

**IN THE  
SUPREME COURT OF MISSOURI**

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**Supreme Court No. SC92793  
Eastern District Appeal No.: ED96532**

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**MADONNA FARROW,  
Plaintiff / Appellant,**

**vs.**

**SAINT FRANCIS MEDICAL CENTER and CEDRIC C. STRANGE,  
Defendants / Respondents.**

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**On Transfer from the Missouri Court of Appeals  
For the  
Eastern District of Missouri**

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**Respondents' Substitute Brief**

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## I. STATEMENT OF FACTS

Defendants/Respondents Saint Francis Medical Center (“Saint Francis”) and Dr. Cedric Strange (“Dr. Strange”) take this opportunity to emphasize that a large portion of Plaintiff/Appellant Madonna Farrow’s “Statement of Facts” within her Substitute Brief does not consist of “facts.” As was true about Appellant’s initial appeal brief, the large majority of Appellant’s “Statement of Facts” in her Substitute Brief are supported by citation to Appellant’s First Amended Petition even though Appellant does not clarify she is merely reciting allegations rather than facts. All citations by Appellant in her “Statement of Facts” to pages 7-36 of the legal file are references to Appellant’s First Amended Petition. However, as indicated in the legal argument section below, as it pertains to Counts V-VIII in Appellant’s First Amended Petition Respondents have accepted as true the allegations in the First Amended Petition for purposes of Respondents’ Motion to Dismiss, or, in the alternative, Motion for Summary Judgment. Respondents will address the particular allegations in the First Amended Petition within the legal argument section of this brief. Additionally, Respondents submit the following, pursuant to Rule 84.04(f) as a supplement to Appellant’s Statement of Facts.

### A. **Background Concerning Appellant’s Lawsuit.**

Appellant filed a Petition (“the Original Petition”) against Saint Francis and Dr. Strange on or about March 18, 2010. (LF 6). On April 20, 2010, Saint Francis filed a Motion to Dismiss Appellant’s Petition or, in the alternative, Motion for Summary Judgment. (LF 5-6). On June 3, 2010, Dr. Strange filed his separate Motion to Dismiss Appellant’s Petition or, in the alternative, Motion for Summary Judgment. (LF 5). On

July 1, 2010, Appellant filed her Memorandum in Opposition to Respondents' motions. (LF 5). On July 26, 2010, Respondents filed their reply in support of their motions. (LF 4). A hearing on Respondents' motions was set in front of the trial court for August 30, 2010. (LF 3). Prior to the hearing, the trial court granted Appellant's request for leave to file an amended petition and canceled the hearing scheduled for August 30, 2010. (LF 3). Appellant filed her First Amended Petition on August 31, 2010. (LF 3).

Count I and Count II of Appellant's First Amended Petition are asserted against both Respondents and allege Appellant was subjected to sexual harassment (Count I) and retaliatory discrimination (Count II) in violation of the Missouri Human Rights Act, Mo. Rev. Stat. § 213.010 *et seq.*, R.S.Mo. ("MHRA"). (LF 21-26). Count III is an MHRA retaliatory discharge claim asserted only against Saint Francis. (LF 25-26). Count IV is a second MHRA retaliatory discharge claim asserted against Saint Francis that focuses solely on alleged conduct occurring subsequent to Plaintiff's discharge. (LF 26-27). Count V is a common law wrongful discharge claim asserted against both Respondents even though the claim had been asserted against only Saint Francis in the Original Petition. (*Compare* LF 27-31 *with* Respondents' Appendix A21-22). The remaining claims in Appellant's First Amended Petition (Count VI - Defamation, Count VII - False Light Invasion of Privacy, and Count VIII - Tortious Interference) are asserted only against Dr. Strange. (LF 31-35). All legal claims which were made within the Original Petition are included in the First Amended Petition. (*Compare* LF 7-36 *with* Respondents' Appendix A3-27). Additionally, Appellant added Count IV (MHRA retaliatory discharge) to the First Amended Petition. Count IV asserts Saint Francis

failed to provide a meaningful review of Appellant's post-discharge grievance of Saint Francis' decision to discharge her. (LF 26-27). The post-discharge grievance claim was not included in the Original Petition. (Respondents' Appendix A3-27).

On February 17, 2011, after filings were completed and a hearing had been held on Respondents' Motion to Dismiss Appellant's First Amended Petition or, in the alternative, Motion for Summary Judgment, Judge Benjamin F. Lewis entered an Order granting summary judgment in favor of Respondents on all counts of Respondents' First Amended Petition. (LF 329).

**B. Facts Concerning Saint Francis' Operations As A Catholic Hospital.**

Saint Francis's Articles of Incorporation specify that Saint Francis "shall be operated as a Catholic Hospital and shall be a member of the Catholic Hospital Association." (LF 67 - Article II(C) of Saint Francis' Articles of Incorporation). The Articles of Incorporation state the corporation "shall engage only in activities which qualify it for tax exemption under Section 501(c)(3) of the Internal Revenue Code of the United States and under all similar exceptions." (LF 85 - Article III(E) of Articles of Incorporation as amended in 1991). Article V of the Articles of Incorporation, establishing a Board of Directors, states that all proposed members of the Board of Directors "shall be submitted to the then duly appointed and acting Bishop or Administrator of the Diocese of Springfield/Cape Girardeau . . ." (LF 86 - Article V of Articles of Incorporation as amended in 1991). Article VII of the Articles of Incorporation states that any amendment to the Articles must be approved by the "then duly appointed and acting Bishop or Administrator of the Diocese of Springfield/Cape

Girardeau.” (LF 86 - Article VII of Articles of Incorporation as amended in 1991). Saint Francis has operated in accordance with its Articles of Incorporation during all times relevant to this lawsuit. (LF 58 – Affidavit of Teri Kreitzer).

