SC97781

IN THE SUPREME COURT OF MISSOURI

ST. LOUIS CITY BOARD OF ELECTION COMMISSIONERS, ET AL.,

Defendants-Appellants,

v.

DAVID ROLAND

Plaintiff-Respondent/Cross-Appellant.

APPEAL FROM THE TWENTY-SECOND CIRCUIT COURT
The Honorable Julian Bush and Jason Sengheiser, Circuit Judges
Case No. 1622-CC09861

SUBSTITUTE REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF FACTS

On Wednesday, August 17, 2016, the Respondent/Cross-Appellant, David Roland ("Roland"), filed on behalf of his client, Bruce Franks, Jr., a Verified Petition for Election Contest which was denominated *Franks v. Hubbard*, St. Louis City Circuit Court Case No. 1622-CC09996. **Franks Verified Petition for Election Contest, A12.** This Petition named the St. Louis City Board of Election Commissioners ("the Board") and each of its Commissioners in their official capacities as Contestees in that lawsuit. *Franks v. Hubbard*, 498 S.W.3d 862, 865 (Mo. App. E.D. 2016); **Franks Verified Petition for Election Contest, A12**. On that same day, Roland filed on Franks's behalf an Emergency Motion for Expedited Discovery, asking the trial court "to immediately issue an order requiring [the Board] to grant Franks and his attorney access to all absentee ballot applications and absentee ballot envelopes submitted by voters living in the 78th State House District[.]" **Franks Emergency Motion for Expedited Discovery, A27-A29**. That afternoon, Circuit Judge Michael Mullen ordered a hearing to be held at 9:00 a.m. on Monday, August 22, 2016. **Judge Mullen Order of August 17, 2016, A30**. Judge Mullen did not order the Board to produce the requested documents to Franks or Roland, nor did the Board take any action at that time to produce them—instead, the Board's attorney entered an appearance on Friday, August 19, 2016, and filed a motion to dismiss the Election Contest. **Board Motion to Dismiss, A31-A33**. That same day, Roland asked the Circuit Court to issue blank subpoenas for the purpose of requesting the documents that the Board had thus far refused to produce. **Franks Request for Subpoenas, A34**.

On Monday, August 22, 2016, Judge Bush determined that Franks's Verified Petition was premature because the Secretary of State had not yet certified the results of the August 2, 2016 primary election; he stayed proceedings in the election contest "pending the official announcement of the results of the primary election by the Secretary of State." **Judge Bush Order of August 22, 2016, A35**. Separately, but also on August 22, Judge Bush took up on verbal cross-motions for judgment on the pleadings in this matter, addressing the question of whether the Sunshine Law permitted the Board to withhold from Roland the records he had requested; the attorney for the Board made clear at that time that the Board would abide by whatever decision Judge Bush reached on that matter. **D152; D173, p. 9-10; Tr. at 165-66.** On Tuesday, August 23, 2016, Judge Bush issued the order and partial judgment in this case from which the Board appealed, finding that the absentee ballot applications and empty absentee ballot envelopes are open public records. **D153; D173, p. 9; Tr. at 166.** After Judge Bush's August 23, 2019 Partial Judgment, one of the Board's attorneys made arrangements for Roland to begin reviewing the documents at 9:00 a.m. on Wednesday, August 24, 2016. **D154; D173, p. 10; Tr. at 166.** Even though Judge Bush had ruled that Roland was entitled to review the documents and even though the Board was also aware of Franks's effort to obtain those documents through discovery in the election contest, when Roland arrived in St. Louis the next morning the Board continued to withhold access to the documents until the next morning. **D154; D173, p. 10; Tr. 166-68.** Roland was not permitted to start reviewing the documents until August 25, 2016. **D173, p. 10.** The Secretary of State certified the results of the August 2, 2016 primary election and on Friday, August 26, 2016, Roland filed an Amended Verified Petition for Election

Contest in *Franks v. Hubbard*. **Franks Amended Verified Petition for Election Contest, A36**.

