

SC 90383

IN THE SUPREME COURT OF MISSOURI

JAY PURCELL

Appellant,

v.

CAPE GIRARDEAU COUNTY COMMISSION,

Respondent.

APPELLANT JAY PURCELL'S SUBSTITUTE REPLY BRIEF

THE CLUBB LAW FIRM, LLC

JOHN P. CLUBB

Missouri Bar No. 51787

400 Broadway, Ste 326

Cape Girardeau, MO 63701

(573) 651-1900

(573) 651-1902

jclubb@theclubblawfirm.com

www.theclubblawfirm.com

ATTORNEYS FOR APPELLANT

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ARGUMENT

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

Respondent Commission argues that it is not a legal entity and, therefore, that the circuit court should have dismissed Purcell’s lawsuit for lack of jurisdiction.¹ The issue of whether the “Cape Girardeau County Commission” may be sued as a public governmental body under section 610.010(4)(d)RSMo must be addressed initially because it is a matter that must be resolved before this Court may consider the merits of the appeal.

Missouri’s Sunshine Law defines the entities that can be sued to enforce its provisions and denominates these entities as “public governmental bodies.”² This Court’s inquiry should begin with the specific statutes defining “public governmental body” to determine whether a county commission falls within this definition. Not once in its brief does Respondent actually address the statutory definition contained in section 610.010(4) RSMo.

That statute provides:

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

including:

¹ Respondent’s Substitute Brief, page 18.

² Section 610.010(4)(d).

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

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

County commissions meet the statutory definition contained in section 610.010(4) because they are governmental entities created by Missouri statutes, specifically section 49.010, RSMo 2006. Section 49.010 specifically states that the entity created shall be known as the “county commission” and shall be composed of three members styled “commissioners.” Additionally, they are political subdivisions of a county, as defined by section 610.010(4)(c). Finally, the Cape Girardeau County Commission is a legislative or administrative governmental deliberative body under the direction of three or more elected members having rulemaking or quasi-judicial power as described in section 610.010(4)(d). The plain language of the statute allows a county commission to be sued for enforcement of Chapter 610.

The Commission argues that an action may be brought against it may only by naming in such action the individual members of the Commission in their official

respective capacities or by suing the “County,” in general.³ The Commission further argues that the Cape Girardeau County Commission is the “street name” for the Commission and not its “legal” name.⁴ Respondent cites no authority for the “street name” quotation and section 49.010, RSMo, specifically states that the entity shall be known as the “county commission.”

As with any issue involving Missouri’s Sunshine Law, a threshold question involves whether the entity is a “public governmental body under section 610.010(4), RSMo. If it is, then the rest of the Sunshine Law applies. The Sunshine Law violations at issue in this matter were committed by the Cape Girardeau County Commission as an entity. They were not committed by the entire county (which, conceivably includes all county officeholders, such as the Sheriff, the Prosecuting Attorney, the Auditor, Recorder, etc.).

The Commission’s argument would make new law and is contrary to the reasoning set forth in *American Fire Alarm Co. v. Board of Police Commissioners*, 227 S.W. 114 (Mo.1920). *American Fire Alarm* was decided more than 50 years before the first statutes commonly known as Missouri’s Sunshine Law were enacted, and nearly 20 years before the enactment of section 49.010 RSMo. The statutory changes to Missouri’s county commissions and the introduction of open meetings and records laws to public

³ Respondent’s Substitute Brief, page 25.

⁴ *Id.* at page 19.

governmental bodies in the decades since the *American Fire Alarm* decision make that decision inapplicable to county commissions under Missouri law.

In *American Fire Alarm*, the Missouri Supreme Court reviewed whether a board of police commissioners could sue or be sued as a corporate or quasi-corporate entity.⁵ In 1920, the Kansas City and St. Louis Boards of Police Commissioners were created by a unique combination of Missouri statutes and the Missouri Constitution.⁶ County commissions and Boards of Police Commissioners were created by wholly distinct and separate legislation several decades apart.

In *Best v. Schoemel*, 652 S.W.2d 740 (Mo.App.E.D.1983), a driver sued the St. Louis Board of Police Commissioners for injuries sustained in a car crash.⁷ Citing *American Fire Alarm*, this Court in *Best* held that it has “long been established that the St. Louis Board of Police Commissioners may only be sued by bringing an action against the individual members of the Board in their official capacity.”⁸ *Best* does not even involve a county officeholder, let alone a county commission. Instead, it merely cites to *American Fire Alarm*.

