

IN THE MISSOURI SUPREME COURT

JOHN STRAKE,

Appellant,

v.

ROBINWOOD WEST COMMUNITY IMPROVEMENT DISTRICT,

Respondent.

No. SC94842

Appeal from the Circuit Court of St. Louis County

Honorable Kristine Allen Kerr, Judge

SUBSTITUTE BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CASES, STATUTES AND AUTHORITIES	3
JURISDICTIONAL STATEMENT	5
STATEMENT OF FACTS	7
POINT RELIED ON	12
 The trial court did not err in entering judgment finding RWCID did not knowingly or purposely violation the Missouri Sunshine Law and therefore denying Strake’s request for a civil penalty, attorney’s fees and costs because Strake failed to meet his burden of proof by failing to present evidence showing RWCID had actual knowledge that the specific types of records requested by Strake were subject to disclosure under the Missouri Sunshine Law or evidence showing RWCID intentionally withheld said documents from Strake.	
ARGUMENT.....	13
A. Knowingly	17
B. Purposely	21
CONCLUSION	26
CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)	27
CERTIFICATE OF MAILING	28

TABLE OF CASES, STATUTES AND AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Bateman v. Rinehart</i> , 391 S.W.3d 441 (Mo. banc 2013)	17, 18
<i>Buckner v. Burnett</i> , 908 S.W.2d 908 (Mo. App. W.D. 1995)	22
<i>Finnegan v. Old Republic Title Co. of St. Louis</i> , 246 S.W.3d 928 (Mo. banc 2008).....	14
<i>Great Rivers Environmental Law Center v. City of St. Peters</i> , 290 S.W.3d 732 (Mo. App. E.D. 2009).....	16, 19, 21
<i>Hemeyer v. KRCG-TV</i> , 6 S.W.3d 880 (Mo. banc 1999)	14
<i>ITT Comm. Fin. Corp. v. Mid-America Marine Supply Corp.</i> , 854 S.W.2d 371 (Mo. banc 1993).....	13, 14
<i>Kansas City Star Co. v. Shields</i> , 771 S.W.2d 101, 104 (Mo. App. W.D. 1989)...	14, 19
<i>R.L. Polk & Co. v. Missouri Dept. of Revenue</i> , 309 S.W.3d 881(Mo. App. W.D. 2010).....	16, 19, 21
<i>Spradlin v. City of Fulton</i> , 982 S.W.2d 255 (Mo. banc 1998)	14, 16, 18, 21, 22
<i>State ex rel. Wolfrum v. Wiesman</i> , 225 S.W.3d 409 (Mo. banc 2007).....	14
<i>Strake v. Robinwood West Community Improvement District</i> , No. ED101213, 2015 WL 166917, at *1 (Mo. App. E.D. Jan. 13, 2015).	6, 11
<i>White v. City of Ladue</i> , 422 S.W.3d 439 (Mo. App. E.D. 2013).....	16, 17, 18, 21
<i>Wright v. City of Salisbury</i> , No. 2:07CV00056 (AGF), 2010 WL 2947709 at *4 (E.E. Mo. July 22, 2010)	14, 16, 17, 19, 21, 22, 23

<u>Statutes & Ordinances</u>	<u>Page</u>
Section 610.027 R.S.Mo (2012).....	14, 18
Section 610.027.3 R.S.Mo (2012).....	16
Section 610.027.4 R.S.Mo (2012).....	16
Section 610.027.6 R.S.Mo (2012).....	20, 24, 25
 <u>Constitutional Provisions</u>	 <u>Page</u>
Article V §10 of the Constitution of the State of Missouri	6, 11
 <u>Other Authorities</u>	 <u>Page</u>
BLACK’S LAW DICTIONARY 1236 (6 th ed. 1990)	21
BLACK’S LAW DICTIONARY 950 (9 th ed. 2009).....	18
MO Supreme Court Rule 2 - Terminology.....	17

JURISDICTIONAL STATEMENT

The present appeal arises from a final order and judgment entered on January 21, 2014 entered by The Honorable Kristine Allen Kerr of the Circuit Court of St. Louis County. (LF at 111-115 and Supp. LF 1).¹ Appellant John P. Strake (hereinafter “Strake”) filed the underlying equitable matter in the Circuit Court of St. Louis County against Respondent Robinwood West Community Improvement District (hereinafter “RWCID”) seeking an injunction ordering RWCID to produce four (4) categories of records under the Missouri Sunshine Law. (LF at 5-6). Strake’s Petition also sought the imposition of a civil penalty and an award of attorney’s fees and costs claiming RWCID purposely, or in the alternate, knowingly, violated the Missouri Sunshine Law. (LF at 4-7).