Article I, § 2 of the By-Laws of Saint Francis state that Saint Francis is “sponsored by St. Francis Healthcare System, a Private Non-Collegial Juridic Person under the jurisdiction of the Bishop of the Diocese of Springfield-Cape Girardeau” which “participates in the health care mission of the Roman Catholic Church.” (LF 90 - By-Laws, Article I, § 2). The By-Laws additionally state that Saint Francis:

“shall be managed and its corporate powers shall be exercised in accordance with the teachings and traditions of the Roman Catholic Church and the then existing Ethical and Religious Directives of the Roman Catholic Health Facilities approved by the National Conference of Catholic Bishops and promulgated by the Roman Catholic Bishop of the Diocese of Springfield/Cape Girardeau as they pertain to health care procedures and practices performed in the Medical Center.” (LF 91 – By-Laws, Article I, § 3).

Article III, § 4 of the By-Laws provides that the Sole Member, the Board of Directors, the President and Chief Executive Officer, the Medical Staff, and all other individuals associated with Saint Francis must “commit themselves to furthering the religious philosophy of the Roman Catholic Church, in the field of health care.” (LF 96 – By-Laws, Article III, § 4). At all times relevant to this lawsuit, Saint Francis has operated in accordance with its By-Laws. (LF 58 – Kreitzer Affidavit).

The Missouri Commission on Human Rights (“MCHR”) has, on numerous occasions, recognized it does not have jurisdiction over MHRA charges filed against Saint Francis on the grounds that Saint Francis is an organization “owned and operated by a religious or sectarian group,” and, thus, Saint Francis is not covered by the MHRA. (LF 52-56). Saint Francis is exempt from Missouri’s Sales and Use Tax on Purchases and Sales pursuant to Mo. Rev. Stat. § 144.030.2(20) and the Internal Revenue Service has determined Saint Francis is exempt from federal income tax pursuant to 26 U.S.C. § 501(c)(3). (LF 60-64).

**C. Appellant’s Allegations Concerning Her Employment With Saint Francis.**

Appellant alleges that from October 1991 until August 1999 she worked for Saint Francis primarily as a Cardiac Floor Nurse. (LF 9 – First Amended Petition, ¶ 15). Appellant alleges she transferred into Saint Francis’ radiology department in August 1999 and worked primarily in that department as a nurse. (LF 9 – First Amended Petition, ¶ 16). Appellant further alleges that from August 1999 until December 2005 she worked without incident as a nurse for Saint Francis. (LF 10 – First Amended Petition, ¶ 17). Appellant alleges Dr. Strange, the Medical Director of Radiology for Saint Francis, began to harass her in December 2005. (LF 10-11 – First Amended Petition, ¶ 23). Appellant alleges Dr. Strange subsequently made defamatory statements about her and that on October 16, 2006 she placed documentation into her personnel file concerning Dr. Strange’s alleged actions. (LF 14 – First Amended Petition, ¶ 43). On November 4, 2006, Appellant transferred from Saint Francis’ radiology department to the progressive

cardiac floor. (LF 195). Appellant was subsequently discharged on December 10, 2008. (LF 18 - First Amended Petition, ¶ 64; LF 195).

**D. Appellant's Post-Discharge Grievance.**

Appellant filed a post-discharge grievance on December 15, 2008, pursuant to Saint Francis' grievance process, requesting that Saint Francis review its decision to discharge her. (LF 214). Step one of the grievance process was completed on December 17, 2008. (LF 215). Appellant proceeded to step two of the grievance process on January 6, 2009 and step two of the process was completed on January 9, 2009. (LF 216). Appellant then proceeded to step three of the grievance process on January 19, 2009 and step three of the process was completed on January 22, 2009. (LF 217-18). Appellant next proceeded to step four of the grievance process on February 4, 2009 and step four of the process was completed on the same day. (LF 219-20). Subsequently, Appellant initiated the final step of the grievance process on February 17, 2009. (LF 223). Saint Francis' final response denying the grievance was issued on March 2, 2009. (LF 223).

**E. Appellant's Untimely Charge of Discrimination.**

As indicated above, Appellant was discharged on December 10, 2008. (LF 18 - First Amended Petition, ¶ 64; LF 195). The last alleged act of discrimination on which Appellant based her Charge of Discrimination was her December 2008 discharge. (LF 44 - Appellant's Charge of Discrimination; LF 195). Appellant's Charge is dated *July 27, 2009* and file stamped as received by the EEOC on the same day, 230 days after her

discharge. (LF 44 – Appellant’s Charge of Discrimination); (Respondents’ Appendix A 1-2).

## II. LEGAL STANDARD

### A. **Motion to Dismiss.**

A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff’s petition. Nazeri v. MO Valley Coll., 860 S.W.2d 303, 306 (Mo Banc. 1993). The petition is reviewed in an almost academic manner to determine if the facts alleged meet the elements of a recognized cause of action or of a cause that might be adopted in that case. Id.

