IN THE SUPREME COURT OF THE STATE OF MISSOURI

No. SC94842

JOHN P. STRAKE,
APPELLANT,

vs.

ROBINWOOD WEST COMMUNITY IMPROVEMENT DISTRICT,
RESPONDENT.

On Appeal from the Circuit Court of St. Louis County, Missouri

BRIEF OF AMICUS CURIAE THE MISSOURI PRESS ASSOCIATION

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INTEREST OF AMICUS CURIAE

Amicus Curiae The Missouri Press Association represents approximately 250 newspapers throughout Missouri. Its members are frequent users of the Missouri Sunshine Law as they cover county and local government activities throughout the State and they have a real and urgent interest in any court decision which involves the statutes contained in Chapter 610, Revised Statutes of Missouri.[1]

The Missouri Press Association was organized in 1867 for the purpose of furthering efficiency and morality in the newspaper field, promoting and improving the journalism profession, and to make the profession of journalism more beneficial to the people of Missouri. The Association was incorporated in 1922 as a not-for-profit corporation. Since inception, the Association has served as a spokesman on journalism activities for those in the newspaper field in Missouri.

The Amicus has a longstanding interest in preserving the right of the public to receive news about important governmental events and activities, because this information can affect the public's lives, livelihood and governance. Clearly, access to public information, particularly information regarding the operation of local government, is critical to citizen participation in the governmental process.

Amicus submits this brief so the Court may be fully informed and advised as to the legal status of Chapter 610, R.S.Mo (commonly known as Missouri's Open Meetings/Open Records or "Sunshine" law), the existing misuse and misinterpretation of the law across the

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1All references to the Revised Statutes of Missouri (R.S.Mo.), are to the 2000 edition, as amended, unless otherwise noted.

State in general and the Amicus' concerns about the arguments being made by the parties in regard to its interpretation.

The sole issue addressed by the amicus in this brief concerns the proper interpretation of and application of Section 610.027, R.S.Mo. Due to the far-reaching effect a decision on this issue will have on reporters and editors of the state's newspapers when covering governmental entities, it is appropriate that Amicus be given the opportunity to weigh in on the trial court and appellate decision and the position taken by the Appellant and Respondent before this Court.

STATEMENT OF FACTS

The Amicus Curiae hereby adopt the statement of facts submitted by the Appellant in this matter.

POINT RELIED ON

The trial court erred in failing to find that the Respondent knowingly or purposely violated the Missouri Sunshine Law, declining to impose a civil penalty against the Respondent and denying Appellant's request for attorneys' fees and costs because the undisputed facts demonstrate, by a preponderance of the evidence, that the Respondent knowingly or purposely violated the Sunshine Law when it failed to disclose the requested records in that the facts do not support a finding that the Respondent reasonably believed nondisclosure was authorized by law.

Cohen v. Poelker, 520 S.W.2d 50 (Mo. 1975)

Spradlin v. City of Fulton, 982 S.W.2d 255 (Mo. 1998)

Section 610.027, R.S.Mo.

ARGUMENT

The trial court erred in failing to find that the Respondent knowingly or purposely violated the Missouri Sunshine Law, declining to impose a civil penalty against the Respondent and denying Appellant's request for attorneys' fees and costs because the undisputed facts demonstrate, by a preponderance of the evidence, that the Respondent knowingly or purposely violated the Sunshine Law when it failed to disclose the requested records in that the facts do not support a finding that the Respondent reasonably believed nondisclosure was authorized by law.

> *"The newspapers, magazines, and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern."* *Grosjean v. Am. Press Co.,* 297 U.S. 233, 250, 56 S. Ct. 444, 449, 80 L. Ed. 660 (1936)

Amicus Curiae understands this case has been appealed by Appellant on a very narrow issue – whether the summary judgment granted by the trial court (affirmed by the Eastern District Court of Appeals) was correct in holding that because the Respondent had "two mutually conflicting obligations" and because it relied on "the advice of counsel" in making its choice, no civil penalty and/or award of attorneys fees and costs was proper. The

Amicus urges this Court to review the trial court's ruling in light of the evidence the trial court cites in its opinion and find that the Respondent either knowingly or purposely violated the Sunshine Law when it refused to disclose the public records requested by the Appellant, and either impose a proper penalty, attorneys fees and costs or remand the matter for such additional imposition of a proper penalty, attorneys fees and costs by the trial court. In conjunction with this, the Amicus requests this Court to issue a ruling as to the definition of the term "knowing" as used in Section 610.027.3.

1. Missouri's Sunshine Law has suffered from its weakness

Missouri's sunshine law, as set out in Chapter 610, has long suffered from extreme disregard by government. The law was originally created in 1973[2] and has been amended multiple times since that initial date. The language contained in Section 610.027 which is at issue in connection with the point Amicus is discussing was added initially in 1990 (specifically the reference to "purposely") and 2004 (specifically the provision relating to "knowing").[3] Neither term was defined by the Missouri legislature in these respective bills. However, it is logical to assume that there were two purposes intended in the creation of two separate sections of this statute, with two different definitions. "Language must not be construed in the abstract but should be defined in light of the construction that those who drafted and adopted the provision must have believed would be placed upon it." *Poertner v. Hess,* 646 S.W.2d 753, 756 (Mo. 1983).

