No. SC98619

In the Supreme Court of Missouri

ELAD GROSS,

Appellant,

v.

MICHAEL PARSON, *et al.*,

Respondents.

Appeal from Circuit Court of Cole County
Nineteenth Judicial Circuit
The Honorable Patricia S. Joyce, Judge

RESPONDENTS' SUBSTITUTE BRIEF

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STATEMENT OF FACTS

On August 18, 2018, the Governor's office received a Sunshine law request ("first Sunshine law request") from Elad Gross ("Gross") that contained 54 separately numbered requests. (D3, pp. 1-9). Each of the 54 requests began with the expansive description: "Any and all records, communications, documents, emails, reports, and other material." *Id.* The requests sought any and all such materials from numerous individuals and groups, including members of the Governor's staff, and dozens of other named individuals and groups, including staffers, attorneys, political associates, and advisors of former Governor Eric Greitens. *Id.* In every request, Gross asked for materials beginning on January 9, 2017, with no end date. *Id.*

In his first Sunshine law request, Gross asked that all fees for locating and copying the requested records be waived, and also asked the Governor's office to "let [him] know in advance of any search or copying if the fees will exceed $100.00." (D3, pp. 8-9). He also indicated that, "If portions of the requested records are closed, please note that in your responses, segregate the closed portions, and provide me with the rest of the records." (D3, p. 9).

The Governor's office searched for records responsive to Gross's first Sunshine law request, identifying 13,659 separate *documents* that were potentially responsive. (D5, p. 4). The Governor's office then sent Gross a letter notifying him of the "13,659 documents that may be responsive to your request." *Id.* In the letter, the Governor's office advised Gross, as he had requested, that the "estimated cost of providing these records is $3618.40 (please see enclosed invoice)." The attached invoice provided under the heading "Charges" the following: "Research/Processing: 90.46 hours x $40.00/hour." (D5, p. 5). The $40 per hour rate is the hourly rate of the lowest-paid attorney on the Governor's staff. (D7, p. 2).

To move forward with Gross's request for records, the Governor's office asked Gross to provide a check in the estimated amount necessary for the research and processing of the potentially responsive documents. (D5, pp. 4-5); *see also* § 610.026.2, RSMo (2016).[1] The letter also notified Gross that once the Governor's office received the estimated amount necessary for research and processing the potentially responsive documents, it "estimate[d] it will take at least 120 business days to complete this request." (D5, p. 4). Gross did not forward the estimated amount, but instead sent a letter acknowledging the "large number of documents involved," and demanding the Governor's office waive all fees associated with his first Sunshine law request. (D6, pp. 3-4).

On September 24, 2018, Gross sent the Governor's office a second Sunshine law request. This request, however, had only one request. (D9). The sole request was for materials related to the Governor's office's response to Gross's first Sunshine law request. *Id.* As he did with his first Sunshine law request, Gross asked for fees to be waived, and also asked the Governor's office to "let [him] know in advance of any search or copying if the fees will exceed $100.00." (D9, p. 2). Additionally, Gross indicated that, "If portions of the requested records are closed, please note that in your responses, segregate the closed portions, and provide me with the rest of the records." *Id.*

The Governor's office furnished 57 pages of records in response to Gross's second Sunshine law request. (D12, D13, D14). The response noted that the Governor's office would be "waiving the fees for this specific sunshine request." (D12). Two pages of the records included limited redactions of privileged and confidential information. (D13, pp. 4 & 14). The redactions were partial

[1] All references to the Revised Statutes of Missouri will be to RSMo (2016), unless otherwise indicated.

redactions on two pages that included communications involving the Governor's legal counsel and the Attorney General's Office. *Id.*

Shortly after receiving documents from the Governor's office, Gross filed a petition naming Missouri Governor Michael Parson and Michelle Hallford, the custodian of records for the Governor's office (collectively, "the Governor's office"), and alleging violations of Missouri's Sunshine law. (D2). Gross attached 14 exhibits to the petition, (D3-D16) including all correspondence concerning the matter, print-offs of the Missouri Accountability Portal Data showing the compensation of all employees in the Governor's office (D7), and the documents provided in response to the second Sunshine law request (D13-D14).[2] The petition further alleged, and the exhibits showed, that 11 of 33 employees in the Governor's office made more than $40 per hour, including the general counsel and two deputy general counsels. (D2, p. 11-12).

Gross then engaged in discovery, including service of two sets of interrogatories and requests for production of documents. (D1, pp. 8-11). The Governor's office responded to the discovery, providing answers and documents. (D1, p. 11). Gross also sought to subpoena witnesses to sit for depositions, which the circuit court quashed. (D1, pp. 8 & 12).

After answering and responding to discovery, and with no additional facts or evidence to support the petition, the Governor's office filed its motion for judgment on the pleadings. (D1, pp. 1-2). Gross filed his response to the motion for judgment on the pleadings, and in it he made only four arguments:

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[2] Under Missouri Supreme Court Rule 55.12, "[a]n exhibit to a pleading is a part thereof for all purposes." "When considering a motion to dismiss for failure to state a claim," courts "'consider exhibits attached to the petition ... as part of the allegations.'" *Hendricks v. Curators of Univ. of Mo.*, 308 S.W.3d 740, 747 (Mo. App. E.D. 2010) (quoting *Armistead v. A.L.W. Grp.*, 155 S.W.3d 814, 816 (Mo. App. E.D. 2005)).

