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JURISDICTIONAL STATEMENT

Cape Girardeau County Commissioner Jay Purcell, in his individual capacity, sued the Cape Girardeau County Commission. The Cape Girardeau County Commission consisted of Jay Purcell and two other individuals. The Cape Girardeau County Commission was not a proper party defendant. The individual Commissioners were the proper party defendants. The issue was preserved at all stages of trial. This Honorable Court does not have jurisdiction over a fictional entity.

This appeal raises no issues which fall under the exclusive appellate jurisdiction of the Supreme Court of Missouri pursuant to Article V, Section 3, of the Missouri Constitution. As a result, this case is subject to the general appellate jurisdiction of the Missouri Court of Appeals. This case was tried in the Cape Girardeau County Circuit Court and, therefore, under MO.REV.STAT. §477.050 (2006) territorial jurisdiction rests with the Eastern District of the Missouri Court of Appeals.

The Supreme Court of Missouri has jurisdiction to hear this case pursuant to Article V, Section 10, of the Missouri Constitution in that the Supreme Court of Missouri has ordered transfer of this case after the Opinion by the Eastern District of the Missouri Court of Appeals had been entered.

STATEMENT OF FACTS

In the Missouri Court of Appeals, Eastern District, the Respondent pointed out to the Court and to Purcell that this appeal is taken from a denial of Appellant's Motion for Summary Judgment and a granting of Respondent's Motion for Summary Judgment. As a result both Purcell and Respondent are strictly limited to stating to this Honorable Court the "uncontroverted material facts" as presented to the Trial Court [Mo.R.Civ.P. 74.04(c)(1) and (2)]. Purcell has submitted to this Honorable Court the same Statement of Facts presented to the Missouri Court of Appeals, Eastern District. Purcell again varies widely from the "uncontroverted material facts" considered by the Trial Court. We again state our dissatisfaction and in accordance with Mo.R.Civ.P. 84.04(f) submit the correct Statement of Facts based on the "uncontroverted material facts" considered by the Trial Court.

Since this case is controlled by the uncontroverted material facts submitted under Mo.R.Civ.P. 74.04(c)(6), we will first present the pleadings that established those uncontroverted material facts. Those proffered "uncontroverted material facts" were contained in seventeen numbered paragraphs (LF 34-37) submitted by Purcell and eighteen numbered paragraphs (LF 67-70) submitted by the Respondent. LF 149, ¶ 2. Respondent admitted thirteen of Purcell's proffered "uncontroverted material facts" and denied four of those paragraphs. LF 67-68. Purcell admitted eleven of the Respondent's proffered "uncontroverted material facts," denied three of those paragraphs and challenged the materiality of four of those paragraphs. LF 107-108. The Trial Court considered the twenty-four agreed to "uncontroverted material facts." LF 150-152.

Additionally, the Trial Court found every single one (save one) of the remaining disputed paragraphs in Purcell's favor. LF 149-150. (The Trial Court did find that Paragraph 17 of Purcell's proffered "uncontroverted material facts" was "an out-of-court statement made subsequent to the April 17, 2008, meeting in question" and, therefore, immaterial to the issues in this case. LF 149. The Respondent respectfully submits that Purcell does not mention the facts in the rejected paragraph anywhere in his own Statement of Facts and, therefore, has waived that issue.)

We have carefully gone through Purcell's Statement of Uncontroverted Facts (LF 34-37), Respondent's Statement of Uncontroverted Facts (LF 67-70), Purcell's Reply to Respondent's Statement of Uncontroverted Facts (LF 107-108), and the Trial Court's ruling on the proffered uncontroverted facts (LF 149-150). The purpose of this exercise is to assure that this Statement of Facts reflects the exact facts agreed to by Purcell.

Therefore, the uncontroverted material facts exactly as Purcell agreed to them are set forth below. (For purposes of flow, we generally will cite to the Legal File at the end of each paragraph.)

Purcell is a citizen of the State of Missouri, a resident and taxpayer of Cape Girardeau County and a Cape Girardeau County Commissioner for District 2. The Cape Girardeau County Commission is a public governmental body organized pursuant to MO.REV.STAT. Chapter 49 (2006) subject to the Missouri Sunshine Law. The Cape Girardeau County Commission is composed of three members styled commissioners under MO.REV.STAT. §49.010 (2006). The members of the Cape Girardeau County Commission were Jay Purcell, Gerald Jones and Larry Bock. (Purcell's Statement of

Uncontroverted Facts, LF 34; Respondent's Statement of Uncontroverted Facts, LF 67; Trial Court's Judgment, LF 151.)

As of April 17, 2008, Purcell was an experienced politician. He had served parts of three terms on the City Council of the City of Cape Girardeau (the terms are four years in length). He had been elected to the Cape Girardeau County Commission in the fall of 2004. Purcell had received training in the Missouri Sunshine Law as a member of the City Council of the City of Cape Girardeau both at seminars and routinely by the City Attorney, Eric Cunningham. After being elected to the Cape Girardeau County Commission in 2004, Purcell received training in the Missouri Sunshine Law from the Missouri Association of Counties (said training is mandated by the legislature). During that period of time Purcell had been to possibly one hundred closed session meetings mostly as a council member with the City of Cape Girardeau. (Respondent's Statement of Uncontroverted Facts, LF 68; Purcell's Response to Respondent's Statement of Uncontroverted Facts, LF 107; and Trial Court's Judgment, LF 151.)

The Cape Girardeau County Commission rarely went into closed session and has only gone into closed session two or three times during Purcell's term of office. Purcell does not recall any other meetings other than the April 17, 2008, meeting when the Prosecuting Attorney was present for the closed session. (Respondent's Statement of Uncontroverted Facts, LF 69; Purcell's Response to Respondent's Statement of Uncontroverted Facts, LF 107.)

On or about April 17, 2008, the Cape Girardeau County Commission held a regularly scheduled meeting at the County Seat in Jackson, Missouri. The public Notice

and Agenda for the April 17, 2008, meeting stated that the Cape Girardeau County Commission would have an executive session where it may, as part of the regular or special County Commission meeting, hold a closed session to discuss legislation or litigation, leasing, purchasing, sale of real estate, or personnel matters. The public Notice and Agenda did not mention a discussion of the County Auditor. The public Notice and Agenda did not mention the potential discussion of recording real estate easements for the County. A portion of the April 17, 2008, meeting was held in open session and a portion was held in closed session. Present at the closed session portion of the April 17, 2008, meeting were Purcell and Commissioners Jones and Bock as well as the County Auditor and the Cape Girardeau County Prosecuting Attorney. (Purcell's Statement of Uncontroverted Facts, LF 35; Respondent's Statement of Uncontroverted Facts, LF 68.)