Testimony at trial showed that the practice of the Board prior to September 2016 was that when it had certified an election's results the Board's employees would box up and seal "***all the election related materials***" – not just voted ballots and absentee ballot envelopes—putting them "under lock and key" until they could be destroyed. **D173, p. 11; Tr. at 51.**

ARGUMENT

I. Roland Sought a Finding that the Board "Knowingly" or "Purposefully" Violated the Sunshine Law Because the Facts of this Case Presented an Important Opportunity for Courts to Reevaluate Their Interpretation of § 610.027, RSMo.[1]

As an initial matter, a citizen plaintiff's motives for pursuing a finding that a public governmental body "knowingly" or "purposefully" violated the Sunshine Law should be irrelevant to the question of whether § 610.027 allows a trial court to order costs against such a citizen plaintiff who has proved a violation of the Sunshine Law. Roland explained in his initial brief why the design of the Sunshine Law forecloses the idea that a trial court could assess costs against a citizen plaintiff in a non-frivolous Sunshine Law case. **Roland Initial Subst. Br., pp. 45-51.** He will not belabor those points here.

That having been said, the Board's brief indicates the Board's opinion that Roland's motives are indeed relevant, and it insists that Roland's effort to prove that the Board's

[1] All statutory references in this brief shall be to the most recent edition of the Missouri Revised Statutes unless otherwise noted.

violations of the Sunshine Law were knowing or purposeful was driven by a desire "to pay himself for his own time spent pursuing his claims," or, as the Board somewhat less charitably put it, "for the purpose of enriching himself." **App. Subst. Response/Reply Br., p. 24-25.** The Board attempts to support its interpretation of Roland's motivations by pointing to a single discovery response. **App. Subst. Response/Reply Br., p. 24.**

What the Board does not mention is that the interrogatories the Board had propounded were not asking Roland about his motivations for pursuing his action against the Board, but rather about attorney's fees incurred and the total amount Roland had billed himself. **D171, p. 3**. In Roland's experience as a public interest attorney who represents clients *pro bono*, defendants frequently use this sort of question to try to establish that because the public interest attorney never billed their clients for their services, the court has no basis for ordering the defendants to pay any attorney fees. Thus, Roland's response when asked how much he had billed himself was intended to make clear that the present absence of a bill should not be taken to mean that attorney fees could be disregarded in the event that Roland proved a knowing or purposeful violation of the Sunshine Law. His response in no way suggested that financial gain was Roland's motivation for pursuing the action.

To whatever extent that Roland's motivations are relevant, the record in this case makes plain why Roland was pursuing a finding that the Board "knowingly" or "purposefully" violated the Sunshine Law. Roland discussed at length in his Trial Brief Missouri courts' current approach to "knowing" or "purposeful" violations of the Sunshine Law, how there is little difference between the (extremely high) standards for proving either, and how Roland hoped to preserve for appellate review the question of whether courts should clarify

the difference between the two. **D169, pp. 2-3.** Roland also pointed out that the courts' current interpretation of what constitutes a "knowing" violation of the Sunshine Law "incentivizes willful ignorance" such that "public governmental bodies and their members would be well advised to learn ***as little as possible*** about the Sunshine Law because any plausible claim of ignorance regarding [its] requirements would likely shield them from the consequences of their violations." **D169, p. 3.** Roland emphasized his opinion that this case, in particular, highlighted these problems because the Board's membership included "highly intelligent, educated, and experienced attorneys"—including a former Circuit Judge—who had decided to withhold public records without conducting even minimal investigation into the meaning of the statutes they were claiming as the basis for withholding records. **D169, p. 4.** If courts allow trained, experienced attorneys to claim ignorance of what the Sunshine Law required even after they had been shown that their superficial reading of the statutes was incorrect, "ordinary citizens will have little hope of ever proving such a violation because government officials can simply shelter behind their attorney's statements, no matter how poorly founded." **D169, p. 4.** The disputed material facts that Roland asked the trial court to resolve focused intently on whether the Board and its attorneys had made a good faith effort to research, understand, and strictly construe the statutes they relied upon to withhold the records Roland had requested. **D169, pp. 13-18.** This effort to have courts reassess the standard for establishing a "knowing" or "purposeful" violation of the Sunshine Law may have proved to be unsuccessful, but that—not the dubious prospect of financial gain—was Roland's motivation for following through with this lawsuit even after establishing the Board's violations of the Sunshine Law.

