IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD86415

CITIZENS FOR TRANSPARENCY AND ACCOUNTABILITY, *et al.*,

Appellants,

v.

WESTERN CASS FIRE PROTECTION DISTRICT, *et al.*,

Respondent.

Circuit Clerk of Cass County
The Honorable R. Michael Wagner

APPELLANTS' BRIEF

TUETH KEENEY COOPER
MOHAN & JACKSTADT, P.C.

James R. Layton
MoBar No. 45631
34 N. Meramec Avenue, Ste. 600
St. Louis, MO 63105
Phone: (314) 880-3600
Fax: (314) 880-3601
jlayton@tuethkeeney.com
ATTORNEYS FOR APPELLANTS

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JURISDICTIONAL STATEMENT

On June 14, 2023, the circuit court granted Defendants' Motion for Judgment at the Close of Plaintiffs' Case. Doc.1,p.27.[1] On June 26, 2023, the circuit court entered a final judgment based on the grant of that motion. Doc.1,p.27; Doc.6.

On July 13, 2023, Plaintiffs filed their notice of appeal to this Court. Doc.1,p.27; Doc.7.

The issue posed here does not fall within the exclusive jurisdiction of the Supreme Court of Missouri, and the case below is from Cass County. This Court thus has jurisdiction pursuant to Art. V, §3 of the Missouri Constitution and §477.070, RSMo.

[1] Documents in the Legal File will be referred to simply by document number.

STATEMENT OF FACTS

This case was brought by Citizens for Transparency and Accountability, an unincorporated association, and two individual plaintiffs: [redacted] and [redacted]. [redacted] and [redacted] were elected members of the Board of Directors of the Western Cass Fire Protection District. They were recalled from the Board in an August 2023 election.

The operative Second Amended Petition (Doc.2) addressed various issues relating to how the Western Cass Fire Protection District operated, including issues regarding how a Board majority restricted the access of two Board members to information about the District. Plaintiffs appeal only as to the issues raised in Count I, those arising under the Missouri Sunshine Law, Chapter 610, RSMo. Thus the facts stated below are only those pertinent to the Sunshine Law claims.

The claims arose from actions made during or in connection with eleven meetings of the District's Board, all but one of them in 2022.

For its **April 13, 2022**, meeting, the Board posted a tentative agenda that included a closed session to address "legal matters, hiring/ firing, disciplining of employees, personnel matters and security systems," citing as authority "§621.021(1)(3)(13)(19)." Plaintiff's Exhibit ("P.Ex.") 18. During the meeting, the Board voted to go into closed session, using the same description. P.Ex.19. The closed session began with discussion individual firefighters (*i.e.*, "personnel matters"). But while still in closed session the new Board Chair "announce[d] to the board how he was going to conduct things moving forward as board chair and president of the District and outlining that everything

basically would funnel through him." Tr.537. *See also* P.Ex.20 (Chair's follow-up email).

The posted agenda for the Board's **May 18, 2022**, meeting (P.Ex.21; *see* Tr.540) said that there would be reports from named District officers and Board members but gave no indication what the reports might cover. During the report portion of the meeting, the Board not only heard reports, but took up and approved motions on topics that were not listed in the agenda, such as changing the District's arrangements with an IT provider, changing banking arrangements, and approving a contract for a district manager. P.Ex.22.

The posted agenda for the Board's May 18, 2022, meeting said there would be a closed session dealing with "[p]ersonnel and legal matters" and citing §621.021(1), (3), (13), and (19). Tr.540. During the open meeting, the Board discussed workflow diagrams proposing "a process for the board in how we were going to go about hiring and trying to restaff the District" (Tr.570) and a similar process for "hiring the administrative contractors" (Tr.571). *See* P.Ex.27, 28. Once the Board went into closed session, those diagrams were "the first thing [the Chair] brought up." Tr.572-573. The Chair "wanted to remove the background requirements for the administrative contractors." Tr.573. In closed session the Board also discussed whether to require drug tests. Tr.577. And it discussed whether to contract for lawn care. Tr.578.

The Board next met on **May 28, 2022**, at 9:00 a.m. P.Ex.32. But the notice of that meeting (P.Ex.30,31) was not posted until after 5:30 p.m. on May 27 (Tr.141-142). The agenda posted the evening of May 27 (P.Ex.30,31) said nothing about the reason for the short notice. And it listed only one agenda item: a closed session dealing with "[p]ersonnel and legal matters," though citing more broadly "§610.021 (1) (3)(13)(21)." P.Ex.31.

[redacted] and [redacted] learned about the meeting the evening of May 27, concluded that the meeting would be illegal, and did not attend. Tr.142; P.Ex.32.

"The nature of the good cause justifying that departure from the normal [*i.e.*, 24-hour notice] requirements [as] stated in the minutes" (§610.020.4) was "[a]n urgent need to review of recent resignation Treasurer position, Appoint new Treasure[r] and District's financial system approval" (P.Ex.32). But the actual reason that the meeting was held the morning of May 28, rather than in the evening or the next day, with 24-hours notice, was not that the listed matters could not be addressed by the Board with the required notice. Rather, it was because one Board member, the Board Chair, was going out of town on a previously scheduled vacation and he "wanted to know that this was taken care of before [he] left." Tr.236-237.

When the meeting opened the morning of May 28, the Chair moved to go into closed session "pursuant to 610.021 (1) RSMo legal (contracts pending); 610.021 (3) & (13) Personnel; and financial systems 610.021(21) RSMo." P.Ex.32. In closed session the Board took up and adopted motions to:

- contract with QuickBooks in lieu of Xero, the District's then-current accounting system provider;
- contract with the District's CPA for data transfer; and
- add treasurer duties to the duties of the District manager. P.Ex.32

The Board also discussed:

- issues relating to the District's employer identification number from the Internal Revenue Service; and
- whether to contract for bookkeeper service. *Id.*

The Board did not act on the bookkeeper issue because there was a proposal to contract for such services with Twinc, and the question was tabled because the Chair recused, leaving the Board without a quorum. *Id.*

The morning of the Board's **July 6, 2022**, meeting, three directors corresponded regarding the District's insurance coverage. P.Ex.106. They did not "post a notice of the meeting on its website in addition to its principal office [nor] notify the public how to access that meeting." §610.020.1.

The agenda posted for the July 6, 2022, meeting labelled it as a "work session," which historically meant that the board would discuss issues but not take votes on final decisions. Tr.611-613; P.Ex.41. By motion the Board added an item to the agenda: "contracting Belton to provide fire services to the district." P.Ex.41. Then, despite it being a "work session," the Board took up motions, including the approval of stipends to the fire chief. P.Ex.41. Stipends were not on the posted or even the amended agenda; they were considered and approved during what the posted agenda had merely listed as receiving "reports." *Id.*

The agenda posted for the Board's **July 20, 2022**, meeting listed, under the heading "Banking," a resolution identified only by number: 20220720.1. P.Ex.43; Tr.649. The posted agenda did not say what that resolution was, nor was the resolution made available to the public (or even to some of the board members, *see* Tr.640-641) prior to the meeting.

The posted agenda for the July 20 meeting again listed "reports," without indicating what, if any, business would be taken up during those "reports." P.Ex.43. During the "reports," the Board took up and adopted motions to change the job duties of certain District personnel. *See* P.Ex.44; Tr.637-638.