On April 17, 2008, Purcell concealed his tiny Olympus DSS player inside his sport jacket with the intent to tape the closed session discussion of the Cape Girardeau County Commission. Purcell moved to go into closed session to discuss both the "County Auditor issue" and "the McBryde easement" issue. At no time during the closed session on April 17, 2008, did Purcell object to being in closed session. During the closed session on April 17, 2008, Purcell never availed himself of the protections required by MO.REV.STAT. §610.022.6 (2006). (Respondent's Statement of Uncontroverted Facts, LF 69; Purcell's Reply to Respondent's Statement of Uncontroverted Facts, LF 108.)

At the April 17, 2008, meeting Purcell made a motion to adjourn to closed session. Commissioners Jones and Bock voted with Purcell to adjourn to a closed session. During the closed session portion of the meeting the members of the Cape Girardeau County

Commission discussed alleged misuse of County resources by the County Auditor and what options the Cape Girardeau County Commission had to punish the County Auditor or to get him to discontinue his violation of County policies on resource use. The County Auditor is an elected official pursuant to MO.REV.STAT. §55.050 (2006). In addition at the closed session the members of the Cape Girardeau County Commission also discussed the issue of an improperly notarized easement on County Road 436. (Purcell's Statement of Uncontroverted Facts, LF 36; Respondent's Statement of Uncontroverted Facts, LF 68.)

The following facts were not material to the Trial Court's ruling but were admitted by Purcell. We submit them to help this Honorable Court understand the genesis of this lawsuit.

On Friday, May 9, 2008, H. Morley Swingle learned from Peg McNichol, a reporter for the Southeast Missourian newspaper, that Purcell had secretly tape recorded the closed session portion of the April 17, 2008, Cape Girardeau County Commission meeting. She said "what are you going to do about Jay Purcell taping a closed session." Swingle knew that if Purcell had done so it would be a criminal offense under MO.REV.STAT. §610.020.3 (2006) and further knew that he (Swingle) had no choice but to turn that criminal investigation over to the Attorney General of the State of Missouri since he (Swingle) was present at that closed session and, therefore, a witness. (Respondent's Statement of Uncontroverted Facts, LF 70; Purcell's Reply to Respondent's Statement of Uncontroverted Facts, LF 108.)

Purcell received a call from the newspaper reporter telling him of the action Swingle was obligated to take. On Monday, May 12, 2008, the opinion of H. Morley Swingle that Purcell had committed a criminal violation was printed in the Southeast Missourian newspaper. (Respondent's Statement of Uncontroverted Facts, LF 70; Purcell's Reply to Respondent's Statement of Uncontroverted Facts, LF 108.)

After April 17, 2008, Purcell never voiced an objection or concern to any other Commissioner or the Prosecuting Attorney about the closed session until filing his lawsuit on May 14, 2008. (Respondent's Statement of Uncontroverted Facts, LF 69-70; Purcell's Reply to Respondent's Statement of Uncontroverted Facts, LF 108.)

On Wednesday, May 14, 2008, this suit was filed. (Respondent's Statement of Uncontroverted Facts, LF 70; Purcell's Reply to Respondent's Statement of Uncontroverted Facts, LF 108.)

At Purcell's deposition the court reporter certified the following question:

> "Q. . . . did you file this lawsuit as a strategy move to defend from potential prosecution?'
>
> Upon advice of counsel, the witness did not answer said question, which said question was referred by counsel to the Court for direction and I hereby certify said question to Your Honor for direction." (Respondent's Statement of Uncontroverted Facts, LF 70; Purcell's Reply to Respondent's Statement of Uncontroverted Facts, LF 108.)

In the Answer of the Respondent, the fact that Purcell had not sued a legal entity was raised. LF 17. Purcell filed his Motion for Summary Judgment. LF 33-46.

Respondent filed its Motion for Summary Judgment (incorrectly titled Motion for Declaratory Judgment). LF 66-72. Respondent filed its Motion to Amend Defendant's Motion to Dismiss and for "Declaratory Judgment." LF 146. The Trial Court granted Respondent's Motion to Amend Defendant's Motion to Dismiss and for "Declaratory Judgment" and found that Defendant's Motion to Dismiss and for Summary Judgment would be considered for disposition on the merits as a counter-motion for summary judgment along with Plaintiff Jay Purcell's Motion for Summary Judgment. LF 148.

On October 9, 2008, the Trial Court took up the case for oral argument. On October 24, 2008, the Trial Court issued its Judgment in this case. LF 2.

The Trial Court did not rule on the issue of whether the Plaintiff had sued a legal entity and said:

> "Notwithstanding the jurisdictional significance of the legal entity argument, this Court finds that it is not material to make such determination in order to reach a decision on the merits in this case based upon the premise that the Commission is such a legal entity." LF 153

The Trial Court then carefully examined and ruled on the "Sunshine Law" issues and granted Respondent summary judgment. LF 153-160.

Thereafter, Plaintiff took a timely appeal to the Missouri Court of Appeals, Eastern District. That Court reversed the Trial Court and remanded this case with directions that the action be dismissed without prejudice because the courts lacked jurisdiction because Appellant had not sued a legal entity.

POINTS RELIED ON

UNNUMBERED POINT

(RESPONDING TO APPELLANT'S UNNUMBERED POINT RELIED ON)

THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT, DID NOT ERR IN FINDING THAT THE RESPONDENT WAS NOT A LEGAL ENTITY WHICH COULD BE SUED BECAUSE RESPONDENT RAISED THE ISSUE OF JURISDICTION OF THE PERSON AS REQUIRED BY MO.R.CIV.P. 55.27 AND BECAUSE THE COURTS OF MISSOURI ONLY HAVE JURISDICTION OVER NATURAL PERSONS OR LEGAL ENTITIES IN THAT THE CAPE GIRARDEAU COUNTY COMMISSION WAS THE NAMED DEFENDANT AND NOT THE COUNTY OF CAPE GIRARDEAU OR THE INDIVIDUAL COMMISSIONERS.

American Fire Alarm Co. v. Board of Police Commissioners, 227 S.W. 114 (Mo. 1920)

Best v. Schoemehl, 652 S.W.2d 740 (Mo.App.E.D. 1983)

Parker v. Unemployment Compensation Commission, 214 S.W.2d 529 (Mo. 1948)

Werths v. Director, Division of Child Support Enforcement, 95 S.W.3d 136, 143 (Mo.App. W.D. 2003)

MO.REV.STAT. §§610.021 through 610.024 (2006)

MO.REV.STAT. §610.027, Subsections 3 and 4, (2006)

Mo.R.Civ.P. 52.04(a)

Mo.R.Civ.P. 52.13(d)

Mo.R.Civ.P. 55.27

POINTS RELIED ON

I

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO THE RESPONDENT BECAUSE THE RESPONDENT'S MEETING NOTICE AND AGENDA DID NOT VIOLATE EITHER MO.REV.STAT. §§610.020 OR 610.022 (2006) IN THAT SAID NOTICE ADVISED THE PUBLIC OF THE TIME, DATE AND PLACE OF THE CLOSED SESSION AND CITED TO A SPECIFIC EXCEPTION SET FORTH IN MO.REV.STAT. §610.021 (2006) AND BECAUSE THE REMEDY OF DECLARATORY JUDGMENT IS NOT JUSTIFIED IN THAT THE APPELLANT HAS FAILED TO SATISFY THE LEGAL REQUIREMENTS FOR A DECLARATORY JUDGMENT TO BE GRANTED.