(1) the Governor's office "charged Plaintiff an excessive fee for public records;" (2) the Governor's office did not provide a "definite date by which records would be provided, and Defendants' estimate was unreasonable;" (3) the Governor's office "improperly closed the few records they did provide to Plaintiff;" and (4) the Governor's office "knowingly and purposefully violated the Sunshine Law" by engaging in (1)-(3). (D20, pp. 3-8). Even after engaging in discovery, Gross did not attempt to identify any facts or evidence – outside of the petition and the exhibits attached to the petition – supporting his claims. *Id.* He also did not request any additional time for discovery.

At no point did Gross seek *in camera* inspection of the very limited redaction of records in response to the second Sunshine law request, either in the course of discovery or in arguments to the circuit court. The circuit court entered its judgment sustaining the motion for judgment on the pleadings and dismissing Gross's petition. (D25).

SUMMARY OF THE ARGUMENT

The fundamental question in this case is whether a public governmental body, such as the Governor's office, can charge its actual costs for searching, researching, or duplicating public records, even if some or all of the research is done by an attorney that is an employee of the public governmental body. The answer is, unquestionably, yes. The plain language of the statute provides that,

> [E]ach public governmental body shall … furnish copies of public records subject to the following:
>
> (1) … Research time required for fulfilling records requests may be charged at the *actual cost of research time*. Based on the scope of the request, the public governmental body shall produce the copies *using employees of the body* that result in the lowest amount of charges for search, research, and duplication time.

§ 610.026 (emphasis added).

The Governor's office employs attorneys, as the petition and the attached exhibits allege, and it is axiomatic that "research time" is a major part of an attorney's work. Indeed, it is a critical part of an attorney's routine responsibilities, especially when reviewing documents and making determinations as to whether documents contain attorney-client privilege or constitute work product materials that are closed records under the Sunshine law. *See* § 610.021(1). Here, the plain language of the Sunshine law provides that "research time" may be charged at the "actual cost" in responding to records requests. This language is unambiguous and certainly includes any research time for an attorney that is an employee of the governmental body and is used to research the records. The court of appeals opinion, though vacated now, easily and correctly reached this conclusion.

Despite the plain language of the statute, Gross argues that he was "impermissibly charged" "attorney's fees, which are not authorized under Missouri Sunshine Law." Appellant's Sub. Br. p. 16. This claim both misses the mark and is incorrect at the same time. First, it misses the mark because Gross is not being charged attorney's fees. There is no attorney-client relationship between Gross and the Governor's office. Instead, he was being given an *estimate* of the actual cost for "Research/Processing" necessary to complete his voluminous request. (D9, p.2 (Gross asked to "let [him] know in advance of any search or copying if the fees will exceed $100.00.")). Second, the plain language of the statute authorizes not only the charging of actual costs of research, § 610.026.1(1), but also authorizes an estimate, which is precisely what the Governor's office did in this case. *See* § 610.026.1(1) ("Prior to producing copies of the requested records, the person requesting the records may request the public governmental body to provide an estimate of the cost to the person requesting the records.").

Ancillary to the fundamental question in this case is the issue of what public records are subject to the charge for the actual cost of research time. This is where the court of appeals' opinion lost its way. Gross and the *amici* argue that research time can only be charged for "public records maintained as paper records on paper not larger than nine by 14 inches." Appellant's Sub. Br. p. 16. This argument makes no sense and wholly ignores the statutory definition of public records, which must be followed even before the plain language. *See, e.g.*, *Akins v. Dir. of Revenue*, 303 S.W.3d 563, 565 (Mo. banc 2010) ("Absent a statutory definition, the primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute."). "**Public record**," is defined as "any record, whether written *or electronically stored*." § 610.010 (emphases in original and added).

Thus, charges for the actual cost of research time are not limited to paper records not larger than nine by 14 inches, which would truly be an absurd result.

There is no dispute as to whether the statutory language at issue is ambiguous. It is not. And that ends the inquiry. But even if the analysis proceeded further, the entire statutory framework and surrounding statutory provisions support the plain language of the statute. Nevertheless, Gross argues the circuit court erred because the Governor's office should have waived the actual cost for research time. The Sunshine law, however, provides that a governmental body "*may*" waive or reduce the costs or fees. § 610.026.1(1) (emphasis added). It is within the discretion of the governmental body to waive costs and fees, and Gross makes no allegations, other than conspiracy theories and conjecture, supporting his claim for waiver.

The Governor's office appropriately decided it would not waive the costs and fees necessary to review the 13,659 documents responsive to Gross's sweeping requests, which Gross himself acknowledged was a "large number of documents." The "courts of this state may not interfere with, or attempt to control, the exercise of discretion by the executive department in those areas where, as in this case, the law vests such right to exercise judgment in a discretionary manner with the executive branch of government." *State, ex rel., Missouri Highway & Transp. Comm'n v. Pruneau*, 652 S.W.2d 281, 289 (Mo. App. S.D. 1983).

Beyond the petition's deficiencies, Gross asserts a number of new legal theories on appeal that were never previously raised before this case reached the appellate level. A party is required to identify how and where a claim of error was raised and preserved below. *See* Mo. Sup. Ct. R. 84.04(e) and 84.13(a). Gross fails to comply with this requirement, because he cannot.

Appellate briefing is not the place for raising new claims or legal theories. Accordingly, Gross's newly raised claims and legal theories on appeal (Points V, VIII, IX, and X) are waived.

Finally, Gross argues that the circuit court erroneously dismissed his case despite "the Missouri Constitution, and the United States Constitution." (Point X). Yet not once in his petition did he ever cite any constitutional provision or use the words "equal protection" or "due process." Not only did Gross fail to raise any constitutional claims in his petition, he also failed to raise any constitutional claims or arguments in his opposition to the motion for judgment on the pleadings or at any other time while appearing before the circuit court. Missouri caselaw and the rules of civil procedure require that constitutional claims be raised at the earliest opportunity. *Mayes v. Saint Luke's Hosp. of Kansas City*, 430 S.W.3d 260, 266 (Mo. banc 2014). An appeal brief is certainly not the earliest opportunity, particularly in this case.

