman threatened the Board with litigation prior to the July 23, 2009 executive session or public hearing, and (3) thus, the Board was not confronted with imminent court action when it convened into executive session that day. The trial court specifically held that "in order to demonstrate that the Board was conferencing with its attorney concerning disputes involving the public body that were the subject of imminent court action, *direct evidence* that there was a dispute involving the public body that was the subject of imminent court action is required." (Emphasis added.) The trial court concluded that the July 23, 2009 executive session violated OMA.

{¶ 43} On appeal, the Board challenges the trial court's decision that the July 23, 2009 executive session violated OMA. Specifically, under its first through fourth assignments of error, the Board argues that the trial court erred in (1) holding that the Board could not receive legal advice from its counsel in executive session unless litigation was pending or imminent, (2) requiring the Board to provide *direct evidence* of imminent court action when asserting that R.C. 121.22(G)(3) applied to the executive session, (3) finding that R.C. 121.22(G)(5) did not apply to the executive session, and (4) finding that the Board was not acting in a quasi-judicial capacity during the executive session when it discussed the possible issuance of subpoenas for the protest hearing. In his cross-assignment of error, Hardin argues that the trial court erred in finding that the August 26, 2008 executive session did not

violate OMA.

{¶ 44} As stated earlier, the intent of OMA is to require public bodies to deliberate public issues in public. R.C. 121.22(A) requires "public officials to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law." R.C. 121.22(G) allows public officials "to hold an executive session and only at a regular or special meeting for the sole purpose of consider[ing]" certain specified matters, including "[c]onferences with an attorney for the public body concerning disputes involving the public body that are the subject of pending or imminent court action," and "[m]atters required to be kept confidential by federal law or regulation or state statutes." R.C. 121.22(G)(3), (5).

{¶ 45} R.C. 121.22(H), in turn, provides in relevant part that:

A resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body. A resolution, rule, or formal action 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) * * * of this section and conducted at an executive session held in compliance with this section.

{¶ 46} R.C. 121.22(B)(2) defines "meeting" as "any prearranged discussion of the public business of the public body by a majority of its members."

{¶ 47} The foregoing makes it clear that "[a] resolution, rule, or formal action by a public body is invalid unless (1) it was adopted in an open meeting, and (2) it did not result from nonpublic deliberations 'unless the deliberations were for a purpose specifically authorized' by the act," such as under R.C. 121.22(G). *Cincinnati Enquirer*, 2011-Ohio-703 at ¶ 10, quoting R.C. 121.22(H). Thus, OMA allows public officials to hold an executive session, that is, a gathering of public officials from which the public is excluded, and to conduct deliberations during the executive session as long as the subject matter of the

deliberations is specifically excepted under R.C. 121.22.

{¶ 48} "Deliberations," a term not defined in OMA, "involve more than information-gathering, investigation, or fact-finding." *Springfield Local School Dist. Bd. of Edn. v. Ohio Assn. of Pub. School Emp., Local 530*, 106 Ohio App.3d 855, 864 (9th Dist.1995), citing *Holeski v. Lawrence*, 85 Ohio App.3d 824 (11th Dist.1993). Deliberations involve "the act of weighing and examining the reasons for and against a choice or measure." *Springfield* at 864, quoting *Webster's Third International Dictionary* 596 (1961). "Question-and-answer sessions between board members and other persons who are not public officials do not constitute 'deliberations' unless a majority of the board members also entertain a discussion of public business with one another." *Springfield id.*; see also *Carver v. Deerfield Twp*, 139 Ohio App.3d 64 (11th Dist.2000).

{¶ 49} Ohio courts have recognized that information-gathering and fact-finding are essential functions of any board, and that the gathering of facts and information for ministerial purposes does not constitute a violation of OMA. See *Holeski* at 829; *Cincinnati Enquirer*, 2011-Ohio-703 at ¶ 12, 14; *Steingass Mechanical Contracting, Inc. v. Warrensville Hts. Bd. of Edn.*, 151 Ohio App.3d 321, 2003-Ohio-28 (8th Dist.). In addition, "OMA does not prevent public officials from privately seeking and receiving advice from their legal counsel." *Cincinnati Enquirer* at ¶ 13; *Steingass* at ¶ 50-52; *State ex rel. Cincinnati Enquirer v. Hamilton Cty. Bd. of Comms.*, 1st Dist. No. C-010605, 2002 WL 727023 (Apr. 26, 2002).