⁵ *American Fire Alarm*, 227 S.W. 114 (Mo.1920).

⁶ *Id.*

⁷ *Best*, 652 S.W.2d 740 (Mo. App. E.D. 1983).

⁸ *Id.* at 742 (citing *American Fire Alarm Co. v. Board of Police Commissioners*, 227 S.W. 114 (Mo. 1920)).

In *American Fire Alarm*, the Missouri Supreme Court analyzed whether a Board of Police Commissioners should be considered a “person” or entity capable of being sued as an entity.⁹ That case demonstrates the vast differences between a Board of Police Commissioners and a county commission.

County commissions may issue service of process, buy, sell, and lease real and personal property, settle county debts, and sue in court to condemn real property.¹⁰ The Court in *American Fire Alarm* also noted that “both the St. Louis and Kansas City Police Commissioners have sued and been sued often, and always by their individual names, not as a board.”¹¹ If this Court adopted the Commission’s reasoning, it would mark the first time the Missouri Supreme Court has ruled that county commissions may not be sued as entities, it would make new law, and it would add language to section 610.010(4) that currently does not exist. The plain language of Missouri’s Sunshine Law should be read, enforced, and construed liberally towards openness.

⁹ *American Fire Alarm Co.*, 227 S.W. 114 (Mo. 1920).

¹⁰ Sections 49.210, 49.270, 49.287, 49.300, RSMo 2006.

¹¹ *American Fire Alarm*, 227 S.W. at 120.

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

The Cape Girardeau County Commission’s notice and agenda violated §§610.020 and 610.022, RSMo. The Sunshine Law’s presumption of openness applies to all facets of the business of public governmental bodies like the Cape Girardeau County Commission. Pursuant to the Sunshine Law, a meeting held without posting of a proper notice and agenda is improperly held and all actions taken during such meeting are considered void.¹² The notice requirements of the Sunshine law are not optional and they are not mere “technicalities.”

Appellant Purcell asked the circuit court for a declaration that the Commission’s notice and agenda violated §§610.020 and 610.022, RSMo because it cited to the wrong statutes and did not reasonably advise the public as to what the Commission would discuss at its meeting. Purcell’s petition and motion for summary judgment met all of the requirements for a declaratory judgment under §610.027, RSMo. The circuit court held that issuing a declaratory judgment in this matter would not serve a useful purpose.¹³ The

¹² Sections §§610.020 and 610.027, RSMo.

¹³ LF 158-159.

Commission cites to *Buckner v. Burnett*, 908 S.W.2d 908 (Mo.App.W.D.1995) as authority for its position.

In *Buckner*, an individual sued to recover records from the Missouri Speaker of the House's office.¹⁴ On the day he filed suit, the House provided the individual with the records sought.¹⁵ The Western District Court of Appeals upheld the dismissal of the suit as moot because the only relief requested was the records and they had been provided.¹⁶ The *Buckner* case and this matter are clearly distinguishable. *Buckner* concerned access to copies of records. Once the records were provided, there was no actionable request for the court to act upon. In this matter, Appellant Purcell has asked for a declaration that the language used in the Commission's Notice and Agenda violated the Sunshine Law. The Commission continues to use the same language in its notices. Without clear guidance from this Court, the Commission and other public governmental bodies will continue to use vague language in their notices that does not comply with the law. Furthermore, Appellant Purcell is entitled to a declaratory judgment regarding the topics discussed in the illegal closed session to prevent future illegally held meetings.

The circuit court and the Commission are wrong. A declaratory judgment in this matter will have a salutary purpose letting all future county commissions (and other public governmental bodies) know that over-inclusive, omnibus notice clauses are

¹⁴ *Buckner v. Burnett*, 908 S.W.2d at 909.

¹⁵ *Id.*

¹⁶ *Id.* at 911.

improper. A declaratory judgment holding public officials accountable for their actions in this matter serves a very useful purpose. The Commission failed to meet its burden as a matter of law and this failure entitled Mr. Purcell to judgment as a matter of law. declaring that the Commission's notice and agenda violated the Sunshine Law.¹⁷

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

In Missouri, meetings of public governmental bodies are presumed open¹⁸ the law is to be liberally construed with the exceptions to open meetings and records strictly construed to promote Missouri's public policy of open meetings and records.¹⁹

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

¹⁷ Mo.R.Civ.Pro. 84.14; *Auto Club Family Ins. Co. v. Jacobsen*, 19 S.W.3d 178 (Mo. App. E.D. 2000).