II. The Question of Whether § 610.027 Allows a Trial Court to Force a Citizen Plaintiff to Pay the Government's Costs in a Sunshine Law Case is Properly Before This Court.

This Board contends that Roland was required to file a motion to retax costs as a prerequisite for challenging the trial court's award of costs on appeal. **App. Subst. Response/Reply Br., p. 19-22.** The Board also contends that "there is no final appealable order for this Court to review." **App. Subst. Response/Reply Br., p. 19**. In the course of this court-tried case, the Circuit Judge ordered the clerk to tax against Roland the costs the Board had incurred. **D136, p. 16**. The Board submitted its Bill of Costs seeking $1,084.50. **D174.** The clerk taxed those costs against Roland. **D136, p. 16.** The trial court's order requiring Roland to pay the Board's costs was conclusive as to this point and, because the clerk did indeed tax the costs as the Board requested and Roland is not disputing the details of the Board's bill of costs,[2] the trial court's order is final and appealable, presenting a simple, straightforward legal question that does not require any further factual development. *See, e.g., Hobbs v. Dir. of Revenue*, 109 S.W.3d 220 (Mo. App. E.D. 2003) (where appellant had not filed motion to retax, appellate court nonetheless held that trial court had no authority to tax costs against government and reversed judgment assessing costs); *In Interest of J.P.*, 947 S.W.2d 442 (Mo. App. W.D. 1997) (addressing merits of

[2] Had Roland desired to dispute the *amount* of the costs the clerk had taxed or whether any *particular* cost was appropriate, he would have need to file a motion to retax costs before there would be an appealable order—the function of a motion to retax is "to correct errors made by the clerk in taxing court costs." *Wiley v. Daly*, 472 S.W.3d 257, 265 (Mo. App. E.D. 2015); *see also Fisher v. Spray Planes, Inc.*, 814 S.W.2d 628, 633 (Mo. App. E.D. 1991) (court's function on motion to retax is "simply correcting errors made by the clerk in trying to obey the statutes").

whether trial court had authority to order party to pay costs even though clerk had not yet actually taxed costs). Roland timely appealed the trial court's decision, specifically noting that the trial court's authority to tax costs in this situation would be an issue addressed on appeal. **D176, p. 1.**

In addition to the above, this Court's longstanding precedent establishes that where a trial court has ordered costs against a party that substantially prevailed below, this Court may correct the obvious error even if not every procedural box has been checked. In *St. Louis, K.C. & C.R. Co. v. Lewright*, 21 S.W. 210 (Mo. 1893), a trial court produced a verdict in favor of one party and then ordered costs assessed against that same party. On appeal, the party against whom the costs had been assessed argued that the trial court lacked authority to issue the order taxing costs, but it did not present this argument in a bill of exceptions. *Id.* at 211. The respondent argued that because the appellant had failed to raise the issue in a bill of exceptions this Court was not permitted to rule on the issue. *Id.* at 212. This Court disagreed, holding that it is empowered to address and reverse any error that is apparent on the face of the record. *Id.* Because the trial court had taxed costs against the party that had substantially prevailed below and because that constituted "manifest error… apparent on the face of the record," this Court reversed the judgment insofar as the trial court's award of costs. *Id.* *Lewright* does not appear ever to have been questioned or overruled.

