IN THE SUPREME COURT OF THE STATE OF MISSOURI

RACHAL LAUT, et al.,	)	
	)	
Appellants/Plaintiffs,	)	
	)	
v.	)	Cause No. SC95307
	)	Eastern District No. ED101801
CITY OF ARNOLD, MISSOURI,	)	23rd Circuit No. 10JE-CC01193-01
	)	
Respondent/Defendant.	)	

Appeal From the Circuit Court of the County of Jefferson
Twenty-Third Judicial Circuit
State of Missouri
Honorable Gary Kramer, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal arises out of an action filed by Appellants based on Chapter 610 of the Revised Statutes of Missouri ("Missouri Sunshine Law"). After the Trial Court entered its order denying Appellants' Application for Attorneys Fees, L.F. 27, Appellants filed this Appeal. This case was called and heard for argument on or about September 8, 2015. The Eastern District Court of Appeals issued an opinion and simultaneously transferred this case to the Missouri Supreme Court under Rule 83.02. Therefore, this Court has proper jurisdiction.

STATEMENT OF FACTS

Some time in 2010, Respondent City of Arnold (hereinafter referred to as "Respondent" or "City") became aware of a possible inappropriate personal relationship involving one of the Appellants and two City employees. The circumstances of this tryst began causing tension between and among the Respondent's police department employees, and disrupting the course of official City business. After receiving a complaint, Respondent's chief of police, Chief Robert Shockey, immediately ordered an internal affairs investigation. 1 L.F. 62[1]. The sole purpose of the internal affairs investigation was to determine the fitness of the employees to perform their respective job duties. 1 L.F. 62. A personnel investigation was conducted and concluded promptly. 1 L.F. 62. Upon the conclusion of the investigation, the file was closed. 1 L.F. 62.

On or about October 11, 2010, Appellants, through attorney Hardy Menees, and, pursuant to the Missouri Sunshine Law, served a request for documents regarding the investigation. 1 L.F. 11. The request demanded records, which are clearly exempt from the Missouri Sunshine Law, including but not limited to, personnel records, internal affairs reports, and records reflecting employee discipline and termination. 1 L.F. 11. The

[1] This is the second issue on appeal regarding these parties. The first appeal is case number ED99424. This Court ordered the Legal File from the first case transferred to this case on March 13, 2015. Therefore, Respondents will reference the first Legal File as "1 L.F._" and the second Legal File as "2 L.F.___"

City responded timely, within seventy-two (72) hours, by letter dated October 14, 2010 explaining to Appellants why the City felt the records could not be disclosed. 1 L.F. 14.

Upon being denied the requested records, Appellants filed suit, 1 L.F. 3, and ultimately filed a Motion for Summary Judgment on or about July 29, 2011. 1. L.F. 24. In their Summary Judgment Motion, Appellants prayed that the Trial Court order the City to produce the records requested. 1 L.F. 24. On or about December 16, 2011, the Trial Court entered an order denying Appellants' Motion for Summary Judgment. In October 2012, Respondent filed its own Motion for Summary Judgment. 1 L.F. 78. The Trial Court entered a Judgment on or about November 9, 2012 granting Respondent's Motion. 1 L.F. 115. In response to Respondent's successful Summary Judgment Motion, Appellants then filed their first appeal on January 2, 2013 being case number ED99424. 1 L.F. 116.

The Appellate Court affirmed in part, reversed in part, and remanded. 2 L.F. 3. In ED99424, on a matter of first impression, Respondent contended that it was Appellants' burden to request the in camera review of documents, which the City had determined to be closed under Section 610.100.5. 2 L.F. 18. The Appellate Court found that, because the legislature did not assign a burden, "rather than mandate by a particular section of the Sunshine Law here, in camera review is a practical remedy that would resolve any factual dispute, while at the same time maintaining confidentiality of documents that may be exempt from disclosure under the Sunshine Law." 2 L.F. 19. In short, neither the Trial Court nor the Appellants asked for an in camera review. As such, the City maintained its position that the documents were closed and did not provide the documents until such

time as the Appellate Court ordered them to do so. Once the Appellate Court ordered an in camera review, the City immediately turned the documents over to the Trial Court for review.