At the beginning of the July 20 meeting, the Chair moved to add four resolutions – by number – to the agenda. P.Ex.44. In fact, the Chair agreed that it was the practice of the board to "often add things to the agenda" at the beginning of meetings. Tr.193; *see also* Tr.716 (amendments to "new business" happen "[a]ll the time.").

During that July 20 meeting, the board went into closed session, purportedly to discuss "personnel matters," though also citing §610.021(19), which deals with "security measures." P.Ex.44; Tr.639. During that closed session, in addition to discussing the hiring of applicants, the board discussed cancelling the district's agreement with a contractor. P.Ex.44.

The posted agenda for the Board's **August 3, 2022**, meeting included this topic: "special considerations." P.Ex.47. Three of the directors knew before the meeting what that meant. Tr.261-262,381-382. But the other two were not told, not even when they asked as the meeting began. Tr.151-152,657-659. One of the Board members who knew what was coming suggested that a citizen who saw "special considerations" "would be curious" and would attend because they "want to know what that is." Tr. 382; *see also* Tr. 262, 1050. When the Board reached that point in the meeting, it took up and passed a motion to file a petition in court to have [redacted] removed from the board. Tr.153; P.Ex.52. The Board then "establish[ed] a litigation subcommittee" comprised of three Board members (a quorum of the Board) to address "the petition for removal of [redacted]." P.Ex.52.

At the August 3 meeting, the Board continued to take up matters not on the agenda, such as accepting an electrical repair bid. P.Ex.52; Tr.664.

After the August 3, 2022, meeting three of the five Board members (a quorum) used email to discuss proposed budget revisions, including the possibility of hiring "paid parttime volunteers." P.Ex.101. They did not "post a

notice of the meeting on its website in addition to its principal office [nor] notify the public how to access that meeting." §610.020.1.

During its **August 24, 2022**, meeting the Board continued its practice of taking up and acting on new topics during the presentation of what the posted agenda listed as "reports." P.Ex.54,55; Tr.679. At the end of the Board meeting, the "litigation subcommittee" met in closed session, citing §610.021 (1). P.Ex.55.

During its **September 7, 2022**, meeting, when the Board took up "Personnel Qualification and Certification," it also voted to spend "$3000 to purchase uniforms." P.Ex.56,57,58. The Board also went into closed session. P.Ex.58.

During the Chair's "report" section of the September 21, 2022, meeting, the Board voted to spend $1400, which would "double or triple" its cost for a contractor for "inventory tracking and management of call reports." Tr.703; *see* P.Ex.61. During the chief's "report," the Board voted to spend additional funds on truck service and radio installation. Tr.704; P.Ex.61. None of those items were listed on the agenda. *See* P.Ex.60.

At its **October 3, 2022**, meeting the Board continued its practice of adding things to the agenda at the meeting. Tr.716-718. Here, that included purchase of equipment, adopting a new District insignia, and amending the secretary's contract. P.Ex.64,65,66. The Board also held a closed session. P.Ex.64.

At its **October 19, 2022**, meeting, the Board held a closed session, from which [redacted] was excluded. P.Ex.66; Tr.724.

At its **November 16, 2022**, meeting, the Board took up and approved various things that were not on the posted agenda, including: a contract for a medical director; creating and sending a newsletter throughout the district;

adopting a program that would allow firefighters to reside at the fire station; changing the bid solicitation for one of the fire stations; an insurance rider for proof of loss; barring one director from taking photographs at the fire station; having and paying for a party; and purchasing a generator battery. Tr.197-202,724-733; P.Ex.68.

On **February 28, 2023**, the eve of the first day of trial, the Board held a special meeting, for which it listed a single, one-word agenda item, "Terms," without any explanation as the "terms" of what or who. Tr.365,366,814.[2]

[2] The Second Amended Petition (Doc.2) did not include a specific allegation regarding the vague agenda item for the February 28, 2023, meeting. But the evidence was introduced without objection, and pursuant to Rule 55.33 (b) the petition may still be amended to include issues regarding that and other meetings as to which evidence was presented. This Statement of Facts excludes evidence about meetings as to which the defendants did timely object, *i.e.*, those between December 12, 2022, and February 28, 2023. *See* Tr.738-739.

POINTS RELIED ON

Point relied on II: The circuit court erred in entering judgment for defendants at the close of plaintiffs' case on all Sunshine Law issues because judgment as to Sunshine Law claims not addressed in the Motion for Judgment at the Close of Plaintiffs' Case was against the weight of the evidence in that the evidence showed, and the Motion did not dispute, that individual Plaintiffs had standing, that some items on some posted agendas were too vague to advise the public as to the subjects to be discussed, that a quorum of the Board conducted public business by email without public notice or access, and that there were closed sessions from which one or more plaintiffs was absent.

§610.027

Point relied on III.A.1: The circuit court erred in entering judgment for defendants at the close of plaintiffs' case based on a lack of standing for the association plaintiff because such a judgment erroneously applies the law in that the plaintiff association has standing because its members have standing to sue, the suit is within the purpose of the association, and neither the claims nor the relief sought require participation of individual association members.

Hunt v. Washington State Apple Advertising Comm'n., 431 U.S. 343 (1977)

St. Louis Ass'n of Realtors v. City of Ferguson, 354 S.W.3d 620 (Mo. 2011)

Point relied on III.A.2: The circuit court erred in entering judgment for defendants at the close of plaintiffs' case based on a lack of capacity of the associational plaintiff because such a judgment erroneously applies the law in that any question of the standing of the association was waived by defendants' failure to challenge capacity by specific negative averment.

Rule 55.13

City of Wellston v. SBC Communications, Inc., 203 S.W.3d 189 (Mo. 2006)

In Rep. Trustees Indian Springs v. Greeves, 277 S.W.3d 793 (Mo. App. E.D. 2009)

Point relied on III.B: The circuit court erred in entering judgment for defendants at the close of plaintiffs' case as to plaintiffs' closed session claims based on the individual plaintiffs' alleged waiver of their right to sue because such a judgment erroneously declares or applies the law in that the Sunshine Law grants plaintiffs standing as citizens and residents and does not provide for a waiver of such claims.

§610.027.1

§610.011.1.

Point relied on IV.A.1.: The circuit court erred in entering judgment for defendants on plaintiffs' Sunshine Law notice claims at the close of plaintiffs' case because that judgment was against the weight of the evidence in that the evidence showed that notice of the May 28 meeting was given less than 24 hours before the meeting began, that notice could have been given 24 hours before that meeting, and the meeting could have been held 24 hours or more after notice was given.

§610.020.2

Point relied on IV.A.2.: The circuit court erred in entering judgment for defendants on plaintiffs' Sunshine Law notice claims at the close of plaintiffs' case because that judgment erroneously applied the law in that the evidence showed that notice of the May 28 meeting was given less than 24 hours before the meeting began, and notice could have been given 24 hours before that meeting or the meeting could have been held 24 hours or more after notice was given.

§610.020.2

Point relied on IV.B.1: The circuit court erred in entering judgment for defendants on plaintiffs' Sunshine Law notice claims at the close of plaintiffs' case because that judgment erroneously applied the law in that the evidence showed that topics listed on posted agendas were phrased generically, inadequately, or ambiguously and thus were not reasonably calculated to advise the public of the matters to be considered.

