

SC 90383

IN THE SUPREME COURT OF MISSOURI

JAY PURCELL

Appellant,

v.

CAPE GIRARDEAU COUNTY COMMISSION,

Respondent.

APPELLANT JAY PURCELL'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Cape Girardeau County Commissioner Jay Purcell, in his individual capacity, sued the Cape Girardeau County Commission for numerous violations of the Missouri Open Records and Meetings Act, commonly referred to as Missouri's Sunshine Law.¹ The circuit court granted summary judgment in the County Commission's favor, holding that the Commission did not knowingly or purposefully violate the Sunshine Law with its April 17, 2008 meeting notice and actions in closed session. Commissioner Purcell appeals that decision.

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

¹ Sections 610.010 through 610.030, RSMo (2006).

STATEMENT OF FACTS

On May 14, 2008 Appellant Cape Girardeau County Commissioner Jay Purcell filed a three-count petition in the circuit court, seeking an order finding that the Respondent Cape Girardeau County Commission violated Missouri's Sunshine Law during its April 17, 2008 meeting. LF 6-16. The Commission is a public governmental body organized under Chapter 49 of the Missouri Revised Statutes, with its principal place of business in Jackson, Cape Girardeau County, Missouri. LF 30. Purcell filed suit against the Commission stating that its meeting notice for the April 17, 2008 meeting violated §§ 610.020.1 and 610.020.2 RSMo, (2006)² by failing to include as agenda items several items that were discussed at the meeting and by failing to provide notice that conformed to § 610.020.2 RSMo. LF 10. Purcell also stated that the Commission discussed several topics during the closed portion of its meeting without justification under § 610.021 RSMo. LF 11-12.

To ensure there was a clear and accurate record of the Commission's meetings and actions, Purcell taped the Commission's April 17, 2008 meeting, resulting in a four hour, fifty minutes, and two second recording. LF 29-32. After the parties' filed a joint stipulation attesting to the authenticity of the audio recording of the meeting, Purcell filed a motion for summary judgment. LF 29-32, 33-43. In response, the Commission filed a

² Unless otherwise noted, all citations to Sections 610.010 to 610.030 of the Revised Statutes of Missouri are for 2006.

Motion to Dismiss which the circuit court treated as a cross-motion for summary judgment over Purcell's objection. LF 101-03, 148. The circuit court granted summary judgment to the Commission and denied Purcell's motion for summary judgment. LF 148-160.

April 17, 2008 Meeting Notice

Before the meeting was held, the Commission posted notice as required by § 610.020 RSMo. LF 15-16. The notice stated that the Commission would have an "Executive Session" where it may, "as part of a regular or special County Commission meeting, hold a closed session to discuss legislation or litigation, leasing, purchasing, sale of real estate, or personnel matters." LF 15.

The Commission's notice and agenda for the open portion of its meeting consisted of the following detailed list of items (LF 15-16):

Routine Business

1. Erroneous Assessments
2. Payroll Change Forms
3. Statement of Monthly Collections
4. Sheriff's Monthly Report

Action Items

Chip Seal Surfacing Contract with Blevins Asphalt

Discussion Items & Appointments

1. Discussion - FEMA Emergency Plan - Temporary Levee - Dutchtown
2. Robb McClary - Update on Waste Tire Grant

3. Bid - Lien Search Co. Collector

4. Scott Bechtold, request to bid graders and backhoes

5. Scott Bechtold, Discuss Rt. AB title commitments

LF 15-16.

The Commission discussed and addressed each item enumerated on the open session agenda. LF 29-32. Once the open session matters were completed, the Commission voted to go into closed session purportedly to discuss “potential litigation” and “personnel.” LF 29-32. In contrast to the detailed list of topics on the notice and agenda for the Commission’s open session, the closed session notice contained, in parentheses, a bare and boilerplate recitation of the possible topics of discussion and a citation to the Commission’s alleged authority for conducting county business in closed session. LF 15. In total, the closed session notice read as follows:

(The County Commission may, as part of a regular or special County Commission meeting, hold a closed session to discuss legislation or litigation, leasing, purchasing, sale of real estate, or personnel matters.) Authority is Section 610.025.3 and 610.025³ Revised Statutes of Missouri, as amended. LF 15.

