

**BEFORE THE MISSOURI SUPREME COURT**

<b>DORINDA CRAIG,</b>	)	
	)	
<b>Appellant</b>	)	
	)	<b>No. SC84173</b>
<b>vs.</b>	)	
	)	
<b>MISSOURI DEPARTMENT</b>	)	
<b>OF HEALTH, et al.,</b>	)	
	)	
<b>Respondents.</b>	)	

**On Appeal from the Circuit Court of Cole County, Missouri  
Nineteenth Judicial Circuit  
Honorable Byron L. Kinder, Judge**

---

**APPELLANT’S SUBSTITUTE BRIEF**

---

**RESPECTFULLY SUBMITTED,**

**David J. Moen     #39239  
613 East McCarty Street  
Jefferson City, MO 65101  
Telephone: (573) 636-5997  
Facsimile: (573) 636-3799**

**ATTORNEY FOR APPELLANT**

## **JURISDICTIONAL STATEMENT**

This appeal arises from an adverse judgment on Plaintiff's claims for employment discrimination which was entered in the Circuit Court of Cole County, Missouri, case number CV197-1744CC, which granted the Missouri Department of Health *et al.* a judgment as a matter of law on the pleadings. This appeal does not involve any of the categories reserved for the jurisdiction of the Supreme Court of Missouri. Therefore, original appellate jurisdiction was in the Missouri Court of Appeals, Western District, Section 512.020 RSMo 1994. A three judge panel of that court reversed and remanded. Respondent filed a motion seeking transfer which this Court sustained on February 26, 2002.

**TABLE OF CONTENTS**

JURISDICTIONAL STATEMENT ..... ii

TABLE OF AUTHORITIES ..... v

STATEMENT OF FACTS ..... 1

STANDARD OF REVIEW ..... 7

POINTS RELIED ON ..... 8

ARGUMENT I ..... 9

I.     **The trial court erred in ruling that Craig’s claim under the Missouri Human Rights Act was time barred under Section 213.111 RSMo 1994 because Craig was entitled to the litigation exception to the statute of limitations where Respondent prevented Craig from filing her MHRA claim in state court by removing her case to federal court where there was no jurisdiction over the state law cause of action.** . . . . .

ARGUMENT II ..... 12

II.    **The trial court erred in dismissing Craig’s claim under the Missouri Human Rights Act as time barred because Craig’s claim under the MHRA filed in September 1999 related back to the date of the original filing in that Craig filed an identical claim under the Americans With Disabilities Act in December of 1997 which was timely filed and which adequately plead facts necessary to state a cause of action under Missouri Human Rights Act.** . . . . .

ARGUMENT III ..... 15

**III. The trial court erred in failing to grant Plaintiff’s Motion for New Trial or to Set Aside the Judgment and Craig’s Motion to Amend because the judgment on the pleadings was not based on evidence in the record in that the pleading upon which judgment was entered was never contained in the record, never before the court, and was never even seen by the trial court.. . . .**

**CONCLUSION . . . . . 22**

**TABLE OF AUTHORITIES**

Mo. R. Civ. Pro. 55.27 (b) ..... 16, 18

Mo. R. Civ. Pro. 55.33 (c) ..... 13, 17

Mo. R. Civ. Pro. 67.06 ..... 21

Section 213.111 RSMo 1986 ..... 8, 9, 11

28 U.S.C. Section 1331 ..... 9

28 U.S.C.S. Section 1367 (d) ..... 11

*Alsbrook vs. City of Maumelle*, 184 F. 3rd 999 (8<sup>th</sup> Cir. 1999) ..... 1

*Angelo v. The City of Hazelwood*, 810 S.W. 2d 706 (Mo.App. E.D. 1991) ..... 7

*Barker v. Danner*, 903 S.W. 2d 950 (Mo.App. W.D. 1995) ..... 7, 21

*Detrick v. Pulitzer Publishing Company*, 422 S.W. 2d 330 (Mo. 1968) ..... 21

*Follmers Market, Inc. v. Comprehensive Accounting Services Co.*,  
608 S.W. 2d 457 (Mo. App. E.D. 1980) ..... 10

*Hill v. John Chezik Imports*, 797 S.W. 2d 528 (Mo. App. E.D. 1990) ..... 10, 11

*Long v. Bando Mfg. of America*, 201 F. 3d 754 (6<sup>th</sup> Cir. 2000) ..... 11