Missouri Supreme Court Rule 55.05 states a pleading “shall” contain “a short and plain statement of the *facts* showing that the pleader is entitled to relief.” Mo. Sup. Ct. Rule 55.05 (emphasis added). The pleadings must identify the facts upon which the plaintiff’s claim rests. Berkowski v. St. Louis County Board of Election Comm’rs, 854 S.W.2d 819, 823 (Mo.App.E.D. 1993). Mere conclusions of the plaintiff not supported by factual allegations cannot be taken as true and must be disregarded in determining whether a petition states a claim on which relief can be granted. Berkowski, 854 S.W.2d at 823; Schott v. Beussink, 950 S.W.2d 621, 629 (Mo.App.E.D. 1997). Missouri rules of civil procedure demand more than mere conclusions that the pleader alleges without supporting facts. In re Transit Cas Co. ex. rel Pulitzer Publ’g Co. v. Transit Cas. Co. ex. rel Intervening Employees, 43 S.W.3d 293, 302 (Mo. banc 2001).

This Court will affirm a dismissal if it is supported by any ground, regardless of whether the trial court relied on that ground. Dujakovich v. Carnahan, 370 S.W.3d 574, 577 (Mo. banc 2012).

**B. Motion for Summary Judgment.**

Summary judgment is appropriate if the pleadings, depositions, answers to discovery, and any affidavits filed in support of the motion show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Mo.R.Civ.Pro. 74.04(c); ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 380 (Mo. 1993).

In a motion for summary judgment, the movant need not controvert each element of the non-movant's claim in order to establish a right to summary judgment. Id. at 381. Rather, a movant must establish a right to judgment by showing: (1) facts that negate any one of the non-movant's essential elements; (2) that the non-movant, after an adequate period of discovery, has not been able to provide, and will be unable to provide, evidence sufficient to establish any one of the essential elements of the claim; OR (3) that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly pleaded affirmative defenses. Id. at 381. Regardless of which of these three means is employed by the defending party in moving for summary judgment, each method establishes a right to judgment as a matter of law. Id.

Because this Court's review is de novo, if the trial court's judgment can be sustained on any ground as a matter of law, even if different than the one provided in the

order granting summary judgment, it should be affirmed. Rice v. Shelter Mutual Ins. Co., 301 S.W.3d 43, 46 (Mo. banc 2010).

### **III. ARGUMENT**

#### **POINT I**

**The Trial Court Erred In Granting Judgment Against Farrow On Count I Of Her Amended Petition Alleging Employment Discrimination In Violation Of Missouri Human Rights Act, In That The Claim Was Properly Pled, Any Arguments Relating To The Pre-Filing Proceedings Before The Missouri Commission On Human Rights Were Not Raised Before The Agency And Were Not Properly Before The Agency And Were Not Properly Before The Court In Light Of J.C.W. Ex. Rel. Webb v. Wyciskalla And There Were, At A Minimum, Questions Of Fact Precluding Judgment As A Matter Of Law.**

**The Trial Court Did Not Err In Granting Summary Judgment In Favor Of Respondents On Count I (MHRA Sexual Harassment) Of Appellant's First Amended Petition.**

#### **A. Count I Of Appellant's First Amended Petition Fails Because Appellant Failed To Satisfy The Prerequisites For Filing A Lawsuit Under The MHRA.**

In order to proceed with a lawsuit under the MHRA, a Complainant must first file a verified complaint of discrimination with the MCHR within one hundred eighty (180) days of the alleged discriminatory act. Mo. Rev. Stat. § 213.075.1; *see also* Tisch v. DST Systems, Inc., 368 S.W.3d 245, 252 (Mo.App.W.D. 2012).

Compliance with the 180 day time limit is a prerequisite to the maintenance of an MHRA claim in Court. Daffron v. McDonnell Douglas Corp., 874 S.W.2d 482, 484 (Mo.App.E.D. 1994). A discriminatory act which is not made the basis for a timely charge is merely an unfortunate event in history which has no legal consequences. MO Pac. R.R. Co. v. Missouri Comm'n on Human Rights, 606 S.W.2d 496, 501 (Mo.App.W.D. 1980), *citing* United Air Lines v. Evans, 431 U.S. 553, 558 (1977); *see also* Pollock v. Wetterau Food Distribution Group, 11 S.W.3d 754, 763 (Mo.App.E.D. 1999).

In Count I, Appellant alleges she was subjected to sexual harassment during her employment with Saint Francis in violation of the MHRA. (LF 21-24). In Count II, Appellant alleges Respondents retaliated against her in violation of the MHRA in several ways during her employment with Saint Francis for complaining about the alleged sexual harassment. (LF 24-25). In Count III, Appellant alleges she was discharged as a result of her complaint in violation of the MHRA. (LF 25-26). Appellant was discharged on December 10, 2008. (LF 18 - First Amended Petition, ¶ 64; LF 195). Thus, it is undisputable that Counts I-III of Appellant's First Amended Petition focus on her discharge and the alleged actions of Respondents that occurred on or before the date of her discharge. Furthermore, Appellant's Charge of Discrimination also clearly reveals that the last alleged act of discrimination on which she based her Charge was her discharge which occurred in December 2008. (LF 44 - Appellant's Charge of Discrimination). Case law establishes that a termination is a discrete act, not a continuing violation. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114 (2002); *see also*

Tisch, 368 S.W.3d at 253-54. As such, a termination occurs, and thus triggers the start of the limitations period, on the day it happens. Nat'l R.R. Passenger Corp., 536 U.S. at 110; *see also* Tisch, 368 S.W.3d at 254. Thus, Appellant's discharge on December 10, 2008 was a discrete act that triggered the start of the limitations period.