The circuit court correctly dismissed the petition because it fails to state a claim for relief. The Governor's office followed the plain language of the Sunshine law, and, as such, the circuit court's judgment should be affirmed.

ARGUMENT

Standard of Review

On appeal from the circuit court's judgment on the pleadings, courts "review the allegations of Appellant['s] petition to determine whether the facts pleaded therein are insufficient as a matter of law." *State ex rel. Nixon v. Am. Tobacco Co.*, 34 S.W.3d 122, 134 (Mo. banc 2000). "The party moving for judgment on the pleadings admits, for purposes of the motion, the truth of all well pleaded facts in the opposing party's pleadings." *Barker v. Danner*, 903 S.W.2d 950, 957 (Mo. App. W.D. 1995).

Missouri rules of civil procedure and caselaw, however, demand more than mere conclusions without supporting facts. *See Pulitzer Pub. v. Transit Cas. Co.*, 43 S.W.3d 293, 302 (Mo. banc 2001). If the petition contains only conclusions and does not contain the ultimate facts or any allegations from which to infer those facts, the petition may be dismissed for failure to state a claim. *Bohac v. Walsh*, 223 S.W.3d 858, 862 (Mo. App. W.D. 2007). As such, a trial court "properly grants a motion for judgment on the pleadings if, from the face of the pleadings [and attached exhibits], the moving party is entitled to a judgment as a matter of law." *State ex rel. Nixon*, 34 S.W.3d at 134. Here, the petition is strewn with mere conclusions and unsupported claims under Missouri's Sunshine law. Even assuming the facts pleaded by Gross in the petition are true, they do not support a claim.

I. The Governor's Office Complied With the Sunshine Law by Providing an Estimate of the "Actual Cost" and Required "Research Time" as Well as Minor Redactions of Closed and Privileged Material – Responding to Appellant's Points I, II, III, IV, VI, and VII.

The Governor's office, consistent with the statutory definition and plain language of Missouri's Sunshine law, provided Gross an estimate of the "actual

cost" and the required "research time" necessary to process his expansive 54-part, nine-page first Sunshine law request. § 610.026.1(1). Gross himself conceded the requests were for a "large number of documents." In addition, for the documents that were furnished to Gross in response to his second Sunshine law request, the Governor's office properly made limited redactions of privileged and closed material on only two pages. *See* § 610.024.1. Therefore, Gross's Points I, II, III, IV, VI, and VII should be denied.

A. The Plain Language of the Sunshine Law Authorizes "Research Time" to be Charged at the "Actual Cost," and Does Not Require Waiver of Those Costs.

The critical language for this case is in § 610.026.1(1) of the Sunshine law: "*Research time* required for fulfilling records requests may be charged at the *actual cost of research time*." *Id.* (Emphasis added). There can be no dispute that this is the controlling language of the statute. Yet, Gross does not even cite or quote this language in his brief, much less dispute its plain meaning. Instead, he skips right over it and cites to a separate provision – § 610.026.1(2) – that applies to "[f]ees for providing *access* to public records maintained on computer facilities."[3] (Emphasis added).

Gross adds further confusion to what should be a simple interpretation and application of the plain language of the statute by asserting that § 610.026.1(1) applies only to paper records and that § 610.026.1(2) applies only to electronic records, despite the statute's own definition to the contrary.[4]

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[3] The Sunshine law provision for providing "access" to public records – § 610.026.1(2) – typically is used when a requestor is permitted to come into the location where the public records are maintained and is allowed to review (either on a designated computer or in a designated room) and to select the records desired to be duplicated. That is not the case here.

[4] Gross and the *amici* argue that § 610.026.1(1) applies only to paper records. But their arguments are directly contradicted by the plain language and

This is not a case in which *access* to public records on computer facilities, etc., was provided, and the plain language of the controlling provision – § 610.026.1(1) – undermines Gross's argument that research time should somehow not include attorney research time. The statutory language provides no such limitation, and all the surrounding statutory provisions undermine Gross's position as well.

1. The "actual cost" of "research time" is not ambiguous and applies to attorney research time.

As with any statute, the primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute. *State ex rel. Young v. Wood*, 254 S.W.3d 872, 873 (Mo. banc 2008). When the statute's language is plain and unambiguous, a court must give effect to the legislature's chosen language and avoid resorting to tools of interpretation. *Id.* at 873; *see also W.C.H. v. State*, 546 S.W.3d 612, 615 (Mo. App. E.D. 2018). Here, the terms at issue – "actual cost" and "research time" – are not disputed

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controlling statutory definition. Courts must look to the statutory definition first – before even the plain language. *See, e.g.*, *Akins*, 303 S.W.3d at 565 ("Absent a statutory definition, the primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute."). Section 610.026.1(1), uses the term "public record," which is specifically defined as "any record, whether written or *electronically stored*." § 610.010(6) (emphasis added). Additionally, § 610.026.1(2), which Gross and the *amici* assert applies only to electronically stored records, specifically refers to "paper copies." As such, their position is incorrect on both counts.

And even if, as argued by Gross and the *amici*, the Sunshine law pigeonholes paper records under § 610.026.1(1) and electronic records under § 610.026.1(2) — which it does not — § 610.026.1(2) authorizes recovery of attorney research time as "staff time," just as the concurring opinion in the court of appeals concluded.

or ambiguous. Their meanings are straightforward and easily applied in the context of this case.