{¶ 50} The trial court found that the August 26, 2008 executive session did not violate OMA because during that session, the Board only "received general legal advice as to the process and methodology for dealing with a petition to dissolve a village's corporate powers." We agree with the trial court's decision.

{¶ 51} Combs, a board member present at the August 26, 2008 public meeting,

testified that the Board convened into executive session to discuss R.C. Title 35 and the proper procedure for dealing with a petition to surrender the corporate powers of a village. The Board's statutory counsel was present at the executive session. Combs testified that the board members were unfamiliar with, and wanted to get a legal opinion as to, the process and methodology involved with a petition to dissolve a village.

{¶ 52} There is no evidence in the record that any deliberations or debate took place among the board members during the executive session, only that the Board received information from its statutory legal counsel. Nor is there any evidence that the information received by the Board was specific to the actual petition and signatures contained therein. Thus, as the trial court aptly found, the August 26, 2008 executive session was simply "an information-seeking session with the Board's legal counsel so that the Board could gather more information as to the process involving these petitions and better understand its legal responsibilities."

{¶ 53} Hardin nevertheless asserts that the trial court's decision is erroneous because (1) the executive session occurred during the course of a meeting of the Board, and thus from the time the public meeting convened to the time it adjourned, the Board was subject to OMA, (2) the issue of whether the executive session was a "meeting" was not properly before the trial court, and (3) the trial court failed to appreciate that a meeting of a public body may be comprised of both public sessions and executive sessions.

{¶ 54} Hardin's argument is based on semantics. Hardin correctly points out that the legal principle relied upon by the trial court, that is, that a gathering of facts and information for ministerial purposes does not constitute a violation of OMA, "is premised" in *some cases*, "upon the proposition that no 'meeting' had even occurred." Indeed, some Ohio appellate courts have held that when a majority of the members of a public body meets in a ministerial,

fact-gathering capacity, no official meeting of the public body has occurred, and thus there is no violation of OMA. See *Wyse v. Rupp*, 6th Dist. No. F-94-19, 1995 WL 547784 (Sept. 15, 1995). However, in the case at bar, the trial court did *not* hold that the August 26, 2008 executive session was not a "meeting" under R.C. 121.22, and thus did not violate OMA, because no deliberations took place. Rather, the trial court simply held that the executive session did not violate OMA because no deliberations took place during the executive session.

{¶ 55} Further, we note that in drafting R.C. 121.22, the legislature used the term "meeting" throughout the statute and defined it, but only sporadically and specifically used the term "executive session." In *State ex rel. Ross v. Crawford Cty. Bd. of Elections*, 125 Ohio St.3d 438, 2010-Ohio-2167, the Ohio Supreme Court held that:

"Throughout R.C. 121.22, the legislature employed the term 'meeting' to designate 'any prearranged discussion of the public business of the public body by a majority of its members.' R.C. 121.22(B)(2). Since the General Assembly specifically defined, and extensively employed, the term 'meeting' in drafting this statute, and since the term 'hearing' appears only twice in the * * * statute, both times in reference to situations where a formal hearing is statutorily mandated, we must assume that these terms were intended to have altogether different meanings."

Id. at ¶ 23, quoting *Matheny v. Frontier Local Bd. of Edn.*, 62 Ohio St.2d 362, 368 (1980).

We find that the same analysis applies here. A review of the language of R.C. 121.22 shows that "meeting" refers to a gathering of a majority of the members of a public body that is and must be open to the public, whereas "executive session" refers to a similar gathering but from which the public is excluded. As long as an executive session is properly convened for the sole purpose of considering certain specified matters under R.C. 121.22(G), and the deliberations during the executive session are for a purpose specifically authorized under R.C. 121.22(G), there is no violation of OMA. See R.C. 121.22(G), (H).

{¶ 56} We therefore find that the trial court did not err in holding that the August 26, 2008 executive session did not violate OMA. Hardin's cross-assignment of error is overruled.

{¶ 57} By contrast, the trial court held that the July 23, 2009 executive session violated OMA because (1) it went beyond a mere investigative session, and (2) given the Board's failure to provide direct evidence that Hartman threatened the Board with litigation before the executive session, the exception under R.C. 121.22(G)(3) did not apply. The trial court also found that the exception under R.C. 121.22(G)(5) did not apply.

{¶ 58} The trial court first found that the July 23, 2009 executive session went beyond a mere investigative session because "in addition to receiving legal general advice as to the process with regard to a protest to a petition and the legal requirements for a hearing on that matter," the Board also received advice regarding, and deliberated on, the request for the issuance of subpoenas. The trial court's finding was based on Combs' testimony.