Upon the in camera review, the Trial Court found that "with the exception of the Internal Affairs report, all of the other records were clearly personnel records of Linda Darnell." 2 L.F. 25. The Trial Court went on to note that "those personnel records are clearly exempt from disclosure by Defendant City of Arnold under §610.021.3, .13 RSMo." 2 L.F. 25. Although the Trial Court did find that the City's contention that the Internal Affairs report is a personnel record to be "wholly inaccurate", the Trial Court did redact the record finding that part of the report was "personnel records of those other employees and should be redacted prior to any disclosure." 2 L.F. 26.

The Sunshine Law allows personnel records to be closed; and, the City acted to protect the privacy of certain employees. Given all facts relevant to this case, including but not limited to a personal relationship between employees, child custody issues/disputes, and divorce, the City felt that, in its totality, the reason for the investigation was purely a personnel matter – to determine if the employees involved in these escapades could continue employment for the City in a manner in which the City's police department could adequately provide emergency services to the public.

The Trial Court heard arguments regarding an application for attorney fees on or about June 24, 2014. Later that day, the Trial Court entered its Judgment stating "this Court cannot on this record find that the Defendant City of Arnold either knowingly or

purposefully violated the provisions of RSMo §610.010-610.035." 2 L.F. 55. An appeal to the Eastern District Court of Appeals followed. The Eastern District called and heard the above styled case on or about September 8, 2015, and on October 6, 2015, it issued its opinion, in the form of a transfer. The Appellate Court stated "we would affirm, but due to the general interest and importance of the question involved herein, we transfer this case to the Supreme Court pursuant to Rule 83.02". Opinion at 1[2].

[2] The majority opinion issued by the Court of Appeals does not include page numbers. To make the record clear, Respondent has cited to the page on which the citation appears, had page numbers been included.

POINT RELIED ON

I.

THE TRIAL COURT DID NOT ERR IN RULING, THAT ATTORNEYS FEES AND CIVIL PENALTIES WERE NOT APPROPRIATE BECAUSE THE CITY DID NOT KNOWINGLY OR PURPOSELY VIOLATE THE MISSOURI SUNSHINE LAW IN THAT DENYING THE REQUEST FOR RECORDS WAS DONE SO UNDER THE ADVICE OF COUNSEL AND PURSUANT TO THE BELIEF THAT THE PURPOSE OF THE INTERNAL AFFAIRS REPORT WAS A PERSONNEL RECORD TO DETERMINE THE EMPLOYEES FITNESS FOR DUTY.

Hill v. City of St. Louis, 371 S.W.3d 66, 81 (Mo. App., 2012),

Spradlin v. City of Fulton, 982 S.W.2d 255, 262 (Mo. Banc 1998).

Strake v. Robinwood W. Cmty. Improvement Dist., SC 94842 (Mo. banc. Nov. 10, 2015)

RSMo 610.100(5)

II.

THE TRIAL COURT DID NOT ERR IN DECLINING TO AWARD ATTORNEYS FEES BECAUSE THE ATTORNEYS FEES SUBMITTED ARE NOT REASONABLE IN THAT APPELLANTS' ATTORNEYS FEES EXCEED THE INDUSTRY STANDARD FOR LEGAL SERVICES PROVIDED TO MUNICIPALITIES, AND THE REASONABLENESS IS AN ISSUE OF FACT TO BE DETERMINED BY THE TRIAL COURT.

Hill v. City of St. Louis, 371 S.W.3d 66, 81 (Mo. App., 2012),

ARGUMENT

STANDARD OF REVIEW

The Appellate Court will review the judgment of the Circuit Court (finding that there was no purposeful or knowing violation of the law, and denying attorneys fees and civil penalty) "in the light most favorable to the party against whom the judgment was entered". *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Co.*, 854 S.W.2d 371, 376 (Mo. Banc. 1993).

> The decree or judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.

Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. 1976).

> We bear in mind that the judgment is presumptively correct and the burden is on the appealing party to demonstrate error.

Steen v. Colombo, 799 S.W.2d 169 (Mo. App. S.D., 1990).

Appellants attempt to argue that the standard of review should be split. Appellants contend that while this Court should review the issue of whether the Sunshine violation is purposeful or knowingly de novo, it should apply the abuse of discretion standard as to the amount of attorneys' fees that should be awarded. This contention has no basis in the law.