*Madison Block Pharmacy v. U.S. Fidelity*, 620 S.W. 2d 343 (Mo. Banc. 1981) ..... 7

*Mobely v. Fleming*, 11 S.W. 3d. 740 (Mo. App. E.D. 1999) ..... 13

*Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984) ..... 3, 10

*State of Missouri ex. rel. Charles William M.D. v. St. Joseph Hospital*,  
707 S.W. 2d 828 (Mo. App. W.D. 1986) ..... 20

**STATEMENT OF FACTS**

Appellant Dorinda Craig worked for Respondent Department of Health as a secretary from August 1992 through September 1996. On September 24, 1996 Craig was terminated by the Department of Health (L.F. p 5-7).

According to Craig's pleadings, Craig filed a charge of employment discrimination on the basis of disability with the Missouri Commission on Human Rights and the Equal Employment Opportunity Commission. The EEOC issued a Right to Sue letter to Craig in September of 1997. Craig filed suit in state court within 90 days of receiving the right to sue letter from the EEOC (L.F. 5). Craig subsequently alleged also, that all conditions necessary for filing suit under the Missouri Human Rights Act have been satisfied (L.F. 32).

Craig filed her initial Petition in Cole County Circuit Court on December 5, 1997 (L.F. 19). Shortly thereafter Respondent filed its Notice of Removal stating "the action is one in which the United States District Court has original jurisdiction under 28 U.S.C. Section 1331, in that it arises under the Constitution, laws, or treaties of the United States" (L.F. 15). Respondent never filed an answer to Craig's Petition in state court (L.F. 2-4).

While this case was pending and on the verge of trial in the United States District Court for the Western District of Missouri, Central Division, case number 98-4007-CV-C-5, the Eighth Circuit Court of Appeals handed down its decision in *Alsbrook vs. City of Maumelle*, 184 F. 3rd 999, (Eighth Circuit 1999), holding that the Eleventh Amendment bars suits against a state under the ADA. Craig then filed her Motion for Leave to File Second Amended Complaint and Motion to Remand. The Honorable Judge Laughrey considered the Motion to Amend and indicated to the attorneys for Appellant and Respondent that she was going to grant

Leave to Amend. The federal court then considered whether it had jurisdiction to adjudicate Craig's claims in her Second Amended Complaint which included among other theories, a claim under the Missouri Human Rights Act, Section 213.010, RSMo 1999 (L.F. 78). Craig then, on September 24, 1999, filed her Motion to Reopen the case in state court along with a First Amended Petition and a Motion to Amend her original pleading filed in December 1997 (L.F. 29). Respondent never filed an answer to the Plaintiff's First Amended Petition. Craig's case in federal court, including her Second Amended Complaint, was remanded to state court on September 29, 1999 (L.F. 85).

The Department of Health filed its Answer to Plaintiff's Second Amended Complaint in Cole County Circuit Court on October 29, 1999 (L.F. 57). Nowhere in the legal file, record on appeal, or documents contained in the Cole County Circuit Court Clerk file is there any Second Amended Complaint. Respondent never filed an Answer to any pleading filed in State Court. Respondent did not file an Answer to Craig's original petition filed in December 1997 or in response to Plaintiff's First Amended Petition filed in September 1999. Respondent only filed an answer to Plaintiff's Second Amended Complaint which never found its way to the state court file.

On December 10, 1999 Respondent filed its Motion for Judgment on the pleadings arguing that Craig's Three Count pleading should be dismissed (L.F. 65-75). There was no third count in any petition before the court. The only pleading in the Court file was Craig's original Petition and First Amended Petition which is a two count pleading filed on September 24, 1999, alleging among other things that the Missouri Human Right's Act Claim was

properly before the court.

Craig filed her response to Respondent's Motion for Judgment on the pleadings arguing that Craig's claim under the Missouri Humans Rights Act was not time barred because it related back to the original state law action and that Congress had power to abrogate sovereign immunity regarding the ADA (L.F. 86-93). It was apparently unknown by the parties that there was no Seconded Amended Complaint in the legal file. It was obviously unknown by the court.