The statutory authorities cited in the Commission’s notice do not exist.

³ Please note that § 610.025.3 and 610.25.1 are statutes that no longer exist and did not exist on April 17, 2008. Section 610.25 is part of Missouri’s Sunshine Law, but it pertains to the electronic transmission of messages relating to public business.

The Commission's notice and agenda stated that it might discuss any of the following six topics: legislation or litigation, purchasing, sale of real estate, or personnel matters. During the meeting, various topics not listed in the notice and agenda were discussed, including:

- Whether the Commission could fire or discharge County Auditor David Ludwig, an elected official, from his job as County Auditor. LF 29-32
- County Auditor Ludwig's violation of the County's internet policy. LF 29-32
- Possible steps the Commission could take to discipline County Auditor Ludwig. LF 29-32
- A confrontation with Ludwig by Commissioners Jones, Bock, Purcell and Cape Girardeau County Prosecuting Attorney/County Attorney Morley Swingle seeking to persuade Ludwig to resign. LF 29-32
- The Commission's procedure for notarizing easements. LF 29-32
- Whether the Commission would recognize improperly recorded easements. LF 29-32
- Whether the Prosecuting Attorney for Cape Girardeau County might file a *quo warranto* action against Ludwig. LF 29-32
- The potential sale of park land located in Cape Girardeau County Park. LF 29-32
- Lawrence McBryde's refusal to allow the Commission to pave roads on his property. LF 29-32
- A \$5,000 insurance bid from Darryl Decker. LF 29-32

- Whether the Commission could block Ludwig’s internet access and/or bar him from the building. LF 29-32

None of the items were put on the Commission’s April 17, 2008, meeting notice. LF 15-16.

The April 17, 2008 Closed Meeting

In addition to the discussion revolving around Ludwig, the Commission held a relatively lengthy discussion about the county’s procedures for recognizing easements. LF 29-32. In particular, the Commission discussed a landowner’s (Lawrence McBryde) unwillingness to allow the Commission to pave a road on his property because the county did not have a properly recorded easement. LF 29-32. During this portion of the meeting, Commissioner Larry Bock expressed doubt as to whether anyone would ever sue over the easements and on two separate occasions, the Commission’s attorney stated that he “did not believe that [McBryde] would sue” the county or Commission and that McBryde was “happy” with the current state of the easement. LF 29-32.⁴

The Sunshine Lawsuit

A little less than a month after the April 17 meeting, Purcell filed suit against the Commission alleging its notice and meeting violated Missouri’s Sunshine Law. LF 6-16. After the joint stipulation of the audio recording of the meeting was filed with the circuit court, Purcell moved for summary judgment. LF 33-65. In response, the Commission

⁴ See audio recording of the meeting at LF 29-32, at 4 hours and 28 minutes into the meeting.

filed an “Answer to Plaintiff Jay Purcell’s Motion for Summary Judgment,” and suggestions in support of that “Answer.” LF 66-93.

The Commission also filed its “Defendant’s Motion to Dismiss and for Declaratory Judgment.” LF 101-103. Over Purcell’s objections, the circuit court elected to treat the Commission’s “Motion to Dismiss” as a motion for summary judgment. LF 148. The circuit court denied Purcell’s motion for summary judgment and granted summary judgment to the Commission, concluding that the Commission’s notice complied with the Sunshine Law and that no party knowingly or purposefully violated the Sunshine Law. LF 159. The circuit court also concluded that the Commission’s vote to go into closed session complied with Missouri’s Sunshine Law with no purposeful or knowing violation and refused to issue a declaratory judgment that the Commission’s actions during its April 17, 2008 meeting violated Missouri’s Sunshine Law. LF 159-160.

Points Relied On

I. The circuit court erred by granting the Commission summary judgment because the Commission's meeting notice and agenda violated §§ 610.020 and 610.022 RSMo, in that the notice was not reasonably calculated to advise the public of the matters the Commission considered at its April 17, 2008 meeting and it failed to cite to the specific exception of Chapter 610 that allows for the conduct of public business in closed session.