§610.010.3

§610.020.1

Point relied on IV.B.2.a.: The circuit court erred in entering judgment for defendants on plaintiffs' Sunshine Law notice claims at the close of plaintiffs' case because that judgment erroneously declared or applied §610.020.1 requiring that the "tentative agenda" be stated in "manner reasonably calculated to advise the public of the matters to be considered" in that the Board took up items not listed on the posted agenda though there was no evidence nor reason to believe that under §610.011.1 those items qualified for late notice.

§610.011.1

§610.020.2.

§610.020.1, .2

Point relied on IV.B.2.b.: The circuit court erred in entering judgment for defendants on plaintiffs' Sunshine Law notice claims at the close of plaintiffs' case because the judgment was against the weight of the evidence in that the evidence showed that the Board added items to agendas at meetings and took up items not listed on agendas, as to which the public was not advised in advance.

§610.020

Point relied on IV.C.: The circuit court erred in entering judgment for defendants on plaintiffs' Sunshine Law notice claims at the close of plaintiffs' case because that judgment was against the weight of the evidence in that the evidence showed that a quorum of the Board conducted public business via email without notice.

§610.010.1, .3, .5

§610.020

Point relied on V.A.: The circuit court erred in entering judgment for defendants on plaintiffs' notice claims at the close of plaintiffs' case because that judgment erroneously applied the law in that plaintiffs showed that the Board held closed sessions, defendants did not bear their burden of showing that the Board did not take up in those closed sessions topics that fall outside the scope of any exception.

§610.021

§610.011

§610.022

Colombo v. Buford, 935 S.W.2d 690 (Mo. App. W.D. 1996)

Client Servs., Inc. v. City of St. Charles, 182 S.W.3d 718 (Mo. App. W.D. 2006).

Point relied on V.B.: The circuit court erred in entering judgment for defendants on plaintiffs' notice claims at the close of plaintiffs' case because that judgment was against the weight of the evidence in that Plaintiffs' evidence showed that the Board took up, in closed sessions, topics that do not fall under any exception in §610.021.

§610.021

§610.011.1.

ARGUMENT

I. Legal standards

A. Standard of review and preservation

The standard of review for a judgment granted at the end of plaintiff's case in a court-tried case is

> the standard set forth in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). … The trial court's judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy*, 536 S.W.2d at 32.

Nautilus Ins. Co. v. I-70 Used Cars, Inc., 154 S.W.3d 521, 527 (Mo. App. W.D. 2005).

On appeal, the appellants/plaintiffs seek relief only as to their Sunshine Law claims. So the question is whether the circuit court's judgment as to the Sunshine Law claims meets the *Murphy v. Carron* standards.

"Furthermore, no motion for new trial is necessary to preserve an issue in a judge tried case." *477.070 Mutual Automobile Ins. Co. v. Esswein*, 43 S.W.3d 833 (Mo. App. E.D. 2000). And throughout the proceedings in this case, Plaintiffs have "consistently argued" (*id.* at 840) the points made here.

B. Rule of construction

All of the substantive claims at issue in this appeal arise from the Missouri Sunshine Law. That statute imposes, rather than leaving to the courts to choose, the applicable rule of construction:

> It is 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. Sections 610.010 to 610.200 shall be liberally construed and their exceptions strictly construed to promote this public policy.

§610.011. If there are two possible constructions of any provision of the Sunshine Law, the court must use the one that favors openness.

> *Point relied on II: The circuit court erred in entering judgment for defendants at the close of plaintiffs' case on all Sunshine Law issues because judgment as to Sunshine Law claims not addressed in the Motion for Judgment at the Close of Plaintiffs' Case was against the weight of the evidence in that the evidence showed, and the Motion did not dispute, that individual Plaintiffs had standing, that some items on some posted agendas were too vague to advise the public as to the subjects to be discussed, that a quorum of the Board conducted public business by email without public notice or access, and that there were closed sessions from which one or more plaintiffs was absent.*

II. There was no basis for the circuit court to enter judgment on all the Sunshine Law count in its entirety.

The circuit court's judgment was based on the grant of Defendants' Motion for Judgment at the Close of Plaintiffs' Case, and stated no rationale itself. *See* Doc.6. The rationale must be found, then, in the motion and supporting suggestions. But that presents a significant problem here: The Motion did not articulate *any* Sunshine Law-based rationale for judgment as to these claims:

- That the Board included in its posted agendas item descriptions that did not inform the public of the nature of business to be conducted (discussed further in IV.B.1.);
- That a quorum of the Board of Directors deliberated regarding public business via email, *i.e.*, outside a meeting for which notice was posted (discussed further in IV.C.); and

- That in closed sessions at which at least one plaintiff was not in attendance, the Board of Directors addressed topics that do not qualify under §610.021 (discussed further in V.B.).

The only rationale that the circuit court could have extracted from the Motion that might cover those claims would have to be found in the Motion's discussion of standing and capacity. As discussed in point III, those arguments fail on the law. Regardless, they are not broad enough to cover all plaintiffs and all claims.

Defendants argued that the first named plaintiff, an unincorporated association, lacked standing or capacity to sue. But even if that were correct (which it is not, as discussed in III.A.) that would leave the individual plaintiffs named in the Second Amended Petition:

> 3. Plaintiff Citizens for Transparency and Accountability, an unincorporated association of persons who are residents of and registered voters in the Western Cass Fire Protection District. Plaintiffs [redacted] and [redacted] are elected members of the Board of Directors of the Western Cass Fire Protection District, and residents of and owners of property within the District.

Doc.2,¶3. Defendants admitted the allegation regarding the individual defendants. See Doc.3,¶3. Except in their argument that the association lacks standing, their Motion for Judgment consistently and correctly refers to Plaintiffs – *plural*. *See* Doc.5.

Section 610.027.1 gives standing to "[a]ny aggrieved person, taxpayer to, or citizen of, this state" to "seek judicial enforcement of the requirements of sections 610.010 to 610.026." The allegations in the petition were sufficient to establish standing for the individual plaintiffs. The evidence at trial confirmed that the individual plaintiffs were aggrieved. And Defendants

neither argued nor presented evidence to suggest that the individual plaintiffs lacked standing under §610.027.

Regardless of whether the association had capacity to bring this suit initially, then, the individual plaintiffs added in the amended petition have capacity and standing. The circuit court erred if it granted judgment against them on the basis of a lack of standing.

Defendants did assert one challenge to the individual plaintiffs' standing – one that is limited to issues regarding closed sessions in which those plaintiffs "participated" (a term neither the Defendants never defined). Doc.5,p.10. We address that in III.B. below. But even if Defendants were right, that claim would not apply to claims arising from closed sessions in which one or both individual plaintiffs did not "participate."

III. The association and individual plaintiffs have standing and capacity to sue.

We next turn to the preliminary issues of jurisdiction or authority raised in the Defendants' Motion: standing and capacity of the association plaintiff, and Defendants' claim that the individual plaintiffs waived their standing or right to sue regarding some of the Board's closed sessions.

A. The association plaintiff has standing, and any challenge to its capacity was waived.

Point relied on III.A.1: The circuit court erred in entering judgment for defendants at the close of plaintiffs' case based on a lack of standing for the association plaintiff because such a judgment erroneously applies the law in that the plaintiff association has standing because its members have standing to sue, the suit is within the purpose of the association, and neither the claims nor the relief sought require participation of individual association members.

1. Standing

The first argument made in the Motion for Judgment was that a "Plaintiff lacks standing to bring an action under Missouri law." Doc.10,p.2. The sole plaintiff addressed in that argument was the unincorporated association, Citizens for Transparency and Accountability. But there is no question that the association has standing.

