IN THE MISSOURI SUPREME COURT

SUPREME COURT NO. SC95307

EASTERN DISTRICT NO.: ED101801

23rd CIRCUIT NO: 10JE-CC01193-01

RACHAL LAUT, *et al.*, APPELLANTS

v.

CITY OF ARNOLD, RESPONDENT

Appeal from the Circuit Court of the County of Jefferson
23rd Circuit, Division 2
Circuit Judge The Honorable Gary Kramer

APPELLANTS' SUBSTITUTE REPLYBRIEF

Respectfully Submitted,
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STATEMENT OF FACTS

In the Statement of Facts section of its Substitute Respondent's Brief, p.2, the City of Arnold asserts that that "sole purpose of the internal affairs investigation was to determine the fitness of the employees to perform their respective job duties." The City repeats this position in its Argument section at p. 15: "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."

Nevertheless, the trial court conclusion, unchallenged on appeal, as stated in its May 7, 2014 "Memorandum", L.F. 25, A3 is the opposite:

> The Defendant City of Arnold's contention that the Internal Affairs report is in whole or in part a personnel record is wholly inaccurate. The Court finds that the Internal Affairs report is an "Investigative report" as defined in §610.100.1(5) and that it is "Inactive" as defined in §610.100.1(3).
>
> The Internal Affairs investigation was ordered By Police Chief Shockey upon the formal complaint by the Plaintiff herein. The complaint alleged criminal violations by City employee Linda Darnell, while working as a Police Department dispatcher.

Because Respondent has not formally challenged on appeal this factual finding by the Trial Court, Respondent must now live with this Trial Court factual conclusion.

In its Statement of Facts at p. 4 Respondent writes:

> [T]he 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.

Here the City asserts that how it "felt" is relevant. Appellants counter that the factual finding that the sought records were required to be disclosed is no longer an issue in this appeal. How the City's personnel "felt" is not now and never has been relevant.

As Appellants' said in their own Opening Brief, p. 29, this Court in *Guyer v. Kirkwood*, 38 S.W.3d 412, 415 (Mo 2001) stated that "the key aspect of an investigative report is that it is *directed* to alleged criminal conduct," (emphasis added). Here the Chief was directing his investigation into the criminal conduct of improper accessing of records.

POINT RELIED ON

(UNCHANGED FROM THE COURT OF APPEALS BRIEFING)

In this Sunshine Act case the trial court erred in denying a civil penalty and attorney's fees, because a party requesting records under the Act is entitled both to a civil penalty and attorney's fees when the government body has purposefully (or knowingly) violated the Act, in that the City contended in its very first response (and has continued to contend throughout the litigation) that the documents were only personnel records and did not involve a criminal investigation, but the trial judge himself described that contention as "wholly inaccurate", and the city made that wholly inaccurate contention in an attempt to thwart disclosure of the documents and thereby avoid a civil claim against the City.

RSMo. 610.027

Laut v. City of Arnold, 417 S.W.3d 315 (Mo. Ct. App. 2013)

Greer v. SYSCO Food Servs., No. SC94724, 2015 WL 8242710, at *5 (Mo. Dec. 8, 2015)

Strake v. Robinwood, SC94842, November 10, 2015

ARGUMENT

Standard of Review

Appellants suggested in their Substitute Opening Brief that the Standard of Review should be *de novo* for the initial determination as to whether the violation of the Sunshine Act was knowing or purposeful, and that the Standard of Review should be for an abuse of discretion as to whether any fees awarded were incorrect.

Respondent has suggested in its Substitute Brief that the Standard of Review for the initial determination should be that of *Murphy v. Carron*, 536 S.W.2d 30 (Mo. 1976), as stated in *Spradlin v. City of Fulton*, 982 S.W.2d 255, 263 (Mo. 1998):

> The trial court should be affirmed unless it is against the weight of the evidence or there is no substantial evidence to support it.

Appellants stand by their assertion that pursuant to *Franklin Bank v. St. Louis Car Co.*, 9 S.W.2d 901, 904 (1928) when the court exclusively reviews the law with the facts established as here, the review should be *de novo*. Moving forward from the Franklin decision in 1928 to the present, Appellants cite *Greer v. SYSCO Food Servs.*, No. SC94724, 2015 WL 8242710, at *5 (Mo. Dec. 8, 2015) for the well established proposition that "questions of law are reviewed *de novo.*" See also, *Boshears v. Saint-Gobain Calmar, Inc.*, 272 S.W.3d 215, 221 (Mo. Ct. App. 2008):

> The issue before us is whether or not the facts establish that Calmar was both an owner and a general contractor under circumstances which establish that Calmar was Boshears's statutory employer. Under these circumstances, the existence or absence of statutory employment is a

question of law for the courts to decide. (Internal quotations and citations omitted).