The trial court issued its Final Judgment and Findings on March 16, 2000 granting the Department of Health a judgment on the pleadings based on a "pleading" not contained in the record. The trial court's final judgment and findings state among other things that the federal court remanded the case back to State Court. "But prior to issuing that order, the Federal Court in apparent violation of the Eleventh Amendment, see *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984), added an MHRA claim and a 'state law' claim to the law suit" (L.F. 96). This is the only mention of any pleading in the court's Final Judgment and Findings and obviously references the pleading in federal court which the judge never saw. However, the only pleadings that were before the court was contained in the Legal File: Craig's original Petition (L.F. 5-12) and Plaintiff's First Amended Petition (L.F. 29-44).

On April 14, 2000 Craig filed her Motion for New Trial or to Set Aside the Judgment Pointing out that the court had incorrectly made findings which were not based on facts contained in the pleadings. Craig pointed out to the court that Respondent's Motion was one for judgment on the pleadings and not a Motion for Summary Judgment. Therefore, only information contained in the pleadings should be considered in the court's order (L.F. 99-100).

Craig pointed out in her Motion for New Trial or to Set Aside the Judgment:

“the court has no basis in the record for its judgment. There was no evidence presented to the trial court whatsoever regarding the timeliness of Craig’s filing of the Missouri Human Rights Act complaint or the filing of a lawsuit based upon a complaint in federal court. All those matters were outside of the pleadings, and this court did not properly have those facts before it when it made its determination. Defendants improperly submitted an order to the court which included factual information not contained in the pleadings. The judgment is not based upon the pleadings. Therefore the judgment is not based upon facts which are in evidence before the court.” (L.F. 101)

Respondent replied to Plaintiff’s Motion for New Trial.

“the court may look at the pleadings when granting a Motion for Judgment on the pleadings. And in this case the pleadings, ie. **Plaintiff’s Second Amended Complaint**, showed that she did not file her MHRA claim until August of 1999. Thus, the court did not err by concluding that Craig did not file her MHRA claim until August of 1999. Therefore, the court should deny Plaintiff’s Motion for New Trial.” (Emphasis Added) (L.F. 101)

Respondent obviously was ignorant of the fact that the court could not look at the pleading. It was not in the file. Craig subsequently filed her Motion for Leave to File Third Amended Petition. The Third Amended Petition included additional allegations that could have provided a record on appeal. This Motion was filed prior to the deadline for the court’s ruling

on Plaintiff's Motion for New Trial. In her Request for Leave to File the Third Amended Petition, Craig explained that the factual issues were not before the court which were necessary for the court's ruling on Respondent's Motion for Judgment on the pleadings. Craig's request stated:

“Craig believes that her Third Amended Petition contains sufficient factual allegations to allow this court to make a ruling on Respondent's Motion for Judgment on the pleading” (L.F. 107).

Counsel for Appellant made two attempts to persuade Respondent's counsel to accompany him to the Judge's chambers to request the Judge to Grant Leave to File the Third Amended Petition. Respondent was not interested. Counsel for Appellant called the trial Judge's clerk to request a hearing, and alert her to the difficulties created by an order not based on the record and the need to amend to the correct the record on appeal. No hearing could be arranged without the prompt cooperation of Respondent's counsel. Appellant's efforts were too little and too late. The court never ruled on Plaintiff's Motion for New Trial or to set aside the judgement, or on her Motion for Leave to File Third Amended Petition (L.F. 4).

## STANDARD OF REVIEW

In an appeal from a decision of the circuit court granting a motion for judgment on the pleadings, the court of appeals reviews the findings and decisions of the circuit court de novo on the record submitted and the law. For judgment on the pleadings the moving party admits, for the purposes of the motion, the truth of all well pleaded facts in the opposing parties pleadings. *Angelo v. The City of Hazelwood* 810 S.W. 2d 706,707 (Mo.App. ED 1991) citing *Madison Block Pharmacy v. U.S. Fidelity* 620 S.W. 2d 343,345 (Mo. Banc. 1981). A motion for judgment on the pleadings should be sustained if, from the face of the pleadings, the moving party is entitled to judgment as a matter of law. *Id* at 707. A motion for judgment on the pleadings should not be sustained where material issues of fact exist. *Barker v. Danner* 903 S.W. 2d 950,957 (Mo.App. WD 1995) The position of a party moving for judgment on the pleadings is similar to that for a motion to dismiss, ie, facts pleaded by the opposing party are assumed to be true, but are found to be none the less insufficient as a matter of law. *Madison Block Pharmacy v. U.S. Fidelity* 620 S.W. 2d 343,345 (Mo. Banc. 1981).