Local Union 1287, et al., v. Kansas City Area Transportation Authority, 848 S.W.2d 462 (Mo. banc 1993)

Charron v. State, 257 S.W.3d 147 (Mo.App. W.D. 2008)

Buckner v. Burnett, 908 S.W.2d 908 (Mo.App. W.D. 1995)

Campbell 66 Express, Inc. v. Thermo King of Springfield, Inc., 563 S.W.2d 776, 778 (Mo.App. S.D. 1978)

MO.REV.STAT. §527.060 (2006)

MO.REV.STAT. §610.022 (2006)

MO.REV.STAT. §610.027.1 (2006)

Mo.R.Civ.P. 74.04

Mo.R.Civ.P. 87.07

Missouri Attorney General Opinion No. 68-95

Missouri Attorney General Opinion No. 97-90

POINTS RELIED ON

II

THE TRIAL COURT FOUND THAT THE THREE COMMISSIONERS "WANDERED OFF OF 'POTENTIAL LITIGATION'" DISCUSSIONS WHILE IN CLOSED SESSION BUT GRANTED SUMMARY JUDGMENT TO RESPONDENT ON ALL RELIEF REQUESTED BY APPELLANT BECAUSE THE UNCONTROVERTED MATERIAL FACTS AND THE LAW DID NOT ALLOW RELIEF IN THAT THERE WAS NO ACT TO SET ASIDE UNDER MO.REV.STAT. §610.027.5 (2006); THERE WERE NO GROUNDS FOR INJUNCTION; THERE WERE NO GROUNDS FOR DECLARATORY JUDGMENT; AND THERE WAS NO BASIS FOR ATTORNEY FEES OR OTHER DAMAGES UNDER MO.REV.STAT. §610.027, SUBSECTIONS 3 AND 4, (2006).

Tuft v. City of St. Louis, 936 S.W.2d 113 (Mo.App. 1996)

R.E.J., Inc., v. City of Sikeston, 142 S.W.3d 744 (Mo. 2004)

Charron v. State, 257 S.W.3d 147 (Mo.App. W.D. 2008)

Bates v. Webber, 257 S.W.3d 632 (Mo.App. S.D. 2008)

MO.REV.STAT. §610.022 (2006)

MO.REV.STAT. §610.027, Subsections 3 and 4, (2006)

MO.REV.STAT. §610.027.5 (2006)

POINTS RELIED ON

III

THE TRIAL COURT DID NOT ERR IN EXAMINING THE REQUIREMENTS OF MO.REV.STAT. §610.027, SUBSECTIONS 3 AND 4, (2006) AND DETERMINING THAT THERE WAS NO SHOWING THAT ANY COMMISSIONER ACTED KNOWINGLY OR PURPOSELY BECAUSE SUCH A FINDING WAS NECESSARY ON THE ISSUE OF ATTORNEY FEES, COSTS AND OTHER UNSPECIFIED RELIEF IN THAT APPELLANT HAD LED THE TRIAL COURT TO BELIEVE THAT HE WAS REQUESTING SUCH RELIEF.

MO.REV.STAT. §610.027, Subsections 3 and 4, (2006)

POINTS RELIED ON

IV

(RESPONDING TO POINT I OF BRIEF OF AMICUS CURIAE)

IN THE EVENT THE BRIEF OF AMICUS CURIAE FILED IN THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT, IS CONSIDERED, THEN WE STATE THAT THE TRIAL COURT DID NOT ERR IN FINDING THAT PURCELL (AND THE OTHER COMMISSIONERS) "VARIED WIDELY FROM THE APPROPRIATE SUBJECT OR SUBJECTS OF THE CLOSED SESSION" BECAUSE THE TRIAL COURT THEN WENT ON TO ANALYZE ALL RELIEF REQUESTED BY PURCELL IN THAT THE TRIAL COURT COMPLETELY REVIEWED REMEDIES AVAILABLE UNDER MO.REV.STAT. §610.027 (2006) AND ELSEWHERE.

Tuft v. City of St. Louis, 936 S.W.2d 113 (Mo.App. 1996)

MO.REV.STAT. §610.021.1 (2006)

MO.REV.STAT. §610.027, Subsections 3 and 4, (2006)

ARGUMENT

UNNUMBERED POINT

(RESPONDING TO APPELLANT'S UNNUMBERED POINT RELIED ON)

THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT, DID NOT ERR IN FINDING THAT THE RESPONDENT WAS NOT A LEGAL ENTITY WHICH COULD BE SUED BECAUSE RESPONDENT RAISED THE ISSUE OF JURISDICTION OF THE PERSON AS REQUIRED BY MO.R.CIV.P. 55.27 AND BECAUSE THE COURTS OF MISSOURI ONLY HAVE JURISDICTION OVER NATURAL PERSONS OR LEGAL ENTITIES IN THAT THE CAPE GIRARDEAU COUNTY COMMISSION WAS THE NAMED DEFENDANT AND NOT THE COUNTY OF CAPE GIRARDEAU OR THE INDIVIDUAL COMMISSIONERS.

There was no new law created by the Missouri Court of Appeals, Eastern District, in its decision. It has been black letter hornbook law for many years that parties to litigation must be natural persons or legal entities. Parker v. Unemployment Compensation Commission, 214 S.W.2d 529 (Mo. 1948). When reviewing this case it is reasonable to ask why Purcell did not simply amend his Petition and include the individual Commissioners as defendants. To answer this, the Court need look no further than Purcell's own actions on April 17, 2008. Purcell was a co-equal Commissioner equally responsible for the "public notice and agenda" about which he now complains. LF 151-152. Purcell himself made the motion to go into closed session. LF 152. While in closed session he led the Commissioners in a discussion that "varied widely from the

appropriate subject or subjects of closed session." LF 157. Although he recorded the closed session, he never availed himself of the protections of MO.REV.STAT. §610.022.6 (2006). LF 152. He never voiced any objection or concern about any of his own misdeeds until this politically motivated suit was filed on May 14, 2008. LF 152. Had he properly amended his pleadings after the jurisdiction issue was raised, he would have literally sued himself, thereby exposing himself to political humor and a quick dismissal of his suit since a party cannot sue himself. Connell v. Murray, 423 S.E.2d 304 (Ga.App. 1992) (stating that a party cannot be both plaintiff and defendant in the same action). Let us now review Purcell's arguments against the decision of the Missouri Court of Appeals, Eastern District.