Appellant's Charge is dated *July 27, 2009* and file stamped as received by the EEOC on the same day. (LF 44 – Appellant's Charge of Discrimination). Therefore, Appellant filed her Charge more than 180 days after all alleged acts of discrimination occurred. Specifically, Appellant filed her Charge 230 days after her discharge, which was the last alleged act of discrimination or retaliation relied on in Counts I-III of her First Amended Petition. As a result, Appellant clearly failed to meet the prerequisites for filing an MHRA claim.

Therefore, because Appellant's MHRA claims in Counts I-III are time barred, the trial court did not err in granting judgment in favor of Respondents on these claims.

**B. The Holding In Webb v. Wyciskalla Does Not Prevent Judgment In Favor Of Respondents On Appellant's MHRA Claims.**

Throughout the appeal process, Appellant has relied heavily on J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249 (Mo. Banc 2009) in an attempt to avoid the established consequences for her untimely Charge of Discrimination. Appellant essentially argues Webb should be interpreted in such a way as to drastically change Missouri employment law. Appellant's attempt to place significance on Webb is misguided. Webb involved, *inter alia*, the issue of whether a statute requiring a parent to post a bond before filing a petition to modify a custody or visitation judgment can be

considered a *jurisdictional* prerequisite to filing the petition in court. The Court in Webb does not apply or even mention the MHRA. Regardless, whether or not the time limitations on MHRA claims establish *jurisdictional* limitations is irrelevant to the outcome in this case. As indicated recently by the Missouri Court of Appeals for the Eastern District in a case involving MHRA claims:

“The Missouri Supreme Court has recently held that the trial court technically does not lack subject matter jurisdiction over unexhausted claims, but rather lacks authority to review those claims as a result of the statutory exhaustion requirement. J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249 (Mo. Banc 2009). While we recognize the distinction, the end result is the same in both cases, courts should dismiss claims that are not properly exhausted.” Alhalabi v. MO Dep’t of Natural Res., 300 S.W.3d 518, 524, fn. 1 (Mo.App.E.D. 2009).

Similarly, the Webb decision does not overturn controlling Missouri statutes and case law establishing a plaintiff cannot recover for time barred MHRA claims. Statutes of limitation are favored in the law. Hill v. John Chezik Imports, 797 S.W.2d 528, 530 (Mo.App.E.D. 1990). Appellant does not cite to any post-Webb cases which would support an argument that courts no longer have the ability to dismiss time barred MHRA claims. Moreover, Appellant does not make any effort to argue the MHRA statutes setting forth time limitations are unconstitutional as it would be fruitless to do so.

**C. Appellant's Argument That Respondents Had To Appeal Alleged Decisions Made By The MCHR Is Without Merit.**

In this case, as indicated above, there can be no dispute that Appellant's MHRA claims in Counts I-III are untimely. However, Appellant attempts to avoid an adverse judgment by arguing Respondents needed to raise the issue of the timeliness of Appellant's claims with the MCHR. Nonetheless, there are no Missouri statutes or Missouri cases, including the cases cited in Appellant's Substitute Brief, which indicate a defendant is required to raise the issue with the MCHR and/or cannot raise the issue of timeliness of a charge of discrimination with a court on a motion to dismiss and/or motion for summary judgment. To the contrary, case law supports the proposition that the timeliness of claims raised in an MHRA Charge of Discrimination can be raised in court after a lawsuit is filed regardless of whether the plaintiff filed suit pursuant to a right-to-sue. Daffron, 874 S.W.2d at 484; Pollock, 11 S.W.3d at 763; Tisch, 368 S.W.2d at 250-55; Holland v. Sam's Club, 487 F.3d 641, 643-44 (8<sup>th</sup> Cir. 2007).

Appellant cites to Southwestern Bell Tel. Co. v. MO Comm'n on Human Rights, 863 S.W.2d 682 (Mo.App.E.D. 1993) and State ex rel. St. Louis County v. MO Comm'n on Human Rights, 693 S.W.2d 173 (Mo.App.W.D. 1985) in support of an argument that Respondents should have filed an appeal after the MCHR issued a right-to-sue letter. However, Southwestern Bell and St. Louis County did not involve an appeal of a right-to-sue letter. Rather, in Southwestern Bell and St. Louis County the employers filed writs of prohibition seeking to prevent the MCHR from taking any further action on untimely claims. In this case, it would have been futile for Respondents to file a writ of

prohibition after the MCHR issued a right-to-sue letter (issued shortly after the EEOC conducted an investigation and issue a right-to-sue) inasmuch as within the right-to-sue letter the MCHR indicated it “is hereby administratively closing this case and terminating all MCHR proceedings relating to it.” (LF 224 – Notice of Right to Sue). The MHRA specifically provides “[n]o person may file or reinstate a complaint with the commission after the issuance of a notice [of right to sue] under this section relating to the same practice or act.” Mo. Rev. Stat. § 213.111.1. Thus, there was no further action to prevent the MCHR from taking after issuance of the right-to-sue letter. A writ of prohibition is preventative, not corrective. Southwestern Bell, 863 S.W.2d at 686.