Although the *Strake* case does state "Appellate review of a summary judgment is 'essentially de novo'", *Strake v. Robinwood W. Cmty. Improvement Dist.* SC94842, (Mo., 2015)*, citing ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.,* 854 S.W.2d 371, 380 (Mo. banc. 1993), appellants have taken the standard out of context. The Court, in *Strake*, was reviewing the case "essentially de novo" because it was reviewing a summary judgment. Here, the Court is not reviewing summary judgment; this Court is reviewing a judgment by the circuit court after an evidentiary hearing. Therefore, the standard of review is clearly and correctly stated above as an abuse of discretion standard.

Further**,** the Eastern District in its order to transfer states "we review the trial court's decision on the issue to determine if it is against the weight of the evidence, there is no substantial evidence to support it or it erroneously declares or applies the law." Citing, *Spradlin v. City of Fulton,* 982 S.W.2d 255, 263 (Mo. banc 1998). Opinion at 5. Neither the law, nor the standard, has changed since the parties submitted briefs and the Appellate Court issued its transfer. Appellants fail to identify any new legal grounds to establish why this Court should apply a different standard of review. Appellants' contention is a disingenuous attempt to shift the standard of review to one they find more favorable.

Finally, Appellants suggest that, if this Court finds that Respondent acted purposefully and knowingly, that the Court simply ignore judicial process and follow Missouri Supreme Court Rule 84.14, thus circumventing the normal procedure and process by awarding attorneys' fees without an evidentiary hearing. Rule 84.14 states "the

Appellate court shall award a new trial or partial new trial, reverse or affirm the judgment or order of the trial court, in whole or in part, or give such judgment as the court ought to give. Unless justice otherwise requires, the court shall dispose finally of the case." There is no scenario presented in this matter that would warrant the circumvention of judicial process with the awarding of attorneys' fee without an evidentiary hearing. Both judicial process and justice mandate that Respondent, as custodian of the revenue of the taxpayers, be provided the opportunity to inspect, review, and challenge Appellants' astronomically high attorneys' fees. Respondent is entitled to an evidentiary hearing regarding fees, and justice requires the City be provided such opportunity.

POINT I. THE TRIAL COURT DID NOT ERR IN RULING, THAT ATTORNEYS FEES AND CIVIL PENALTIES WERE NOT APPROPRIATE BECAUSE THE CITY DID NOT KNOWINGLY OR PURPOSELY VIOLATE THE MISSOURI SUNSHINE LAW IN THAT DENYING THE REQUEST FOR RECORDS WAS DONE SO UNDER THE ADVICE OF COUNSEL AND PURSUANT TO THE BELIEF THAT THE PURPOSE OF THE INTERNAL AFFAIRS REPORT WAS A PERSONNEL RECORD TO DETERMINE THE EMPLOYEES FITNESS FOR DUTY.

This appeal arises out of an action filed by Appellants based on Chapter 610 of the Revised Statues of Missouri ("Sunshine Law"). Specifically, the Appellants seek relief from the trial court's denial of a request for attorney fees. The trial court did not err in denying Appellants' Attorney's Fee Application.

> We review the trial court's award of reasonable attorney's fees for an abuse of discretion. *Hill v. City of St. Louis*, 371 S.W.3d 66, 81 (Mo. App., 2012), citing *Howard v. City of Kansas City*, 332 S.W.3d 772, 785 (Mo. Banc 2011). To demonstrate an abuse of discretion, the complaining party must show the trial court's decision was against the logic of the circumstances and so arbitrary and unreasonable as to shock one's sense of justice.

Id.

It is understandable that Appellants want attorneys fees, however, the law does not require the court to award attorneys fees. The Sunshine Law, in Sections 610.027(3) and 610.027(4), provides for attorneys fees if the court finds a knowing or purposeful violation. In other words, a condition precedent to the issuance of an award of attorney fees is a finding, by the trial court, of a knowing or purposeful violation. With regard to the matter underlying Appellants' claim, the Trial Court, on more than one occasion, has found that any violation was ***not*** knowing or purposeful.

Specifically, Sections 610.027(3) and 610.027(4) state as follows:

> Upon a finding by a preponderance of the evidence that a public governmental body or member of a public governmental body has knowingly violated section 610.010 to 610.026, the public governmental body or the member shall be subject to a civil penalty in an amount up to one thousand dollars. If the court finds that there is a knowing violation of sections 610.010 to 610.026, the court may order the payment by such body

or member of all costs and reasonable attorneys fees to any party successfully establishing a violation. The court shall determine the amount of the penalty by taking into account the size of the jurisdiction, the seriousness of the offense, and whether the public governmental body or member of the public governmental body has violated section 610.010 to 610.026 previously.