The plain and ordinary meaning of "research" is "a careful or diligent search," or "studious inquiry or examination." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1930 (2002). The plain and ordinary meaning of "cost" is "the expenditure or outlay of money, time, or labor." *Id.* at 515. An attorney who carefully reviews and redacts documents for privilege or work product before producing them plainly is engaged in a "diligent search" and "studious inquiry or examination" of those documents, *id.* at 1930; and that attorney is likewise engaged in "the expenditure or outlay of … time [and] labor." *Id.* at 515.

The Governor's office received a Sunshine law request with 54 separately numbered requests spanning nine pages. Each of the 54 requests began with the expansive description: "any and all records, communications, documents, emails, reports, and other material." The requests then identified numerous different individuals and groups for which records were sought. Importantly for this analysis, the first Sunshine law request sought "[a]ny and all records, communications, documents, emails, reports, and other material" involving attorneys. The resulting search identified 13,659 documents that were potentially responsive.

Because this first Sunshine law request sought materials from attorneys that are potentially closed records, it necessitated research, or a careful review and study of responsive documents by an attorney to determine whether the documents contained privileged communications or work product materials. *See Mountain-Plains Invest. Corp. v. Parker Jordan Metro. Dist.*, 312 P.3d 260, 268 (Colo. Ct. App. 2013) (holding a public governmental body can charge "for retrieving and *researching* records, including the time it takes to identify and

segregate records" such as "documents protected by an attorney-client privilege") (emphasis added). Gross even identified the attorneys employed in the Governor's office in his petition and exhibits. Section 610.021(1) authorizes the closure of attorney-client privileged communications and requires the closure of attorney work product materials, the review of which is a task for an attorney to undertake. *Id.* (providing that "any confidential or privileged communications between a public governmental body or its representatives and its attorneys" as well as "[l]egal work product shall be considered a closed record").

Based on the contents of Gross's first Sunshine law request, attorney research time was certainly necessary to determine whether the responsive documents contained privileged documents or attorney work product materials.[5] Gross suggests that he is potentially being "charged" attorney's fees. Appellant's Sub. Br. p. 16. But he is not. There is no attorney-client relationship between Gross and the Governor's office. Instead, he was provided an estimate of research time necessary to review the requested records which specifically included requests for attorney communications and materials. This

[5] The *amici* take varying positions in their briefs in an effort to suggest that fees for attorney research time should not be permitted, including the claim that attorney research time for redaction or segregation is never "'required' in fulfilling records requests." Amicus Brief of the ACLU, p. 14. This position is profoundly inconsistent with the law and responsible representation. In fact, § 610.021.1(1) specifically provides that: "[l]egal work product *shall* be considered a closed record," and § 610.024.1 provides that: "the public governmental body *shall* separate the exempt and nonexempt material." (Emphasis added). Moreover, no responsible attorney should ever recommend that a client simply not review documents to be produced merely because it can waive privilege. In fact, Missouri's Rules of Professional Conduct *require* attorneys to take affirmative steps to avoid disclosing confidential and privileged materials. Mo. Sup. Ct. R. 4-1.6(a) & cmt. 2 (describing this duty of confidentiality as "a fundamental principle in the client-lawyer relationship").

type of review for attorney-client privilege and work product materials is review that attorneys regularly do in the course of their legal practice. Indeed, such attorney review is well established in court rules and in caselaw. *See* Mo. Sup. Ct. R. 58.01(c); *see, e.g., State ex rel. Ford Motor Co. v. Westbrooke*, 151 S.W.3d 364, 367–68 (Mo. banc 2004) (noting the need for privilege and work product review).

When this statutory provision for "research time" was passed as part of the Sunshine law, this type of research for attorney-client privilege and work product material was well known. The General Assembly knew an attorney's research and review time may be necessary from time to time depending on the nature of a particular Sunshine request, or as the statute provides – "Based on the scope of the request" – and thus drafted § 610.026.1 in a way that allows the public governmental body to charge for the "actual cost" of "research time." In fact, the General Assembly effectively mandated that such research time *must* occur by providing that "[l]egal work product *shall* be considered a closed record." § 610.021(1) (emphasis added). The General Assembly did not simply include a flat rate for research time, as it did with copying charges. *See* § 610.026.1. As such, the research time necessary to review for attorney-client privilege and work product certainly falls under the meaning of "research time" as described in the plain language of the statute. The only way for the Governor's office to properly comply with Gross's requests was to have an attorney undertake research and review of potentially responsive documents.

Although decided on a different basis, in *White v. City of Ladue*, 422 S.W.3d 439 (Mo. App. E.D. 2013), the court reviewed the "actual cost" of research time and upheld the governmental body's decision to charge $250 per hour for attorney review time, stating "we do not find that the hourly charge [$250 per hour] reflects an attempt to recover more than the actual cost" of

attorney review time. *Id.* at 451-52 & n.10. Attorney review time in *White* represented an "actual cost" to the city because the Sunshine requests related to future litigation. Here, an attorney's review time is needed to comply with Gross's Sunshine law request based on the contents of the records sought, thus recovering the actual costs of an attorney's review time is entirely appropriate, as well as authorized under the Sunshine law. Given the probability that public governmental bodies were likely to receive expansive requests for records, the Sunshine law is intended to protect taxpayers from having to pay the costs of such requests by passing the "actual cost" of the request back to the requesting party.