POINTS RELIED ON

**I.**

The trial court erred in ruling that Craig's claim under the Missouri Human Rights Act was time barred under Section 213.111 RSMo 1986 because Craig was entitled to the litigation exception to the statute of limitations where Respondent prevented Craig from filing her MHRA claim in state court by removing her case to federal court where there was no jurisdiction over the state law cause of action.

**II.**

The trial court erred in dismissing Craig's claim under the Missouri Human Rights Act as time barred because Craig's claim under the MHRA filed in September 1999 related back to the date of the original filing in that Craig filed an identical claim under the Americans With Disabilities Act in December of 1997 which was timely filed and which adequately plead facts necessary to state a cause of action under Missouri Human Rights Act.

**IV.**

The trial court erred in failing to grant Plaintiff's Motion for New Trial or to Set Aside the Judgment and Craig's Motion to Amend because the judgment on the pleadings was not based on evidence in the record in that the pleading upon which judgment was entered was never contained in the record, never before the court, and was never even seen by the trial court.

## ARGUMENT

### I.

**The trial court erred in ruling that Craig’s claim under the Missouri Human Rights Act was time barred under Section 213.111 RSMo 1986 because Craig was entitled to the litigation exception to the statute of limitations where Respondent prevented Craig from filing her MHRA claim in state court by removing her case to federal court where there was no jurisdiction over the state law cause of action.**

Chapter 213.111.1 reads in pertinent part:

“Any action brought in court under this section shall be filed within 90 days from the date of the Commission’s notification letter to the individual but no later than two years after the alleged cause occurred or its reasonable discovery by the alleged injured party.”

Shortly after Craig filed her complaint with the Missouri Human Rights Commission, Department of Health removed the case to federal court. The Department of Health stated: “the action is one in which the United States District Court has original jurisdiction under 28 U.S.C. Section 1331.” The Department of Health now claims that the federal court lacks jurisdiction over Craig’s claims. The Department of Health has defeated any opportunity Craig might have had to file her claim under the Missouri Human Rights Act. As Judge Laughrey correctly stated: “Although Plaintiff may be able to pursue the MHRA claim in State Court, she may not pursue it in Federal Court. (Judge Laughrey’s Order, p. 5, citing *Pennhurst State*

*School and Hosp. V. Haldermen*, 465 U.S. 89, at 100-1 (1984).

Nonetheless, Department of Health argues that even though Defendant made it impossible for Craig to amend her complaint adding a claim under the Missouri Human Rights Act, Department of Health should be entitled to the benefit of the two year limitations period.

The litigation exception precludes the Department of Health from using the two year limitations period to dispose of Craig's claim. Missouri courts recognize an exception to the limitation period in a case such as this where a person is prevented from exercising her legal remedy by the pendency of legal proceedings brought by her opponent. *Hill v. John Chezik Imports*, 797 S.W. 2d 528, 530 (Mo. App. E.D. 1990), citing *Follmers Market, Inc. v. Comprehensive Accounting Services Co.*, 608 S.W. 2d 457, 460 (Mo. App. E.D. 1980). This so-called "litigation exception" is only available where the legal proceedings are caused by the party claiming that the statute of limitations prevents his opponent from exercising her legal right. *Id.*

In our case, the Department of Health removed the case from state court to Federal Court. The Department of Health provoked, induced, promoted and caused the case to be litigated in Federal Court where Craig could not join her state law case of action. It was only after the Department of Health forced Craig to seek a remand to state court that the possibility even arose that Craig could file her claim under the Missouri Human Rights Act. Therefore, Craig has met the requirements of the litigation exception, and the statute of limitations should be tolled because it was the Department of Health's actions which prevented Craig from filing

her Missouri Human Rights Act claim, prior to September 1999.

In *Hill*, Plaintiff filed a Title VII discrimination and MCHR case in Federal Court. The court ruled that she filed two weeks late for the Title VII claim. The court dismissed her case entirely. *Hill* then refilled in State Court, claiming that her state law claim under the Missouri Human Rights Act had been filed timely in Federal Court and she should be entitled to equitable tolling of the statute of limitations. The Missouri Appellate Court rejected Hill's argument, stating that her claim was time barred under state law even though it had originally been filed on time in Federal Court. Unlike Craig, *Hill* caused her case to be filed in Federal Court where the statute of limitations extinguished her claim.