Because there are no facts in dispute, whether the facts make out a knowing or purposeful violation is wholly a matter of law and subject to *de novo* review.

Appellants acknowledge that in making this suggestion they seek a change in existing law, for heretofore the standard appears to be that of *Murphy*, as Respondent suggests. (For all intents and purposes the outcome may be the same, because even under *Murphy* if the court has misinterpreted the law this Court reverses).

Point Relied On

(UNCHANGED FROM THE COURT OF APPEALS BRIEFING)

In this Sunshine Act case the trial court erred in denying a civil penalty and attorney's fees, because a party requesting records under the Act is entitled both to a civil penalty and attorney's fees when the government body has purposefully (or knowingly) violated the Act, in that the City contended in its very first response (and has continued to contend throughout the litigation) that the documents were only personnel records and did not involve a criminal investigation, but the trial judge himself described that contention as "wholly inaccurate", and the city made that wholly inaccurate contention in an attempt to thwart disclosure of the documents and thereby avoid a civil claim against the City.

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The Civil Penalty and Attorney's Fees Statute Sections

The heart of Respondent's position is that the trial court got it right. Respondent argues at 15 that "[b]eing wrong is not tantamount to being knowingly or purposefully wrong." That latter sentence seems to fairly join the issue. Appellants will refrain from shamelessly repeating their arguments from their Substitute Opening Brief. They will instead simply restate that once the Trial Court found that the City's position was "wholly inaccurate", Respondent City was then more than merely "wrong." When a party has taken a position which is "wholly inaccurate", the court may presume that party acted with a purposeful or at least knowing intent. Therefore the Trial Court did not get it right. The Trial Court got it wrong.

At the least, even under a *Murphy* standard this court shall reverse if the trial court misinterpreted the law. And the trial court did misinterpret the law in refusing to find a purposeful violation of the Sunshine Law and to award civil penalties and attorney's fees.

At 17 Respondent argues that this case differs from *Strake v. Robinwood*, SC94842, 2015 WL 6948758, November 10, 2015, in that in *Strake* there was evidence and here there was not. Appellants counter that the "wholly inaccurate" finding is indeed evidence and it is all the evidence this court needs. In *Strake*, this Court found a purposeful violation where the City had chosen to honor the confidentiality provisions of a settlement agreement over disclosure of the settlement agreement that was an open record. Here, the City has chosen to honor the "privacy of certain employees", Respondent's Substitute Brief, p.4, over disclosure of an investigative report that is an open record. In both cases, the government entity's choice to withhold open records,

with the non-disclosure erroneously based in both law and fact, constitutes a purposeful violation of the Sunshine Act.

This choice is further compounded by the motives for such non-disclosure. The City acknowledges at p. 17 that a factor in *Strake* was that the City was trying to avoid liability elsewhere. As stated by Appellants in their Substitute Opening Brief, Appellants informed the City in their very first letter that they were seeking the information in order to investigate a civil claim. Therefore here, just as in *Strake*, the City's action may be presumed to have been an attempt to "avoid liability elsewhere".

If this Court views the case at hand to be distinguishable from *Strake* based on a difference in the quantum of evidence available in each case, this Court should still find that Respondent purposefully violated the Sunshine Act. Attorney-Client privileged communications will make it nearly impossible for most Sunshine Act plaintiffs to prove the actual knowledge or purpose of the government body as found in *Strake*. It is unclear why and how such privileged communications were disclosed in *Strake*; however, in most cases, such communications will not be available to a Plaintiff due to the attorney-client privilege.

Here, the trial court found the factual basis for the denial to be "wholly inaccurate," and given the legal presumption in *Guyer v. Kirkwood*, 38 S.W.3d 412, 415 (Mo 2001) combined with the originally stated purpose of the request by Appellants (i.e. for a civil suit against the City), no inference can be drawn in this case other than that the records denial was purposeful or at least knowing. To require Appellants to ferret out direct statements from the City's attorney or employees that prove that the City and its attorney had

communications indicating that it purposefully and knowingly violated the law would render the open records policy of the Sunshine Act nugatory and give government agencies *carte blanche* to hide behind bad legal advice and privileged communications.

It should be further noted that Respondent alleges for the first time on appeal that it acted appropriately under an "advice of counsel" defense. Because Respondent did not raise this argument below or appeal this issue, it is not properly before the Court.