Andresen v. Board of Regents of Missouri Western State College, 58 S.W.3d 581, 588 (Mo. App. W.D. 2001).

ITT Comm'l Fin. Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo.banc 1993).

Kansas City Star Co. v. Fulson, 859 S.W.2d 934, 940 (Mo.App.W.D. 1993).

Junior College Dist. of St. Louis v. City of St. Louis, 149 S.W.3d 442, 452 (Mo. 2004).

Mo.R.Civ.Pro. 74.04(a).

Mo.R.Civ.Pro. 84.14.

Missouri Attorney General Opinions 99-90 and 68-95.

Section 610.010, RSMo (2006)

Section 610.020, RSMo (2006)

Section 610.021, RSMo (2006)

Section 610.022, RSMo (2006)

Section 610.027, RSMo (2006)

II. The circuit court erred by granting the Commission summary judgment because the Commission violated §§610.011 and 610.021 RSMo during the closed portion of its meeting in that it discussed a wide range of topics that were not covered by an exception contained in §610.021 RSMo.

Hawkins v. City of Fayette, 604 S.W.2d 716 (Mo.App.W.D.1980)

Scott v. Harris, 127 S.Ct.1769, 1774-5 (2007).

Tuft v. City of St. Louis, 936 S.W.2d 113, 118 (Mo.App.E.D.1996).

Section 610.010, RSMo (2006)

Section 610.011, RSMo (2006)

Section 610.021, RSMo (2006)

Section 610.022, RSMo (2006)

Section 610.026, RSMo (2006)

Section 610.027, RSMo (2006)

III. The circuit court erred by granting the Commission summary judgment based on the Commission's unintentional violation of the Sunshine Law because intent is not required to prove a violation of the Sunshine Law in this matter in that Purcell did not seek the imposition of civil penalties.

Section 610.027, RSMo (2006)

Black's Law Dictionary 1422 (6th ed. 1990).

ARGUMENT

The circuit court had jurisdiction to ascertain whether the Commission violated the Sunshine Law.

Before its three Points Relied On addressing error at the circuit court level, Appellant will discuss the issue of whether the Cape Girardeau County Commission is a legal entity that may be sued as a “public governmental body” under section 610.010(4)(d) RSMo. The Commission argued to the circuit court that the court lacked jurisdiction over the Commission because it was not a “legal entity” and was an “improper defendant.”⁵ This argument formed the foundation of the Eastern District Court of Appeals’ decision.⁶ Appellant recognizes that the Eastern District’s decision is vacated, but addresses the issue of whether the “Cape Girardeau County Commission” may be sued as a public governmental body under section 610.010(4)(d)RSMo first because it is a matter that must be resolved before this Court may consider the merits of the appeal.

Missouri’s Sunshine Law defines the entities that can be sued to enforce its provisions and denominates these entities as “public governmental bodies.”⁷ The statute defines “public governmental body” and a county commission falls within this definition.

⁵ LF 75-6.

⁶ See *Purcell v. Cape Girardeau County Commission*, ED 92213.

⁷ Section 610.010(4)(d).

Missouri’s Sunshine Law is the statutory scheme the Missouri Legislature set up to define which public governmental bodies are required to follow Missouri’s Sunshine Law. Chapter 610 does not merely provide for remedies against “public governmental bodies”, it defines “public governmental bodies” in section 610.010(4), RSMo. That statute provides:

(4) “Public governmental body”, *any legislative, administrative or governmental entity created by the constitution or statutes of this state . . .*

including:

(c) *any department or division of the state, of any political subdivision of the state, of any county* or of any municipal government, school district or special purpose district including but not limited to sewer districts, water districts, and other subdistricts of any political subdivision;

(d) *any legislative, administrative or governmental entity created by the constitution or statutes of this state*, by order or ordinance of any political subdivision or district...*including (d) any other legislative or administrative governmental deliberative body under the direction of three or more elected or appointed members having rulemaking or quasi-judicial power.* Section 610.010 (d), RSMo 2006. [emphasis added]

The proper question for the Court then, is whether a county commission meets the definition detailed in sections 610.010 RSMo. If it does, then it is a “public governmental body” that must comply with the statutory scheme devised under Chapter 610 and may be sued for enforcement of Chapter 610.