One way of viewing *Lewright* is that it was an early expression of the concept of "plain error review." The contemporary version of this concept is given shape by Rule 84.13(c), which gives this Court the authority to apply "plain error" review when warranted by the

circumstances of a given case. *See McGee ex rel. McGee v. City of Pine Lawn*, 405 S.W.3d 582 (Mo. App. E.D. 2013). Missouri appellate courts will review for plain error matters affecting substantial rights where the record shows that a "manifest injustice or a miscarriage of justice" would result if the matter is left uncorrected. *In re Marriage of Lawry*, 883 S.W.2d 84, 89 (Mo. App. S.D. 1994) (reversing trial court order regarding maintenance order although matter not properly preserved for appellate review). Where an appellate court applies plain error review, it asks whether there are substantial grounds for believing that the trial court committed an error that is "evident, obvious and clear, which resulted in manifest injustice or a miscarriage of justice." *Wagner v. Mortgage Information Services, Inc.*, 261 S.W.3d 625, 632-33 (Mo. App. W.D. 2008).

In addition to this Court's ruling in *Lewright*, Missouri courts have applied plain error review to reverse trial court judgments in a range of different situations. In *McGee ex rel. McGee*, an appellant had failed to challenge a trial court's damage award before raising that issue on appeal, so the claim had not been properly preserved for appellate review. *Id.* at 588. Nonetheless, the Court of Appeals exercised its discretion to engage in plain error review, concluding that the trial court had erred in awarding damages in the absence of any evidence thereof and remanding the case to the trial court. *Id.* at 589. In *Wilson ex rel. Wilson v. Simmons*, 103 S.W.3d 211 (Mo. App. W.D. 2003), the Court of Appeals reversed a trial court's grant of summary judgment even though the appellant did not preserve the legal theory on which the Court relied by including it in their briefs. Applying plain error review, the Court first noted that the trial court had made a clear error in applying a principle of law and that the error had prejudiced the appellant and caused manifest

injustice, then the Court proceeded to reverse the judgment and order the cause remanded. *Id*. at 221. In *The Empire Dist. Elec. Co. v. Caldwell*, 344 S.W.3d 842 (Mo. App. S.D. 2011), the Court of Appeals applied plain error review to reverse a trial court's error in quieting title in a tract of land. In *Wagner v. Mortgage Information Services, Inc.*, 261 S.W.3d 625 (Mo. App. W.D. 2008), the Court of Appeals applied plain error review to reverse a trial court's judgment on the grounds that the trial court had erred in submitting an instruction to a jury, which resulted in "manifest injustice." In *Dana Commercial Credit Corp. v. Cukjati*, 880 S.W.2d 612 (Mo. App. S.D. 1994), the Court of Appeals applied plain error review to correct a trial court's judgment entry of a judgment against a defendant against whom the plaintiff did not seek relief. Thus, although it may be relatively uncommon for an appellate court to apply plain error review, this sort of review does have a place where a particular error has caused a "manifest injustice."

"[T]here is a manifest injustice in burdening the successful party to a proceeding with the costs of the same[.]" *Ex parte Nelson*, 162 S.W. 167 (Mo. banc 1913). As explained in Roland's initial brief, he went to great lengths to *avoid* having to sue the Board; he gave them every possible opportunity (1) to understand their obligations under the Sunshine Law and (2) to comply with those obligations. It was the Board that made the choice to ignore those obligations—just as it had also ignored its obligations to comply with the state's absentee ballot laws. **Roland Subst. Br., pp. 35-37.** Roland prevailed in this lawsuit, showing that the Board had violated the Sunshine Law; Judge Bush correctly ordered the Board to produce the records Roland had requested. Roland exercised his right under § 610.027, to try to prove that the Board's violation had been knowing or purposeful.