It is likely at this point that *Hill* would be decided differently. Two months after *Hill's* discrimination action in State Court was over, Congress passed the Judicial Improvements Act of 1990. One section of the Act provides that a claim is preserved for thirty (30) days after it is dismissed in Federal Court. 28 U.S.C.S. Section 1367 (d). This section of the Act also tolls the state statute of limitations on any state claim over which a Federal Court has exercised jurisdiction until thirty (30) days after the case is remanded. *Long v. Bando Mfg. of America*, 201 F.3d 754 (6<sup>th</sup> Cir. 2000).

Moreover Section 213.111.1 does not require that a cause of action be filed within two years of the time in which the claim arose. The statute requires that a suit be filed within two years of the date the claim accrued. In Craig's case, her cause of action did not accrue during the time the claim was pending in federal court because she could not have filed it in federal

court. The only time Craig could have filed her MHRA claim in any court is when the federal judge indicated she was going to remand the case to state court. Therefore Craig filed her MHRA claim timely in relation to the accrual of her claim.

## **II.**

**The trial court erred in dismissing Craig's claim under the Missouri Human Rights Act as time barred because Craig's claim under the MHRA filed in September 1999 related back to the date of the original filing in that Craig filed an identical claim under the Americans With Disabilities Act in December of 1997 which was timely filed and which adequately plead facts necessary to state a cause of action under the Missouri Human Rights Act.**

Craig filed her First Amended Petition in State Court on September 24, 1999, within ninety (90) days of receiving her notification letter of right to sue under the Missouri Human Rights Act. However, the Department of Health contends that the case was brought in court more than two years after the last date of discrimination. The factual allegations necessary to sustain a cause of action against the Department of Health under the ADA are identical to those necessary to sustain a cause of action under the Missouri Human Rights Act (L.F. 6-11 and L.F. 35-42, comparing Craig's original petition with her First Amended Complaint). Department of Health does not dispute that Craig brought her original lawsuit in State Court alleging facts identical to facts necessary to sustain the claim under the Missouri Human Rights Act. Craig's claim under the Missouri Human Rights Act relates back to the date of the

original pleading.

This case is similar to *Mobely v. Fleming*, 11 S.W. 3d. 740 (Mo. App. ED 1999). In *Mobely*, Plaintiff filed her original petition alleging wrongful termination within the limitations period. However, after the five year limitations had run, Craig filed an Amended Petition bringing a count for fraud. The trial court held that the second count did not relate back to the filing of the original petition. The Court of Appeals reversed.

In *Mobely* reversal was required because Plaintiff alleged in his Amended Petition, a fraud claim and the conduct alleged related to a transaction and occurrence set forth in the original petition. Therefore the claim did relate back to the original petition and the statute of limitations did not bar the claim.

Rule 55.33 (c) requires that this court reverse the dismissal of Craig's MHRA claim. Clearly her MHRA claim is founded upon conduct, transactions and occurrences set forth in the original petition. As in *Mobely*, plaintiff filed her Amended Petition alleging a cause of action based upon facts pled in her original petition which was timely. Therefore her claim relates back. The trial court should be reversed in its judgment on the pleadings because Craig's MHRA claim relates back to her original pleading.

Craig's claim, which she originally filed in State Court, alleges conduct which states a cause of action for retaliation and discrimination under the Missouri Human Rights Act (L.F. 5-11). Craig set forth allegations describing an occurrence and transaction which is identical to the one filed in her amended pleading (L.F. 31-42). Therefore, it relates back to the original

date of her pleading in December, 1997.

### III.

**The trial court erred in failing to grant Plaintiff's Motion for New Trial or to Set Aside the Judgment and Craig's Motion to Amend because the judgment on the pleadings was not based on evidence in the record in that the pleading upon which judgment was entered was never contained in the record, never before the court, and was never even seen by the trial court.**

In Respondent's Motion for Judgment on the Pleadings the Department of Health tendered to the trial court factual allegations from pleadings which were outside of the pleadings in the court file. Indeed, the factual allegations contained in respondent's Motion for Judgment on the pleadings were not based on any factual material contained in the record before the trial court. No affidavits, depositions, certified records or records of any kind were tendered to the trial court to establish the position relied upon by respondent. Respondent tendered to the trial court an order and judgment which were not based upon any factual material contained in the record. Respondent did not even tender to the trial court a copy of the Second Amended Complaint upon which it asked the trial court to grant it a judgment on the pleadings.