Did Chapter 610 carve out any exception to the rule that parties to litigation must be legal entities? We can all agree with Purcell without further argument that "the Chillicothe City Council," "the Rock Port School Board," "the Jefferson City Planning and Zoning Commission" and "the Perry County T.I.F. Commission" are all covered by Chapter 610 of the Missouri Statutes (hereinafter referred to as the Sunshine Law). However, no lawyer would think of suing any of those groups using just their "street names." If a lawyer wants to sue the "Jackson Coca-Cola Plant" she or he knows to search the records of the Missouri Secretary of State and find the appropriate legal entity to sue and to fashion the pleadings accordingly. The requirement is no different for a lawyer suing a government entity under this "new" Sunshine Law. This is not new. 59 Am.Jur.2d Parties §20. A careful reading of each section of the thirty-one sections of the Sunshine Law shows that there is no suggestion of an effort by the legislature to change

this rule just on Sunshine Law cases. MO.REV.STAT. §§610.010 through 610.225 (2006). The disaster of "legal Armageddon" suggested by Purcell if he is held to this rule is just wrong. Any lawyer who finds that "the Rock Port School Board" has violated the Sunshine Law knows that it can be sued as "the Rock Port R-I School District" (the legal name of the school district according to the Missouri Department of Elementary and Secondary Education) or in the individual board member names.

Does the restatement of the law by the Missouri Court of Appeals, Eastern District, create impossible hurdles for trial attorneys? Let us now review Purcell's parade of paradoxes proffered at Page 17 of his Substitute Brief.

1. He asks "Should a taxpayer sue all members of a body even if only one member violated the law?" That depends on the purpose of the suit. For example, suits for damages under MO.REV.STAT. §610.027, Subsections 3 and 4, (2006) should exclude innocent parties. Suits to obtain records under MO.REV.STAT. §§610.021 through 610.024 (2006) would be best against all the members of the body controlling the documents. Each fact situation would guide the trial attorney's strategy, but none is too difficult to figure out.

2. He asks "What happens if one of the members of the body leaves office during the litigation?" Of course, Mo.R.Civ.P. 52.13(d) allows for substitution of a party if the party is a public officer sued in the party's official capacity. We also suggest that Mo.R.Civ.P. 52.13(d) is strong evidence that the Missouri Supreme Court has always assumed that public officers would be named individually as defendants where appropriate.

3. He asks "Will that departed member still be bound by any judgment?" If the member is sued in his official capacity, then the judgment relates to his official position. If the member is sued under MO.REV.STAT. §610.027, Subsections 3 and 4, (2006) for personal bad acts, then the judgment would bind the person.

4. He asks "Does a newly elected or appointed member have to be joined if there is a pending lawsuit for enforcement of the Sunshine Law at the time the new member takes his position on the body?" It depends on the purpose of the suit, but in a suit to obtain records it would be prudent to joint the sitting members. MO.REV.STAT. §§610.021 through 610.024 (2006). See also Mo.R.Civ.P. 52.13(d).

5. He asks "Can a new member be joined even if he/she had nothing to do with the subject matter of the lawsuit?" If the suit is to compel the body to act [see MO.REV.STAT. §§610.021 through 610.024 (2006)], then Mo.R.Civ.P. 55.13(d) provides for that.

6. He asks "Does a quorum of the body have to be sued in order for any court order to be binding against the body?" We can think of no instance where the term "quorum" would be controlling or useful in planning litigation. It would be necessary for a trial court to find that a person must be joined if "relief cannot be accorded among those already parties." Mo.R.Civ.P. 52.04(a). If suing the "Rock Port School Board," for example, it would be necessary to name the individual filling each board seat (as opposed to suing the Rock Port R-I School District if the District was the appropriate defendant).

Purcell's parade of paradoxes presents no problem for the trial attorney. As in all cases, the attorney needs to always professionally consider how the case is to be presented.

Are the statements about the Missouri statutes at Lines 1 and 2 at the top of Page 20 of Appellant Jay Purcell's Substitute Brief correct? They are not as shown:

1. MO.REV.STAT. §49.210 (2006) allows the county commission to cause people to come before them. This section remains from when they were the "county court" and takes no steps to bind them into a legal entity that may sue or be sued.

2. MO.REV.STAT. §49.270 (2006) allows the commissioners to deal with real estate owned by the County.

3. MO.REV.STAT. §49.287 (2006) allows the commissioners to settle debts of or to the County.

4. MO.REV.STAT. §49.300 (2006) allows the commissioners to condemn real property for the County.

All of the statutes cited by Purcell relate to actions of the County with the Commission acting only as the governing arm of the County, not as a separate legal entity.

Are the four cases that Purcell proffers at Page 20 of his Substitute Brief as precedent truly justification for his desire to sue a "County Commission"? Mo.R.Civ.P. 55.27 requires that "lack of jurisdiction over the person" be raised and if not raised it is waived. The cases cited by Purcell are of no precedential value. We have

found that often the reporter system omits the commissioner names and that the names have to be searched for. In other cases, the defense is just never raised.

1. Franklin County ex rel. Parks v. Franklin County Commission, et al., 269 S.W.3d 26 (Mo. 2008). We attach a copy of the cover sheet of the Brief of Respondents filed in the Missouri Supreme Court as Appendix A1. We note that the Franklin County Counselor is the attorney for respondents, Franklin County Commission, Edward Hillhouse, Terry O. Wilson and Ann G. L. Schroeder. Hillhouse, Wilson and Schroeder are the Franklin County Commissioners (Official Manual State of Missouri 2005-2006, p. 809). The plaintiffs therein correctly sued the individual commissioners.

2. Shawnee Bend Special Road District "D" v. Camden County Commission, et al., 800 S.W.2d 452 (Mo.App. S.D. 1990). The decision of the court clearly states at Page 453 that the defendants are . . . the three members of the county commission . . . .

3. In Re Petition for Incorporation of Village of Table Rock v. The County of Stone, The County Commission of Stone County, Missouri, George Cutbirth, Denny McCrorey, and Jerry Dodd, constituting the Stone County Commission, 201 S.W.3d 543 (Mo.App. S.D. 2006), is yet another case where the individual county commissioners are properly named.

4. Kuyper v. Stone County Commission, 838 S.W.2d 436 (Mo. 1992). Stone County was represented by Robert B. Fuchs of Sikeston, Missouri, and Thomas W. Rynard of Jefferson City, Missouri. Those two excellent attorneys have the right to waive any defense they choose on behalf of Stone County. See Mo.R.Civ.P. 55.27. We do not know if this issue was not timely raised as required by Mo.R.Civ.P. 55.27 or

whether it was waived for strategic reasons. The ultimate result is that it provides no negative precedence for cases in which the defense is timely raised.

Purcell can find no case in which the jurisdictional defense was properly raised under Mo.R.Civ.P. 55.27 and in which a party was allowed to sue any entity called the "County Commission." We were unable to find such a case. The Missouri Court of Appeals, Eastern District, was unable to find such a case. No such case exists.

Does the Court have jurisdiction over a defendant called "the Cape Girardeau County Commission" when that defense is properly raised under Mo.R.Civ.P. 55.27? We cannot improve on the analysis of the Missouri Court of Appeals, Eastern District, on this issue. We attach the decision of that Court as Appendix A2 and respectfully refer this Honorable Court to Pages 5 through 9 of that decision.

