IN THE MISSOURI SUPREME COURT

No. SC94842

JOHN P. STRAKE

Plaintiff-Appellant

v.

ROBINWOOD WEST COMMUNITY IMPROVEMENT DISTRICT

Defendant-Respondent

On Appeal from the Circuit Court of St. Louis County

SUBSTITUTE REPLY BRIEF OF APPELLANT

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Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Argument

A. RWCID misstates the content of the confidentiality clause in the settlement agreement, the agreement specifies that the confidentiality clause does not apply where disclosure is required by law, and the Sunshine Law unambiguously made the settlement agreement an open record.

RWCID asserts that the settlement agreement from the *Michael* case "contained a confidentiality clause stating that the terms of the settlement and release shall remain confidential unless there is an order of the court." Respondent's Substitute Brief, at p. 9.[1] This is not accurate. The clause states: "The terms of this settlement and release shall remain confidential unless *required by law*, order of the court or as necessary to complete probate and settlement of the case." Ex. A (emphasis added). The confidentiality clause states that the agreement is *not* confidential when required by law. And, there is no ambiguity that the settlement agreement is an "open record"—and, thus, must be disclosed—under the Sunshine Law. The Sunshine Law provides that, "any minutes, vote or settlement agreement relating to legal actions, cause of action or litigation involving a

[1] In making this assertion, RWCID relies on its own statement of uncontroverted material facts, Strake's response to RWCID's statement of uncontroverted material facts, and an affidavit signed by RWCID's president. RWCID does not cite to the settlement agreement ("Release of all Claims") in support of its assertion as to the content of the confidentiality clause. *See* Ex. A.

public governmental body … shall be made public upon final disposition of the matter … unless, prior to final disposition, the settlement is ordered closed by a court." § 610.021(1).[2] To allow any records to remain closed after litigation, a court must enter "a written finding that the adverse impact to a plaintiff or plaintiffs to the action clearly outweighs the public policy considerations of section 610.011." *Id.* There is no dispute that no such order was entered in the *Michael* case. (LF 37).

While RWCID acknowledges the statutory requirements it must comply with as a governmental entity, it asserts that, "*regardless* of the statutory requirements[,]" it did not knowingly or purposely violate the Sunshine Law because it was concerned about liability for breach of contract. Respondent's Substitute Brief, at p. 9 (emphasis added). This concern, however, does not eliminate the clear statutory terms requiring disclosure, nor was it even a realistic concern given the clear language in the confidentiality agreement itself. [3] That is, even if RWCID imagined that it had a good reason to violate

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[2] All statutory references are to Missouri Revised Statutes (2000), as updated, unless otherwise noted.

[3] It is irrelevant that RWCID notified Ms. Michael about the request and asked her permission to produce a copy of the settlement agreement. First, RWCID does not need Ms. Michael's permission to comply with the Sunshine Law, especially where the agreement between Ms. Michael and RWCID specifically contemplates that the settlement agreement will *not* be confidential when required by law. Second, RWCID's reaching out to Ms. Michael months after the Sunshine Law request was made and only

the Sunshine Law, it does not change the fact that RWCID made the choice to violate the Sunshine Law.[4]

Moreover, while § 610.027.6 allows a governmental entity to consult an attorney when they are in doubt about the legality of closing a particular record, the attorney consulted by RWCID never suggested that the settlement agreement could be hidden from the public under the Sunshine Law. Nor could she have, because § 610.021(1), a statutory provision the letter references, specifically provides that, absent circumstances not present here, settlement agreements may not be closed under the Sunshine Law. (LF 33-34). The letter states nothing more than that disclosure of the settlement agreement could expose RWCID to a breach-of-contract lawsuit. (LF 33). This is *not* the equivalent of advice from counsel that the settlement agreement could be closed under the law.

RWCID's violation of the Sunshine Law was both knowing and purposeful. "A public official's intentionally forestalling production of public records until the requester sues would be a purposeful violation of Chapter 610 and would be subject to a fine and

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after this suit commenced is merely an attempt to create a *post hoc* justification for refusing to comply with the Sunshine Law.

[4] RWCID suggests that the federal HIPPA law somehow justified its failure to comply with the Sunshine Law. This assertion should not distract the Court. Strake never sought information implicated by HIPPA. Rather, he sought public records—records created or retained by RWCID—related to the *Michael* case, including the settlement agreement and the minutes and votes of RWCID, the defendant in that lawsuit.

reasonable attorney fees." *Buckner v. Burnett*, 908 S.W.2d 908, 911 (Mo. App. W.D. 1995). The *Buckner* court concluded "that Chapter 610 would be a hollow law if it permitted a custodian intentionally to forestall production of public records until the requester sued[.]" *Id.* This is exactly what RWCID chose to do in this case.[5]

B. The claim that RWCID had not previously received a request for the same records at issue in this case does not allow RWCID to escape the conclusion that its violation of unambiguous provisions of the Sunshine Law was knowing or purposeful.