"Missouri has adopted the *Hunt v. Washington State Apple Advertising Comm'n.*, 431 U.S. 343 (1977),] framework for analyzing associational standing." *St. Louis Ass'n of Realtors v. City of Ferguson*, 354 S.W.3d 620, 622 (Mo. 2011). The test is whether (a) the association's members would "have standing to sue in their own right; (b) the interests [the association] seeks to

protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." 431 U.S. at 343, quoted, 354 S.W.3d 622. Defendants did not argue below that Citizens for Transparency fails any part of that test. And it is apparent that it meets the test: (a) the members of Citizens for Transparency are the two individually named plaintiffs (*see* Tr.159), who have standing to sue; (b) the purpose of the Citizens is "the betterment of [their] community with the fire department" (*id.*); and (c) neither the Sunshine Law nor other claims nor the relief sought require participation of individual members.

> *Point relied on III.A.2: The circuit court erred in entering judgment for defendants at the close of plaintiffs' case based on a lack of capacity of the associational plaintiff because such a judgment erroneously applies the law in that any question of the standing of the association was waived by defendants' failure to challenge capacity by specific negative averment.*

2. Capacity.

Though Defendants use the word "standing," what they actually argued to the circuit court was that the association lacks capacity to sue in its own name. *See*, *e.g.*, *City of Wellston v. SBC Communications, Inc.*, 203 S.W.3d 189, 193 (Mo. 2006) (differentiating standing and capacity). But there was a good reason for Defendant to label their argument "standing": standing cannot be waived by Defendants, but capacity can be – and was.

Rule 55.13 requires that a challenge to capacity of a plaintiff be raised "by specific negative averment." When a defendant fails to do so, the capacity challenge is waived. *E.g.*, *In Rep. Trustees Indian Springs v. Greeves*, 277

S.W.3d 793 (Mo.App.E.D. 2009) (challenge to capacity of association was waived because it was not asserted by a motion to dismiss and the defendant did not file a responsive pleading in which the required averment could be made). In answering the Second Amended Petition, Defendants did not make a "specific negative averment" as to the association's capacity. Compare Doc.2,¶3 and Doc.3,¶3. They thus waives a capacity challenge.

Had the Defendants made a timely "specific negative averment," Plaintiffs could have responded by supplementing their description of the individual plaintiffs in the petition to expressly state that they sued not only in their own names, but as the representative association members as demanded by Defendants in their Motion. By waiting until after Plaintiffs completed presenting their case at trial, Defendants/Respondents waived their capacity challenge.[3]

> *Point relied on III.B: The circuit court erred in entering judgment for defendants at the close of plaintiffs' case as to plaintiffs' closed session claims based on the individual plaintiffs' alleged waiver of their right to sue because such a judgment erroneously declares or applies the law in that the Sunshine Law grants plaintiffs standing as citizens and residents and does not provide for a waiver of such claims.*

B. No plaintiff waived the ability to challenge closed sessions.

Defendants did make a very narrow challenge to the standing of the individual plaintiffs: a claim that at least one, and perhaps both, individual Plaintiffs waived their rights to bring certain claims under §610.027.2 based

[3] Moreover, when there is a challenge to capacity, the challenger has the burden of proof. Rule 55.13.

on waiver. That argument is based on the plaintiff-specific factual assertion that "Plaintiff [redacted] testified that there were discussions held in closed sessions …, but she herself participated in such discussions without objection." Motion p.10. The Motion labels that "an admission of a waiver." *Id.* The argument says nothing about Plaintiff [redacted], nor about the association. And it cites no authority for the proposition that "participation" (whatever that might mean) constitutes waive. And there is none.

Before turning to the law, however, we reiterate that Plaintiff [redacted] did not attend, much less "participate in," all of the closed sessions identified at trial by Plaintiffs. Nor did Plaintiff [redacted]. *See pp.10-11, supra.* The waiver theory could not apply as to closed sessions they did not attend – most notably, the late-noticed closed session on May 28, 2022. And Plaintiff [redacted] never testified that she "participated" in *all* "discussions in closed session[s]" (Doc.5.p.10) that she attended. Nor did anyone else.

Regardless of whether either individual plaintiff attended or "participated" in improper closed session discussions, and assuming that the association lacked capacity to assert a Sunshine Law claim, there is no authority in the Sunshine Law for deeming the attendance or "participation" of board members in closed session to waive their right to sue if the session goes off the rails, as closed sessions of the Board here did. The right to sue is granted to any "taxpayer to, or citizen of, this state" (§610.027.1). Like all parts of the Sunshine Law, that must be "liberally construed." §610.011.1. That construction does not leave room for a waiver theory.

Defendants seem to have drawn the word "participate" from the Sunshine Law's a "safe harbor" provision, §610.022.6. That section enables Board members like the individual plaintiffs here to preserve a defense to a

claim of the sort that these Plaintiffs now bring. But the "safe harbor" does not otherwise impose an obligation on them. It neither says nor suggests that a failure to invoke the 'safe harbor" constitutes some sort of waiver.

A key practical problem with inferring a broad waiver theory from the "safe harbor" of §610.022.6 is that provision applies only at the point where the board votes to go into closed session. So it has an effective prerequisite: the member must know in advance what will be discussed in closed session. That prerequisite was not always fulfilled. [redacted] was not told in advance what the closed session topics were to be (Tr.601), so she had no basis to "believe[] that such motion, if passed, would cause a meeting, … or vote to be closed from the public in violation of any provision in this chapter." §610.022.6. Moreover, it seems that many of the impermissible discussions in closed sessions may have been late additions, outside the originally intended purpose of the session.[4]

One of those additions demonstrates the difficulty this court would have in crafting a workable rule. For the closed session on April 13, 2022, the notice said the closed session would address security systems and cited exceptions dealing with security systems, litigation, and personnel. P.Ex.18. The closed session began with a discussion of individual firefighters – something not mentioned in the narrative portion of the notice, but that falls within the

[4] It is hard for the public – and even board members – to discern in advance even the general subject intended for this Board's sessions. The posted agendas and the motions to go into closed session often provide a narrative, then a statutory cite that exceeds the scope of the narrative. *See, e.g.*, P.Ex.30,31 (narrative in agenda posted May 27 specified "personnel and legal matters," but the notice also listed §610.021(21), which addresses "the configuration of components or the operation of a computer, computer system, computer network, or telecommunications network"). Such ambiguity cannot be "reasonably calculated" (§621.020.1) to advise the public of the intended nature of the closed session discussion.

scope of the listed §610.021 exceptions (assuming that is enough). P.Ex.19. But the meeting then strayed beyond any exception in §610.021: the Chair "outlined the executive and legislative structure of the district." P.Ex.19. The public was entitled to hear that – but could not.

If the court were to infer a waiver from §610.022.6 that applies not just before but *during* a closed session and apply it here, the court would have to retroactively define what a board member must do to avoid the waiver – and when. The definition that would most closely parallel the §610.022.6 approach would be for the objecting member to leave the closed session, return to the public, and make the objection. If the secretary at that point remains in the closed session, there will be no one to record the objection. And as a practical matter the board member would forfeit their ability to vote – not just on that issue, but on others as the closed session continues. For example, if one of the plaintiff directors left the April 13 closed session when the Chair led the Board to impermissible topics, they would have missed discussion of the declared subject of the session, "current bids for security doors and cameras." P.Ex.19.