Admirably the Trial Court wanted to settle all disputes between the parties. It did not want to avoid the other legal issues by letting Purcell's jurisdictional mistake be dispositive. The Trial Court said:

> "Defendant has argued the 'Cape Girardeau County Commission' is not a legal entity against which suit may be brought when that issue is properly raised before the Court. . . . Notwithstanding the jurisdictional significance of the legal entity argument, this Court finds that it is not material to make such determination in order to reach a decision on the merits in this case based upon the premise that the Commission is such a legal entity." LF 153 (emphasis added).

The defendant named in this action is the "Cape Girardeau County Commission." That is not a proper defendant against which suit may be brought. The Respondent preserved this point at Paragraph 3 of its "Answer to Petition for Judicial Enforcement of Missouri's Sunshine Law and for Injunctive Relief" wherein it is stated:

> ". . . the Cape Girardeau County Commission is not a legal entity which may be sued in the manner attempted by plaintiff/member defendant. All suits must be brought against the individual County Commissioners in their capacity as the County Commission."

The law is settled that a party to an action in court must be a legal entity, that is, either a natural person, an artificial person or a quasi artificial person. Parker v. Unemployment Compensation Commission, 214 S.W.2d 529 (Mo. 1948). The "Cape Girardeau County Commission" is the name given to the three individuals who serve as County Commissioners in Cape Girardeau County. MO.REV.STAT. §49.010 (2006). That entity has no right to hold property and no right to sue or be sued in its own name.

As set forth in Best v. Schoemehl, 652 S.W.2d 740 (Mo.App.E.D. 1983), it has long been established that a Board of Commissioners may only be sued by bringing an action against the individual members of the Board in their official capacity. American Fire Alarm Co. v. Board of Police Commissioners, 227 S.W. 114 (Mo. 1920). In a suit naming individuals comprising a board or commission as defendants in their official capacity it is not an attempt to hold the commissioners individually liable but is the only method to properly bring them before the court. Best v. Schoemehl, supra.

As this Honorable Court well knows, prisoner filed suits under 42 U.S.C. §1983 which sue "the County Commission" are regularly dismissed in federal court. Very simply put, the federal courts always find with little or no discussion that "the County Commission" is not an identifiable entity. Estate of Rosenburg v. Crandell, 56 F.3d 36 at 37 (8th Cir. 1995).

A party is a natural person, artificial person or other legal entity that has the capacity to sue or be sued. Werths v. Director, Division of Child Support Enforcement, 95 S.W.3d 136, 143 (Mo.App. W.D. 2003).

Purcell made his strategic decision to sue the County Commission rather than name himself as a defendant. He chose to stick with that decision when the issue was raised at the Trial Court level. He is stuck with the consequences of his legal strategy. The Missouri Court of Appeals, Eastern District, ruled analytically, thoughtfully and reasonably and that decision should be affirmed. We respectfully request that Purcell's action be dismissed.

I

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO THE RESPONDENT BECAUSE THE RESPONDENT'S MEETING NOTICE AND AGENDA DID NOT VIOLATE EITHER MO.REV.STAT. §§610.020 OR 610.022 (2006) IN THAT SAID NOTICE ADVISED THE PUBLIC OF THE TIME, DATE AND PLACE OF THE CLOSED SESSION AND CITED TO A SPECIFIC EXCEPTION SET FORTH IN MO.REV.STAT. §610.021 (2006) AND BECAUSE THE REMEDY OF DECLARATORY JUDGMENT IS NOT JUSTIFIED IN THAT THE APPELLANT HAS FAILED TO SATISFY THE LEGAL REQUIREMENTS FOR A DECLARATORY JUDGMENT TO BE GRANTED.

The Missouri Sunshine Law is a very important link in our chain of good government. It should not be misused by politicians who do something wrong and then use it as a publicity tool against their enemies. A lawsuit should have meaning. Lyons v. School District of Joplin, 311 Mo. 349, 365, 278 S.W. 74, 78 (Mo. 1925).

We respectfully refer this Honorable Court to the Judgment of the Trial Court (LF 148-160). The Trial Court was critical of Purcell and his fellow Commissioners and thoroughly searched the facts presented to it under Mo.R.Civ.P. 74.04 and the law of Missouri.

It is important to note that in Purcell's Substitute Brief before this Honorable Court he sets out what relief he wants when he states:

> "Purcell asked the circuit court for a declaration that the Commission's notice and agenda violated §§610.020 and 610.022, RSMo because it cited to the wrong statutes and did not reasonably advise the public as to what the Commission would discuss at its meeting." Appellant Jay Purcell's Substitute Brief, p. 23

The Trial Court correctly found that the Respondent must comply with MO.REV.STAT. Chapter 610 (LF 152, ¶5) and that MO.REV.STAT. §610.027.1 (2006) provides that the remedies provided by the Sunshine Law are in addition to those provided for any other provision of the law [LF 153, ¶8(a)]. Therefore, Purcell's request for declaratory judgment must be analyzed and considered; which the Trial Court did (LF 158, ¶13). A declaratory judgment is more than just a publicity tool; it is more than just a document that says "I am good and my enemies are bad"; it has form and purpose; it is granted only after the party seeking it meets definite legal requirements. See Declaratory Judgment Act, MO.REV.STAT. §§527.010 through 527.130 (2006).

Courts tend to treat declaratory judgment actions in accord with equitable principles. C.S. v. J.W., 514 S.W.2d 848 (Mo.App. W.D. 1974). Due to the unique nature of the declaratory judgment, "the trial court has a considerable measure of discretion in determining whether or not a declaratory judgment action should be entertained." Campbell 66 Express, Inc. v. Thermo King of Springfield, Inc., 563 S.W.2d 776, 778 (Mo.App. S.D. 1978). Both MO.REV.STAT. §527.060 (2006) and Mo.R.Civ.P. 87.07 provide that the court may refuse to render or enter a declaratory judgment or decree where the judgment or decree would not terminate the uncertainty or controversy

giving rise to the proceeding. Given the fact-intensive nature of justiciability determinations, the trial court has broad discretion in deciding whether facts are sufficiently mature to justify judicial intervention by way of a declaratory judgment. Missouri Property Ins. Placement Facility v. McRoberts, 598 S.W.2d 146 (Mo.App. E.D. 1978) (courts have wide discretion in administering the Uniform Declaratory Judgment Act); Webb-Boone Paving Co. v. State Highway Comm'n, 351 Mo. 922, 173 S.W.2d 580 (1943).

A question is justiciable only where the judgment will declare a fixed right and accomplish a useful purpose. Local Union 1287, et al., v. Kansas City Area Transportation Authority, 848 S.W.2d 462 (Mo. banc 1993). There are four elements that must be met in order for Purcell to escape summary judgment. Charron v. State, 257 S.W.3d 147 (Mo.App. W.D. 2008). The Trial Court correctly found that Purcell failed to satisfy the four necessary elements (LF 158-159, ¶13).