County commissions meet the statutory definition contained in section 610.010(4) because they are governmental entities created by Missouri statutes, specifically section 49.010, RSMo 2006. Additionally, they are political subdivisions of a county, as defined by section 610.010(4)(c). Finally, the Cape Girardeau County Commission is a legislative or administrative governmental deliberative body under the direction of three or more elected members having rulemaking or quasi-judicial power as described in section 610.010(4)(d). This Court need look no further than the plain language of the statute for authority that a county commission may be sued for enforcement of Chapter 610.

Before the circuit court, the Commission argued that an action may be brought against the Commission only by naming in such action the individual members of the Commission in their official respective capacities. This is not only contrary to law, but such a ruling would inject a great deal of uncertainty about future actions to enforce the Sunshine Law.

There are many entities that fall within the purview of the Sunshine Law---city councils, school boards, licensing boards, ambulance districts---and under the Commission's argument, a taxpayer must name each individual member of the entity in order to seek judicial enforcement the Sunshine Law. Section 610.011, RSMo requires the Sunshine Law's provisions to be "liberally construed and their exceptions strictly construed to promote" Missouri's public policy of openness. This would greatly increase the litigation and court costs associated with enforcement actions by requiring more parties, attorneys' fees, and filing fees.

Adopting the Commission's argument also raises more new questions than it answers. Should a taxpayer sue all members of a body even if only one member violated the law? What happens if one of the members of the body leaves office during the litigation? Will that departed member still be bound by any judgment? 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? Can a new member be joined even if he/she had nothing to do with the subject matter of the lawsuit? Does a quorum of the body have to be sued in order for any court order to be binding against the body?

In Appellant's case, for example, one of the county commissioners' terms of office ended during the appeal and a new commissioner was sworn into office. The remedies in section 610.027, RSMo specifically contemplate the use of injunctive relief to force compliance with the Sunshine Law. What if all three commissioners are replaced during litigation? A lawsuit for injunctive relief against individual county commissioners no longer in office would be moot and all of the time, effort, and expense to enforce the Sunshine Law would be vitiated.

The definitions for a "public governmental body" in section 610.010(4), RSMo control in this matter. The Commission's argument that a county commission is a not a legal entity that may sue or be sued in its own name and that all actions against a county commission must be instituted against the name of the county commission members in their official character would be making new law and is contrary to the reasoning set

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

American Fire Alarm was decided more than 50 years before the first statutes commonly known as Missouri's Sunshine Law were enacted, and nearly 20 years before the enactment of section 49.010 RSMo. The statutory changes to Missouri's county commissions and the introduction of open meetings and records laws to public governmental bodies in the decades since the *American Fire Alarm* decision make that decision inapplicable to county commissions under Missouri law.

In *American Fire Alarm*, the Missouri Supreme Court reviewed whether a board of police commissioners could sue or be sued as a corporate or quasi-corporate entity.⁸ In 1920, the Kansas City and St. Louis Boards of Police Commissioners were created by a unique combination of Missouri statutes and the Missouri Constitution.⁹ County commissions and Boards of Police Commissioners were created by wholly distinct and separate legislation several decades apart.

In *Best v. Schoemel*, 652 S.W.2d 740 (Mo.App.E.D.1983), a driver sued the St. Louis Board of Police Commissioners for injuries sustained in a car crash.¹⁰ Citing *American Fire Alarm*, this Court in *Best* held that it has "long been established that the St. Louis Board of Police Commissioners may only be sued by bringing an action against

⁸ *American Fire Alarm*, 227 S.W. 114 (Mo.1920).

⁹ *Id.*

¹⁰ *Best*, 652 S.W.2d 740 (Mo. App. E.D. 1983).

the individual members of the Board in their official capacity.”¹¹ *Best* does not even involve a county officeholder, let alone a county commission. Instead, it merely cites to *American Fire Alarm*.