RWCID admits that it is subject to the provisions of the Sunshine Law and is aware that "certain documents" must be produced, yet, it argues that its violation of the Sunshine Law cannot be knowing or purposeful because it had never received a similar request. There is no support for a finding that a governmental entity will be found liable for a knowing or purposeful violation of the Sunshine Law only where it has previously received a request for the type of records it is now refusing to disclose. RWCID would create a presumption that governmental bodies do not know their obligations under the Sunshine Law. There is no support for such a presumption in the Sunshine Law. And it is

[5] RWCID attempts to distinguish *Bucker*, but its attempt is unpersuasive. In *Buckner*, the reason that a purposeful violation was not found was because it was not properly pled below. That is not the case here. Thus, the holding in *Buckner* applies directly to this case because RWCID "intentionally forstall[ed] production of public records until [Strake] sue[d]." 908 S.W.2d at 911.

contrary to the ordinary presumption that everyone knows the law. *See Hartley Realty Co. v. Casady*, 332 S.W.2d 291, 295 (Mo. App. 1960).[6]

[6] RWCID should be familiar with the Sunshine Law, but it has a documented history of noncompliance. The results of a 2005 audit by the Missouri State Auditor revealed that RWCID did "not have adequate controls to ensure information requests from the public are handled in compliance with the Sunshine Law." (LF 24, 26, 63); Claire McCaskill, Missouri State Auditor, State Auditor's Report – Robinwood West Community Improvement District 11 (Oct. 2006), *available at* auditor.mo.gov/press/2006-63.pdf. The report recommended that RWCID's Board of Directors "[e]stablish a records policy to ensure compliance with the Sunshine [L]aw." State Auditor's Report, at 12. In response to this recommendation, RWCID stated that "[t]he Board of Directors agrees with the State Auditor that we will establish a records policy to ensure compliance with the Sunshine Law." *Id.* at 13. RWCID then listed several steps it would take to ensure compliance. *Id.* Despite this 2006 report and the auditor's recommendations, RWCID still failed to comply with the requirements of with the Sunshine Law. (LF 24, 40, 63). A June 2013 judgment found that RWCID did not comply with the law when it refused to produce open records to a requesting party and ordered RWCID to produce the requested documents. (LF 40). Despite the warnings from the State Auditor and a prior court judgment, RWCID argues that it can be held liable for a violation only if a requester can show that the specific record they are seeking has been previously requested. Otherwise, according to RWCID's mistaken belief as to how the

The Sunshine Law embodies "the public policy of this state that meetings, records, votes, actions, and deliberations of public governmental bodies be open to the public unless otherwise provided by law." § 610.011.1. The Sunshine Law should be interpreted with this public policy in mind. *See Guyer v. City of Kirkwood*, 38 S.W.3d 412, 414 (Mo. banc 2001). The legislature intends that provisions for open records "shall be liberally construed and their exceptions strictly construed to promote this public policy." § 610.011.1.

RWCID understood Strake's request. *See* Respondent's Substitute Brief, at p. 7. However, RWCID seeks a holding that will only encourage a governmental entity to withhold open records and then sit back and wait to see if a citizen initiates litigation to challenge that entity's decision to violate the law. If violating an unambiguous provision of the Sunshine Law comes with no consequence, then there is no incentive to comply with the Sunshine Law; even on the off chance that a member of the public can mount a lawsuit, a governmental entity will not be penalized for sitting back and waiting to be sued.[7]

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law operates, they have no way of knowing whether disclosure is required. This, however, is simply not how the law operates.

[7] And in cases, unlike here, where there is some doubt about what the Sunshine Law requires, there would be no incentive for a government body to initiate a

There is no ambiguity in the Sunshine Law's requirement that the settlement agreement, votes, and minutes are open records, and there is no dispute that RWCID violated the Sunshine Law by refusing to disclose them until ordered to do so by the trial court. RWCID chose to require Strake to go to court, litigate his this matter to judgment, and obtain a judicial imprimatur before disclosing to him records that the public was entitled to inspect or copy upon request.[8] That choice was a knowing and purposeful decision to violate the Sunshine Law.

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suit to determine if records might be "closed" and be responsible for the requestors attorneys' fees. *See Hemeyer v. KRCG-TV*, 6 S.W.3d 880, 883-84 (Mo. banc 1999).

[8] To the extent that the terms of the settlement agreement caused RWCID some confusion, agreeing to those terms was also a choice made by RWCID.

Conclusion

RWCID knowingly and purposely violated the Sunshine Law when it refused to disclose the settlement agreement, votes, and minutes requested by Strake. This Court should reverse the portion of the trial court's judgment on the issue of Strake's request for a civil penalty, attorneys' fees, and costs; find that RWCID's violation of the Sunshine Law was purposeful, or, in the alternate, knowing; and remand for imposition of a civil penalty and award of Stake's attorneys' fees and costs.

Respectfully submitted,

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Certification of Service and of Compliance

The undersigned hereby certifies that on July 27, 2015, the foregoing was filed electronically and served automatically on the counsel for Respondent.

The undersigned certifies that the foregoing complies with the limitations contained in Rule 84.06(b), and that the brief contains 1,778 words.

The undersigned certifies that the filed electronic copy of the brief has been scanned for viruses and is virus-free.

/s/ Anthony E. Rothert