The Governor's office's *estimate* of $40 per hour is consistent with the lowest-paid attorney on staff, as provided in the statute.[6] (D7). The estimate of $40 per hour is also far less than the $250 per hour that was approved in *White* as an actual cost. 422 S.W.3d at 452. It is also substantially less than the $75 hourly rate permitted for recovery against the State in agency proceedings.[7] *See* §§ 536.085(4) & 536.087. Because the Sunshine law allows for a public governmental body to charge for the actual cost of research time of an employee in responding to a Sunshine law request, and because Gross's request required the research time of an attorney in the Governor's office, the statute

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[6] Gross makes no claim, nor can he, that the $40 rate for research time is not the "actual cost" or that it was not "using employees of the body that result in the lowest amount of charges for search, research, and duplication time." § 610.026.1(1). Not only was it an estimate, but the "actual cost of research time" is "[b]ased on the scope of the request." Here, the scope included attorney communications and materials.

[7] Moreover, the Sunshine law provides specific restrictions on the amounts that can be charged, not only requiring persons "that result in the lowest amount of charges for search, research, and duplication time," but also requiring that the persons doing those tasks be "employees of the body," as they were in this case. § 610.026.1(1).

contemplates situations in which the requestor will have to pay for that research time.

Gross now complains that he has "undertaken substantial costs" in this matter. But that did not need to be the case. He was quoted an *estimate* of $3,618.40 and 120 business days to complete the request. Yet, instead of depositing that amount and receiving the documents more than two years ago, he decided to file a lawsuit and depose witnesses. Gross's lawsuit does not state a claim against the Governor's office under the plain language of the statute, and the circuit court was correct to dismiss Gross's claims as a matter of law.

2. The surrounding statutory provisions support the plain language authorizing the "actual cost" of attorney "research time."

Despite the statutory definition and plain language of the statute, Gross claims attorney research time can never be charged because the Sunshine law should be interpreted in favor of allowing greater access to and affordability of public documents. A plain reading of Chapter 610 certainly demonstrates the General Assembly intended for greater access and transparency – but not at the expense of the taxpayer. This is why the requestor is expected to pay the fees and costs of responding to the request. This is evident throughout the language of § 610.026:

- Section 610.026.1(1) authorizes "[f]ees for copying public records," including photocopying.
- Section 610.026.1(1) authorizes an "hourly fee for duplicating time."
- Section 610.026.1(2) authorizes "[f]ees for providing access to public records maintained on computer facilities, recording tapes or disks, videotapes or films, pictures, maps, slides, graphics, illustrations or similar audio or visual items or devices, and for paper copies larger than nine by fourteen inches."

- Section 610.026.1(2) authorizes charges for "the cost of copies" and "staff time."
- Section 610.026.1(2) authorizes charges for computer "programming, if necessary," as well as "the cost of the disk, tape, or other medium used for the duplication." Indeed, if computer "programming is required" then the government agency can charge the "actual costs of such programming." *Id.*
- Section 610.026.1(2) also authorizes "[f]ees for maps, blueprints, or plats that require special expertise to duplicate" at the "actual rate of compensation for the trained personnel required to duplicate such maps, blueprints, or plats."

The fees and costs associated with making public records available are not, in any sense, to make a profit or increase the budget of the relevant governmental body. In fact, the General Assembly limited fees and costs, never providing for more than "actual costs." § 610.026.1(1). Additionally, the resulting amounts collected by "each public governmental body of the state" is given to "the director of revenue for deposit to the general revenue fund of the state." § 610.026.3. As such, the beneficiary of the fees and costs associated with Sunshine law requests is the public.

3. The Governor's office "may" waive fees and costs, but is not required to do so.

In the Sunshine law requests at issue, Gross acknowledges that he can be charged for the requests. (D3 & D9). He also pleads in his petition that a prior administration charged for an unspecified Sunshine law request. (D2, ¶ 47). Nevertheless, he argues that the Governor's office violated the Sunshine law by not waiving the fees and actual costs. That is not the case.

The Governor's office followed the Sunshine law precisely when it declined to waive the fees and costs associated with Gross's expansive and burdensome requests for more than 13,000 documents. Gross's claim that the Governor's office violated the Missouri Sunshine law by choosing not to waive

all fees in response to his first Sunshine law request fails as a matter of law. Section 610.026.1(1), provides that "documents *may* be furnished without charge or at a reduced charge *when the public governmental body determines* that waiver or reduction of the fee is in the public interest." (Emphasis added).

The word "may" is permissive only, not mandatory. *See, e.g., State ex rel. Robison v. Lindley-Myers*, 551 S.W.3d 468, 474 n.4 (Mo. banc 2018) ("It is the general rule that in statutes the word 'may' is permissive only, and the word 'shall' is mandatory."); *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 672 (Mo. banc 2010) (same); *Wolf v. Midwest Nephrology Consultants, PC*, 487 S.W.3d 78, 83 (Mo. App. W.D. 2016) (same). The use of the word "may" clearly and unambiguously indicates that the General Assembly intended for the statute to be permissive rather than mandatory. *Silvey v. Bechthold*, 499 S.W.3d 760, 763 (Mo. App. W.D. 2016).

Section 610.026.1(1) confers upon the Governor's office the discretion to waive or reduce costs and fees. It does not confer authority on the requestor to determine whether or not to waive or reduce fees, and whether such fee waiver or reduction is in the public interest. And "the courts of this state may not interfere with, or attempt to control, the exercise of discretion by the executive department in those areas where, as in this case, the law vests such right to exercise judgment in a discretionary manner with the executive branch of government." *Pruneau*, 652 S.W.2d at 289 (citing *State ex rel. State Highway Comm'n v. Sevier*, 97 S.W.2d 427, 428 (Mo. banc 1938), and *Selecman v. Matthews*, 15 S.W.2d 788, 789 (Mo. banc 1929)).