While Missouri is without benefit of legislative history records, Amicus believes that each of these changes was motivated by a desire by the legislature to assess a penalty – a

2 See *Smith v. Sheriff,* 982 S.W.2d 775, 778 (Mo. Ct. App. 1998).

3 See 1990 Mo. Legis. Serv. H.B. 1395 & 1448 and 2004 Mo. Legis. Serv. S.B. 869

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penal remedy – when more than a simple violation has occurred.

> "When called upon to construe a statute, the court's prime duty is to give effect to the legislative intent as expressed in the statute. To this end we are guided by certain well established and recognized rules, among which are the following: (a) The object sought to be obtained and the evil sought to be remedied by the Legislature; (b) the legislative purpose should be assumed to be a reasonable one; (c) laws are presumed to have been passed with a view to the welfare of the community; (d) it was intended to pass an effective law, not an ineffective or insufficient one; (e) it was intended to make some change in the existing law. (Omitting cites.) The several sections of Chapter 610, considered together, speak loudly and clearly for the General Assembly that its intent in enacting the Sunshine Law, so-called, was that all meetings of members of public governmental bodies ... at which the peoples' business is considered must be open to the people and not conducted in secrecy, and also that the records of the body and the votes of its members must be open." *Cohen v. Poelker,* 520 S.W.2d 50, 52 (Mo. 1975).

However, these changes to the law in recent years, attempting to create an incentive for observation of the sunshine law requirements, have not resulted in significant respect for the obligations of that law. The Missouri State Auditor's office, in recent years, has included in its duties of auditing various state, county and local government entities, the creation of a regular report which includes observations regarding whether public bodies are properly following the Sunshine Law.

In its most recent report, released in October, 2014, covering audits between the period of January 2012 to December, 2013, it notes forty-four of its reports during that period

addressed sunshine law issues.[4] Those deficiencies noted by the State Auditor's office regarding public meetings included a lack of formal meeting minutes being prepared or maintained (six instances), meeting minutes lacking sufficient details or documentation (five instances), failure to properly document the reason for a closed meeting (cited in 24 instances), examples of business being conducted outside of a regular open meeting (cited in two cases), failure to approve minutes (three instances), lack of preparation of minutes for closed meetings (18 instances), lack of detail in closed meeting minutes (three instances), possible violations of the restrictions allowing closed meeting discussions due to failure to properly state a reason for the closed meeting (19 instances), illegal discussions in a closed meeting (8 citations), and failure to properly disclose actions in a closed meeting (two cases).

Similarly, in regard to public records, there were citations to failure to have a public access policy (six cases), failure to prepare a proper meeting agenda (six cases), and failure to post a closed meeting notice (two instances).

In the report issued prior to this one, issued in March, 2012 and covering the period from January, 2010, to December, 2011, the State Auditor's office documented fifty-five audits where violations of the Sunshine Law were found.[5]

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4 See Mo. State Auditor Thomas A. Schweich, Summary of State and Local Audit Findings-Sunshine Law, Oct., 2014, Report No. 2014-097, found at http://www.auditor.mo.gov/AuditReports/CitzSummary.aspx?id=321 (Last visited June 5, 2015).

5 See Mo. State Auditor Thomas A. Schweich, Summary of State and Local Audit Findings-Sunshine Law, March, 2012, Report No. 2012-19, found at http://www.auditor.mo.gov/AuditReports/CitzSummary.aspx?id=65 (Last visited June 5, 2015).

And the Amicus would also point out to the Court the study done by The Center for Public Integrity, and others, completed in March, 2012 and updated in May, 2015. This survey ranks each state in the United States on the basis of a number of categories related to its Open Meetings/Open Records law.[6] In that survey, Missouri is given an overall grade of C- and the survey points out that the state's ineffectiveness in its right of access to public records is closely tied to concerns over ethics issues in government.

Far too often, public bodies have acted knowing that courts in the State are reticent to impose penalties even if faced with litigation showing a clear violation of the law. This is a case where that should not be the rule. Amicus urges that this Court act to properly apply the language contained in Chapter 610 in a situation that clearly shows an intentional violation of that law.

2. The facts set out a "purposeful" violation of the Sunshine Law

Following the addition of the section establishing a penalty for "purposely" violating the law in 1990, this Court had occasion to address the term "purposely" and crafted a definition for that term.

> "Purposely" is defined as "intentionally; designedly; consciously; knowingly. Act is done 'purposely' if it is willed, is product of conscious design, intent or plan that is to be done, and is done with awareness of probable consequences." BLACK'S LAW DICTIONARY 1236 (6th ed.1990). "Purpose" is defined as "that which one sets before him to accomplish or attain; an end, intention, or aim,

6 This survey may be found at http://www.publicintegrity.org/2012/03/19/8423/grading-nation-how-accountable-your-state (last accessed June 8, 2015).

object, plan, project. Term is synonymous with ends sought, an object to be attained, an intention, etc." BLACK'S LAW DICTIONARY 1236 (6th ed.1990). *Spradlin v. City of Fulton,* 982 S.W.2d 255, 262 (Mo. 1998).