Section 610.027(3)

Upon a finding by a preponderance of the evidence that a public governmental body or member of a public governmental body has purposely violated Section 610.010 to 610.026, the public governmental body or the member shall be subject to a civil penalty in an amount up to five thousand dollars. If the court finds that there is a purposeful violation of Sections 610.010 to 610.026, then the court shall order the payment by such body or member of all costs and reasonable attorneys fees to any party successfully establishing a violation. The court shall determine the amount of the penalty by taking into account the size of the jurisdiction, the seriousness of the offense, and whether the public governmental body or member of the public governmental body has violated Section 610.010 to 610.026 previously.

Section 610.027(4).

"We consider the trial court to be an expert on the issue of attorney's fees because it is acquainted with all the issues of the case, and it may determine the amount of attorneys fees without the aid of evidence." *Hill*, 371 S.W.3d at 81, citing *Essex Contracting, Inc. v. Jefferson County*, 277 S.W.3d 647, 656 (Mo. Banc 2009). In order for the Court to find a "knowing" violation of the Sunshine Law "a plaintiff must show that the defendant had actual knowledge that the conduct violated a statutory provision". *White v. City of Ladue*, 422 S.W.3d 439, 452 (Mo. App., 2014). An "act is done 'purposely' if it is willed, is product of conscious design, intent or plan that is to be done, and is done with awareness of probable consequences." *Spradlin v. City of Fulton*, 982 S.W.2d 255, 262 (Mo. Banc 1998). "Furthermore, engaging in conduct reasonably believed to be authorized by statute does not amount to a purposeful violation." *White*, 422 S.W.3d at 452, citing *R.L. Polk & Co. v. Missouri Depart. of Revenue,* 309 S.W.3d 881, 886 (Mo. App. W.D. 2010).

In the case at bar, the Appellants sought approval of their Appellants' Attorney Fees Application. The Trial Court, as the finder of fact, heard all relevant facts, circumstances and evidence as presented by the parties.[3] After considering all of the facts, circumstances and evidence presented by the parties, the Trial Court found that the City did not knowingly or purposefully violate the Sunshine Law. During the presentation

[3] Both parties were provided a full and fair opportunity to present their respective arguments for or against the award of attorney fees; and, Appellants make no claim that Appellants were denied an opportunity to present facts, evidence or argument.

of evidence, Respondent argued that "[t]raditionally, IA investigations have been closed, up until this point. There wasn't an intent to deprive them. We didn't intentionally stonewall. This case came up twice on summary judgment, which we won both summary judgment motions. We went up to the Court of Appeals, and the Court of Appeals reversed. That takes time. And that wasn't the City of Arnold stonewalling or stalling, it's just the judicial system". TR 19. The Trial Court agreed with that position.

Further, regarding the procedure for the examination of disputed records, this was a case of first impression. Although Section 610.100(5) allows for in camera review, it does not direct the parties, nor the court, as to who has the burden to request the in camera review. Respondent reasonably believed the burden was on the Appellants. On Appeal, the Appellate Court held, "Section 610.100(5) assigns no burden to either party to request an in camera review. Further the Sunshine Law contains no presumption permitting the trial court to close a disputed record that it has not seen". 2 L.F. 18. The Appellate Court went further and stated "rather than mandate by a particular section of the Sunshine Law here, in camera review is a practical remedy that would resolve any factual dispute, which at the same time maintaining confidentiality of documents that may be exempt from disclosure under the Sunshine Law." 2 L.F. 19.

During oral arguments, this position was discussed. "Our intent was to protect the employees, which is an important position." TR 19. "I am the party that brought up the in-camera review because I believe there was a burden shift. When we closed the records, the burden shifts back to Plaintiff to ask for the in-camera review although the statute was

silent about that." TR 20. The Trial Court again agreed that the position taken by the Respondent was reasonably calculated to be authorized by statute.