A motion for summary judgment was filed by Strake and said motion was granted in part and denied in part. (LF at 111-115 and Supp. LF 1). Prior to entering its final order and judgment on Strake’s motion for summary judgment, the court entered a separate order stating that denial of summary judgment on a particular issue is deemed a judgment in favor of the opposing party on that same issue. (LF at 83).

Strake appealed the trial court’s denial of the imposition of a civil penalty and denial of an award of attorney’s fees and costs to Strake as the trial court found RWCID did not knowingly or purposely violate the Missouri Sunshine Law. (LF at 111-115). The Missouri Court of Appeals, Eastern District, affirmed the trial court’s ruling. *Strake v.*

¹ The Legal File shall be designated throughout this brief as “LF”. The Supplemental Legal File shall be designated throughout this brief as “Supp. LF”.

Robinwood West Community Improvement District, No. ED101213, 2015 WL 166917, at *1 (Mo. App. E.D. Jan. 13, 2015).

On April 28, 2015, this Court granted Strake's application for transfer. Jurisdiction is vested in this Court under Article V §10 of the Constitution of the State of Missouri.

STATEMENT OF FACTS

I. Underlying Facts

Strake is a resident living in Robinwood West Community Improvement District. (LF at 22, 25, 59, 113). RWCID is a government entity created by statutes of the State of Missouri and is a “[p]ublic governmental body” within the definition of § 610.010(4), RSMo (2012) of the Missouri Sunshine Law. (LF at 22, 36, 59-60, 113). On or about November 12, 2012, Plaintiff submitted a written request under the Sunshine Law to RWCID’s custodian of records seeking copies of documents related to “a personal injury lawsuit filed against the RWCID on/a [sic] Feb 2010” and seeking “copies of the documents related to the late payment on the non-resident pool membership, to include a copy of the non-resident pool membership form, the date payment was deposited and the amount of payment.” (LF at 5-6, 9, 23, 25-26, 28, 60-61, 63).

RWCID admits it understood Strake’s request with regards to the personal injury lawsuit to relate to a lawsuit titled Michael v. Robinwood West Community Improvement District. (LF at 60-61, 64). Specifically with regards to this personal injury lawsuit, Strake requested the following records:

- a. Any agreements made by RWCID or on behalf of the RWCID;
- b. Any minutes or votes taken by the RWCID Board;
- c. Any legal bills, including legal bills that may have been paid on behalf of Jerold Polt; and
- d. Correspondence among RWCID, its insurance company, and attorneys representing RWCID, its Board, or Polt.

(LF at 5-6, 9, 23, 25-26, 28, 60-6, 63, 111-115).

On November 20, 2012, RWCID sent Strake an email confirming receipt of his Sunshine Law request on Friday, November 16, 2012 at 4:30pm. (LF at 29, 61, 64, 85). Said email also stated that Steve O'Rourke, RWCID's President, was contacting RWCID's attorney "in regards to [Mr. Strake's] request for information related to the personal injury lawsuit, and [RWCID] will respond to [Mr. Strake] once [RWCID] receive[s] guidance on what can and should be shared." (LF at 29, 64, 86). Furthermore, RWCID's email of November 20, 2012 to Mr. Strake forwarded documents responsive to the portion of Mr. Strake's November 12, 2012 request for documents relating to late payment on non-resident pool membership. (LF at 29, 64, 86).

On December 7, 2012, RWCID sent correspondence to Mr. Strake regarding RWCID's response to Mr. Strake's request for documents relating to the personal injury lawsuit. (LF at 32-34, 86). The correspondence consisted of an email from Mr. O'Rourke, President of RWCID, to Mr. Strake dated December 7, 2012. This email forwarded correspondence RWCID received from its legal counsel providing RWCID with said counsel's legal analysis of Mr. Strake's requests and the responses that should be given to said requests. (LF at 32-34, 86). The letter dated December 7, 2012 from RWCID's legal counsel advised Strake that it would not disclose any of the records related to Michael v. Robinwood West Community Improvement District absent a court order requiring it to do so. (LF at 32-34, 61, 86). RWCID only denied Mr. Strake's request for records relating to the personal injury lawsuit after seeking legal advice and only upon reliance of said legal advice. (LF at 29, 32-34, 64, 108-110).