The Appellant has demonstrated to this Court that the Respondent's attorney issued a letter to its client pointing out that the document sought was subject to the state's Sunshine Law. (L.F. 34) (In fact, the Settlement Agreement itself contained a provision that said it was confidential "unless required by law," which obviously was language allowing the disclosure of that Agreement under the provisions of Section 610.021.1. (L.F. 113).) The attorney also recognized that the disclosure might possibly subject the Respondent to separate litigation due to the confidentiality clause it contained. (L.F. 34). The Respondent was advised it had two choices. It could choose to release the Agreement. It could choose to not release the Agreement. Either way, it might face litigation. The Respondent purposely weighed its two options and chose to take the option refusing access to what clearly was a public record. The Amicus believes this Court can face no clearer set of facts demonstrating a "product of conscious design, intent or plan that is to be done, and is done with awareness of probable consequences" as the definition is stated in *Spradlin,* above.

For that reason, this Court should find that the violation of the provisions of Chapter 610 constituted a "purposeful" violation and should either on its own, or by remanding the case to the trial court, proceed to impose the assessment of an appropriate penalty, attorneys fees and costs in this matter.

3. The provision for a "knowing" violation has lacked a clear definition

Should this Court decide the facts do not support a finding of having "purposely" violated the law, then Amicus believes clearly the same facts support a "knowing" violation

of the provisions contained in Section 610.027.

But the Amicus recognizes that the Missouri legislature did not see fit to provide a definition of that term in the statute. And to date, Missouri courts have spoken sparingly as to the meaning of that standard.

The Amicus is aware of the holding in *Wright v. City of Salisbury, Mo.,* No. 2:07CV00056 AGF, 2010 WL 2947709, at *6 (E.D. Mo. July 22, 2010), where the court discussed the issue of the lack of a definition of the term "knowing" and in an analysis of the facts held that the situation before it was not a "knowing" violation, focusing on the lack of evidence that the party had "actual knowledge" of the conduct violating state law. And the Amicus is aware of the holding in *White v. City of Ladue,* 422 S.W.3d 439, 452 (Mo. Ct. App. 2013), reh'g and/or transfer denied (Jan. 30, 2014), transfer denied (Mar. 25, 2014), affirming that definition.

The Amicus believes that the Appellant makes a strong argument that the definition of "knowing" should be broadened to cover not just "actual knowledge" as is defined in the Appellant's argument, but also to cover "constructive knowledge," as it is clear that a public official cannot escape responsibility for his or her actions in violation of the law because they have relied on an opinion of their attorney as to a basic legal requirement they are sworn by oath to uphold. If "constructive knowledge" includes that knowledge "attributed by law" to a person (as it is defined in BLACK'S LAW DICTIONARY),[7] then a public official should be held to have constructive knowledge of certain basic legal knowledge about the statutes which apply to that public office. "A public official holds his office *cum onere* with all responsibilities attached." *State v. Edwards,* 337 S.W.3d 118, 123 (Mo. Ct. App. 2011), citing *State, on Inf. of McKittrick v. Williams,* 346 Mo. 1003, 1015, 144 S.W.2d 98, 105

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7 BLACK'S LAW DICTIONARY 950 (9th ed. 2009).

(1940).

A public official has an obligation to know the laws under which they are elected to govern. They take an oath swearing to uphold the laws of the State of Missouri. These laws include the provisions contained in Chapter 610, and those provisions are of special significance to one who is conducting the public's business. While they may need the advice of their attorney as to complicated technical interpretations of the law, when they are advised that a matter is covered by a law, then they should bring to their decisions on those issues the basic diligence of one who has read that law. In this case, once the Respondent was told by its attorney that the counselor was "cognizant of RSMO 610.021" (L.F. 34), then they should be deemed to understand that the refusal to make a record public would violate that law. Their duty under Chapter 610 was made clear to them. It was a known fact.

For that reason, this Court should find that the violation of the provisions of Chapter 610 constituted a "knowing" violation and should either on its own, or by remanding the case to the trial court, proceed to impose the assessment of an appropriate penalty, attorneys fees and costs in this matter.

CONCLUSION

For the reasons stated herein, Amicus urges this Court to overturn the Appellate Court Order Affirming the underlying trial court's Judgment Under Rule 84.16(b), to find that either the Defendant knowingly or purposely violated the Sunshine Law when it refused to disclose the public records, and to remand the case to the trial court for imposition of a civil penalty and possible award of Plaintiff's attorneys' fees and costs, and for such other and further relief as this Court deems just and proper in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of June, 2015, a copy of the foregoing document was served electronically upon the counsel for Appellant and Respondent via the Missouri eFiling system and that the original pleading was signed by the attorney for the Amicus.

Further, the undersigned certifies that the brief above contains 4,740 words (no lines are single spaced), has been scanned for viruses and is virus-free, and complies with the provisions contained in Supreme Court Rule 84.06 (b).

/s/ Jean Maneke
Jean Maneke