On appeal this court is to consider all well pleaded facts in Appellant's pleadings. Based upon the original pleading filed by Plaintiff in state court, along with her First Amended Petition and Third Amended Petition, all the necessary prerequisites for recovering a verdict on a Missouri Human Rights claim had been satisfied. Indeed Plaintiff's original Petition

states a cause of action under the Missouri Human Rights Act. Although the Missouri Human Rights Act is not specifically cited in Plaintiff's original Petition, the facts pleaded allege all the elements necessary to sustain such a claim. Plaintiff's original pleading filed in state court is undoubtedly timely, and defendant has never raised any claim based on a statute of limitations defense to Plaintiff's original pleading filed in state court. Respondent incorrectly argues that Craig never filed a pleading in Federal Court in a timely fashion under the Missouri Human Rights Act. A Missouri Human Rights Act Claim can be found in the original pleading which defendant removed to federal court. There are no facts in the record which would sustain a conclusion that Plaintiff failed to file a timely claim under the Missouri Human Rights Act. Defendant is not entitled to a judgment on the pleadings.

Missouri Rule of Civil Procedure 55.27 (b) provides:

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for Summary Judgment and disposed of as provided in Rule 74.04, and all parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 74.04"

In our case Respondent Department of Health never filed an Answer to any pleading contained in the court file in the state court proceeding. On September 24, 1999, while Craig's case was still pending in federal court, she filed her First Amended Petition in state

court. Defendant never filed any responsive pleading in state court. Craig had the right as a matter of course to amend her pleading pursuant to Rule 55.33 because Defendant had not filed any responsive pleading and the case was not on the trial calendar. At that stage of the proceedings in state court, Plaintiff was not required to obtain leave of court or written consent of the adverse party. Plaintiff's First Amended Petition was the pleading before the court at that time. However, Defendant did not file an answer to Plaintiff's First Amended Petition or any other motion or document related to Plaintiff's First Amended Petition. Moreover, the First Amended Petition does state a cause of action against Defendant for violations against the Missouri Human Rights Act which relates back to her original pleading filed in state court.

Respondent never took a position in its pleadings or claimed any defense based upon any statute of limitations or limitations period in regard to any pleading filed by Craig in the state court action. Craig filed two Petitions in state court and the Department of Health filed no responsive pleading to either of these petitions. The time for pleadings was not closed when the Department of Health filed this Motion for Judgment on the pleadings. The Department of Health could have and should have filed an answer. At any rate, the pleadings were not at an appropriate stage of finality for the trial court to enter a judgment on the pleadings as required under Rule 55.27.

Respondent Department of Health filed its Motion for Judgment on the pleadings based upon its answer filed to Plaintiff's Second Amended Complaint which was never filed nor was it ever in the state court file. That pleading was not before the trial court in State

Court. Respondent the Department of Health never did file an Answer to either petition filed by Craig in State Court. Therefore, Respondents were in default in the State Court action. Alternatively, the Department of Health was not filing the proper motion for judgment on the pleadings because the time for filing pleadings had not been closed.

Craig filed her Third Amended Petition during the pendency of her Motion for New Trial or to Set Aside the Judgment. Craig stated in her Motion for Leave to File the Third Amended Petition:

“2. There are factual issues which are now before the court which need to be added to the pleadings in order for this court to rule on defendant’s Motion for Judgment on the Pleadings as the plaintiff’s claim under the MCHR Act. (sic)  
3. Plaintiff believes that her Third Amended Petition contains sufficient factual allegations to allow this court to make a ruling on Defendant’s Motion for Judgment on the Pleadings.”

(L.F. 107)

In Craig’s Third Amended Petition she alleged additional factual information which arguably could have formed a basis for the court to make a determination on the pleadings:

4. All conditions proceeding filing suit under the MHRA had been satisfied: (a) Plaintiff filed original petition December 5, 1997, alleging discrimination based on disability. Plaintiff alleged facts in her origin petition that would justify a cause of action under the Missouri Human Rights Act; (b) Defendant subsequently filed Notice of Removal to United States District Court; (c)

Plaintiff would not be able to pursue a claim in federal court against the state of Missouri under state law because the applicable case law barring such claim based on sovereign immunity; (d) in August of 1999, the United States District Court remanded this case back to state court and granted plaintiff Leave to File an Amended joining the Missouri Human Rights Act claim; (e) Plaintiff's claim under the Missouri Human Rights Act related back to the date of original petition filed in Cole County Circuit Court (December, 1997) because the factual basis of the Missouri Human Rights Act claim in her Amended Petition arose out of the conduct transaction occurrence set forth in the original petition filed December 5, 1997; (f) Plaintiff's Missouri Human Rights Act complaint is not time barred because it related back to a timely filing in December, 1997, which is within the two year limitations for bringing suit under the Missouri Human Rights Act.