RWCID admits Michael v. Robinwood West Community Improvement District was fully and finally disposed of through settlement. (LF at 6, 9, 24, 62). The settlement agreement in that matter contained a confidentiality clause stating that the terms of the settlement and release shall remain confidential unless there is an order of the court. (LF at 64, 87, 108-109).

Regardless of the statutory requirements asserted by Plaintiff for disclosure of documents that have not been ordered closed by the Court, RWCID was concerned that it could have been in breach of contract if it produced a copy of the settlement agreement to Mr. Strake without a court order. (LF at 65, 87, 108-109). The undersigned counsel for RWCID sent a letter to Ms. Michael on September 17, 2013 notifying Ms. Michael of this pending matter and asking whether she would voluntarily waive the enforcement of the confidentiality clause so as to permit RWCID to produce a copy of the settlement agreement to Mr. Strake in this matter. (LF at 65, 67-69, 87). The September 17, 2013 letter from the undersigned counsel notified Ms. Michael that if the undersigned counsel did not receive a copy of said letter signed by Ms. Michael within fourteen days, it would be assumed that Ms. Michael is unwilling to waive the confidentiality clause contained in her settlement agreement. (LF at 65, 67-69, 87-88). The undersigned counsel has never received a signed copy of the September 17, 2013 letter from Ms. Michael. (LF at 65, 88).

II. Proceedings Below

On July 2, 2013, Strake filed the underlying equitable matter in the Circuit Court of St. Louis County against RWCID seeking the production of four (4) categories of

records by RWCID alleging said records were public under the Missouri Sunshine Law. (LF at 4-7). In the underlying lawsuit, Strake's Petition sought to have the court: 1) declare that each category of record sought were public records under the Missouri Sunshine Law; 2) enter an injunction requiring RWCID to provide Strake with copies of said records; 3) make a finding that RWCID purposely, or in the alternate, knowingly, violated the Missouri Sunshine Law; 4) impose a civil penalty against RWCID pursuant to the Missouri Sunshine Law; and 5) award Strake attorney's fees and costs of litigation per the Missouri Sunshine Law. (LF at 4-7). On October 28, 2013, Strake filed a motion for summary judgment again requesting each of the above findings by the court. (LF at 12-42).

Strake's motion for summary judgment presented five (5) arguments to the court. Strake requested production of each of the four (4) categories of records and a separate issue was presented relating to whether RWCID knowingly or purposely violated the Sunshine Law and, if so, sought an imposition of a civil penalty and award of attorney's fees and costs. (LF at 12-42).

Prior to entering its final order and judgment on Strake's motion for summary judgment, the court deemed any denial of summary judgment on an issue is a judgment in favor of the opposing party on that same issue so as to resolve the case. (LF at 83). Ultimately, Strake's motion for summary judgment was granted in part and denied in part. (LF at 111-115).

The court denied Strake's request for "correspondence among RWCID, its insurance company, and attorneys representing RWCID, its Board, or Polt." (LF at 111-

115). For the three (3) remaining categories of documents, the court granted Strake's requests and RWCID was ordered to produce certain items falling within those categories. (LF at 111-115). RWCID was ordered to produce the settlement agreement, outstanding meeting minutes, and the amount of the legal bills. (LF at 111-115).

Finally, the court denied Strake's request for the imposition of a civil penalty and an award for attorney's fees and costs finding that RWCID did not knowingly or purposely violate the Missouri Sunshine Law. (LF at 111-115). Strake filed an appeal in the Missouri Court of Appeals, Eastern District, on the solely relating to the trial court's denial of the imposition of a civil penalty and denial of an award of attorney's fees and costs to Strake. The Missouri Court of Appeals, Eastern District, affirmed the trial court's ruling. *Strake v. Robinwood West Community Improvement District*, No. ED101213, 2015 WL 166917, at *1 (Mo. App. E.D. Jan. 13, 2015). On April 28, 2015, this Court granted Strake's application for transfer. Jurisdiction is vested in this Court under Article V §10 of the Constitution of the State of Missouri.

POINT RELIED ON

I.

THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT FINDING RWCID DID NOT KNOWINGLY OR PURPOSELY VIOLATE THE MISSOURI SUNSHINE LAW AND THEREFORE DENYING STRAKE’S REQUEST FOR A CIVIL PENALTY, ATTORNEY’S FEES AND COSTS BECAUSE STRAKE FAILED TO MEET HIS BURDEN OF PROOF BY FAILING TO PRESENT EVIDENCE SHOWING RWCID HAD ACTUAL KNOWLEDGE THAT THE SPECIFIC TYPES OF RECORDS REQUESTED BY STRAKE WERE SUBJECT TO DISCLOSURE UNDER THE MISSOURI SUNSHINE LAW OR EVIDENCE SHOWING RWCID INTENTIONALLY WITHHELD SAID DOCUMENTS FROM STRAKE.

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

Wright v. City of Salisbury, No. 2:07CV00056 (AGF), 2010 WL 2947709 (E.E. Mo. July 22, 2010)

Section 610.027.3 R.S.Mo (2012)

Section 610.027.4 R.S.Mo (2012)

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT FINDING RWCID DID NOT KNOWINGLY OR PURPOSELY VIOLATE THE MISSOURI SUNSHINE LAW AND THEREFORE DENYING STRAKE'S REQUEST FOR A CIVIL PENALTY, ATTORNEY'S FEES AND COSTS BECAUSE STRAKE FAILED TO MEET HIS BURDEN OF PROOF BY FAILING TO PRESENT EVIDENCE SHOWING RWCID HAD ACTUAL KNOWLEDGE THAT THE SPECIFIC TYPES OF RECORDS REQUESTED BY STRAKE WERE SUBJECT TO DISCLOSURE UNDER THE MISSOURI SUNSHINE LAW OR EVIDENCE SHOWING RWCID INTENTIONALLY WITHHELD SAID DOCUMENTS FROM STRAKE.

Standard of Review

When considering appeals from summary judgments, an appellate court reviews the record in the light most favorable to the party against whom judgment was entered. *ITT Comm. Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). The review of an order of summary judgment is essentially de novo as an issue of law. *Id.* When a motion for summary judgment is filed and supported, an adverse party may not simply rest upon allegations made in the pleadings and must set forth specific facts showing a genuine issue for trial. *Id.* at 381. For purposes of summary judgment, a genuine issue exists when the record contains competent materials that evidence two plausible but contradictory accounts of the essential facts. *Id.* at 382. A

genuine issue is a dispute that is real, not merely argumentative, imaginary, or frivolous.
Id.

In this case, per court order, a denial of a summary judgment against one party is deemed a grant of summary judgment in favor of the other party. (LF at 83, 111-115; Supp. LF at 1-2). Here, Strake only appeals one of the court's findings in the final order and judgment from the underlying case. The subject of this appeal is the court's finding that RWCID did not "knowingly" or "purposely" violate the Sunshine Law, which also resulted in a denial of Strake's request for the imposition of a civil penalty and an award for Strake's reasonable attorney's fees and costs. (LF at 111-115).

"Interpretation of a statute is a question of law and subject to *de novo* review." *Finnegan v. Old Republic Title Co. of St. Louis*, 246 S.W.3d 928, 930 (Mo. banc 2008); citing *State ex rel. Wolfrum v. Wiesman*, 225 S.W.3d 409, 411 (Mo. banc 2007). "Suits for 'judicial enforcement' of Chapter 610 are governed by the first four subsections of 610.027." *Hemeyer v. KRCG-TV*, 6 S.W.3d 880, 883-884 (Mo. banc 1999). The civil fine and attorney's fee provisions of §610.027 R.S.Mo (2012) of the Missouri Sunshine Law are penal in nature and must be strictly construed. *See Spradlin v. City of Fulton*, 982 S.W.2d 255, 261-62 (Mo. en banc. 1998); *Wright v. City of Salisbury*, No. 2:07CV00056 (AGF), 2010 WL 2947709 at *4 (E.E. Mo. July 22, 2010); *Kansas City Star Co. v. Shields*, 771 S.W.2d 101, 104 (Mo. App. W.D. 1989).

Argument

Stemming from the final order and judgment entered by the court in the underlying case, Strake is appealing the court's finding that RWCID did not knowingly

or purposely violate the Sunshine Law, which in turn resulted in a denial of Strake's request for RWCID to be subjected to a civil penalty and payment of Strake's reasonable attorney's fees and costs. Although the court in the underlying lawsuit made additional findings as to each category of documentation requested by Strake, these findings are not at issue here. Whether RWCID knowingly or purposely violated the Sunshine Law is the only issue before this court on appeal.