Gross cites no authority to support the proposition that a public governmental body *must* determine that a fee waiver is in the public interest merely because the Sunshine requestor says so, and such an interpretation plainly contradicts the language of § 610.026.1(1). Indeed, such a reading of

the statute would eliminate the meaning behind the fee authorization provision of the statute, and cannot stand. *See State ex rel. Mo. Local Gov't Ret. Sys. v. Bill*, 935 S.W.2d 659, 666 (Mo. App. W.D. 1996) ("We should not interpret statutes in a way which will render some of their phrases to be mere surplusage.").

The plain language of § 610.026.1(1) authorizes the Governor's office to charge the "actual cost" for "research time" of all responsive public records, whether written or electronically stored as statutorily defined under § 610.010(6), including the research time of the lowest paid attorney on its staff. Attorney research time was necessary and appropriate in this case because Gross's first Sunshine law request sought extensive records, including "[a]ny and all records, communications, documents, emails, reports, and other material" from multiple attorneys. As such, the Governor's office provided an estimate of the "actual cost" for "research time," and decided not to waive the costs of such an expansive request, for which it has sole discretion. There can be no violation of the Sunshine law under these circumstances, and the circuit court was correct to dismiss as a matter of law.

B. The Sunshine Law Authorizes an Estimate of Time to Respond to a Request.

In addition to his claim that the Governor's office should not be permitted to charge the "actual cost" of "research time," Gross complains that the Governor's office violated the law by giving him an estimated completion time instead of a specific day. This claim fails as a matter of law. The law requires the records custodian to give an "explanation of the cause for further delay and the place and earliest time and date that the record will be available for inspection." § 610.023.3.

Here, the 120 business days the Governor's office provided to Gross was an appropriate *estimate* of time, not the actual time spent on fulfilling his request. Gross requested an estimate before proceeding, and there was no way to know whether Gross was going to pursue the records given the volume of his request. Thus, no time was ever actually accrued because Gross elected to initiate the present litigation instead of working toward the completion of his request by providing any deposit of the actual costs to complete the request. As the Court concluded in *White*, a public governmental body does not violate the Sunshine law merely because it estimates a certain amount of time to complete a Sunshine request. *White*, 422 S.W.3d at 452-53.

Furthermore, the 120 business days the Governor's office provided to Gross as an estimate was reasonable as a matter of law, given the voluminous and complex scope of Gross's Sunshine request. The Governor's office had identified 13,659 documents potentially responsive to Gross's first Sunshine law request, and estimated 120 business days to research and process all these documents, based on a review rate of 150 documents per hour at 10% of that employee's time. (D5). There is no authority whatsoever that shows dedicating such time to research and review in response to such a large request is a violation of the Sunshine law, because no such authority exists. As such, the circuit court correctly dismissed the petition and should be affirmed.

C. Closed and Privileged Material Can Be Redacted From Responsive Documents.

In his second Sunshine law request, Gross made only one request:

> Any and all records, communications, documents, emails, reports, and other material sent by or to Office of the Governor's staff, advisors, contractors, or other agents involving the Office of the Governor's response or plans to respond to the Sunshine Requests sent to

> the Office of the Governor by Elad Gross dated August 18, 2018.

(D9). The Governor's office responded to this request, which generated only 57 *pages*. The documents were provided with minimal redactions on two pages, as authorized by the Sunshine law. Gross, however, claims that the Governor's office violated the Sunshine law by redacting limited portions of two pages. His claim fails as a matter of law.

The mere fact of redaction itself fails to state a violation of the Sunshine law because redaction is authorized under the Sunshine law. *See, e.g.*, §§ 610.100.3 (authorizing the redaction of information from investigative reports to protect safety of victims and witnesses); 610.100.4 (similar); 610.100.5(5)(e) (authorizing the redaction of "personally identifiable features or other sensitive information" from mobile video recordings or public reports); 610.225.2 (authorizing the redaction of tax credit records); 610.024.1 (authorizing the redaction of closed materials from documents that contain a mixture of open and closed materials); and 610.021(1) (authorizing the closure of "any confidential or privileged communications between a public governmental body or its representatives and its attorneys").

What is more, the second Sunshine law request clearly involved privileged and closed communications, since the requested documents involved multiple attorneys. Furthermore, on the face of the two pages at issue, there is reference to the Attorney General, and two of the Governor's legal counsel are copied on the email. It is clear from the face of the documents that they involved privileged and closed materials, and the redactions were limited to only those privileged and closed portions of the materials. Gross never argued for a burden shifting and never requested *in camera* review of the two redactions in the circuit court. Without alleging more, Gross has failed to state a claim, and the circuit court was correct to dismiss the claim.

D. There Was No Knowing or Purposeful Violation of the Sunshine Law.

Finally, even if Gross had properly alleged a violation of the Missouri Sunshine law, he failed to state a claim that the Governor's office "knowingly" or "purposefully" violated the Sunshine law.

To state a claim for penalties under the Sunshine law, Gross must plead and prove the Governor's office either knowingly or purposefully violated the Sunshine law. *See* §§ 610.027.3 & 610.027.4. To purposefully violate the Sunshine law, a public governmental body must exhibit a conscious design, intent, or plan to violate the law and do so with awareness of the probable consequences. *Spradlin v. City of Fulton*, 982 S.W.2d 255, 262 (Mo. banc 1998). Engaging in conduct reasonably believed to be authorized by statute does not amount to a knowing or purposeful violation. *R.L. Polk & Co. v. Mo. Dep't of Revenue*, 309 S.W.3d 881, 886 (Mo. App. W.D. 2010); *White*, 422 S.W.3d at 452-53.