A writ would have been futile for the additional reason that it is undisputed the MCHR had the discretion to issue a right-to-sue letter to Appellant prior to deciding all issues through a completed administrative processing of the Charge. The MHRA actually requires the MCHR to issue a right-to-sue notice even though “the commission has not completed its administrative processing” where the complainant requests such a notice in writing 180 days or more after filing a charge. Mo. Rev. Stat. § 213.111.1. Furthermore, as this Court has stated, “[t]he commission has very limited resources and must determine which few cases to investigate thoroughly in order to proceed with its own hearing and determination of the claims. The other option is for the claims to be litigated – as Igoe’s were – after the commission had issued a letter giving notice of his right to sue.” Igoe v. Dep’t of Labor and Indus. Relations, 152 S.W.3d 284, 287 (Mo. banc 2005). This Court further stated the MCHR can issue a right-to-sue letter “*sua*

*sponte* at any time within the statute of limitations period, without completing an investigation.” Id.

Moreover, Appellant’s argument that the MCHR rendered, pursuant to Mo Rev. Stat. § 213.085, a “final decision,” “finding,” “rule,” or “order which addressed or acknowledged the timeliness of Appellant’s Charge is meritless inasmuch as the MCHR simply issued a right-to-sue notice in this case that did not comment on the timeliness of Appellant’s claims. In this case, the Notice of Charge sent to Respondents clarifies the Charge was to be investigated by the EEOC. (LF 45 – Affidavit of Thomas O. McCarthy). On November 11, 2009, Appellant requested that the EEOC provide her with a Notice of Right to Sue. (LF 48 – Appellant’s letter to EEOC). On November 16, 2009, five days after Appellant’s request, the EEOC sent Appellant a “Notice of Right to Sue (Issued on Request).” (LF 49 – EEOC Notice of Right to Sue). The EEOC Notice of Right to Sue indicates the EEOC is terminating its processing of the Charge after having determined “it is unlikely the EEOC will be able to complete its administrative processing within 180 days from the filing of this charge.” (LF 49).

Further, Appellant’s own exhibit, her Notice of Right to Sue sent by the MCHR, clarifies MCHR’s limited involvement with the Charge was that: “The MCHR has been informed that the EEOC has completed their processing of your complaint and issued a notice of your right to sue. Therefore, the MCHR is also issuing a notice of your right sue based on the EEOC’s processing.” (LF 224 – MCHR Notice of Right to Sue). The undisputed evidence reflects Respondent Saint Francis was never even contacted by an MCHR investigator concerning Appellant’s Charge. (LF 46 – Affidavit of Thomas O.

McCarthy). Thus, the MCHR did not separately investigate the dually filed Charge or receive any arguments from the parties concerning the timeliness or merits of Appellant's MHRA claims. In fact, the EEOC did not even finalize its investigation. (LF 49).

Regardless, the facts in this case are completely different than those in Bresnahan v. May Dep't Stores Co., 726 S.W.2d 327 (Mo.banc 1987), which is cited to by Appellant in support of her argument that Respondent should have filed an appeal after the right-to-sue letter was issued. In Bresnahan, the employee was barred from relitigating the fact issue of whether she was attempting to remove an item from the store without permission, because the Labor and Industrial Relations Commission had previously made a specific finding on the issue after a hearing. Bresnahan, 726 S.W.2d at 330. In making this finding, the Missouri Supreme Court applied the collateral estoppel doctrine which provides that a party may not "relitigate the issues **raised** and **decided** adversely to her in the administrative proceeding" if the administrative proceedings satisfy the following four-pronged test: (1) the prior adjudication was identical with the issue presented in the present action; (2) the prior adjudication resulted in a judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and (4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. Id. at 330 (emphasis added). In this case, the collateral estoppel doctrine clearly does not apply where, *inter alia*, there can be no dispute that the MCHR never made any judgments on the merits and Respondents did not have a full and fair opportunity to litigate the issue of the timeliness of Appellant's Charge nor did the MCHR even conduct a hearing in this matter. *See*

Anheuser-Busch, Inc. v. MO Comm'n on Human Rights, 682 S.W.2d 828, 834 (Mo.App.E.D. 1984) (doctrine of collateral estoppel did not bar reversal of circuit court's judgment which affirmed in part and reversed in part order of MCHR where record did not indicate issue involved was ever decided before).

Likewise, Appellant's reliance on McCracken v. Wal-Mart Stores E., LP, 298 S.W.3d 473 (Mo.banc 2009) is misplaced as this Court did not interpret the MHRA in McCracken and the case involved steps necessary to preserve arguments at the trial court level rather than the agency level. There is no dispute that Respondents raised their timeliness defense at the first possible opportunity in the trial court.

In sum, Appellant's attempt to make creative arguments to excuse her untimely filing of a Charge of Discrimination does not change the fact that, pursuant to Missouri law, a court should dismiss a plaintiff's MHRA claims where the plaintiff has not filed a timely charge of discrimination. *See Daffron*, 874 S.W.2d at 484.