Five (5) separate issues were ruled upon by the court in its final order and judgment in the underlying case. (LF at 111-115). The court ruled as to each of the four (4) categories of documents requested from RWCID by Strake and ruled as to whether RWCID knowingly or purposely violated the Missouri Sunshine Law. (LF at 111-115). Strake is not appealing the findings made by the court relating to whether each category of documentation must be produced under the Sunshine Law. In the underlying case, the court found Strake's request for "correspondence among RWCID, its insurance company, and attorneys representing RWCID, its Board, or Polt" fell within an exception to the Sunshine Law and therefore disclosure was not ordered. (LF at 111-115). As such, RWCID did not violate the Sunshine Law in denying Strake's request for said documents. There can be no knowing and purposeful violation of the Sunshine Law when in fact there is no violation of said law.

For the three (3) remaining categories of documents, RWCID was ordered to produce certain items falling within those categories of documents as the court found those documents to be open and subject to the Sunshine Law. (LF at 111-115). However, simply because RWCID was ordered to produce these documents does not equate to a

“knowing” or “purposeful” violation of the Sunshine Law. These types of violations require a finding of something more than the violation itself.

Pursuant to the Sunshine Law, Strake has the burden of showing, by a preponderance of the evidence, that RWCID or its members knowingly or purposely violated the Sunshine Law. Only then can RWCID be subject to a civil penalty and possibly subject to payment of Strake’s reasonable attorney’s fees and costs. *See* §610.027.3 R.S.Mo. (2012) and §610.027.4 R.S.Mo. (2012). Here, the record is completely void of evidence to support a claim that RWCID knowingly or purposely violated the Missouri Sunshine Law. Thus, Strake cannot meet his statutory burden of proof for such a finding.

A violation of the Sunshine Law does not automatically equate to a “knowing” or “purposeful” violation. *See Spradlin v. City of Fulton*, 982 S.W.2d 255 (Mo. en banc. 1998); *White v. City of Ladue*, 422 S.W.3d 439 (Mo. App. E.D. 2013); *R.L. Polk & Co. v. Missouri Dept. of Revenue*, 309 S.W.3d 881 (Mo. App. W.D. 2010); *Wright v. City of Salisbury*, No. 2:07CV00056 (AGF), 2010 WL 2947709 at *5 (E.E. Mo. July 22, 2010); *Great Rivers Environmental Law Center v. City of St. Peters*, 290 S.W.3d 732 (Mo. App. E.D. 2009) (each finding a lack of a “knowing” or “purposeful” violation of the Sunshine Law despite a separate finding that a violation did occur). “Knowingly” and “purposely” are two separate and distinct degrees of violating the Sunshine Law. They are set forth separately within the statute and require different standards. Therefore, each will be analyzed separately herein.

A. Knowingly

In Missouri, Appellate Courts have yet to independently interpret “knowingly” in the context of the Missouri Sunshine Law. However, in an opinion issued by the Missouri Court of Appeals, Eastern District, in December 2013, it adopted an interpretation of “knowingly” made by a federal district court. *See White v. City of Ladue*, 422 S.W.3d 439, 452 (Mo. App. E.D. 2013); (quoting *Wright v. City of Salisbury*, No. 2:07CV00056 (AGF), 2010 WL 2947709 at *5 (E.E. Mo. July 22, 2010)). In *Wright*, the federal district court interpreted “knowingly” in the Missouri Sunshine Law by using the plain and ordinary meaning of the statutory language, which is consistent with Missouri’s primary rule of statutory interpretation. *See Wright*, at *5; *See also Bateman v. Rinehart*, 391 S.W.3d 441, 446 (Mo. banc 2013). Per the *White* opinion, to establish a “knowing” violation of the Missouri Sunshine Law, Strake is required, and has the burden of showing, that RWCID had “**actual knowledge** that the conduct violated a statutory provision.” *White*, 422 S.W.3d at 452 (quoting *Wright v. City of Salisbury*, No. 2:07CV00056 (AGF), 2010 WL 2947709 at *5 (E.E. Mo. July 22, 2010)) (emphasis added). Defining “knowing” as having “actual knowledge” within the context of the Missouri Sunshine Law is consistent with the definition of “knowingly”, “knowledge”, “known” and “knows” as used within this Court’s Rules governing the Missouri Bar and the Judiciary. *See* MO Supreme Court Rule 2 - Terminology. In Rule 2, this Court defines “knowingly”, “knowledge”, “known” and “knows” as “actual knowledge of the fact in question.” *Id.*