In *American Fire Alarm*, the Missouri Supreme Court analyzed whether a Board of Police Commissioners should be considered a “person” or entity capable of being sued as an entity.¹² The Court discussed the long history of the Kansas City Police Commissioners and the legislative intent behind its creation.¹³ The Court noted that police commissioners are not authorized to use a seal, are never spoken of as a corporation, are almost always referred to in the plural number, and generally not referred to with a distinctive name.¹⁴ Police commissioners were appointed by the Governor and the body was “designated, but not named a board of police,” as opposed to county commissions which are specifically denominated as bodies in section 49.010 (which was enacted into law for the first time nearly 20 years after *American Fire Alarm*). Seen in that light, the differences between a Board of Police Commissioners and a county commission are striking and, in light of the statutory additions to sections 49.010 and 610.010 et seq., of paramount legal significance.

¹¹ *Id.* at 742 (citing *American Fire Alarm Co. v. Board of Police Commissioners*, 227 S.W. 114 (Mo. 1920)).

¹² *American Fire Alarm Co.*, 227 S.W. 114 (Mo. 1920).

¹³ *Id.* at 119-20.

¹⁴ *Id.* at 120.

County commissions may issue service of process, buy, sell, and lease real and personal property, settle county debts, and sue in court to condemn real property.¹⁵ The Court in *American Fire Alarm* also noted that “both the St. Louis and Kansas City Police Commissioners have sued and been sued often, and always by their individual names, not as a board.”¹⁶ There are numerous examples in Missouri of county commissions being sued as entities. In *Franklin County ex rel. Parks v. Franklin County Commission*, taxpayers filed suit contending that §137.073, RSMo violated Article X, § 22(a) of Missouri's Constitution (the Hancock Amendment).¹⁷ In *Kuyper v. Stone County Commission*, a deputy clerk assessor brought an action against the Stone County Commission concerning a salary dispute.¹⁸ In *Shawnee Bend Special Road District “D” v. Camden County Commission*, a road district brought an action against the Camden County Commission seeking to challenge the commission’s order dissolving the district.¹⁹ Finally, in *In re Incorporation of Village of Table Rock*, the Stone County

¹⁵ Sections 49.210, 49.270, 49.287, 49.300, RSMo 2006.

¹⁶ *American Fire Alarm*, 227 S.W. at 120.

¹⁷ *Franklin County ex rel. Parks v. Franklin County Commission*, 269 S.W.3d 26 (Mo. 2008).

¹⁸ *Kuyper v. Stone County Commission*, 838 S.W.2d 436 (Mo. 1992).

¹⁹ *Shawnee Bend Special Road District “D” v. Camden County Commission*, 800 S.W.2d 452 (Mo. App. S.D. 1990).

Commission was named as a party defendant.²⁰ Accepting the Commission's argument in this matter would mark the first time the Missouri Supreme Court has ruled that county commissions may not be sued as entities and it would make new law.

Requiring individuals or entities to sue individual county commissioners and preventing them from suing county commissions as entities, would inject uncertainty into all litigation involving governmental entities where the individual members of the governmental body have not been named as defendants. In addition, it would significantly raise the cost of litigation for plaintiffs seeking suit against public governmental bodies by requiring more defendants, more filing fees, and more service costs, thereby having a further chilling effect on Missourians' access to open records and meetings. The plain language of Missouri's Sunshine Law should be read, enforced, and construed liberally towards openness.

²⁰ *In re Incorporation of Village of Table Rock*, 201 S.W.3d 543 (Mo. App. S.D. 2006).

I. The circuit court erred by granting the Commission summary judgment because the Commission’s meeting notice and agenda violated §§ 610.020 and 610.022 RSMo, in that the notice was not reasonably calculated to advise the public of the matters the Commission considered at its April 17, 2008 meeting and it failed to cite to the specific exception of Chapter 610 that allows for the conduct of public business in closed session.

The Cape Girardeau County Commission’s notice and agenda violated §§610.020 and 610.022, RSMo. The Sunshine Law’s presumption of openness applies to all facets of the business of public governmental bodies like the Cape Girardeau County Commission. Pursuant to the Sunshine Law, a meeting held without posting of a proper notice and agenda is improperly held and all actions taken during such meeting are considered void.²¹ Proper meeting notices are important because they inform the public about the conduct of public business and allow for citizens to meaningfully participate in and understand the workings of their government. The notice requirements of the Sunshine law are not optional and they are not mere “technicalities.” The Sunshine Law is the codification of Missouri’s commitment to openness in government and its strictures cannot be cast aside in the manner the Commission advances.