{¶ 59} Combs testified that the Board convened into executive session to discuss the proper procedure for dealing with a protest filed against a candidacy petition. The Board's statutory counsel was present at the executive session. Combs testified that the board members were unfamiliar with, and wanted to get a legal opinion as to, the process and methodology involved with such a protest as well as what the Board's responsibilities were. Combs also testified that during the executive session, the Board talked about the issuance of subpoenas, and more specifically, whether the Board was required to issue such subpoenas or whether it was merely an option:

Q. [by Hartman, counsel for Hardin]: And what decision was made by the Board as to whether or not it would issue subpoenas for the protest hearing - -

* * *

A. [by Combs]: - - is that we could. That was an option. It was not a requirement. It was an option if we needed to subpoena

witnesses to come in. We have that duty or that responsibility to do that. We concluded - - at least I concluded, that we didn't need to exercise that at that level.

Q. Okay. So that was * * * those discussions - - those decisions were made during that executive session on July 23, 2009?

A. I believe that was some of the conversation that we do have the power to exercise subpoenas, but it is not a requirement.

{¶ 60} Ferenc, a board member present at the July 23, 2009 executive session, testified that the executive session addressed two issues: (1) the Board's responsibilities, rights, and obligations with regard to the issuance of subpoenas as this was an issue the Board was not familiar with, and (2) the process and methodology involved with a protest to a candidacy petition.

{¶ 61} Upon reviewing the testimony of Combs and Ferenc, we disagree with the trial court's finding that the July 23, 2009 executive session involved deliberations among the board members as to the issuance of subpoenas. Notwithstanding Hartman's use of the term "decision" in his cross-examination of Combs, we find that Combs' testimony, and to a lesser extent Ferenc's testimony, show that the Board did not deliberate on the issue of subpoenas; rather, the Board merely had a conversation and established its options on the issue. Thus, the July 23, 2009 executive session was simply an information-seeking session with the Board's legal counsel so that the Board could gather more information as to the process involving these petitions and better understand its legal responsibilities, including with regard to the issuance of subpoenas.

{¶ 62} We therefore find that the July 23, 2009 executive session did not violate OMA. However, even assuming, arguendo, that deliberations took place during the executive session, we find that the executive session fell under R.C. 121.22(G)(3) and thus, did not violate OMA.

{¶ 63} Pursuant to R.C. 121.22(G)(3), the members of a public body may hold an executive session during a public meeting to "conferenc[e] with an attorney for the public body concerning disputes involving the public body that are the subject of pending or imminent court action."

{¶ 64} In *State ex rel. Bond v. Montgomery*, 63 Ohio App.3d 728 (1st Dist.1989), the First Appellate District defined "pending court action" as "that period of time between the inception of the lawsuit and rendition of final judgment." *Id.* at 737. It then defined "imminent court action" as "an action or event 'on the point of happening' or one that is 'impending.'" *Id.*, quoting *Black's Law Dictionary* 676 (5th Ed.1979). In *Hamilton Cty. Bd. of Commrs.*, 2002 WL 727023, the court clarified its definition of imminent court action:

The definition we adopted in *Bond* - something "about to happen" - was not meant to have strictly a temporal meaning. The definition is more elastic because of the protean nature of litigation, in which court action is not always a foregone conclusion. Litigation is an inherently complex and nuanced process. * * * By including both "pending" court action and "imminent" court action within R.C. 121.22(G)(3), the legislature clearly contemplated that litigation need not have formally begun to reach a sensitive stage where the public's need to know is outweighed by the public body's need for confidentiality. "[I]mminent" in the context of R.C. 121.22(G)(3) denotes something that "is mediate rather than immediate." * * * [T]he term "imminent" is satisfied where the public body has formally committed itself to a litigative solution and assumed a litigative posture. Such a posture is frequently manifested by the public body's decision to commit government resources to the prospective litigation.

Id. at *4.

{¶ 65} It is undisputed that there was no pending court action when the Board convened into executive session on July 23, 2009. The trial court found that there was no imminent court action because:

While both Board members Combs and Ferenc testified that it was their understanding that the Board's statutory counsel * * *

indicated that a threat of litigation was made by attorney Curt Hartman prior to the [July 23, 2009 public] meeting, the court has no direct evidence that any such threat was actually made. The court finds that, in order to demonstrate that the Board was conferencing with its attorney concerning disputes involving the public body that were the subject of imminent court action, *direct evidence* that there was a dispute involving the public body that was the subject of imminent court action is required.