The Appellants in this case, could have, and should have asked for an in camera review. They failed to do so. Although the statutory language does allow for attorney fees, to protect the public, the statute cannot be used as a vehicle in which attorneys recklessly, imprudently or frivolously drive up the fees, without exhausting practical, statutorily provided means to resolve the dispute.

Respondent's position has always been that the record in dispute was intended to determine if the employees were fit for duty, a purely personnel issue. The investigation was not for the purpose of criminal prosecution. Therefore, the City reasonably believed the documents should remain closed. The City has no prior violations, and because this was a case of first impression, could not have knowingly or purposefully violated the Sunshine Law.

It is true that the Trial Court states that the Respondent's "contention that the Internal Affairs report is in whole, or in part, a personnel record is wholly inaccurate", 2 L.F. 25. Appellants assert that this reference equates to a finding of knowing or purposeful violation. Appellants cite no authority to support that position. Although the Trial Court found that Respondent's "contention" was inaccurate, that same Trial Court found that the violation that resulted from that "contention" was not knowing or purposeful. Being wrong is not tantamount to being knowingly or purposefully wrong. The Respondent reasonably believed that, because the purpose of conducting the report

was to determine if the employees were fit for duty and because the prosecutor declined to prosecute, the record was a personnel record. The Trial Court, the Appellants, and Respondent all failed to request an in camera review, which would have resolved this issue several years ago[4].

The Eastern District Court of Appeals Correctly Found No Evidence to Substantiate a Purposeful or Knowing Violation of the Sunshine Act

The case before this Court has been transferred from the Eastern District Court of Appeals, in part, because a similar case, *Strake*, was pending before this Court. Therefore, the Appellate Court held that "this case involves an issue of general interest and importance and thus it is proper to transfer the case to the Supreme Court". Opinion at 8. The *Strake* case has similar, although distinguishable, facts and circumstances to the case at bar. Since the time of the transfer, this Court has handed down a decision in the *Strake* case.

In *Strake,* the Court found "Robinwood's decision to withhold the requested documents requested to avoid potential contractual liability amounts to 'purposely' violating the Sunshine Law as part of a conscious design, intent, or plan 'to violate the law…' with awareness of the probable consequences". *Id* at 8, citing, *Spradlin,* 982

[4] Appellants argue that because Respondent did not file a motion under Section 610.100(4) that this Court should hold this as evidence of purposeful defiance. Section 610.100(4) pertains to the individual requesting their own records, which are closed, not those of another person.

S.W.2d at 262. The appellant in the *Strake* case had one very important thing that this case does not - evidence.

In *Strake*, the appellant put on evidence that Robinwood admitted to "knowing or having actual knowledge that it is subject to the Sunshine Law". See *Strake*. Further, the Robinwood appellant put on evidence that Robinwood's attorney had provided an opinion that "while we are cognizant of RSMo 610.021, we believe the most prudent course is to refuse these requests absent a Court Order to produce the requested documents". See *Strake*. The evidence in *Strake* demonstrated a strategic plan, a conscious design, on the part of the political subdivision to ignore or circumvent the Sunshine Law. The *Strake* appellant demonstrated that Robinwood was both aware that its failure to disclose was a violation and that it (Robinwood) had carefully weighed the risks and benefits of violating the law. The respondent (Robinwood) in *Strake* acknowledged that it had an obligation to disclose the documents under the Sunshine Act, but chose not to do so in order to limit liability elsewhere. That is a purposeful violation. The present case has no such evidence. To the contrary, the City of Arnold did not engage in any purposeful or knowing behavior calculated to deprive Appellants of the requested documents. Unlike *Strake*, which involved a settlement agreement, the record at issue at present is a personnel file. Settlement agreements are presumptively open under the Sunshine Law while personnel files are presumptively closed. RSMo 610.021. Further, in the present matter, counsel for the City did not opine that the record was open. Finally, there was no

effort by the City of Arnold to avoid other liability. The only evidence is that the City sought to protect the privacy of its employees' personnel records, hardly a nefarious act.

While Respondent and the law suggest that an abuse of discretion standard be used, regardless of the standard of review used by this Court, the burden is on the Appellants to demonstrate that there was a knowing or purposeful violation of the Sunshine Act. Appellants have failed to identify any evidence of a purposeful or knowing violation, because no evidence exists. The sole piece of evidence Appellants rely on is the characterization by the trial court in its Judgment that the City's contention was "inaccurate". 2 L.F. 25. Inaccuracy does not amount to a knowing or purposeful violation. "Engaging in conduct reasonably believed to be authorized by statute does not amount to a purposeful violation." *Spradling*, 982 S.W.2d at 263. It was not unreasonable for the Respondent to think that protecting personnel files was authorized by the Sunshine Law.