Moreover, returning to make a public announcement often will not provide the public notice that the Sunshine Law requires: governmental bodies frequently put closed sessions at the end of the meeting, and the public, knowing the public portion is finished, leaves.

To return to the Sunshine Law's scheme, to insist that directors leave a closed session or waive their right to bring suit would be inconsistent with the requirement that even the "safe harbor" provision be "liberally construed" to promote openness.

IV. The undisputed evidence shows various and repeated violations of the notice requirements of the Sunshine Law.

We turn, then to the substantive claims at issue, arising under the Sunshine Law, starting with the District's violations of the Sunshine Law's requirements that the public be given timely notice of discussion of and action on particular subjects of public business.

Though Defendants' Motion led the circuit court to enter judgment for Defendants on all of the Sunshine Law claims, the scope of the Motion rationale was explicitly limited to the notice claims:

> *Two* of the categories of Sunshine Law violations alleged by the Plaintiffs may be dealt with by the Court at the close of Plaintiffs' evidence, namely the allegations that there existed no grounds for the late posting of *notice* of the May 28, 2022 meeting of the Defendant Board of Directors, and more generally, the allegation that business undertaken by the Defendant Board of Directors was not adequately *noticed*.

Doc.10,p.6 (emphasis added). As discussed in this section, entering judgment on the notice points was erroneous.

The notice requirements of the Sunshine Law are a key – perhaps *the* key – to prerequisite to making the open meetings provisions work: they are intended (and must be "broadly construed") to ensure that the public *knows in advance* what will be considered at each and every public meeting.

The notice requirement is found in §610.020.

The opening clause of subsection 610.020.1 specifies the content of the notice: "All public governmental bodies shall give notice of the time, date, and place of each meeting, and its tentative agenda, in a manner *reasonably*

calculated to advise the public of the matters to be considered." (Emphasis added.)

The timing of the required notice is set out in the opening sentence of subsection 2:

> Notice conforming with all of the requirements of subsection 1 of this section shall be given at least twenty-four hours, exclusive of weekends and holidays when the facility is closed, prior to the commencement of any meeting of a governmental body unless for good cause such notice is impossible or impractical ….

As discuss in this section IV, the Board repeatedly failed to provide such notice, once by giving notice late, but often by not giving advance notice at all as to items of public business that the Board takes up.

> *Point relied on IV.A.1.: The circuit court erred in entering judgment for defendants on plaintiffs' Sunshine Law notice claims at the close of plaintiffs' case because that judgment was against the weight of the evidence in that the evidence showed that notice of the May 28 meeting was given less than 24 hours before the meeting began, that notice could have been given 24 hours before that meeting, and the meeting could have been held 24 hours or more after notice was given.*

> *Point relied on IV.A.2.: The circuit court erred in entering judgment for defendants on plaintiffs' Sunshine Law notice claims at the close of plaintiffs' case because that judgment erroneously applied the law in that the evidence showed that notice of the May 28 meeting was given less than 24 hours before the meeting began, and notice could have been given 24*

hours before that meeting or the meeting could have been held 24 hours or more after notice was given.[5]

A. The Board held its May 28, 2022, meeting without the required 24-hours notice, though neither giving notice earlier nor holding the meeting later was "impossible or impractical."

The first Sunshine Law issue that Defendants persuaded the circuit court to decide at the end of Plaintiffs" case was whether the District board violated §610.020.2 when it held a meeting on the morning of May 28, 2022, though it posted notice the evening of May 27 – less than the requisite 24 hours.

Section 610.020.2 permits a meeting to be held with less than 24-hours notice only when "for good cause such notice is impossible or impractical." §610.020.2. Because it creates an "exception" to the rule requiring 24-hours notice, "impossible or impractical" must be "strictly construed."

For it to be "impossible or impractical" for a meeting to be held with 24-hours notice, both the date and time of the meeting and the date and time of the notice must be constrained. So here, the question before the circuit court was whether the meeting had to be the morning of May 28, and if so, whether the notice could not be posted prior to the evening of May 27. The record evidence presented by plaintiffs showed that the meeting did not have to be

[5] One problem created by the circuit court's decision to enter judgment based solely on its grant of the Motion for Judgment at the Close of Plaintiffs' Case is that it is possible that the Court misread the law, or it is possible, in some instances, that the Court did not find the evidence persuasive. That uncertainty makes drafting "points relied on" a difficult task. But as to the circuit court's treatment of the evidence, we emphasize that nearly all of the evidence on which the Sunshine Law claims here are based comes from the posted Board agendas and the approved Board minutes, and there is no basis on the record to question the content of those documents. There is no room for disbelief, so presumably the error was in applying the law.

held the morning of May 28, and that the notice could have been posted before the evening of May 27. If either of those were true—and they both were—then the meeting violated §610.020.2.

1. Date and time of the meeting.

The meeting did not have to be held the morning of May 28.

The reason given by the Board Chair for that schedule was a combination of two things:

- The need to appoint a new treasurer; and
- His departure the afternoon of May 28 for a vacation. Tr.236-237.

The Board chair did not suggest that the Board could not assembly a quorum later. After the Chair left, the Board still had a quorum in town that could appoint a new treasurer. And the Chair could have participated remotely. *See* §610.015 (permitting votes by members "who are participating via videoconferencing"). The Chair simply deemed his personal presence essential for the Board to address the treasurer appointment issue. *See* Tr.237.

Nothing had to happen on May 28 or over the next few days that demanded action the morning of May 28 to formally appoint a treasurer. Though the Chair says he thought it "really important" that the new treasurer have access to banks (Tr.240), Monday May 30 was a federal and bank holiday, so no change could have been made until Tuesday May 31. Moreover, bill payments were current as of May 18 (Tr.585). And perhaps most important, appointing a treasurer was not a prerequisite to getting bills paid.

The first step in the District's bill-pay process was for the District's accountant to initiate payment of a bill. Tr. 566. Then a director reviewed the accountant's entry and approved release of the funds. *Id.* As of May 28, the accountant was still authorized to initiate payments, and a director was still

authorized to approve release of the funds. Tr. 567. In fact, on May 31 three directors were corresponding with the accountant regarding bills to be paid through that process. P.Ex.105. So if there had been a bill that needed to be paid on or soon after May 28, that could have been done without a board meeting the morning of May 28.[6]

Because the meeting held the morning of May 28 could have been held later, it failed the "impossible or impractical" standard even if the notice could not be posted before the evening of May 27.

2. Date and time of the notice

And the notice did not have to be posted the evening of May 27. It could have been posted that morning – or on a prior day.

Again, the alleged need for the meeting was for the Board to agree upon and appoint a new treasurer. The former treasurer had resigned on May 18. P.Ex.22. Notice could have been posted any time after the May 18 meeting for a meeting to take up that business. Between May 18 and May 28 there was no surprise, no new need, no emergency.

So why the late notice? The Board Chair suggested that it was not until the afternoon of May 27 that he came up with a proposed treasurer replacement. Tr.233. But he knew for more than a week before May 27 both that the Board needed to make the decision, and that if the Board was going to make it with him physically present, his vacation schedule required that the meeting be held no later than the morning of May 28. Days before May 28

[6] There was some discussion between the Chair and another Board member about the quality of he accountant's work, *i.e.*, whether the District's retained accountant had been timely initiating payment of District bills. Tr.235. But the District was still using that accountant to perform that function 10 months later. Tr.235-236.

he could have instructed the clerk to post an agenda for a May 28 Board meeting to take up the question.