**D. In The Alternative, Count I Of Appellant's First Amended Petition Fails Because Respondents Are Not "Employers" As Defined By The MHRA.**

Even assuming falsely, but *arguendo*, that Appellant's MHRA claims satisfied the procedural prerequisites, judgment was properly entered in Respondents favor on Counts I-IV of Appellant's First Amended Petition for the additional reason that Respondents are not "employers" covered by the MHRA.

Count I (sexual harassment), Count II (retaliatory discrimination), Count III (retaliatory discharge), and Count IV (retaliatory discharge) of Appellant's First Amended Petition are all statutory claims brought pursuant to the MHRA. The definition

of “employer” within the MHRA: “does not include corporations and associations owned and operated by religious or sectarian groups.” Mo. Rev. Stat. § 213.010(7).

Missouri case law interpreting the MHRA’s definition of “employer” confirms that corporations and associations owned and operated by religious or sectarian groups are not “employers” subject to the MHRA. *See St. Louis Christian Home v. MO Comm’n on Human Rights*, 634 S.W.2d 508 (Mo.App.W.D. 1982). In this case, Saint Francis is not an “employer” as defined by the MHRA because Saint Francis is a corporation owned and operated by a religious or sectarian group.

The MCHR has repeatedly recognized it does not have jurisdiction over MHRA charges filed against Saint Francis on the grounds that Saint Francis is an organization “owned and operated by a religious or sectarian group,” and, thus, Saint Francis is not covered by the MHRA. (LF 52-56). In fact, in five letters issued by the MCHR before and after Appellant’s discharge, the MCHR has stated that the reason for the finding of no jurisdiction is: “based on the fact that this complaint was filed against an organization that is owned and operated by a religious or sectarian group, which are not covered by the Missouri Human Rights Act.” (LF 52-56).

Additionally, Saint Francis is exempt from Missouri’s Sales and Use Tax on Purchases and Sales pursuant to Mo. Rev. Stat. § 144.030.2(20). (LF 60). This exemption applies “to religious and charitable organizations and institutions in their religious, charitable or educational functions and activities.” Mo. Rev. Stat. § 144.030.2(19). The Internal Revenue Service has also determined that Saint Francis is exempt from federal income tax pursuant to 26 U.S.C. § 501(c)(3). (LF 61-64). The IRS

exemption applies to corporations “organized and operated exclusively for religious . . . purposes.” 26 U.S.C. § 501(c)(3).

Furthermore, Saint Francis’ Articles of Incorporation specify that Saint Francis “shall be operated as a Catholic Hospital and shall be a member of the Catholic Hospital Association.” (LF 67 - Article II(C) of Saint Francis’ Articles of Incorporation). The Articles of Incorporation also state the corporation “shall engage only in activities which qualify it for tax exemption under Section 501(c)(3) of the Internal Revenue Code of the United States and under all similar exceptions.” (LF 85 - Article III(E) of Articles of Incorporation as amended in 1991). Article V of the Articles of Incorporation, establishing a Board of Directors, specifically provides that all proposed members of the Board of Directors “shall be submitted to the then duly appointed and acting Bishop or Administrator of the Diocese of Springfield/Cape Girardeau . . .” (LF 86 - Article V of Articles of Incorporation as amended in 1991). Moreover, Article VII of the Articles of Incorporation clarifies that any amendment to the Articles must be approved by the “then duly appointed and acting Bishop or Administrator of the Diocese of Springfield/Cape Girardeau.” (LF 86 - Article VII of Articles of Incorporation as amended in 1991). Saint Francis has operated in accordance with its Articles of Incorporation during all times relevant to this lawsuit. (LF 58 – Affidavit of Teri Kreitzer).

The By-Laws of Saint Francis further establish that Saint Francis is owned and operated by a religious group. Article I, § 2 of the By-Laws state that Saint Francis is “sponsored by St. Francis Healthcare System, a Private Non-Collegial Juridic Person under the jurisdiction of the Bishop of the Diocese of Springfield-Cape Girardeau” which

“participates in the health care mission of the Roman Catholic Church.” (LF 90 - By-Laws, Article I, § 2). The By-Laws additionally reflect St. Francis:

“shall be managed and its corporate powers shall be exercised in accordance with the teachings and traditions of the Roman Catholic Church and the then existing Ethical and Religious Directives of the Roman Catholic Health Facilities approved by the National Conference of Catholic Bishops and promulgated by the Roman Catholic Bishop of the Diocese of Springfield/Cape Girardeau as they pertain to health care procedures and practices performed in the Medical Center.” (LF 91 – By-Laws, Article I, § 3).

The religious operation of Saint Francis is also reasserted by Article III, § 4 of the By-Laws which provides that the Sole Member, the Board of Directors, the President and Chief Executive Officer, the Medical Staff, and all other individuals associated with Saint Francis must “commit themselves to furthering the religious philosophy of the Roman Catholic Church, in the field of health care.” (LF 96 – By-Laws, Article III, § 4). At all times relevant to this lawsuit, Saint Francis has operated in accordance with its By-Laws. (LF 58 – Kreitzer Affidavit).