Further, the opinion of the Court of Appeals, after applying the abuse of discretion standard, states, in pertinent part, that "[i]n this case, we have the chief's affidavit, from which we can reasonably infer that the City's intent was not to forestall a lawsuit, but to protect its employee's privacy. There being no evidence to contradict that this was the City's motive, it would not be reasonable to infer a more sinister one." Opinion at 5. The majority opinion goes on to say "Even if we could reach the inferences and conclusions Appellants urge-that the City knew all along that the internal affairs report qualified as a criminal investigation and knowingly took a wholly inaccurate position intending to

thwart Appellants' efforts to file a lawsuit-we simply would not be free to substitute our judgment for that of the trial court." Opinion at 7.

The concurring opinion is also worth discussing. Although the concurrence does point to the Trial Court's statement that Respondent "knowingly and purposely refused to grant the documents", that statement is taken out of context. This comment is part of a much longer discussion between the Judge and counsel, and this phrase is only one part of that discussion. The comment by the Trial Court was made prior to the court holding an evidentiary hearing regarding the knowingly and purposefulness of the City's actions. Although the Trial Court clearly made a statement, this comment was made prior to the presentation of facts; and, upon hearing the facts, the Judge agreed with Respondent, that there was no evidence of a knowing or purposeful infraction. To bind the Trial Court to these pre-evidentiary comments that were not part of the judgment entered by the Trial Court stretches credulity. In fact, this leap of logic is borne out by the fact that the Trial Court did ***not*** make a finding of knowing or purposeful violation. To the contrary, after the evidentiary hearing, the Trial Court understood that the characterization of the documents was a mistake, and that the actions of the City did not amount to a knowing or purposeful violation. In fact, the only evidence the concurring opinion and the Appellants point to in support of a purposeful violation, is the "non-finding" utterance of the Trial Court during the in camera review. However, it is clear from the standard set out in *Strake* that there must be more than an inference. There must be actual evidence, such as an acknowledgment that the decision not to disclose was understood to be a violation of the

Sunshine Law and that the party considered the pros and cons of not disclosing the documents, and still decided to not disclose. Those facts simply do not exist in the present matter.

It is noteworthy that at no time did Appellants engage in any discovery to uncover any evidence of knowing and purposeful action.[5] Appellants did not depose any member of the city council, Chief Shockey, or the Mayor. Nor did Appellants request any documentation or interoffice e-mails, communications, or meeting minutes where any documents may have been discussed. Unlike the appellant in *Strake*, these Appellants made no effort to uncover the alleged improper motive of the municipal government. Instead, Appellants seek to have this Court infer it. However, it would be an injustice to infer that such evidence exists, especially when there was no such finding by the Trial Court and no effort by the Appellants to discover it.

The Existence of Criminal Conduct is not Dispositive, Disciplinary Records are Specifically Exempt from Disclosure and Neither Issue is Relevant nor before this Court on Appeal

The existence of criminal conduct is not dispositive regarding the disclosure of personnel records. In addition, disciplinary records are specifically exempt from

[5] While no such evidence exists, it is telling that Appellants made no effort to discover such evidence. This lack of effort calls into question whether Appellants' motives were to uncover open documents or engage in protracted litigation and ever increasing attorney fees.

disclosure under the Sunshine Law. RSMo. 610.021(3). Although Appellants only allude to these issues in their brief, Appellants have consistently raised these issues on appeal and during oral arguments. Therefore, Respondent feels it must address these points so the inappropriate argument is not presumed admitted. First, these issues are not before the Court. The Trial Court entered no order or judgment regarding criminal conduct being, or not being, dispositive. Further, Appellants' contention that disciplinary records should be open, is ridiculous. Disciplinary records are specifically closed under Section 610.021(3). The legislature has seen fit to keep disciplinary records closed, and this Court should not consider that matter. Finally, Appellants did not properly preserve these issues for appeal. Appellants' Notice of Appeal specifically states this appeal is limited to the denial of attorneys' fees and civil penalties. 2 L.F. 57.