Courts routinely strike or dismiss threadbare, speculative, and conjectural allegations of conspiracy. *See, e.g., Exec. Bd. of Missouri Baptist Convention v. Windermere Baptist Conference Ctr.*, 280 S.W.3d 678, 699 (Mo. App. W.D. 2009) ("The Convention's allegations of so-called actions, agreements, and conspiracy … are vague and insufficient. Such allegations must be supported by facts. Missouri is a fact-pleading state"); *Magee v. Hamline University*, 747 F.3d 532, 536 (8th Cir. 2014) (affirming the dismissal of a fraud claim because Magee did not plead any specific facts plausibly connecting any concerted action to her termination); *Gibson v. Brewer*, 952 S.W.2d 239, 245 (Mo. banc 1997) ("The trial court properly dismissed the conspiracy count for failure to state a claim upon which relief can be granted" because the allegations "do not support the inference of a meeting of the minds"); *Amesquita v. Gilster-Mary Lee Corp.*, 408 S.W. 293, 304 (Mo. App.

W.D. 2013) (affirming dismissal because plaintiff's civil conspiracy claims failed to allege any unlawful objective, an essential element of civil conspiracy); *Messman v. Riss & Co.*, 255 S.W.2d 80, 83 (Mo. App. 1953) ("There was no causal connection between the illegal operation of the trucks without permits and the granting of credit to Vallow and Mielke; and Riss & Company's motion to strike the conspiracy charge from the petition was therefore properly sustained").

Here, Gross's petition makes threadbare assertions of knowing and purposeful violations of the Sunshine law. And there is no connection between Gross's alleged facts and whether the Governor's office knowingly and purposefully violated the Sunshine law. Gross's allegations amount to nothing more than a conspiracy theory that is far more vague and insufficient than those facts mentioned in the above cases where the courts held the petitions failed to state a claim.

II. New Claims and Legal Theories Raised for the First Time on Appeal Are Waived – Responding to Appellant's Points V, VIII, IX, and X.

Before analyzing whether Gross's points on appeal are legally supported, it is essential to determine whether Gross even made or preserved all the claims he now argues on appeal. The petition in this case alleged certain violations of Missouri's Sunshine law under chapter 610. Gross did not raise any constitutional claims in his petition or in the circuit court, and he also did not seek a burden shifting or *in camera* review of the redacted records provided to him by the Governor's office – all arguments and alleged errors he raised for the first time on appeal. These new claims and legal theories are, therefore, waived and are not proper for consideration on appeal.

A. New Legal Theories, Raised for the First Time on Appeal, Are Not Preserved for Appellate Review.

Gross seeks to broaden his actual claims with new legal theories on appeal not raised before the circuit court. For example, in Point V, Gross argues for the first time that the circuit court erred because "the trial court improperly left the burden of persuasion on Appellant instead of shifting it to Respondents." Appellant's Sub. Br. p. 30. He further argues that the burden of persuasion should have "shifted to Respondents to provide an appropriate explanation of why the public records needed to be redacted," and he cites a case in which the circuit court conducted *in camera* review of records. *Id.* at 30 & 31. Of course, Gross does not identify where this issue was raised and preserved below, as he is required to do under Missouri Supreme Court Rule. *See* Mo. Sup. Ct. R. 84.04(e) and 84.13(a). That is because it was not. Nowhere in the circuit court – in his petition, briefing, or arguments – did Gross ever raise the issue of a shifting burden of persuasion or *in camera* review of redacted records.

The law is clear and longstanding – a theory will not be considered on appeal when that theory was not pleaded or submitted to the circuit court. *See Walton v. U.S. Steel Corp.*, 362 S.W.2d 617, 620-21 (Mo. banc 1962); *Corning Truck and Radiator Service v. J.W.M., Inc.*, 542 S.W.2d 520 (Mo. App. E.D. 1976). An issue is not properly preserved for appeal when the party fails to allege and argue at trial the grounds asserted on appeal. *See State v. Lewis*, 243 S.W.3d 523, 524 (Mo. App. W.D. 2008) (citing *State v. Tisius*, 92 S.W.3d 751, 767 (Mo. banc 2002)). Although Gross seeks to broaden his claims on appeal, an appellant cannot broaden or change allegations of error on appeal. *See State v. Lewis*, 243 S.W.3d at 524 (citing *State v. Cartwright*, 17 S.W.3d 149, 154 (Mo. App. E.D. 2000)).

A fundamental precept of appellate review is that a party is bound by the theory of the case and the grounds for relief as presented to the circuit court. *Johnson v. Debyle*, 312 S.W.3d 460, 463 (Mo. App. S.D. 2010). For example, a plaintiff who brought an action solely on the theory of wrongful garnishment is precluded from asserting, on appeal, a theory of prima facie tort. *See McGlothin v. Eidelman & Traub, Inc.*, 733 S.W.2d 851 (Mo. App. E.D. 1987); *see also Hagler v. J.F. Jelenko & Co.*, 719 S.W.2d 486 (Mo. App. W.D. 1986) (where the appellate court refused to consider the claim that ERISA was violated when a terminated employee did not receive payment of benefits, because the case had been pled and tried solely as a common law claim for breach of contract).

Similar to his new arguments in Point V, Gross raises new legal theories in Points VIII and IX. He argues the circuit court erred because he was "treated differently than previous requesters" of records from the Governor's office.[8] Appellant's Sub. Br. pp. 34 & 35. Once again, he does not identify where this issue was raised and preserved below, as he is required to do by Missouri Supreme Court Rule. Mo. Sup. Ct. R. 84.04(e) and 84.13(a). It is not alleged in the petition and it is not in his arguments in response to the motion for judgment on the pleadings.