The trial court did not rule on Craig's pending motion for leave to file her Third Amended Petition. According to the factual allegations contained in Plaintiff's Amended Petitions, her claim is timely. The motion filed by Respondent for a Judgment on the Pleadings based on the Second Amended Complaint which was not before the court is inadequate to sustain a Motion to Dismiss. There is no Second Amended Complaint in the record. This court cannot evaluate whether Craig's claim under the Missouri Human Rights Act is adequately pleaded based upon the Second Amended Complaint as described by Respondent. Alternatively, this court could consider the trial court's Entry of Judgment based

on the First Amended Petition or Third Amended Petition which are in the court record. Assuming the facts pled in either of these pleadings, Respondent was not entitled to a judgment as a matter of law. The only basis according to the Department of Health for a judgment as a matter of law by the trial court was a pleading that is not in the record. Nothing in the court file indicated to the trial court when Craig's MHRA claim was filed in federal court.

This case is similar to *State of Missouri ex. rel. Charles William M.D. v. St. Joseph Hospital*, 707 S.W. 2d 828 (Mo. App. WD 1986). In that case the trial court granted defendant's Motion to Dismiss. Plaintiff then requested Leave to Amend. This was denied. Plaintiff appealed. The court reversed the trial court's refusal to grant Leave to Amend pointing out that our Supreme Court has stated the general rule that "Ordinarily when a first pleading is ruled to be insufficient in a trial court, the party is afforded a reasonable time to file an amended pleading if desired."

*Detrick v. Pulitzer Publishing Company*, 422 S.W. 2d 330,334 (MO 1968). The trial court shall freely grant Leave to Amend and shall specify the time within which the Amendment shall be made or Amended Pleading filed. Rule 67.06.

There is no indication on the record of any consideration by the trial court, or any argument by opposing counsel as to how it would be prejudiced by granting Leave to Amend the Third Amended Petition. Where there is no demonstrated prejudice to defendant, leave to file an Amended Petition should be granted even after an order by the court has been entered. *Barker v. Danner* 903 S.W. 2d 958 (Mo. App. WD 1995).

Therefore, this court should reverse the trial court's Entry of Judgment as a matter of law in favor of Respondent and remand this case to the trial court for further consideration of the Third Amended Petition and merits of Craig's claims.

## CONCLUSION

Appellant, Dorinda Craig, prays this court to consider the record on Appeal and reverse the trial court's Entry of Judgment on the pleadings because there is no basis in the pleadings for the trial court to have rendered a judgment in favor of the Department of Health. Craig also requests that this court reverse and remand this case for further proceedings on the merits because Craig's claims under the Missouri Human Rights Act are identical to her claims under the Americans with Disabilities Act. Therefore her claim relates back to her original filing and is timely and not barred by the Statute of Limitations.

Respectfully Submitted,

---

**David J. Moen #39239**  
613 East McCarty Street  
Jefferson City, MO 65101  
Telephone: (573) 636-5997  
Facsimile: (573) 636-3799

**ATTORNEY FOR APPELLANT**

**BEFORE THE MISSOURI SUPREME COURT**

**DORINDA CRAIG,** )  
 )  
 **Appellant** )  
 )  
 **vs.** ) **No. SC84173**  
 )  
 **MISSOURI DEPARTMENT OF)**  
 **HEALTH, et al.,** )  
 )  
 **Respondents.** )

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that two copies of Appellant’s Substitute Brief in the above captioned case has been mailed this 18th day of March, 2002, to: Gail Vasterling, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

Respectfully submitted,

---

David J. Moen #39239  
411 West Miller Street  
Jefferson City, MO 65101  
Telephone: (573) 636-5997  
Facsimile: (573) 636-3799

**ATTORNEY FOR APPELLANT**