In St. Louis Christian Home, the Missouri Court of Appeals for the Western District concluded St. Louis Christian Home was exempt from coverage of the MHRA as a religious group under very similar circumstances. St. Louis Christian Home, 634 S.W.2d 508. *Inter alia*, in making its finding the Court relied on evidence that the St. Louis Christian Home was: (1) exempt from Missouri state sales and use tax and federal

income tax due to its religious status; (2) subject to designation of its officers, directors, and other functionaries by a religious group; and (3) its articles of incorporation and by-laws were subject to prior approval by a religious group. Id. at 511-13. Therefore, in light of the foregoing, it is clear Saint Francis is not an “employer” covered by the MHRA.

Appellant cites to 8 CSR 60-3.010(9) in support of an argument that the MHRA religious exemption does not apply to Saint Francis. However, Appellant cannot cite to any Missouri state court decisions validating and applying 8 CSR 60-3.010(9). Regulations such as 8 CSR 60-3.010(9), which are in conflict with the wording of a statute, fail. *See St. Louis Christian Home v. MO Comm’n on Human Rights*, 634 S.W.2d 508, 513 (Mo.App.W.D. 1982). Similarly, Plaintiff’s technical argument that the religious exemption does not apply to not-for-profit corporations because they do not have private “owners” is refuted by Missouri state and federal case law. In St. Louis Christian Home and the federal case cited by Plaintiff (Wirth v. Coll. of the Ozarks, 26 F.Supp.2d 1185, 1187 (W.D. Mo. 1998)),<sup>1</sup> the entities which were declared exempt from coverage of the MHRA under the religious exemption were not-for-profit corporations.

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<sup>1</sup> Respondents note Appellant cites to Wirth for the proposition that the “religious corporation” exception applies only where persons whose beliefs are consistent with those of the corporation are the only individuals employed. For this proposition, Wirth cites to language in Title VII’s “religious corporation” exception which is not present in the wording of the MHRA religious exemption. Wirth, 26 F.Supp.2d at 1187.

Furthermore, Plaintiff is attempting to establish MHRA individual liability against Dr. Strange as a person “directly acting in the interest of an employer.” Mo. Rev. Stat. § 213.010(7). However, because Saint Francis is not an “employer” under the MHRA, it clearly follows that Dr. Strange cannot be subject to liability under the MHRA as an individual allegedly acting directly in the interest of Saint Francis. Dr. Strange could only potentially be subject to individual liability under the MHRA if Saint Francis was an “employer” covered by the MHRA. *See Cooper v. Albacore Holdings, Inc.*, 204 S.W.3d 238, 244 (Mo.App.E.D. 2006).

**E. Respondents’ MHRA Arguments Were Properly Preserved With The Trial Court And Appellant Waived Any Contention To The Contrary.**

Finally, Appellant argued for the first time at the appellate level that the issue of whether Respondents fall within an MHRA statutory exemption must be raised as an affirmative defense before it is asserted in a motion. Because Appellant never raised this argument before the trial court, Appellant has waived any such argument. *See State ex rel. Nixon v. Am. Tobacco Co., Inc.*, 34 S.W.3d 122, 129 (Mo.banc 2001). Regardless, even assuming *agruendo*, but incorrectly, Appellant’s argument was properly before this Court, it is meritless. Appellant relies on *McCracken v. Wal-Mart Stores E., LP*, 298 S.W.3d 473 (Mo.banc 2009) in support of her contention it was improper for Respondents to assert an argument based on an MHRA statutory exemption prior to filing an answer raising the argument as an affirmative defense. However, *McCracken* did not involve any interpretation of the MHRA. More importantly, in *McCracken* the Court analyzed whether one of the defendant’s arguments was properly preserved because it

was not raised in the answer but rather in a motion to dismiss for lack of subject matter jurisdiction that was filed more than two years after the plaintiff had filed his lawsuit. McCracken, 298 S.W.3d at 476. In this case, there can be no dispute that Respondents preserved its argument that Respondents are not “employers” under the MHRA as it was raised at the first possible opportunity at the trial court level in Respondents Motion to Dismiss or, in the alternative, Motion for Summary Judgment and there has not even been an answer filed in this case. Similarly, to the extent Appellant is now also contending Respondents argument concerning the untimeliness of Appellant’s MHRA claims should have been raised as an affirmative defense, Appellant’s contention fails because it was not raised at the trial level and, regardless, Respondents’ untimeliness argument was raised at the first possible opportunity in the trial court.

## POINT II

**The Trial Court Erred In Granting Judgment Against Farrow On Count II Of Her Amended Petition Alleging Unlawful Retaliation In Violation Of The Missouri Human Rights Act, In That The Claim Was Properly Pled, Any Arguments Relating To The Pre-Filing Proceedings Before The Missouri Commission On Human Rights Were Not Raised Before The Agency And Were Not Properly Before The Agency And Were Not Properly Before The Court In Light Of J.C.W. Ex. Rel. Webb v. Wyciskalla And There Were, At A Minimum, Questions Of Fact Precluding Judgment As A Matter Of Law.**

**The Trial Court Did Not Err In Granting Summary Judgment  
In Favor Of Respondents On Count II (MHRA Retaliation) Of  
Appellant's First Amended Petition.**

**A. Count II Of Appellant's First Amended Petition Fails Because Appellant Failed To Satisfy The Prerequisites For Filing A Lawsuit Under The MHRA.**

In Count II of her First Amended Petition, Appellant alleges that, during her employment for Saint Francis, Respondents retaliated against her for opposing practices and conduct of Respondents which was prohibited by the MHRA. (LF 24-25). For all the reasons set forth above in sections A-C of Respondents' response to Appellant's Point I, Appellant's MHRA claim in Count II is time barred and, thus, the trial court did not err in granting judgment in favor of Respondents on this claim.