(Emphasis added.)

{¶ 66} We find that the trial court erred in requiring the Board to provide *direct evidence* of imminent court action in order to show R.C. 121.22(G)(3) applied to the executive session. We first note that while it imposes a rather harsh requirement on the Board, the trial court does not cite any cases in support of its holding. It is well-established that direct evidence and circumstantial evidence have the same probative value. *Rini v. Dyer*, 4th Dist. No. 07CA3180, 2008-Ohio-4172, ¶ 41. Circumstantial evidence is not inherently less reliable or certain than direct evidence, and reasonable inferences may be drawn from both direct and circumstantial evidence. See *Sellers v. Whitt*, 2nd Dist. No. 91 CA 96, 1993 WL 451575 (Nov. 3, 1993). During oral arguments before this court, Hardin's counsel conceded that evidence of imminent court action can be circumstantial rather than direct.

{¶ 67} In addition, we note that in *Warthman v. Genoa Twp. Bd. of Trustees*, 5th Dist. No. 10CAH040034, 2011-Ohio-1775, a public body was allowed to provide circumstantial evidence of pending or imminent court action under R.C. 121.22(G)(3). *Id.* at ¶ 104 (township board of trustees properly entered into executive session to conference with an attorney regarding pending and imminent court action pursuant to R.C. 121.22(G)(3) where a zoning commission chairperson had already contacted his attorney and threatened litigation against the township, and where letters to the board indicated potential for legal action).

{¶ 68} We therefore find that the trial court erred in holding that "in order to

demonstrate that the Board was conferencing with its attorney concerning disputes involving the public body that were the subject of imminent court action, direct evidence that there was a dispute involving the public body that was the subject of imminent court action is required."

The Board's fourth assignment of error is well-taken and sustained.

{¶ 69} Upon reviewing the testimony of Combs and Ferenc, we find that the Board provided sufficient circumstantial evidence of imminent court action at the time it convened into the July 23, 2009 executive session. It is undisputed that three days before the Board's July 23, 2009 public meeting, the board director notified the board members by email that Hardin, represented by Hartman, had filed a protest against Conrad's candidacy petition. The affidavits of two board employees indicate that in late June 2009, Hartman went to the Board to review Conrad's candidacy petition. While conversing with the employees, Hartman stated, "I'm trying to stick it to him any way I can." One employee witnessed Hartman "perform a gesture as if he was sticking something with a knife."

{¶ 70} On the day of the July 23, 2009 public meeting, the board director told the board members that Birck, the Board's statutory counsel, wanted to discuss a legal matter with the Board in executive session (Hardin's protest against Conrad's petition) prior to moving forward. The minutes of the public meeting show that before the Board could convene into executive session, Hartman asked for further clarification. Birck told Hartman the Board was going into executive session because it was a legal matter as Hartman had threatened legal action against the Board.

{¶ 71} Both Combs and Ferenc testified they believed litigation was imminent. Combs testified that before the July 23, 2009 public meeting, it was his understanding Hartman had threatened litigation if the Board did not issue subpoenas for the protest hearing. Combs indicated he takes any threat of litigation seriously.

{¶ 72} Ferenc testified that there was imminent court action on July 23, 2009 based upon the protest filed against Conrad's petition. Ferenc explained that he considered the filing of such protest to be an initiation of the litigation process. In addition, prior to the July 23, 2009 public hearing, he had seen Hartman's various requests to the Board with regard to the protest and was aware of Hartman's threat to sue the Board with regard to the issuance of subpoenas. Ferenc also testified that when Hartman asked for clarification right before the Board convened into executive session, Ferenc "felt that it could be imminent that if we overruled [Hartman's] request, denied the protest, that an administrative appeal would be pursued[.]" Ferenc further explained:

The petition protest had been filed prior to July 23, 2009, at a regular meeting of the Board. The relator, if dissatisfied with the Board's decision on the process, had the automatic right of appeal to the Clermont County Common Pleas Court. I was made aware by the Board's legal counsel, Mary Lynne Birck, that Mr. Hartman * * * had threatened to file suit against the Board if * * * it did not accede to his various demands concerning the relator's protest. Mr. Hartman has an established reputation in our legal community in initiating court actions similar to this; therefore, I believe there was threat to file a lawsuit and made in its professional capacity as counsel of record for the realtor - - that - - or the relator was legitimate and sincere.