Delaying the posting of the notice until the evening of May 27 was not because earlier posting was "impossible or impractical." It was a choice – one that deprived the public (and, in fact, a least two Board members) of the statutorily mandated 24 hours to arrange to attend and prepare to participate in a meeting at which the Board would conduct public business.

The evidence presented by Plaintiffs, which Defendants did not dispute, shows both that it was both possible and practical for the Board to hold the May 28 meeting later, *and* that it was possible and practical to have posted the notice earlier. Either one is enough to establish that the Board violated the Sunshine Law by meeting the morning of May 28, 2022, and the circuit court erred in entering judgment for Defendants as to that notice.

B. The Board violated the requirement that its post agendas actually tell the public what may be discussed.

In addition to requiring that notice of a meeting be posted 24 hours in advance, the Sunshine Law requires that notice actually inform the public what may be discussed:

> All public governmental bodies shall give notice of the time, date, and place of each meeting, and its tentative agenda, in a manner reasonably calculated to advise the public of the matters to be considered ….

§610.020.1. That is the provision that promises the public they will know when a matter may be taken up, and can then arrange to be present to hear the Board's deliberation and witness the Board's action.

The evidence presented by Plaintiffs showed that the Board posted agenda items that hid the matter to be discussed, using generic agenda items as discussed in III.B.1. The Board also took up items that were never on the posted agenda, sometimes formally adding them to the agenda at the outset of the meeting, and sometimes taking them up without ever adding them to any agenda, as discussed in III.B.2.

> *Point relied on IV.B.1: The circuit court erred in entering judgment for defendants on plaintiffs' Sunshine Law notice claims at the close of plaintiffs' case because that judgment erroneously applied the law in that the evidence showed that topics listed on posted agendas were phrased generically, inadequately, or ambiguously and thus were not reasonably calculated to advise the public of the matters to be considered.*

1. The Board included generic or ambiguous agenda items on the posted agenda, hiding the nature of matters to be discussed.

On some agendas, the Board stated an item in a way that was too vague to have been "reasonably calculated to advise the public of the matters to be considered." §610.020.1. In some instances, the words on the posted agenda hid was actually intended to be raised at meetings. And the Board commonly included a generic word, "reports," under which it regularly considered – and took action on – items of "public business" (§610.010.3).

"Special considerations"

The most egregious instance of hiding the real subject of an agenda item was an item posted for the Board's August 3, 2022, meeting. Agenda item 5 for that meeting simply said, "special considerations." P.Ex.47. It is apparent that three members of the Board knew that the agenda item was a motion to remove one of the directors from the Board. *See* Tr.151-154,376,381-384,1050. But she and another director were not told what "special considerations" meant – not even when they asked about it when the tentative agenda was presented for approval at the beginning of the meeting. Tr.152,658

There is no evidence in the record, nor any rationale permissible under the Sunshine Law, on which the circuit court could conclude that listing "special considerations" was "reasonably calculated" to let the public know that the Board was going to discuss ejecting one of its elected members.

Resolutions by number

Another way of hiding from the public the actual nature of a proposal is to refer to it not by substantive description, but by resolution number. For the July 20 meeting, the Board posted an agenda that included among topics under the general heading of "Banking" these entries: "District Resolution #20220720.5" and "District Resolution #20220720.3." P.Ex.43. The agenda did not say what these resolutions were, nor where the public could see them in advance of the meeting. The Board also cited resolution numbers on its August 3 agenda, though this time with a bit of helpful information: "Citizen's bank Resolution 220803.1" and "Merchant Card Resolution 220803.2." P.Ex.47.

If at the July 20 and August 3 meetings the Board had intended to have a general discussion of the District's banking relationships, a reference to that

subject might have sufficed. But when the Board decided to consider action on the particulars of a resolution that has already been written (and likely shared among some Board members, perhaps a quorum), it is not "reasonable" to leave the public in the dark by just giving the number of a resolution nowhere made public.

"Reports"

The most common problem with the way in which the Board lists agenda items and then conducts its business is to list on the agenda the generic item, "reports," then use that portion of the meeting to conduct various items of public business. In the posted agenda for each meeting, the Board says that "reports" will be given by various designated people, *e.g*, the fire chief, the Board chair, etc. The word "reports" is not "reasonably calculated to advise the public" that any particular "matter [is] to be considered," that is, that the Board will deliberate and act on undisclosed items of "public business."

Plaintiffs do not suggest here that listing "report" is not "reasonably calculated" to tell the public that at that point in the meeting, the listed person will report on matters within their purview. But in the meetings of the this Board, that portion of the meeting often does not stop there. Rather, the report often becomes a springboard for taking up and acting on public business that is not identified as a "matter to be considered."

Among the topics that the minutes showed the Board took up during "reports":

- May 18: changing arrangements with an IT provider; changing banking arrangements; and approving a contract for a district manager. P.Ex.22.
- July 6: approving stipend for the fire chief. P.Ex.41.

- July 20: adopting changes to job duties of District personnel. P.Ex.44.
- August 24: approving insurance matters. P.Ex.55.
- September 21: approving spending for a contractor doing inventory and for truck servicing and installation. P.Ex.61.

Again, the evidence that the Board used "report" agenda items in this way was the Board's approved minutes – and Defendants did not dispute it. Defendants did not, and cannot, claim that "report" is sufficient to "reasonably calculated to advise the public of the matters to be considered."

* * *

"Special considerations," resolution numbers, and "reports" are not agenda items that are "reasonably calculated to advise the public of the matters to be considered." Nor are cryptic words like "terms." See p.40, *supra*. The circuit court's apparent conclusion otherwise is contrary to law.

2. The Board took up matters for which there was no item listed on the posted agenda.

Point relied on IV.B.2.a.: The circuit court erred in entering judgment for defendants on plaintiffs' Sunshine Law notice claims at the close of plaintiffs' case because that judgment erroneously declared or applied §610.020.1 requiring that the "tentative agenda" be stated in "manner reasonably calculated to advise the public of the matters to be considered" in that the Board took up items not listed on the posted agenda though there was no evidence nor reason to believe that under §610.011.1 those items qualified for late notice.

a. That posted agendas are "tentative" does not mean that new items can freely be added or taken up without advance notice.

In addition to taking up items under generic headings that gave no hint to the public as to the topics, the Board used two other approaches to move beyond the posted agendas:

- Adding new items to the agenda at the outset of meetings; and
- Taking up items never listed on any agenda.

Defendants have not claimed, and cannot claim, that the public is "advised," "reasonably" or otherwise, that any of those additional "matters" would "be considered," as §610.020.1 requires.

Instead, Defendants pointed to the requirement that the Board post a "tentative agenda," then told the circuit court that the word "tentative" means that so long as the Board posts notice of a meeting, the Board can add anything and everything to the agenda. Doc.10,p.p.8-9. That cannot be reconciled with the clause requiring that the posted agenda, though tentative,

be "reasonably calculated to advise the public of the matters to be considered." The statute, especially when "liberally construed" to serve the purpose of making "deliberations of public governmental bodies be open to the public" (§610.011.1), cannot countenance that interpretation.

So what is "tentative" about the agenda that must be posted? Three things.