POINT II. THE TRIAL COURT DID NOT ERR IN DECLINING TO AWARD ATTORNEYS FEES BECAUSE THE ATTORNEYS FEES SUBMITTED ARE NOT REASONABLE IN THAT APPELLANTS' ATTORNEYS FEES EXCEED THE INDUSTRY STANDARD FOR LEGAL SERVICES PROVIDED TO MUNICIPALITIES, AND THE REASONABLENESS IS AN ISSUE OF FACT TO BE DETERMINED BY THE TRIAL COURT.

Respondent contends that the judgment of the Trial Court, declining to assess attorneys' fees and/or civil penalty, should be affirmed. However, even if this Court were to find that a knowing or purposeful violation existed, the Appellants' contention that Remand is not appropriate is unsupported by the law.

"A party may recover attorney's fees when allowed by statute." *Hill*, 371 S.W.3d at 81, citing *Williams v. Finance Plaza Inc.*, 78 S.W.3d 175, 184 (Mo. App. 2002). Section 610.027(3) and Section 610.027(4) allow a trial court to award "all costs and reasonable attorney fees". "Relevant factors in determining the reasonable value and amount of statutorily authorized fees, include: 1) the rates customarily charged by the attorneys involved in the case and by other attorneys in the community for similar services; 2) the number of hours reasonably expended on the litigation; 3) the nature and character of the services rendered; 4) the degree of professional ability required; 5) the nature and importance of the subject matter; 6) the amount involved or the result obtained; and 7) the vigor of the opposition." *Hill*, 371 S.W.3d at 81-82. "Another relevant factor is the degree of responsibility imposed on the attorney for whom fees are sought. *Id,* citing *Next Day Motor Freight, Inc v. Hirst*, 950 S.W.2d 676, 680 (Mo. App. 1997).

Because the Trial Court has consistently found that there was no knowing or purposeful violation, these factors have never been considered by the Trial Court, and not before this Court for review. The reasonableness of Appellants' attorneys' fees is an issue of fact that was never addressed by the Trial Court. It could not have been addressed, because the Trial Court never found that attorney fees were warranted. Respondent has not stipulated that Appellants' attorney fees are reasonable; no evidence

has been presented as to the reasonableness; and, Respondent has not been provided an opportunity to dispute the reasonableness.[6]

Factually, Appellants' fees are unreasonable, considering the type of law at issue. The standard municipal rate is far lower than the hourly rate sought by Appellants. Attorney Schock's approximate hourly rate for this case is $350.00 per hour. Attorney Menees' approximate hourly rate is $295.00 per hour, and Attorney McManama's hourly rate is approximately $150.00 per hour. 2 L.F. 30.

Further, Appellants' inexplicably brought multiple attorneys to almost every court appearance and/or conference. 2 L.F. 34. In some cases, Appellants brought three attorneys for matters that could be, and were, easily handled by one attorney for Respondent. The statutes set out, specifically, the factors that should be considered ***if*** attorney fees are awarded. In the present matter, there was no award of attorney fees; and, therefore, no consideration of the statutory factors. Each factor, listed in the statutes, must be heard and considered by the Trial Court before an attorney fee award can be made. Absent an award of attorney fees, Respondent has not been given notice of the grounds on which the reasonableness of the attorney fees was determined. The award of attorney fees is simply not ripe for this Court to decide.

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[6] Respondent should have the opportunity to present the average hourly rate charged to municipalities in the 23rd Judicial Circuit. As noted, above, no evidence was presented because no finding of knowing or purposeful violation was made.

CONCLUSION

This Court should deny this appeal because Respondent did not purposefully or knowingly violate the Missouri Sunshine Law. The previous issue on Appeal was a case of first impression; Respondent reasonably believes it acted in compliance with the law; Appellants can point to no evidence to substantiate their position; and, finally the issue of the amount and reasonableness of any attorney fees is not ripe for determination.

Respectfully submitted,

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RULE 84.06(c) CERTIFICATION AND CERTIFICATE OF SERVICE

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word 2007 and contains no more than 5,419 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure (less than the 31,000 limit in the rules). The font is Times New Roman, proportional spacing, 13-point type. An electronic copy of the full text of this brief has been served on each party separately represented by counsel via the court's electronic filing system this 17th day of December, 2015.

Respectfully submitted,

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