Much like this Court's use of the Black's Law Dictionary to define "purposely" within the context of the Sunshine Law in *Spradlin*, the Black's Law Dictionary definition of "actual knowledge" should be applied. *See Spradlin* at 262 (Mo. en banc 1998). Under Black's Law Dictionary, "actual knowledge" is defined as "[d]irect and clear knowledge...of information that would lead a reasonable person to inquire further." BLACK'S LAW DICTIONARY 950 (9th ed. 2009) (emphasis added). As such, Strake had the burden of proof to show beyond a preponderance of the evidence that RWCID had direct and clear knowledge that it was violating the Sunshine Law when it denied Strake's request.

Both Strake and the Amicus have asserted arguments that a better interpretation of "knowingly" within the Missouri Sunshine Law is to permit a demonstration of constructive knowledge as opposed to actual knowledge. Under this theory, knowledge would be imputed by law to the entity from which records are requested. There is nothing in Missouri case law to support this alternative interpretation proposed by Strake and the Amicus. In fact, to permit a demonstration of constructive knowledge would be contrary to the legislative intent as it would result in a finding that all violations are "knowing" violations. Again, "the primary rule of statutory interpretation is to effectuate legislative intent through reference to the plan and ordinary meaning of the statutory language." *Bateman*, at 446. The legislature intended for the civil fine and attorney's fee provisions of §610.027 R.S.Mo (2012) of the Missouri Sunshine Law to be penal in nature and not all violations of the Sunshine Law are done "knowingly" or "purposely". *See Spradlin v. City of Fulton*, 982 S.W.2d 255, 261-62 (Mo. en banc. 1998); *White v. City of Ladue*, 422

S.W.3d 439 (Mo. App. E.D. 2013); *R.L. Polk & Co. v. Missouri Dept. of Revenue*, 309 S.W.3d 881 (Mo. App. W.D. 2010); *Wright v. City of Salisbury*, No. 2:07CV00056 (AGF), 2010 WL 2947709 at *4 (E.E. Mo. July 22, 2010); *Kansas City Star Co. v. Shields*, 771 S.W.2d 101, 104 (Mo. App. W.D. 1989); *Great Rivers Environmental Law Center v. City of St. Peters*, 290 S.W.3d 732 (Mo. App. E.D. 2009). Consistent with holdings within many Missouri Appellate Courts, including this Court, Strake must show RWCID had actual or direct and clear knowledge that it was violating the Sunshine Law.

RWCID admits knowing or having “actual knowledge” that it is subject to the Sunshine Law. RWCID also admits generally knowing that certain documentation is subject to production under the Sunshine Law. However, it adamantly denies that it had any knowledge as to whether documents relating to a settled personal injury lawsuit filed against RWCID must be produced under the Sunshine Law. (*See* LF at 108-110). This is a request that would require the production of documents that include sensitive, private, confidential and privileged information. As a result, RWCID sought advice from legal counsel who indicated the documents need not be produced. (LF at 33-34). There is nothing in the record suggesting that RWCID had direct and clear knowledge that it would violate the Sunshine Law if it relied upon said advice from legal counsel and deny Strake’s requests.

Additionally, Strake has failed to provide any evidence that RWCID had previously received Sunshine Law requests for documentation relating to settled personal injury lawsuits, or even other types of litigation, involving RWCID so as to impute RWCID with actual or prior knowledge. Absent prior experience with a request such as

Strake's request for documentation relating to a personal injury lawsuit, it was absolutely reasonable for RWCID to seek advice of counsel. As noted above, the requested documents related to privileged litigation information (which the court in the underlying case found to be true as to the correspondence requested), and related to another resident's personal medical information.

The lawsuit at issue, Michaels, was a personal injury claim. Ms. Michaels has a statutory expectation of privacy as it relates to her medical information (i.e. HIPPA) and her desire for this information to remain private is not only evidenced in the confidentiality clause of the settlement agreement, but also in her lack of response to the letter sent by the undersigned counsel seeking waiver of said confidentiality clause. (LF at 64-65, 67-69, 108-110).