{¶ 73} The record shows that immediately after the Board ended the executive session, resumed its public meeting, and announced it would hold a hearing on Hardin's protest a week later, Hartman filed a "Praecipe for Issuance of Subpoenas Ad Testificandum." On the eve of the protest hearing, Hartman wrote in an email to Birck, "Naturally, if the board fails to comply with its legal obligations, litigation will necessarily ensue."

{¶ 74} We find that the facts surrounding the July 23, 2009 executive session and the testimony of Combs and Ferenc clearly show that the protest filed by Hardin created a dispute involving the Board that would be the subject of imminent court action. As a result,

the executive session fell under R.C. 121.22(G)(3) and did not violate OMA. The Board's second assignment of error is well-taken and sustained.

{¶ 75} At this juncture, we briefly address the Board's argument that the trial court erred in holding that R.C. 121.22(G)(5) does not apply to the July 23, 2009 executive session.

{¶ 76} R.C. 121.22(G)(5) allows a public body to convene an executive session to discuss "[m]atters required to be kept confidential by federal law or regulations or state statutes[.]" On appeal, as it did below, the Board argues that the July 23, 2009 executive session fell under R.C. 121.22(G)(5) because the Board was discussing matters with its statutory counsel and such discussions are protected by the attorney-client privilege which is codified in a state statute (R.C. 2317.02). The trial court rejected the Board's argument, finding that R.C. 121.22(G)(5) did not apply to either executive session merely because the Board was conferring with or discussed matters with its legal counsel during the executive sessions.

{¶ 77} In support of its holding, the trial court cited *Hamilton Cty. Bd. of Commrs.*, 2002 WL 727023. Addressing a similar argument, the First Appellate District held 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. * * * "[T]he 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." The exception in R.C. 121.22(G)(5) is intended, rather, to allow the commissioners to convene an executive session to discuss matters that they are *legally bound* to keep from the public, such as records exempted from Ohio's Public Records Act (see R.C. 149.43), sealed records of criminal convictions (see R.C. 2953.35), information concerning an abortion without parental consent (see R.C. 2151.85[F]), results of HIV testing by the director of health (see R.C. 3701.241), and the like.

(Emphasis sic. and internal citation omitted.) *Id.* at *5.

{¶ 78} We agree with the First Appellate District's analysis. R.C. 121.22(G) lists the matters a public body may consider privately in an executive session, including matters of imminent or pending litigation when discussed with the public body's counsel, R.C. 121.22(G)(3), and matters required to be kept confidential by state or federal law. R.C. 121.22(G)(5). The exceptions in R.C. 121.22(G) are distinct, separate exceptions that apply in specific situations. At heart, the Board's argument is that R.C. 121.22(G)(5) is a catch-all provision that applies whenever a public body confers with its counsel during an executive session. We disagree. If it were so, there would have been no need for the legislature to include R.C. 121.22(G)(3).

{¶ 79} We therefore hold that the trial court did not err in finding that R.C. 121.22(G)(5) did not apply to the July 23, 2009 executive session simply because the Board conferred with its counsel during that session. The Board's third assignment of error is overruled.

{¶ 80} Finally, because we have found that the Board did not violate OMA when it entered into executive session on July 23, 2009, we decline to address whether the Board was acting in a quasi-judicial capacity during that executive session. The Board's first assignment of error is overruled.

{¶ 81} In light of the foregoing, we find that the trial court properly held that the August 26, 2008 executive session did not violate OMA. We find, however, that the trial court erred in holding that the July 23, 2009 executive session violated OMA. Accordingly, Hardin's cross-assignment of error is overruled, the Board's first and third assignments of error are overruled, and the Board's second and fourth assignments of error are well-taken and sustained.

{¶ 82} Assignment of Error No. 7:

{¶ 83} THE COURT ABUSED ITS DISCRETION IN AWARDING \$41,335.50 IN ATTORNEYS' FEES AND IN FINDING THAT THE STANDARD OF R.C. 121.22(l)(2)(a)(i) HAD NOT BEEN MET. [SIC]

{¶ 84} The Board argues that the trial court erred in finding that R.C. 121.22(l)(2)(a)(i) was not met, and thus abused its discretion in awarding \$41,335.50 in attorney fees to Hardin. We note that the Board does not challenge the hourly rate and/or number of hours approved by the trial court.