First, the meeting itself could be cancelled or the time or date changed (to a date and time at least 24-hours later, of course). Nothing in §610.020.1 prevents the Board from deciding not to meet after all at the posted date and time. It is also possible that the Board will attempt meet, but fail to assemble a quorum. Or that some circumstance – perhaps weather – will make meeting difficult or requirement postponement.

The May 28 schedule presents an example of a meeting that might have been noticed but cancelled. The Chair and the rest of the Board knew well before May 28 that the District needed a new treasurer, and the Board Chair knew he was leaving on vacation and that the regular June meeting the next Wednesday had thus been cancelled. Tr.588. At any time between the evening of May 18 and the morning of May 27 the Board could have posted notice of and a tentative agenda for a meeting for the morning before the Chair was to leave, knowing that they could cancel or reschedule it if it appeared that no one on the Board had a proposal to address the vacancy.

Second, the Board may not take up all items on the agenda. After all, the Board cannot always predict what will happen during the meeting. The Board may run out of time. Or a person whose contribution is essential may be absent. Or the material or information needed to address a matter may not be available. Or circumstances regarding a particular item could change.

Nothing in §610.020.1 requires the Board to take up and act on every matter listed in advance.

Third, an urgent or emergency matter could arise – an item that could be taken up with less than 24-hours notice under the provision of §610.020.2 discussed in II.A. above. That is what happened (and all that happened) in the sole case, an Iowa case, that Defendants cited to the circuit court, *KCOB/KLVN, Inc. v. Jasper Cty. Bd. of Supervisors*, 473 N.W.2d 171 (Iowa 1991).[7] *See* Doc.10,p.10.

But what "tentative" cannot mean is that public governmental bodies are free to add to posted agendas at will, depriving the public of the notice the Sunshine Law requires.

[7] Of course, the public would still have to be given as much notice "as is reasonably possible" (§610.020.2). So if an emergency arose 23 hours before a meeting for which an agenda has already been posted, notice that the Board would consider the additional item at the meeting would have to be given then, not merely at the outset of the meeting, during the amendment and approval of the agenda.

Point relied on IV.B.2.b.: The circuit court erred in entering judgment for defendants on plaintiffs' Sunshine Law notice claims at the close of plaintiffs' case because that judgment erroneously declared or applied §610.020.1 requiring that the "tentative agenda" be stated in "manner reasonably calculated to advise the public of the matters to be considered" in that the Board took up items not listed on the posted agenda though there was no evidence nor reason to believe that under §610.011.1 those items qualified for late notice.

b. The Board added items to agendas without notice and took up items never added to agendas.

The Board Chair confirmed that the Board often adds items to the agenda at the outset of most meetings. Tr.193. The minutes introduced into evidence prove him right: that occurred repeatedly. For example:

- July 20: added four resolutions. P.Ex.44.
- October 3: added purchase of equipment, adopting a new District insignia, and amending the secretary's contract. P.Ex.64,65,66.
- November 16: added unspecified "amendments." P.Ex.69.

None of the additions made by the Board were for items as to which consideration with proper notice was "impossible or impractical." Each addition violated §610.020.

In addition to formally adding items to the agenda, the Board has often simply taken up new items during its meetings. Among them:

- August 3: accepting an electrical repair bid. P.Ex.52.
- September 7: purchasing uniforms. P.Ex.56,57,58.

- November 16: a contract for a medical director; creating and sending a newsletter throughout the district; adopting a program that would allow firefighters to reside at the fire station; changing the bid solicitation for one of the fire stations; an insurance rider for proof of loss; barring one director from taking photographs at the fire station; having and paying for a party; and purchasing a generator battery. Tr.197-202; 724-733; P.Ex.68.

As to these items, the Board did not even give notice at the outset of the meeting that the matter would be considered, much less give notice the requisite 24 hours in advance. And like the items formally added to meeting agendas, none of these were items it would be "impossible or impractical" to address with the requisite notice.

> *Point relied on IV.C.: The circuit court erred in entering judgment for defendants on plaintiffs' Sunshine Law notice claims at the close of plaintiffs' case because that judgment was against the weight of the evidence in that the evidence showed that a quorum of the Board conducted public business via email without notice.*

C. A quorum of the Board discussed public business through electronic mail in advance of meetings, without notice—or scrutiny.

As noted above, there is another Sunshine Law claim in this case that that was not mentioned in Defendants' the Motion: the claim that the Board held via email meetings as to which it gave no notice at all. But that is shown in the uncontradicted evidence presented at trial.

The Sunshine Law defines "meetings" to include ones conducted via email:

> (5) "Public meeting", any meeting of a public governmental body subject to sections 610.010 to 610.030 at which any public business is discussed, decided, or public policy formulated, whether such meeting is conducted in person or by means of communication equipment, including, but not limited to, conference call, video conference, internet chat, or internet message board.

§610.010.5. There is a special requirement if a quorum meets electronically: "If a public body plans to meet by internet chat, internet message board, or other computer link, it shall post a notice of the meeting on its website in addition to its principal office and shall notify the public how to access that meeting." §610.020.1.

"Public Business," which the Board cannot discuss without noticing a meeting and giving contemporary public access, is broadly defined:

> (3) "Public business", all matters which relate in any way to the performance of the public governmental body's functions or the conduct of its business….

§610.010.3. The only exclusion – the only communications among a quorum that are allowed without being a "meeting" – is communication "for ministerial or social purposes." *Id*. The "ministerial" exception allows communication to set meeting dates and times and to compile agendas.

As shown by emails authenticated by Defendants who were participants in the conversations, before the July 6 and August 3 Board meetings, three members of the Board discussed matters relating to the performance of the Board's functions and the conduct of

the Board's business that were not restricted to ministerial functions. *See* pp.11-12, *supra*.

Because those communications among a quorum of the Board were "public meetings," conducting them without the notice required by §610.020 violated the Sunshine Law.

* * *

The evidence presented by Plaintiffs demonstrated that the Board posted agenda items that hid matters to be discussed, took up matters under the unhelpful, generic agenda items like "special considerations" and "reports," added new items to agendas at meetings, took up items not appearing on any agenda, and held email meetings without notice. Each of those instances was a violation of the Sunshine Law. None of them were disputed during presentation of Plaintiffs' case. The circuit court erred by entering judgment against the Plaintiffs on their notice claims.

V. The Board did not meet its burden as to its closed sessions—and addressed impermissible topics in them.

Defendants' Motion for Judgment said it addressed just "two categories" of Sunshine Law violations, both of them notice violations. Doc.10,p.6. But the Motion went on to broadly seek, and the circuit court granted, judgment on "*any* allegations made by Plaintiffs that Defendants violated the Missouri Sunshine Law by discussing or voting on items … posted prior to meetings *or at closed meetings* of the Defendant Board of Directors." Doc.10,p.10 (emphasis added).

The only rationale that Defendants gave the circuit court for entering judgment as to Plaintiffs' closed meeting claims was the wavier theory. As discussed in III.B. above, that theory is wrong—and it would not apply to all Plaintiffs nor to all closed meetings anyway. The circuit court thus lacked any rationale on which to enter judgment as to all (indeed, as to any) of the Plaintiffs' closed session claims.