The circuit court noted and admitted that the Commission cited to non-existent statutory exceptions in its notice, but the Court held that “there is no evidence that this

²¹ Sections §§610.020 and 610.027, RSMo.

incorrect citation knowingly or purposely impermissibly advised the public.”²² The circuit court misinterpreted the relief sought by Purcell and misapplied the law. 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. The Commission failed to meet its burden as a matter of law and this failure entitled Mr. Purcell to judgment as a matter of law. The circuit court erred by granting the Commission’s motion for summary judgment on this matter.

The Commission has advanced the argument that it may cite to all of the statutory exceptions to the Sunshine Law contained in § 610.021, RSMo 2006 for every meeting and that it will always be in compliance with the notice requirements. It has also cited to Attorney General Opinions for the proposition that its notice complied with the law.²³ The Opinions in no way support the Commission and the Commission’s reliance on them is misplaced. Furthermore, Attorney General Opinions are not entitled to any more deference than any other competent attorney’s opinion.²⁴

Under the Commission’s argument, any public governmental body could cite to every provision of § 610.021 for every meeting (whether it intends to have a discussion

²² LF 155.

²³ Missouri Attorney General Opinions 99-90 and 68-95.

²⁴ *Andresen v. Board of Regents of Missouri Western State College*, 58 S.W.3d 581, 588 (Mo. App. W.D. 2001).

on those matters or not) and it will sufficiently notify the public that it might discuss one of the 21 exceptions in § 610.021. The Commission’s argument “proves too much.”²⁵ By giving notice of the possibility that the Commission will discuss *anything* in closed session, it gives the public notice of *nothing*, which is contrary to the intent and purpose of the Sunshine Law.

Under the Sunshine Law, when a public governmental body intends to hold a closed meeting, the notice and agenda for the meeting must cite to the specific exception in the law that allows for the conduct of public business in closed session.²⁶ By failing to post a proper notice and agenda of its April 17, 2008 meeting, the entire meeting of the Commission was conducted improperly and the open and “closed” actions taken should be considered void. This Court should remand this case to the circuit court with instructions to enter summary judgment in favor of Purcell on this Point.²⁷

²⁵ *Junior College Dist. of St. Louis v. City of St. Louis*, 149 S.W.3d 442, 452 (Mo. 2004).

²⁶ Section 610.022.2, RSMo.

²⁷ Mo.R.Civ.Pro. 84.14; *Auto Club Family Ins. Co. v. Jacobsen*, 19 S.W.3d 178 (Mo. App. E.D. 2000).

II. The circuit court erred by granting the Commission summary judgment because the Commission violated §§610.011 and 610.021 RSMo during the closed portion of its meeting in that it discussed a wide range of topics that were not covered by an exception contained in §610.021 RSMo.

In Missouri, meetings of public governmental bodies are presumed open.²⁸ The law is to be liberally construed with the exceptions to open meetings and records strictly construed to promote Missouri's public policy of open meetings and records.²⁹

Because there was no legal authority for the "closure" of the April 17 meeting, the meeting was improper and violated the Sunshine Law and Mr. Purcell is entitled to judgment as a matter of law. The circuit court erred by granting the Commission summary judgment and this Court should remand the case to the circuit court with instructions to enter summary judgment in favor of Purcell.

The circuit court recognized that the Commission is a public governmental body subject to the provisions of §§610.010 et seq. RSMo.³⁰ Therefore, pursuant to §610.027.2 RSMo., it is the Commission's burden of persuasion to demonstrate compliance with the requirements of §§610.010 to 610.026 RSMo. The Commission failed to meet its burden.

²⁸ Section 610.011.2, RSMo.

²⁹ Section 610.011.1, RSMo.

³⁰ LF 151.