{¶ 85} Under R.C. 121.22(l)(2)(a), if a court of common pleas issues an injunction, the court must award to the party that sought the injunction "reasonable attorney's fees." The court may then, in its discretion, reduce the award of attorney fees (or decide not to award attorney fees) "if the court determines both of the following:"

That, based on the ordinary application of statutory law and case law as it existed at the time of violation or threatened violation that was the basis of the injunction, a well-informed public body reasonably would believe that the public body was not violating or threatening to violate this section;

That a well-informed public body reasonably would believe that the conduct or threatened conduct that was the basis of the injunction would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

R.C. 121.22(l)(2)(a)(i) and (ii). Thus, a trial court may reduce an award of attorney fees "if the court determines that the public body reasonably believed it was not violating R.C. 121.22 and that its conduct served public policy." *Mansfield City Council v. Richland Cty. Council AFL-CIO*, 5th Dist. No. 03 CA 55, 2003 WL 23652878, *6 (Dec. 24, 2003).

{¶ 86} In its decision, the trial court declined to reduce the attorney fees award on the ground that based on its prior analysis regarding the July 23, 2009 executive session, R.C. 121.22(l)(2)(a)(i) was not met. The trial court did not make any finding with regard to R.C.

121.22(l)(2)(a)(ii).

{¶ 87} In light of our holding that the Board's July 23, 2009 executive session did not violate OMA, we find that the trial court erred by issuing an injunction and awarding court costs and attorney fees to Hardin with regard to that executive session. Hardin was not entitled to attorney fees or costs because he failed to prove that the July 23, 2009 executive session violated OMA. *Cincinnati Enquirer*, 2011-Ohio-703 at ¶ 18. Furthermore, because we upheld the trial court's finding that the Board's August 26, 2008 executive session did not violate OMA, Hardin is likewise not entitled to court costs and attorney fees with regard to that executive session.

{¶ 88} As stated earlier, however, the parties stipulated and the trial court found that the Board violated OMA when it entered into executive session on 18 separate occasions between October 2007 and November 2009 "for personnel matters." Under R.C. 121.22(l), Hardin is entitled to court costs and reasonable attorney fees with regard to these violations. The case is therefore remanded to the trial court to determine the amount of reasonable attorney fees Hardin is entitled to with regard to these stipulated violations.

{¶ 89} On remand, the trial court needs to determine the numbers of hours Hartman and his two co-counselors, Christopher Finney and Joshua Bolinger, spent investigating the facts, conducting legal research, and preparing pleadings regarding the Board's foregoing 18 violations.¹ Once the trial court makes the determination, it then needs to consider the applicability of R.C. 121.22(l)(2)(a)(i) and (ii) to the case at bar.

{¶ 90} During the hearing on attorney fees, Hartman testified that much of the time

1. Hardin filed his amended complaint on April 5, 2010. The amended complaint alleged that in addition to the Board's violation of OMA on August 26, 2008 and July 23, 2009, the Board also violated OMA on 18 separate occasions when it entered into executive sessions "for personnel matters." The record shows that in July 2010, three months after Hardin filed his amended complaint, the Board admitted violating OMA on those 18 occasions in its trial brief. The parties' joint stipulation of facts, which included the Board's admission, was filed a month later.

expended prior to trial was focused on preparing the lengthy joint stipulation of facts, which involved a somewhat arduous and contested process. However, while the joint stipulation has 65 paragraphs, only 7 of those cover the 18 executive sessions for "personnel matters." In granting \$41,335.50 in attorney fees, the trial court approved the following hourly rates: \$250 for Hartman, \$250 for Finney, and \$200 for Bolinger. We question whether the foregoing rates are reasonable given the amount of work done by the attorneys with regard to the 18 violations and given the fact the trial court considered the case to be:

a relatively simple case that ultimately dealt with two meetings where the Board went into executive session [the August 26, 2008 and July 23, 2009 executive sessions]. The case involved a limited set of facts. Meanwhile, there is nothing particularly complex about the legal issues in this case. The issues * * * were relatively straightforward, and there was nothing about the case that required more than the efforts of a single counsel.

{¶ 91} The Board's seventh assignment of error is well-taken and sustained.

{¶ 92} The judgment is affirmed in part and reversed in part, and the case is remanded to the trial court for a re-calculation of the amount of reasonable attorney fees Hardin is entitled to based on the Board's violation of OMA when it convened into executive session for "personnel matters" on 18 separate occasions between October 2007 and November 2009.

R. HENDRICKSON, P.J., and PIPER, J., concur.

W. Hendrickson, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.