Given the foregoing, not only has Strake failed to meet his burden of proof that RWCID "knowingly" violated the Sunshine Law, but the record is clear that RWCID had no "actual knowledge" as to whether these requested records must be produced. Strake did not present the trial court with evidence that RWCID previously received a request similar to Strake's and the record clearly shows that RWCID's action in seeking and relying upon legal advice was reasonable. RWCID followed a course of action permitted by §610.027.6 R.S.Mo (2012), which states that a public governmental body which is in doubt may seek a formal opinion from an attorney for the governmental body. *Id.* As such, RWCID simply complied with a permissible course of action pursuant to the Sunshine Law and relied on the opinion sought when responding to Strake's request. This

action does not equate to a “knowing” violation of the Sunshine Law. *See Great Rivers Environmental Law Center v. City of St. Peters*, 290 S.W.3d at 734.

B. Purposely

For an interpretation and meaning of “purposely” within the context of the Missouri Sunshine Law, this Court’s opinion in *Spradlin v. City of Fulton* is continuously cited to as the governing case. *See R.L. Polk & Co. v. Missouri Dept. of Revenue*, 309 S.W.3d 881 (Mo. App. W.D. 2010); *White v. City of Ladue*, 422 S.W.3d 439 (Mo. App. E.D. 2013); *Wright v. City of Salisbury*, No. 2:07CV00056 (AGF), 2010 WL 2947709 at *5 (E.E. Mo. July 22, 2010). “The word ‘purposely’ must be given its ordinary and usual meaning.” *Spradlin v. City of Fulton*, 982 S.W.2d 255, 262 (Mo. en banc 1998). “Purposely” is defined in the Black’s Law Dictionary as “intentionally; designedly; consciously; knowingly.” *Id.* 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.” *Id.* (citing to BLACK’S LAW DICTIONARY 1236 (6th ed. 1990)) (emphasis added). “More than a mere intent to engage in the conduct resulting in the violation is necessary.” *Id.*

“Engaging in conduct reasonably believed to be authorized by statute does not amount to a purposeful violation.” *Id.* at 263. Prior to responding to Strake’s requests, RWCID sought advice of counsel. It was this advice upon which RWCID relied when responding to Strake. As evidenced by the email from Mr. O’Rourke to Strake dated December 7, 2012, RWCID simply forwarded a letter it had received that very same day from RWCID’s counsel. (LF at 32-34). This correspondence provided legal advice and

analysis addressing each category of documentation sought by Strake and advice as to whether said documentation should be produced. (LF at 32-34). At no time did RWCID or any of its Board members provide responsive comments or information to Strake above and beyond the analysis set forth in the letter from RWCID's counsel. The record is clear that RWCID solely and reasonably relied upon advice of counsel when responding to Strake's requests.

Strake wants this Court to believe that the decisions of the trial court and the Eastern District in this matter are contrary to the holding in *Buckner v. Burnett*, 908 S.W.2d 908 (Mo. App. W.D. 1995). However, "an official obviously can fail to give access and fail to respond fully without purposefully violating Chapter 610." *Id.* at 912. The *Buckner* court ultimately found that allegations of failing to provide access to documents and failing to respond fully and accurately to a request are not sufficient allegations for a finding or a purposeful violation. *Id.* This is exactly analogous to the allegations in the case at hand. Additionally, in *Spradlin*, which is a decision that came three years after *Buckner*, this Court found evidence sufficient to show that a city council members' violation of the Open Meetings Act by closing council meetings relating to a project was not done "purposely" as required to justify award of attorney fees. *Spradlin*, 982 S.W.2d at 263.

The decisions of the trial court and the Eastern District in this matter are also consistent with the holding in *Wright*, which is directly applicable. In that case, when interpreting the Missouri Sunshine Law, the federal district court found the violation at issue was not knowing or purposeful. *Wright*, 2010 WL 2947709 at *3-5 (E.D. Mo. July

22, 2010). The violation at issue in *Wright* related to a city conducting a closed session without announcing the reason for same. *Id.* The court specifically cited to the City Attorney's presence at the meeting, that attorney's belief a violation had not occurred and the city's direct reliance on the attorney's advice. *Id.* This is directly on point and indisputably supports the conclusion that RWCID did not knowingly or purposely violation the Sunshine Law.