¹⁸ Section 610.011.2, RSMo.

¹⁹ Section 610.011.1, RSMo.

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

Purcell’s petition and motion for summary judgment met all of the requirements for a declaratory judgment under §610.027, RSMo. As previously stated, a declaratory judgment holding public officials accountable for their actions in this matter serves a very useful purpose.

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

This Court may determine from listening to the audio recording of the Commission's meeting that there really was no discussion of potential litigation.²⁰ If a public governmental body is in closed session and a topic not proper for closed session comes up, the proper course of action for it to follow is outlined in § 610.022.3 RSMo. The meeting should be closed only to the extent necessary for the specific reason announced to justify the closed meeting or vote.²¹

By holding that the matters discussed by the Commission during its meeting were permissibly held in closed session under the exception for subjects "relating to litigation," the circuit court engaged in the kind of open-ended application of the exception that this Court warned about in *Tuft*.²² The existence of a controversial matter does not necessarily mean the matter is the subject of potential litigation. The Commission did not meet the heavy burden of demonstrating both a substantial likelihood that litigation might occur and a clear nexus between the purported closing of the meeting and the anticipated litigation.²³ Because the discussions did not relate to litigation and because no other exception applies that would have allowed the Commission to talk about these matters in closed session, the meeting was improperly closed and the circuit court erred by granting

²⁰ LF 29-32; see *Scott v. Harris*, 127 S.Ct.1769, 1774-5 (2007).

²¹ Section 610.022.3 RSMo.

²² *Tuft v. City of St. Louis*, 936 S.W.2d 113, 118 (Mo.App.E.D.1996)

²³ *Id.*

the Commission summary judgment on this matter. This Court should remand the case to the circuit court with instructions to enter summary judgment in favor of Purcell.

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

The circuit court's judgment concluded that the Commission was absolved from its Sunshine Law violations because it did not violate the law purposefully or knowingly.²⁴ The circuit court misapplied the law in this context.

There is no *mens rea* requirement for the Sunshine Law to be violated and a violation is not a criminal act. It is a set of strict liability statutes and scienter only matters if the plaintiff seeks civil penalties.²⁵ Strict liability is liability without fault.²⁶ In any event, Purcell never alleged knowing or purposeful violations by the Commission and never sought the imposition of civil penalties. The absence of intent does not absolve the Commission of its violations of the Sunshine Law it merely affects the remedies available to Purcell or the circuit court in that the circuit court may not award civil penalties or attorneys' fees.

²⁴ LF 156-159.

²⁵ Section 610.027, RSMo.

²⁶ Black's Law Dictionary 1422 (6th ed. 1990).

In Mr. Purcell's motion for summary judgment, he did not request an award of attorneys' fees or costs.²⁷ He did ask for attorneys' fees and costs in his original petition, but abandoned that request for relief in his motion for summary judgment. Accordingly, any discussion of intent, whether knowing or purposeful is irrelevant in determining whether the Commission violated the Sunshine Law.

Conclusion

By having the circuit court declare the Sunshine Law violations, future violations of Missouri's Sunshine Law may be prevented. The Commission's meeting notice violated the law because it failed to reasonably advise the public of the matters to be discussed at the meeting and the Commission violated the Sunshine Law during its meeting by discussing a wide array of topics during closed session without any statutory authority for doing so. This Court should reverse the circuit court's judgment granting the Commission summary judgment and remand this matter to the circuit court with instructions to grant Purcell's motion for summary judgment.

Respectfully Submitted,

THE CLUBB LAW FIRM, LLC

JOHN P. CLUBB

Missouri Bar No. 51787

400 Broadway, Ste 320

(573) 651-1900

FAX (573) 651-1902

jclubb@theclubblawfirm.com

www.theclubblawfirm.com

ATTORNEYS FOR APPELLANT JAY
PURCELL

²⁷ LF 37-38.

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 3,002 words, excluding the cover, and this certification, as determined by Word software; and
2. That a compact disc, containing a copy of this brief, has been scanned for viruses; and
3. That a true and correct copy of the attached brief, and a compact disc containing a copy of this brief, were mailed, postage prepaid, this 30th day of December 2009, and sent U.S. mail to:

Tom Ludwig
1334 Indian Parkway
Jackson, MO 63755
Attorney for Respondent

Jean Maneke
Missouri Press Association
910 One Main Plaza
4435 Main Street
Kansas City, MO 64111

John P. Clubb