> *Point relied on V.A.: The circuit court erred in entering judgment for defendants on plaintiffs' notice claims at the close of plaintiffs' case because that judgment erroneously applied the law in that plaintiffs showed that the Board held closed sessions, defendants did not bear their burden of showing that the Board did not take up in those closed sessions topics that fall outside the scope of any exception.*

A. The Board did not meet its burden as to the business addressed in closed sessions.

The Board's burden to demonstrate compliance with the Sunshine Law is triggered once Plaintiffs "demonstrate[]d to the court that the body in question is subject to the requirements of [the Sunshine Law] and has held a closed meeting, record or vote[.]" *Client Servs., Inc. v. City of St. Charles*, 182 S.W.3d 718, 725 (Mo. App. W.D. 2006). The Board did not meet that burden as to any closed session.

The burden is imposed on the Board by §610.027.2:

> 2. Once 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 sections 610.010 to 610.026 and has held a closed meeting, record or

> vote, the burden of persuasion shall be on the body and its members to demonstrate compliance with the requirements of sections 610.010 to 610.026.

Pursuant to that section, all Plaintiffs were required to show was that "1) the body represented by the defendants is subject to the Sunshine Law" and "2) the body has held a closed meeting, record, or vote." *Colombo v. Buford*, 935 S.W.2d 690, 694 (Mo. App. W.D. 1996). Confirming the parties' relative burdens, this Court observed: "The difference between demonstrating a violation of the Sunshine Law and demonstrating that a closed meeting took place is not a semantical difference. The risk of nonpersuasion that the closed meeting constituted a violation of the Sunshine Law was statutorily placed on respondents." *Id*.

Through Board minutes, Plaintiffs demonstrated that the Board held at least eight closed sessions pursuant to §610.021-.022. *E.g.*, pp.8-13, *supra*. The defendant Board – not any plaintiff – then had the burden of demonstrating compliance. That is, the Board had the burden of showing that *each* topic it addressed in *each* closed session was within the scope of the notice on the agenda and the motion to go into closed session, and that the topic fit under one of the exceptions listed in §610.021 – exceptions that must be "strictly construed" (§610.011.2).

On the record made during Plaintiffs' case – that is, on the record on which the circuit court granted judgment – the Board made no attempt to demonstrate compliance. None at all, not even for meetings that one or both individual plaintiffs did not attend.

Point relied on V.B.: The circuit court erred in entering judgment for defendants on plaintiffs' notice claims at the close of plaintiffs' case because that judgment was against the weight of the evidence in that Plaintiffs' evidence showed that the Board took up, in closed sessions, topics that do not fall under any exception in §610.021.

B. The Board exceeded the scope of discussion allowed in closed sessions.

Though the Sunshine Law did not require Plaintiffs to do anything more than show that closed sessions were held, Plaintiffs went ahead and demonstrated that the Board did not keep its closed session discussions and actions within the bounds of the §610.021 exceptions—which, again, must be "strictly construed." §610.011.1.

The infamous May 28 meeting (again, as to which there is no waiver argument because no plaintiff attended, much less "participated") is an example.

The Board went into closed session citing these exceptions from §610.021:

- (1), for discussion of "legal actions, causes of action or litigation";
- (3) for "hiring, firing, disciplining or promoting of particular employees";
- (13) for "individually identifiable personnel records, performance ratings or records pertaining to employees or applicants for employment"; and
- (21) for "records that identify the configuration of components or the operation of a computer, computer system, computer network, or telecommunications network, and would allow unauthorized access

to or unlawful disruption of a computer, computer system, computer network, or telecommunications network of a public governmental body."

The Board then proceeded to discuss (as shown in the minutes, P.Ex.32.):

- Whether to change its accounting system from Xero to QuickBooks.
    - Obviously this did not fall within (1), (2), or (13). And if it could be characterized as falling with the first sentences of (21), narrowly construed, it would be excluded by the last sentence: "Records related to the procurement of or expenditures relating to such computer, computer system, computer network, or telecommunications network, including the amount of moneys paid by, or on behalf of, a public governmental body for such computer, computer system, computer network, or telecommunications network *shall be open*." §610.021(21) (emphasis added).
- Whether to contract with the District's CPA for data transfer. P.Ex.32
    - The CPA was not an employee, did not have a "personnel record," and was not to be "hir[ed], fir[ed], discipline[ed] or promot[ed" at that (or any other) meeting. None of the exceptions applied.
- Whether to change the duties of the District manager to add some duties of the treasurer.
    - The district manager had already been hired. That job duties might be adjusted among employees is not within exceptions (3) or (13).
    - And even if they were, the prerequisite policy decision whether to pay a district employee to take on duties of the treasurer rather

than have them done by a Board member without charge does not fall within any exception.

- Issues the District had with inconsistent employer identification number from the Internal Revenue Service.
    - The question was not about an employee's identification number, which would be in a personnel file. It was about the District's number, as to which no exception applied.
- Whether to contract for bookkeeper service.
    - As a prerequisite to addressing any particular contract for bookkeeping, there was a policy question as to which no exception applies: whether to have all bookkeeping services done in-house, or to contract them out.

To explain his rationale for taking up some of these topics in closed session, the Board Chair took the position, in his testimony, that anything discussion relating to contracts may be done in closed session. Tr.243. But there is no broad contracting exception in §610.021. Discussion of contracts in closed session is limited to:

> Sealed bids and related documents, until the bids are opened; and sealed proposals and related documents or any documents related to a negotiated contract until a contract is executed, or all proposals are rejected….

§610.021.12. None of the discussion at the May 28 closed session, or in the other instances identified by Plaintiffs, deals with "sealed bids" or contract negotiations after the Board had decided in public session to contract for a particular good or service.

The nefariousness of the broad exception the Board chief claimed exists should be readily apparent: If the Board can negotiate for a service such as bookkeeping without publicly saying it will do so, those with an inside track

(here, someone related to the Board Chair, *see* Tr.247) have an advantage the Sunshine Law does not allow.

Plaintiffs' evidence showed that the Board similarly exceeded the scope of permissible discussion in other meetings. For example:

- In closed session on April 13, the new Board Chair addressed "how he was going to conduct things moving forward as board chair and president of the District and outlining that everything basically would funnel through him." Tr.537.
- In closed session on May 18, the Board addressed:
    - Processes for hiring employees;
    - Removing background requirements for contractors;
    - Whether to require drug tests; and
    - Whether to contract for lawn care (Tr.572-578).
- In closed session on July 20, the Board discussed cancelling an agreement with a contractor. P.Ex.44.

But again, as these and the Board's other closed sessions, Plaintiffs had no obligation to show that forbidden topics were addressed. Once Plaintiffs showed that there was a closed session, Defendants were obligated to show that each topic addressed during that session fell within one of the exceptions stated in §610.021, "strictly construed" (§610.011.1). At the point the circuit court ended the trial, Defendants had made no effort to meet that burden. If the trial were really to end where it did, judgment had to be entered on the closed session claims *against* Defendants.

CONCLUSION

For the reasons stated above, the judgment of the circuit court should be vacated and the case remanded to complete the trial as to the Sunshine Law issues, applying the correct standards from Chapter 610, RSMo.

Respectfully submitted,

TUETH KEENEY COOPER MOHAN & JACKSTADT, P.C.

/s/ James R. Layton
James R. Layton
MoBar No. 45631
34 N. Meramec Avenue, Ste. 600
St. Louis, MO 63105
Phone: (314) 880-3600
Fax: (314) 880-3601
jlayton@tuethkeeney.com
ATTORNEYS FOR APPELLANTS

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Brief complies with the limitations contained in Rule 84.06(b) and Western District Rule 41 in that excluding the table of contents, table of authorities or appendix, the Brief contains 11,533 words.

/s/ James R. Layton