The Commission has argued that Purcell is not entitled to a judgment declaring that the Commission violated the Sunshine Law at its April 17, 2008 meeting or an order enjoining the Commission from future similar violations. Section 610.027.1 specifically provides that the remedies contained in the statute are “in addition to those provided by any other provision of law.” Section 610.027.6 allows a circuit court to “ascertain the propriety” of any action to close a particular record, meeting, or vote. Finally, § 610.030, RSMo 2007 states: “The circuit courts of this state shall have the jurisdiction to issue injunctions to enforce the provisions of sections 610.010 to 610.115.”

Purcell’s petition and motion for summary judgment met all of the requirements for a declaratory judgment under §610.027, RSMo. The circuit court held that issuing a declaratory judgment in this matter would not serve a useful purpose.³¹ It would appear that the circuit court’s finding was that a declaratory judgment would serve no useful purpose in that the circuit court did not believe that the Commission had violated the Sunshine Law. A declaratory judgment in this matter will have a salutary purpose letting all future county commissions (and other public governmental bodies) know that over-inclusive, omnibus notice clauses are improper. Additionally, any alleged violation of §610.020.3, RSMo (prohibiting the audio recording of closed meetings) is not a defense to the Sunshine Law violations committed by the Commission. A declaratory judgment holding public officials accountable for their actions in this matter serves a very useful purpose.

³¹ LF 158-159.

The circuit court erred by granting the Commission summary judgment because the Commission violated §§610.011 and 610.021 RSMo during the closed portion of its meeting in that it discussed a wide range of topics that were not covered by an exception contained in §610.021 RSMo. Accordingly, Purcell is entitled to a judgment declaring that the Commission's actions violated the Sunshine Law.

The Commission violated the Sunshine Law during its meeting by discussing a wide range of topics not proper for closure under the law. There is no exception in Missouri's Sunshine law for a public governmental body to "wander off" of closed session topics. That is the complete essence and importance of Missouri's Sunshine Law. Either the public governmental body discusses proper topics in closed session or it does not. The circuit court recognized that the Commission strayed from proper closed session topics, but refused to hold the Commission accountable for its actions.

The Commission attempts to distract this Court from actually listening to the audio recording of the meeting. This Court may determine from listening to the audio recording of the Commission's meeting that there really was no discussion of potential litigation.³² If a public governmental body is in closed session and a topic not proper for closed session comes up, the proper course of action for it to follow is outlined in §610.022.3 RSMo. The meeting should be closed only to the extent necessary for the specific reason announced to justify the closed meeting or vote.³³

³² LF 29-32; see *Scott v. Harris*, 127 S.Ct.1769, 1774-5 (2007).

³³ Section 610.022.3 RSMo.

By holding that the matters discussed by the Commission during its meeting were permissibly held in closed session under the exception for subjects “relating to litigation,” the circuit court engaged in the kind of open-ended application of the exception that the Eastern District Court of Appeals warned about in *Tuft v. City of St. Louis*.³⁴ The existence of a controversial matter does not necessarily mean the matter is the subject of potential litigation. The Commission did not meet the heavy burden of demonstrating both a substantial likelihood that litigation might occur and a clear nexus between the purported closing of the meeting and the anticipated litigation.³⁵ Because the discussions did not relate to litigation and because no other exception applies that would have allowed the Commission to talk about these matters in closed session, the meeting was improperly closed and the circuit court erred by granting the Commission summary judgment on this matter. This Court should remand the case to the circuit court with instructions to enter summary judgment in favor of Purcell.

The *Quo Warranto* Discussion Violated the Sunshine Law

Missouri’s Sunshine Law provides the authority to discuss matters in closed session “involving a public governmental body.” This provision applies to litigation involving the County Commission or the County, not to actions that might be brought independently by a prosecuting attorney---such as a *quo warranto* action.

³⁴ *Tuft v. City of St. Louis*, 936 S.W.2d 113, 118 (Mo.App.E.D.1996).