We respectfully submit that there is nothing in this case for a court to declare. Just as in the case of Buckner v. Burnett, 908 S.W.2d 908 (Mo.App. W.D. 1995), wherein the court found that it had nothing to enforce on a past and done Sunshine Law violation, the Trial Court herein had nothing to declare between the parties. Therefore, even if the notice to go into closed session was defective, Purcell had not met any of the elements necessary for summary judgment.

However, the Trial Court found that the notice to go into closed session was not defective (LF 155, ¶9). (See also Brief of Amicus Curiae The Missouri Press Association, p. 12, stating that the "notice, while not as well drafted as one would wish

for, probably met the basic standard for a proper notice . . . .") Although in a perfect world we should analyze the notice language in a vacuum, we submit that this notice must be viewed in light of the facts that occurred on April 17, 2008. On April 17, 2008, Purcell concealed his tiny Olympus DSS player inside of his sport jacket with the intent to tape the closed session discussion of the Cape Girardeau County Commission. Purcell moved to go into closed session to discuss both the "County Auditor issue" and "the McBryde easement" issue (LF 69, 108). At the moment Purcell moved to go into closed session on the two issues of which he now complains, he knew exactly what the notice to go into closed session said.

However, the Opinions of the Missouri Attorney General have adopted a "Rule of Reason" approach to this issue. Missouri Attorney General Opinion No. 97-90 is helpful on this issue. Therein the Missouri Attorney General said:

> "It is the opinion of this office that pursuant to Section 610.022.2, RSMo Supp. 1989, notice of a closed meeting of a public governmental body must include the time, date and place of the meeting and a reference to the specific statutory exception allowing the meeting to be closed; however, notice of a closed meeting is not required to include a tentative agenda."

In 1995 the Missouri Attorney General also addressed this issue. The Missouri Attorney General continued with the "Rule of Reason" approach set forth above by his predecessor. Missouri Attorney General Opinion No. 68-95 stated:

> "Your first question is answered by the language of Section 610.022. Subsection 2 requires a public governmental body proposing to hold a

closed meeting to give notice of 'the reason for holding it by reference to the specific exception' allowing the meeting to be closed ."

The "uncontroverted material facts" agreed to by Purcell give no possible alternative on the issue of declaratory judgment other than that reached by the Trial Court. Purcell has not cited any law to this Honorable Court to explain why the Trial Court was incorrect in its analysis of the law of declaratory judgments.

In conclusion, we respectfully request this Honorable Court to agree with the Missouri Press Association, the Missouri Attorney General and the Trial Court that the Notice was sufficient under the law. If this Honorable Court finds that it was not, then we respectfully request that the Trial Court's ruling on Purcell's request for declaratory judgment be affirmed.

II

THE TRIAL COURT FOUND THAT THE THREE COMMISSIONERS "WANDERED OFF OF 'POTENTIAL LITIGATION'" DISCUSSIONS WHILE IN CLOSED SESSION BUT GRANTED SUMMARY JUDGMENT TO RESPONDENT ON ALL RELIEF REQUESTED BY APPELLANT BECAUSE THE UNCONTROVERTED MATERIAL FACTS AND THE LAW DID NOT ALLOW RELIEF IN THAT THERE WAS NO ACT TO SET ASIDE UNDER MO.REV.STAT. §610.027.5 (2006); THERE WERE NO GROUNDS FOR INJUNCTION; THERE WERE NO GROUNDS FOR DECLARATORY JUDGMENT; AND THERE WAS NO BASIS FOR ATTORNEY FEES OR OTHER DAMAGES UNDER MO.REV.STAT. §610.027, SUBSECTIONS 3 AND 4, (2006).

We can all agree that Chapter 610 stands for open meetings and records. We are sure that the legislature never contemplated the bizarre actions of Purcell on April 17, 2008, when it wrote the law. We are sure that the legislature never contemplated a public official suing himself for his own actions. Even so, as his defense attorney we have striven to defend Purcell against his own allegations.

The Trial Court expressed a bit of its frustration with Purcell's arguments when it said:

> "7. The plaintiff fully and completely led or participated in all of the actions that he now alleges were in violation of Chapter 610. Plaintiff did not avail himself of the protections provided in Section 610.022. Section

> 610.027 does give broad rights for the bringing of suit to enforce Chapter 610 to almost any individual. Chapter 610 is a statutory enactment which includes statutory as well as equitable enforcement remedies. The Court finds that the legislature did not intend to allow a public official to commit violations of Chapter 610 and then sue himself as a member defendant of that body in order to reap the equitable benefits of judicial enforcement as a shield from any repercussions of those violations." LF 153.

The April 17, 2008, closed session of the Cape Girardeau County Commission was led by Purcell. He moved to go into closed session (while recording it with no one else's knowledge) and then he led his fellow Commissioners in a rambling and uncontrolled closed session. LF 156.

Purcell complains at Appellant Jay Purcell's Substitute Brief, p. 25, that the Respondent has not met its burden of persuasion to demonstrate compliance with the requirements of MO.REV.STAT. §§610.010 through 610.025 (2006).

When Purcell sued himself in this case, he put a heavy burden on Respondent's counsel to defend and justify his actions. Purcell totally misreads the Trial Court's judgment; Respondent's counsel failed. LF 156, ¶ 11. The Trial Court found that Purcell had led his fellow Commissioners off the permissible track. First the Trial Court said:

> "(b) Section 610.027.2 provides that once a closed meeting, record or vote is shown, the 'burden of persuasion shall be on the body and its members to demonstrate compliance' (emphasis added). In this case the Court is presented with one of the members being both the plaintiff and a member

defendant. Even so this Court must require the Commissioners to persuade the Court of their compliance. The uncontroverted facts . . . show that the burden of persuasion has been met on some actions of the Commissioners and not met on some of the other actions of the Commissioners. The Court will discuss that more fully below." LF 154.

Then the Trial Court said:

"11. The Court now looks at the actual closed session itself. There is no doubt that the three County Commissioners discussed potential litigation on both the 'County Auditor' issue and on the 'McBryde easement' issue. Discussion of potential litigation is appropriate in closed session. ***Tuft v. City of St. Louis***, 936 S.W.2d 113 (Mo.App. 1996). However, it is also clear to the Court that the discussions in closed session wandered off of 'potential litigation' to a large degree especially during the County Auditor portion of the discussions. All public bodies should establish procedures and practices for closed session that would limit the rambling engaged in by this body on April 17, 2008, while in closed session. The mere fact that one or more members of a public governmental body wander off the permissible subject does not change the fact that the body is in closed session and should always endeavor to follow the dictates of Chapter 610." LF 156-157.

The language of the Trial Court is a firm finding that Purcell and the other Commissioners "wandered off" and "rambled" and "should always endeavor to follow

the dictates of Chapter 610." We do not know how the Trial Court could have put it more plainly. So convinced was the Trial Court that it immediately analyzed what relief was available.

Purcell does nothing in his Substitute Brief to argue against the Trial Court's findings and analysis on the issue of remedy. We will survey each remedy briefly along with the Trial Court's citations.