Although the trial court ultimately disagreed that the violation was knowing or purposeful, § 610.027 still does not authorize a trial court to order a citizen plaintiff to pay the government's court costs, which makes it "manifestly unjust" that the trial court ordered Roland to pay the Board's costs, especially after he proved that the Board had violated the Sunshine Law by denying him access to the records he had requested.

Under these circumstances, even if the Court concludes that Roland did not properly preserve this issue for appellate review, this Court should exercise its discretion to engage in plain error review and to correct the trial court's mistake in ordering Roland to pay the Board's court costs. Correcting this manifest injustice is particularly important, to assure other citizens considering Sunshine Law litigation that they do not need to be concerned about finding themselves stuck paying the government's cost, even if the citizen succeeds in proving whatever violations the citizen alleges. If this Court leaves undisturbed the trial court's order for Roland to pay the Board's costs, it will unquestionably and unjustifiably discourage citizens from seeking redress under § 610.027.

III. The Board's Position Regarding Court Costs Does Violence to the Express Purpose of the Sunshine Law.

The express purpose of the Sunshine Law is to ensure transparent government, and all of its provisions must be interpreted with a view toward advancing that purpose. § 610.011. Under the general rule, citizens who sue their government are at a distinct disadvantage because, although a court may order a citizen to pay the government's costs, a court *cannot* order a government party to pay a citizen's costs unless a statute specifically authorizes

such an order. *See Hinton v. Dir. Of Revenue*, 21 S.W.3d 109, 112 (Mo. App. W.D. 2000); *Richardson v. State Highway & Transp. Comm'n*, 863 S.W.2d 876, 882 (Mo. banc 1993). In keeping with the Sunshine Law's expressed purpose of promoting government transparency, § 610.027 changes the balance between citizen litigants and the public governmental bodies they sue under that provision, thereby encouraging citizens to pursue litigation for the purpose of keeping their public governmental bodies transparent and accountable to the people.

Properly understood, § 610.027 encourages citizen plaintiffs to vigorously assert their rights to government transparency by authorizing courts to award civil penalties, court costs, and attorney fees against a government defendant that has been shown to have committed a knowing or purposeful violation of the Sunshine Law. This design gives citizens confidence that even if they do not ultimately recover any of the expenses of their litigation, as long as their lawsuit is not frivolous they will only be required to pay their own litigation-related expenses. But the *only* way a citizen can qualify for those civil penalties, court costs, or attorney fees is to prove that a public governmental body knowingly or purposefully violated the Sunshine Law. And, due to the way that courts have interpreted the terms "knowing" and "purposeful," it is very, very difficult for a citizen to meet the requisite burdens of proof. As explained above, the reason Roland sought a ruling that the Board had knowingly or purposefully violated the Sunshine Law was to encourage courts to reconsider how they apply those standards.

The Board has taken the position that, rather than encouraging citizen plaintiffs to vindicate their rights to transparent, accountable government, the legislature designed §

610.027 so that even if a citizen plaintiff proved a violation of the Sunshine Law, if that citizen could not meet the high bar courts have established for proving that the violation was knowing or purposeful, § 514.060 would ***automatically*** entitle the government defendant to have the citizen pay its court costs. **App. Subst. Response/Reply Br., pp. 22, 26.** And even though Roland has at no point suggested that the government must bear a citizen plaintiff's costs if the plaintiff fails to prove a "knowing" or "purposeful" violation of the Sunshine Law, the Board emphasizes the general rule (which § 610.027 specifically alters in Sunshine Law cases) that government entities and officials are immune from having costs taxed against them. Roland has already explained to the Court in pages 46-51 of his initial brief why this position is inconsistent with sections 610.011 and 610.027; he will not belabor those arguments here.