Gross's claims of different treatment are also untrue based on his own allegations. Gross alleges, for example, that a *prior* administration charged $19 per hour for records research and review.[9] (D2, ¶ 47). Never, however, does

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[8] In Point VIII, Gross states the circuit court erred because he was "treated differently than previous requesters." He makes no claim or argument, however, about how he was treated differently. Thus, his argument does not even support his point relied on.

[9] In support of this allegation, Gross cites to an exhibit that does not support or even mention the alleged facts. (D2, ¶ 47 (citing Ex. 7, p. 6)).

he allege in his petition that it is a violation of the Sunshine law for different administrations at different times for different requests to charge different amounts per hour. That is because it is not.

Under both Supreme Court rules and well-established case law, appellate courts are limited to a review of claims and theories that were first raised before the circuit court. By raising new claims and theories for the first time on appeal, Gross is attempting to stack up new legal theories that either did not occur to him when his case was before the circuit court, or that he chose to sit on and now bring out at a later time when he believes it is the more opportune moment or venue. Either way, Gross's delay in bringing these claims and theories denies the Governor's office the ability to have defended against such allegations at the circuit court level, and denies the circuit court the ability to hear and resolve such claims and theories. As such, they are not preserved for appeal and should be denied.

B. New Constitutional Claims, Raised for the First Time on Appeal, Are Waived.

Recognizing the complete inadequacy of the actual claims in his petition, Gross's last point on appeal is an entirely new constitutional claim, neither alleged in his petition nor raised at any time in the circuit court. Gross claims for the first time that his constitutional rights under "the equal protection clauses and the due process clauses" of the Missouri and the United States constitutions have been violated. Appellant's Sub. Br. p. 37. He also advances the novel and unsupported theory that he has "a liberty interest in accessing public records." *Id.* at 39.

Nowhere (prior to his appeal brief) did Gross raise these claims or theories. A thorough reading of his petition uncovers no claim with respect to equal protection or due process rights, much less some unknown liberty

interest. (D2). Indeed, there is not even a single citation to the Missouri Constitution or the United States Constitution in the petition. *Id.* He cites and alleges only supposed Missouri Sunshine law violations. *Id.* Likewise, Gross never cited or raised constitutional claims in his response to the motion for judgment on the pleadings. (D20). And he never sought to amend his petition to assert these claims. (D1). In short, Gross never advanced or suggested these claims – ever – yet they constitute one of his allegation of trial court error.

Courts have long held that constitutional issues are waived unless raised at the earliest possible opportunity consistent with orderly procedure. *Hollis v. Blevins*, 926 S.W.2d 683, 683 (Mo. banc 1996) (citing *Callier v. Dir. of Revenue*, 780 S.W.2d 639, 641 (Mo. banc 1989)). To raise a constitutional challenge properly, the party must:

> (1) raise the constitutional question at the first available opportunity; (2) designate specifically the constitutional provision claimed to have been violated, such as by explicit reference to the article and section or by quotation of the provision itself; (3) state the facts showing the violation; and (4) preserve the constitutional question throughout for appellate review.

Mayes v. Saint Luke's Hosp. of Kansas City, 430 S.W.3d 260, 266 (Mo. banc 2014) (quoting *United C.O.D. v. State*, 150 S.W.3d 311, 313 (Mo. banc 2004)). If the constitutional question is not raised at the earliest moment that good pleading and orderly procedure admit, it is waived. *Century 21 v. City of Jennings*, 700 S.W.2d 809, 810 (Mo. banc 1985); *see also Murphy v. Timber Trace Ass'n*, 779 S.W.2d 603, 606 (Mo. App. W.D. 1989).

Gross failed to satisfy any of the requirements for preserving constitutional issues as laid out in *Mayes*. He did not raise the constitutional issues of due process or equal protection at the first opportunity available to

him because he did not raise these issues anywhere in the record before the circuit court. He did not even cite a single provision of the Missouri Constitution or the United States Constitution. Because these constitutional claims were never advanced or even mentioned before the circuit court, they certainly were not preserved for appellate review.

Furthermore, by rule, allegations and claims not presented to or expressly decided by the circuit court are not considered in any appeal. *See* Mo. Sup. Ct. R. 84.13(a). The rules are specific, in fact, that "[f]or each claim of error, the argument shall also include a concise statement describing whether the error was preserved for appellate review; if so, how it was preserved." Mo. Sup. Ct. R. 84.04(e). Of course, Gross does not, and cannot, describe whether the error was preserved or how it was preserved because he never raised these claims before. Gross has completely waived his ability to raise any constitutional claims by not bringing them before the circuit court at the earliest opportunity, and thus is precluded from bringing them now.

Not only did Gross fail to raise these constitutional theories and claims before the circuit court, they are also patently wrong. The Missouri Sunshine law exists as a statute created by the Missouri General Assembly, and thus operates to confer only the rights and privileges that are specifically provided within its terms. Gross conflates the provisions of the Missouri Sunshine law with being granted a liberty interest by both the Missouri Constitution and the United States Constitution, which is simply incorrect. Gross cites nothing for this proposition, and no court has ruled that individuals have a constitutional right to, or liberty interest in, access to the government's public records. There is a right, to be sure, but it is statutory, not constitutional.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the circuit court sustaining the motion for judgment on the pleadings and dismissing the petition in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned counsel for Respondents certifies that the foregoing brief includes the information required by Rule 55.03, and complies with the requirements contained in Rule 84.06.

Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 9,261 words, which is within the applicable limitations on length set forth in Rule 84.06(b).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of January, 2021, the foregoing was filed electronically with the clerk of court, and, therefore, served on the following:

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