³⁵ *Id.*

The entire *quo warranto* discussion held by the Commission violated the Sunshine Law because this discussion should have been held in open session. The circuit court's judgment is contrary to the Missouri Supreme Court's ruling in *Spradlin v. City of Fulton*.³⁶ In *Spradlin*, the Court held that a discussion by a city council of a private developer's actions to purchase land did not allow the city council to invoke § 610.021(2) (the real estate exception) to close that discussion because it did not involve the purchase of land *by the public body*.³⁷ The same logic applies in this matter. The potential litigation in question did not involve litigation of or *by the public body* (the Commission) and therefore, the litigation exception does not apply to the *quo warranto* discussion. Accordingly, the circuit court erred by granting the Commission summary judgment in this matter and this Court should remand the case to the circuit court with instructions to enter summary judgment in favor of Purcell.

The Easements Discussion Violated the Sunshine Law

In addition to the discussions previously detailed, the Commission held a substantial discussion regarding the procedure for recording and processing easements and a particular landowner's complaints to the Commission.³⁸ No exception to the Sunshine Law allowed for the discussion of the easements in closed session.

³⁶ *Spradlin v. City of Fulton*, 982 S.W.2d 255, 260 (Mo. 1998).

³⁷ *Id.*

³⁸ LF 29-32.

The litigation exception to the Sunshine Law did not give the Commission authority to discuss the conduct of the County Auditor, the Prosecuting Attorney's possible *quo warranto* action against Ludwig, or the procedure for recording easements. The Commission did not meet its heavy burden of demonstrating both a substantial likelihood that litigation may occur and a clear nexus between the closed meeting and the anticipated litigation. The circuit court erred by granting summary judgment to the Commission on this matter and this Court should remand this matter to the circuit court with instructions to grant Purcell's motion for summary judgment.

III. The circuit court erred by granting the Commission summary judgment based on the Commission's unintentional violation of the Sunshine Law because intent is not required to prove a violation of the Sunshine Law in this matter in that Purcell did not seek the imposition of civil penalties.

The circuit court's judgment concluded that the Commission was absolved from its Sunshine Law violations because it did not do so purposefully or knowingly.³⁹ The circuit court misapplied the law in this context.

There is no *mens rea* requirement for the Sunshine Law to be violated and a violation is not a criminal act. It is a set of strict liability statutes and scienter only matters if the plaintiff seeks civil penalties.⁴⁰ Strict liability is liability without fault.⁴¹ In

³⁹ LF 156-159.

⁴⁰ Section 610.027, RSMo.

any event, Purcell never alleged knowing or purposeful violations by the Commission and never sought the imposition of civil penalties. The absence of intent does not absolve the Commission of its violations of the Sunshine Law it merely affects the remedies available to Purcell or the circuit court in that the circuit court may not award civil penalties or attorneys' fees.

In Mr. Purcell's motion for summary judgment, he did not request an award of attorneys' fees or costs.⁴² Mr. Purcell did ask for attorneys' fees and costs in his original petition, but abandoned that request for relief in his motion for summary judgment. Accordingly, any discussion of intent, whether knowing or purposeful is irrelevant in determining whether the Commission violated the Sunshine Law.

Conclusion

The Cape Girardeau County Commission held a meeting in violation of the text and spirit of Missouri's Sunshine Law, based on a flawed, overbroad and misleading, notice. The goal of this matter was not to punish the Commission. By having the circuit court declare the Sunshine Law violations, future violations of Missouri's Sunshine Law may be prevented. The citizens of Cape Girardeau County, and the general public, deserve no less. The Commission's meeting notice violated the law because it failed to reasonably advise the public of the matters to be discussed at the meeting and the Commission violated the Sunshine Law during its meeting by discussing a wide array of topics during closed session without any statutory authority for doing so. This Court

⁴¹ Black's Law Dictionary 1422 (6th ed. 1990).

⁴² LF 37-38.

should reverse the circuit court's judgment granting the Commission summary judgment and remand this matter to the circuit court with instructions to grant Purcell's motion for summary judgment.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 6,499 words, excluding the cover, and this certification, as determined by Word software; and
2. That a compact disc, containing a copy of this brief, has been scanned for viruses; and
3. That a true and correct copy of the attached brief, and a compact disc containing a copy of this brief, were mailed, postage prepaid, this 2nd day of December 2009, and sent via electronic mail message to:

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