Roland does, however, wish to add to his earlier argument that the Board's proposed rule of law would create perverse incentives for government defendants to push for "bifurcated" Sunshine Law trials—even though § 610.027 does not expressly authorize the bifurcation of trials. If a citizen plaintiff succeeds in the so-called first phase of a "bifurcated" Sunshine Law trial, the citizen is confronted with a difficult choice. If the citizen chooses to "stand pat" and not pursue a finding that the violation was "knowing" or "purposeful," they have no hope of recovering the litigation expenses they have already devoted to the case and they are not in any way guaranteed that they will gain access to the public records, meetings, or votes they were seeking because the government might get the judgment reversed on appeal. If the citizen risks the so-called second phase of a "bifurcated" Sunshine Law trial, however, not only will they accrue more litigation

expenses that they may or may not recover, if they cannot meet the extremely high standard for proving that the government's Sunshine Law violation was "knowing" or "purposeful" the citizen will automatically be on the hook for the government's court costs. And, of course, even if the trial court finds that the government knowingly—but not purposefully—violated the Sunshine Law, the court might not require the government to pay the citizen's litigation expenses. Consequently, public governmental bodies sued under § 610.027 will have an enormous incentive to have the trial courts "bifurcate" these cases because doing so would discourage many citizens from filing Sunshine Law cases in the first place.

Especially in light of how difficult it has become for a citizen to prove a knowing or purposeful violation of the Sunshine Law, allowing trial courts to force citizen plaintiffs to pay the court costs of government entities would virtually eliminate the incentive the General Assembly provided in § 610.027 for citizens to pursue their rights to government transparency. The Board's position is not only unprecedented, it is plainly contrary to the public policy of transparency that the Sunshine Law is designed to advance. § 610.011. This Court must reject the Board's position.

CONCLUSION

In sum, this case presents the question of whether § 610.027 authorizes trial courts to force citizen plaintiffs who have brought non-frivolous actions to enforce the Sunshine Law to pay the court costs of the defendant public governmental body. This issue has major implications for those confronted with the decision of whether to pursue their rights under the Sunshine Law, and particularly because the trial court below awarded costs even though the citizen plaintiff had proven violations of the Sunshine Law this Court should take this

opportunity to reassure this state's citizens that § 610.027 does not authorize such an order. If, in the alternative, should this Court conclude that a motion to retax costs is an absolutely necessary prerequisite before an appellant may challenge a trial court's authority to award costs in a given case, Roland respectfully asks the Court to acknowledge that, as the Board has itself suggested,[3] Roland may yet raise this issue after the conclusion of this appeal by filing a motion to retax costs in the Circuit Court. *See, e.g., Collector of Revenue v. Wiley*, 529 S.W.3d 42, 45 n3 (Mo. App. E.D. 2017) (allowing party to pursue motion to retax five years after opposing party dismissed petition against him and also after initial unsuccessful appeal regarding trial court's authority to tax costs).

For the above reasons and the reasons stated in his initial brief, Roland asks this Court (1) to affirm the trial court's holding that § 115.289 could not justify the Board's choice to withhold from Roland the absentee ballot applications he requested; (2) to affirm the trial court's holding that § 115.493 could not justify the Board's choice to withhold from Roland the absentee ballot envelopes he requested; (3) to hold that Missouri law does not authorize a trial court to order a citizen plaintiff in a non-frivolous Sunshine Law case to bear the defendant's costs, especially when the citizen plaintiff proved that the defendant violated the Sunshine Law; and (4) to reverse the trial court's order authorizing the taxation of the Board's costs against Roland.

[3] **App. Subst. Response/Reply Br., p. 21-22.**

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that on August 13, 2019, I electronically filed the foregoing with the Clerk of the Missouri Supreme Court by using the Electronic Filing System, and that a copy will be served by the Electronic Filing System upon those parties indicated by the Electronic Filing System. Pursuant to Missouri Supreme Court Rule 55.03(a), I have signed the original of this Certificate and the foregoing brief.

I also hereby certify that this brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b). This brief was prepared in Microsoft Word 365 and contains 4,335 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure (fewer than the 7,750 word limit in the rules). The font is Times New Roman, double-spacing, 13-point type.

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