Applicable to both analyses as to whether RWCID either "knowingly" or "purposely" violated the Sunshine Law when responding to Strake's requests, it is important to note that Strake made an additional request unrelated to the Michaels litigation. In his letter of November 12, 2012, Strake also sought the production of a non-resident pool membership form and documentation showing the date a late payment was deposited and the amount of the payment. (LF at 28). As Strake admits, this information was provided by RWCID to Strake in a timely manner without seeking advice of counsel. (LF at 29-31). RWCID knew this information must be disclosed to Strake under the Sunshine Law and did not withhold said information.

In its brief, the Amicus makes numerous general, broad sweeping policy arguments regarding the need to enforce the Sunshine Law by imposing more sanctions on violators. The Amicus cites to and discusses at length reports issued by the State Auditor's Office noting numerous deficiencies and/or violations found. However, this discussion by the Amicus is completely irrelevant and unrelated to the matter at hand. None of the deficiencies cited from these State Auditor reports are present in the case at hand. *See* Brief of Amicus Curiae, The Missouri Press Association at pages 9-11. The

Missouri State Auditor may have found instances of Sunshine Law violations during its audit of various governmental entities, but RWCID cannot be called to answer for the deficiencies or violations of others. Despite the Amicus' urging for this Court to make an example of RWCID based on broad sweeping policy arguments, a determination of whether a "knowing" or "purposeful" violation of the Sunshine Law must be made by examining the facts on a case-by-case basis.

RWCID cannot be tasked with understanding and interpreting the Sunshine Law as it relates to each and every Sunshine Law request received. This is why RWCID sought the advice of an attorney that defended it during the lawsuit that was the subject of the records requested by Strake. This exact action is permitted by §610.027.6 R.S.Mo (2012) as the legislature clearly anticipated that a governmental entity may need to seek advice of counsel from time-to-time when presented with an unfamiliar Sunshine Law request for sensitive information. RWCID assumed the advice provided by its attorney was accurate and relied on said advice in providing Strake a response. Despite assertions from Strake, the legislature did not intend to require RWCID to interpret the law without seeking advice of counsel or to then discard the legal advice received based upon its own inexperienced interpretation of the law as it relates to the specific request submitted. Although RWCID may have been involved in other Sunshine Law requests, each request is different and unique. Strake has no evidence that RWCID has previously received a request for the same documents and knew that the documents must be produced under Sunshine Law.

The record shows RWCID only sought advice of counsel relating to Strake's requests for documentation in the Michaels case. (LF at 28-34). RWCID was clearly attempting to do its due diligence and was acting within the confines of §610.027.6 R.S.Mo (2012) before it simply produced such sensitive and potentially confidential information. Again, the record is wholly void of evidence supporting Strake's contention that RWCID knowingly and purposely violated the Sunshine Law. In fact, Strake even admits in his Substitute Brief to this Court that "RWCID might have mistakenly believed that a contract or privilege forbade disclosure of public records." *See* Substitute Brief of Appellant at page 18. A mistake surely does not equate to a "knowing" or "purposeful" violation. RWCID took precautions to assure adherence to the Sunshine Law. As such, Strake fails to meet his burden of proof and, therefore, RWCID cannot be subjected to the penal nature of the Sunshine Law. Strake is certainly not entitled to costs and attorney's fees and RWCID should not be subject to a civil penalty for seeking advice of counsel and reasonably relying on same.

CONCLUSION

Based on the foregoing, Respondent Robinwood West Community Improvement District hereby requests this Court affirm the decision of the trial court and for any other and further relief the Court deems just and proper.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(B) AND 84.06(C)
AND SPECIAL RULE 360

I, Jon Sanner, as one of the attorneys for Respondent Robinwood West Community Improvement District, herby certify that the number of words in the Brief of Respondent is 5,632, in compliance with Rule 84.06(c) and Special Rule 360, which is based on a word count of the word processing system. The name and version of the word processing software used to prepare the brief is Microsoft Word 2010. The undersigned further certifies that the filed electronic copy of the Substitute Brief of Respondent has been scanned for viruses using Symantec Protection Suite v.12 and is virus-free.

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CERTIFICATE OF SERVICE

COMES NOW Jon Sanner, after being duly sworn and upon his oath hereby certifies that on July 17, 2015, the foregoing Substitute Brief of Respondent was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon the following:

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