- The Trial Court said that it would consider setting any action taken in closed session aside under MO.REV.STAT. §610.027.5 (2006). However, the uncontroverted material facts showed that no action was taken and, therefore, nothing to set aside. Therefore, summary judgment to Respondent. LF 157-158; R.E.J., Inc., v. City of Sikeston, 142 S.W.3d 744 (Mo. 2004).
- The Trial Court then considered whether it could issue an injunction requested by Purcell. LF 158, ¶12. (Nowhere in his Substitute Brief does Purcell mention the denied injunction nor ask this Honorable Court for that relief and it is, therefore, waived.) The Trial Court found that the uncontroverted material facts did not support the issuance of an injunction. Therefore, summary judgment to Respondent. LF 158; Bates v. Webber, 257 S.W.3d 632 (Mo.App. S.D. 2008); Hudson v. The School District of Kansas City, 578 S.W.2d 301 (Mo.App. 1979); St. Louis County v. St. Louis County Police Officers Ass'n, Local 844, 652 S.W.2d 142 (Mo.App. 1983).

- The Trial Court then considered whether it could issue a declaratory judgment requested by Purcell. LF 158, ¶ 13. (See Respondent's Reply to Point I of Appellant Jay Purcell's Substitute Brief herein.) The Trial Court found that the uncontroverted material facts did not support the issuance of a declaratory judgment. Therefore, summary judgment to Respondent. LF 158-159; Charron v. State, 257 S.W.3d 147 (Mo.App. W.D. 2008).
- The Trial Court then considered whether civil penalties were due under MO.REV.STAT. §§610.027.3 and 610.027.4, RSMo (2006). (See Respondent's reply to Point III of Appellant Jay Purcell's Substitute Brief herein.) The Trial Court found that Purcell's actions (and those of his fellow Commissioners) were not such as to "knowingly or purposely" violate Chapter 610 according to the uncontroverted material facts. LF 157, ¶11(a), (b) and (c). Therefore, summary judgment to the Respondent.

There was no other relief requested or available and, therefore, the Trial Court was left with no alternative but to grant summary judgment to Respondent. We respectfully request this Honorable Court to find in favor of Respondent on Point II of Appellant Jay Purcell's Substitute Brief.

III

THE TRIAL COURT DID NOT ERR IN EXAMINING THE REQUIREMENTS OF MO.REV.STAT. §610.027, SUBSECTIONS 3 AND 4, (2006) AND DETERMINING THAT THERE WAS NO SHOWING THAT ANY COMMISSIONER ACTED KNOWINGLY OR PURPOSELY BECAUSE SUCH A FINDING WAS NECESSARY ON THE ISSUE OF ATTORNEY FEES, COSTS AND OTHER UNSPECIFIED RELIEF IN THAT APPELLANT HAD LED THE TRIAL COURT TO BELIEVE THAT HE WAS REQUESTING SUCH RELIEF.

We respectfully state that we are puzzled by Point III of Appellant Jay Purcell's Substitute Brief and a little saddened by the misstatement of the ruling of the Trial Court. The Trial Court never "concluded that the Commission was absolved from its Sunshine Law violations because it did not do so purposefully or knowingly." Appellant Jay Purcell's Substitute Brief, p. 30.

When faced with the pleadings (LF 6-14 and LF 33-46) and arguments of Purcell, the Trial Court exhibited extreme patience and courtesy to all parties. The Trial Court examined all remedies available without considering any required mental state. The Trial Court only interjected the concepts of "knowingly and purposely" at Paragraphs 8(c) and (d) (LF 154), 9 (LF 155), 10 (LF 156), and 11(a), (b) and (c) (LF 157) of its Findings of Fact and Conclusions of Law and Paragraphs A, B and C of its Final Judgment.

In Purcell's Petition he asked the Trial Court to award "attorneys fees and costs" and such other and further relief as the court shall deem proper. LF 13. In Purcell's Motion for Summary Judgment he asked the Trial Court for any just and proper relief

that the Trial Court might deem proper. LF 38. It is only reasonable that a careful trial judge would feel compelled to rule on all potential "Sunshine Law" issues. The only two provisions that could give Purcell the relief referenced above were MO.REV.STAT. §610.027, Subsections 3 and 4, (2006) and those subsections require acts that are knowingly or purposely done.

Rather than ignore or dismiss Purcell's prayer for attorney fees and costs, the Trial Court took it on itself to review the law and give him the courtesy of a decision on that issue. The uncontroverted material facts showed clearly that neither Purcell nor the other Commissioners acted purposely or knowingly in violation of MO.REV.STAT. §610.027, Subsections 3 and 4, (2006). Summary judgment was granted to the Respondent on that issue.

The Trial Court never suggested that all actions must be done "purposely or knowingly" in order for the Trial Court to find a violation of the requirements of MO.REV.STAT. Chapter 610 (2006). In fact, the Trial Court analyzed every other possible relief to Purcell without injecting any intent requirements. (See Point II of Substitute Brief of Respondent.)

The Trial Court courageously ruled on every issue presented by Purcell and tried to make sense of every request made by Purcell. Purcell was not entitled to attorney fees and costs because neither he nor the other two Commissioners acted knowingly or purposely to violate the Sunshine Law. He lost on all of the other issues because of the reasons clearly stated by the Trial Court in its Findings of Fact and Conclusions of Law and Final Judgment. LF 149-160.

Purcell cites no law in support of his Point III of Appellant Jay Purcell's Substitute Brief. We respectfully suggest that point is nothing more than a "straw man" issue propped up to be knocked down. This issue never existed in the rulings of the Trial Court. We respectfully request this Honorable Court to affirm the Judgment of the Trial Court.

IV

(RESPONDING TO POINT I OF BRIEF OF AMICUS CURIAE)

IN THE EVENT THE BRIEF OF AMICUS CURIAE FILED IN THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT, IS CONSIDERED, THEN WE STATE THAT THE TRIAL COURT DID NOT ERR IN FINDING THAT PURCELL (AND THE OTHER COMMISSIONERS) "VARIED WIDELY FROM THE APPROPRIATE SUBJECT OR SUBJECTS OF THE CLOSED SESSION" BECAUSE THE TRIAL COURT THEN WENT ON TO ANALYZE ALL RELIEF REQUESTED BY PURCELL IN THAT THE TRIAL COURT COMPLETELY REVIEWED REMEDIES AVAILABLE UNDER MO.REV.STAT. §610.027 (2006) AND ELSEWHERE.

We note that Mo.R.Civ.P. 83.08 states that it is optional for the amicus curiae to file a Substitute Brief but if they do not then their original Brief of Amicus Curiae filed in the Missouri Court of Appeals, Eastern District, will be considered. The Respondent is filing this Substitute Brief of Respondent and Mo.R.Civ.P. 83.08 states that by so doing Respondent "shall not incorporate by reference any material from the Court of Appeals briefs." Therefore, it is prudent and required that Respondent argue against the Brief of Amicus Curiae herein. If this Honorable Court does not consider the Brief of Amicus Curiae, then this Point IV need not be considered; if the Brief of Amicus Curiae is considered, then we respectfully submit this Point IV.