Whether or Not a Matter of First Impression

In its Substitute Brief, Respondent attempts to use *Laut v. City of Arnold*, 417 S.W.3d 315 (Mo. Ct. App. 2013), ("*Laut* I") and RSMo. 610.100.5 to diminish the purposefulness of its violation of the Sunshine Act by arguing that the issues of whether an investigative report is an open record and which party has the burden of proof under RSMo. 610.100.5 were matters of first impression in this matter. Appellants suggest that Respondent's reading of *Laut* I is incorrect. In *Laut* I, the Appellate Court stated that RSMo 610.100.5 was inapplicable to the case because the section only applies to situations where the documents would be "otherwise closed," meaning the investigation was still active. *Laut* at 322, Footnote 6. The Appellant Court noted that under the statute under which Appellants proceed here, RSMo. 610.027.2, the burden is on the governmental body to justify non-disclosure. "Section 610.027.2 states, '[o]nce a party seeking judicial enforcement of Sections 610.010 to 610.026 demonstrates to the court that the body in question is subject to the requirements of [those sections] and has held a closed . . . record . . ., the burden of persuasion shall be on the body and its members to demonstrate compliance . . . .'" *Laut* at 320.

The Appellate Court in *Laut* I thus broke no new ground but only reiterated the standard set forth by this Court in *Guyer* that "the key aspect of an investigative report is that it is *directed* to alleged criminal conduct"; that "public policy 'should be used as a tiebreaker in favor of disclosure when records fit equally well under two specific but opposite provisions of the Sunshine Law"; and that "the requirement of open investigative reports in Section 610.100.2 (investigative reports are open records once investigation is inactive) overrides the permissive exemption for personnel records in Section 610.021." *Laut* at 321-322, (emphasis added). The only issue of first impression decided by the Appellate Court was whether RSMo. 610.024, which allows for the simultaneous redaction of exempt material and the disclosure of non-exempt material within the same public record, applies to investigative reports, and held that it did apply. That issue is not relevant here.

The Appellate Court in *Laut* noted that its decision could be viewed as conflicting with *Guyer*, which theretofore would have required the City to disclose the requested documents because they "fit equally well under two specific but opposite provisions of the Sunshine Law." Thus, at the time of the violation and the records denial, the City took the position that the holding in *Guyer* did not apply to it, and it did not need to release the documents. The City did not seek a modification of the law to allow it to redact parts and disclose others. Rather, it took the "wholly inaccurate" position that there was no investigation into criminal matters and the holding in *Guyer* did not apply to it. This choice to disregard Supreme Court precedent based on a factual misrepresentation amounts to a purposeful violation of the Sunshine Act.

Awarding the Fees in this Court

Respondents, of course, want to go back to Jefferson County for final determination of the attorney's fees. They describe Appellants' fee requests as unreasonable and complain that those fees have not been subject to analysis pursuant to the customary factors.

Nevertheless, as stated in Appellants' Brief at p. 38, under *Trimble v. Pracna*, 167 S.W.3d 706, 715 (Mo. 2005) this court may exercise Rule 84.14 to issue an attorney's fee award without remand to the Trial Court. Appellants recognize that this court has a choice on this issue, and Appellants ask the court to award the fees right now and thus choose to bring this saga to a close.

CONCLUSION

Appellants pray the Court to find that the City violated the Sunshine Act in a "purposeful" manner, award a full $5,000.00 civil penalty; (or alternatively find the violation "knowing" and award a full $1,000.00 civil penalty), award reasonable attorney's fees as requested pursuant to RSMo. 610.027, A15, and for such other and further orders as the Court deems just, meet, and proper.

The amount of the attorney's fees sought will be $51.394.66, plus fees accrued after September 2, 2015.

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RULE 84.06(c) CERTIFICATION AND VIRUS PROTECTION NOTICE

Undersigned counsel certifies that this Brief complies with the limitations contained in Rule 84.06(b) because the Brief's word count is less than 7750, that is, the word count is 2432.

Pursuant to undersigned counsel's customary practices and virus protection software, all emails and attachments have been checked for viruses and on information and belief are virus free.

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CERTIFICATE OF SERVICE

Undersigned counsel for Appellants hereby certifies that on January 4, 2016 pursuant to Rule 103 he is delivering an email copy of this brief to opposing counsel named below via the electronic filing system, is simultaneously sending a copy in Word, and within five days thereafter undersigned counsel will deliver by regular mail to that counsel two paper copies of the brief:

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