Respondent's counsel appreciates the fact that the Brief of Amicus Curiae credits a "win" to us in our efforts to defend Purcell's (and the other Commissioners') actions

while in closed session. However, the Trial Court clearly stated that the discussions in closed session "wandered off" of potential litigation. LF 156. The Trial Court then went on to admonish Purcell and the other Commissioners and told them to establish "procedures and practices for closed session that would limit the rambling engaged in by this body on April 17, 2008, while in closed session." LF 156. The Trial Court then zeroed in on the two remaining members and told them that just because Purcell wandered off the permissible subject does not change the fact that they need to follow Chapter 610 and not Purcell. LF 156-157.

The Trial Court then went on to analyze the actions of all three Commissioners in Paragraph 11(a), (b) and (c). LF 157. In those three subparagraphs the Trial Court even considered sanctions against the Respondent under MO.REV.STAT. §610.027, Subsections 3 and 4, (2006), but found that the uncontroverted material facts did not show that any action was purposeful or knowing. LF 157. The Trial Court then went on to say that if any action was taken while on improper subjects the Court would be obliged to closely scrutinize those actions and set them aside under MO.REV.STAT. §610.027.5 (2006). LF 157-158.

The Brief of Amicus Curiae focuses on the propriety of going into closed session to discuss potential litigation. It suggests the interesting question of whether an attorney telling a client that they have no cause of action was appropriate for closed session. The Brief of Amicus Curiae relies on the case of Tuft v. City of St. Louis, 936 S.W.2d 113 (Mo.App. 1996). The Trial Court found guidance in the same case wherein it states:

> "Further, the term 'cause of action,' as generally used and understood, means the claim or general subject matter upon which an action may be maintained, and thus is not limited to cases in which a petition is filed. *Estate of Ingram v. Rollins*, 864 S.W.2d 400, 403 (Mo.App.1993)." Tuft v. City of St. Louis, 936 S.W.2d 113, 117 (Mo.App. 1996).

The difference between Tuft, supra, and the case at bar is that Tuft, supra, contained a real issue. The reporter in Tuft, supra, was trying to obtain a document generated in closed session. In this case Purcell just wants some sort of court order declaring that he is good and others are bad. We respectfully submit to this Honorable Court that if Purcell and his fellow Commissioners had taken any action such as generating a document while in closed session, the Trial Court would have been good to its word and would have closely scrutinized it as required in MO.REV.STAT. §610.027.5 (2006).

The Brief of Amicus Curiae complains that the judge in the Trial Court (formerly an extremely experienced and respected private attorney) should have known that "You cannot have an attorney-client privileged communication when the opposing party is sitting in on the discussion. *State v. Longo*, 789 S.W.2d 812 (Mo.App., 1990)." (Brief of Amicus Curiae, p. 11.) The Trial Court knew this; it ruled that Purcell (and the other Commissioners) "varied widely from the appropriate subject or subjects of the closed session." LF 157. It then went on to analyze every relief requested by Purcell.

The Brief of Amicus Curiae complains that the Trial Court erred because Amicus believes that an inappropriate discussion of the "quo warranto action" was allowed

because the Respondent could not file the action themselves. Spradlin v. City of Fulton, 982 S.W.2d 255, 260 (Mo. 1998). Amicus makes a flawed analogy between discussing quo warranto and discussing a private developer in closed session. Government attorneys have often had to tell their clients why they can't file a lawsuit or why they have no cause of action. Prudent government attorneys have always done that in closed session and will continue to do so. MO.REV.STAT. §610.021.1 (2006). There was nothing wrong with the Prosecuting Attorney of Cape Girardeau County doing that, but that argument is pointless because the issue is moot. The Trial Court found that Purcell (and the other Commissioners) "varied widely from the appropriate subject or subjects of the closed session." LF 157. The Trial Court then went on to analyze every relief requested by Purcell.

Finally, Amicus makes the rather overbroad statement that "there was no substantial likelihood that sexual harassment litigation might ensue" in Point I of its Points Relied On. Brief of Amicus Curiae, p. 8. The Amicus does seem to try to argue this point at Brief of Amicus Curiae, p. 11, ll. 10-17. There is no need to discuss how likely sexual harassment litigation needs to be before competent practicing government attorneys would get their clients in closed session to discuss it because the issue is moot. The Trial Court found that Purcell (and the other Commissioners) "varied widely from the appropriate subject or subjects of the closed session." LF 157. The Trial Court then went on to analyze every relief requested by Purcell.

We respectfully request this Honorable Court to affirm the Trial Court's decision. In the alternative, we respectfully request this Honorable Court to affirm the decision of the Missouri Court of Appeals, Eastern District, and dismiss Purcell's action.

CONCLUSION

It has been a long road for the Respondent since Purcell first concealed a tape recorder inside his sports jacket and went into the Cape Girardeau County Commission meeting and made his motion to go into closed session. The Trial Court carefully listened and analyzed Purcell's requests and in the end granted summary judgment against him. We respectfully ask this Honorable Court to affirm that ruling.

The Trial Court desired to solve the Sunshine Law issues for the parties and in so doing stepped over the jurisdictional issue. The Missouri Court of Appeals, Eastern District, carefully analyzed the jurisdictional issue and in a thorough and learned opinion found the law to be what it has always been. In order to be a party to litigation, one must be either a natural person or a legal entity. We respectfully ask this Honorable Court to affirm that ruling.

Respectfully submitted,

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IN THE SUPREME COURT OF MISSOURI

JAY PURCELL,	)
	)
Appellant,	)
vs.	) Supreme Court No. SC90383
	)
CAPE GIRARDEAU COUNTY COMMISSION,	)
	)
Respondent.	)

CERTIFICATE OF SERVICE

The undersigned certifies that two (2) copies of the enclosed SUBSTITUTE BRIEF OF RESPONDENT were served upon John P. Clubb, attorney of record for Appellant in the above action, by enclosing same in an envelope addressed to him at his regular business address of 400 Broadway, Ste. 326, Cape Girardeau, MO 63701, and by sending it via Federal Express this 23rd day of December, 2009.

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	)
Appellant,	)
vs.	) Supreme Court No. SC90383
	)
CAPE GIRARDEAU COUNTY COMMISSION,	)
	)
Respondent.	)

CERTIFICATE AS REQUIRED BY RULE 84.06(c)

The undersigned hereby certifies as follows:

1. That the Substitute Brief of Respondent complies with the page limits outlined in Rule 84.06(b).

2. That the Substitute Brief of Respondent is written in Times New Roman, size 13 font, with a word count of 9,835.

3. The undersigned further certifies that a disk containing Substitute Brief of Respondent in Microsoft Word format is included herein and has been served on all counsel of record, and the undersigned further certifies that the disks have been scanned for viruses, they are virus-free, and they comply with the requirements of Rule 84.06(g).

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APPENDIX

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