**B. In The Alternative, Count II Of Appellant's First Amended Petition Fails Because Respondents Are Not "Employers" As Defined By The MHRA.**

Even assuming falsely, but *arguendo*, that Appellant's Count II MHRA claim satisfied procedural prerequisites, Count II of Appellant's First Amended Petition still fails because, for all the reasons set forth above in section D of Respondents' response to Appellant's Point I, Saint Francis and Dr. Strange are not "employers" covered by the MHRA. Accordingly, for this alternative reason, the trial court did not err in granting judgment in favor of Respondents on Count II of Appellant's First Amended Petition.

**POINT III**

**The Trial Court Erred In Granting Judgment Against Farrow On Count III Of Her Amended Petition Alleging Retaliatory Discharge In Violation Of The Missouri**

**Human Rights Act In That The Claim Was Properly Pled, Any Arguments Relating To The Pre-Filing Proceedings Before The Missouri Commission On Human Rights Were Not Raised Before The Agency And Were Not Properly Before The Agency And Were Not Properly Before The Court In Light Of J.C.W. Ex. Rel. Webb v. Wyciskalla And There Were, At A Minimum, Questions Of Fact Precluding Judgment As A Matter Of Law.**

**The Trial Court Did Not Err In Granting Summary Judgment In Favor Of Respondents On Count III (MHRA Retaliatory Discharge) Of Appellant's First Amended Petition.**

**A. Count III Of Appellant's First Amended Petition Fails Because Appellant Failed To Satisfy The Prerequisites For Filing A Lawsuit Under The MHRA.**

In Count III of her First Amended Petition, Appellant alleges she was discharged for complaining about alleged sexual harassment on December 10, 2008. (LF 18, 25-26 - First Amended Petition, ¶¶ 64, 98-102). As indicated above, discharge is a discrete act. Nat'l R.R. Passenger Corp., 536 U.S. at 114; *see also* Thompson v. W-S Life Assurance Co., 82 S.W.3d 203, 208 (Mo.App.E.D. 2002); *and* Tisch, 368 S.W.3d at 253-54. Thus, Plaintiff's discharge on December 10, 2008 was a *discrete act* that triggered the start of the limitations period. Nat'l R.R. Passenger Corp., 536 U.S. at 110; *see also* Tisch, 368 S.W.3d at 254. There is no dispute in this case that Appellant did not file her Charge of Discrimination within 180 days of the date of her discharge. For this reason, as explained in more detail above in sections A-C of Respondents' response to Appellant's Point I,

Appellant's MHRA claim in Count III is time barred and, thus, the trial court did not err in granting judgment in favor of Respondents on this claim.

**B. In The Alternative, Count III Of Appellant's First Amended Petition Fails Because Respondents Are Not "Employers" As Defined By The MHRA.**

Even assuming falsely, but *arguendo*, that Appellant's Count III MHRA claim satisfied the procedural prerequisites, Count III of Appellant's First Amended Petition still fails because, for all the reasons set forth above in section D of Respondents' response to Appellant's Point I, Saint Francis and Dr. Strange are not "employers" covered by the MHRA. Accordingly, for this alternative reason, the trial court did not err in granting judgment in favor of Respondents on Count III of Appellant's First Amended Petition.

**POINT IV**

**The Trial Court Erred In Granting Judgment In Favor Of Respondents On Farrow's Separate Public Policy Exception Wrongful Discharge Claim (Count V In Her First Amended Petition), In That (A) Respondents Had Moved To Dismiss The Count, Not For Summary Judgment (B) Such Claim Was Properly Pled And Stated A Claim, (C) Even If The Motion Was Viewed As One For Summary Judgment, The Record Established There Were At Least Questions Of Material Fact On All Elements Which Would Preclude The Grant Of Summary Judgment At This Early Juncture And (D) Farrow Was Entitled To Leave To Amend Her Claim In Any Event.**

**The Trial Court Did Not Err In Granting Judgment In Favor Of  
Respondents On Appellant's Wrongful Discharge Claim.**

**A. Scope of Review.**

Under Missouri's public policy exception to the at-will employment doctrine, an at-will employee may not be terminated for: (1) refusing to violate the law or any well-established and clear mandate of public policy as expressed in the constitution, statutes, regulations promulgated pursuant to statute, or rules created by a governmental body; or (2) reporting wrongdoing or violations of law to superiors or third parties. Fleshner v. Pepose Vision Institute, P.C., 304 S.W.3d 81, 92 (Mo. banc 2010); *see also* Margiotta v. Christian Hosp. Northeast Northwest, 315 S.W.3d 342, 346 (Mo. banc 2010). The public policy exception to the at-will employment doctrine is very narrowly drawn. Margiotta, 315 S.W.3d at 346. The mere citation of a constitutional or statutory provision in a pleading is not by itself sufficient to state a cause of action for retaliatory discharge, the plaintiff must demonstrate that the public policy mandated by the cited provision is violated by the discharge. Margiotta, 315 S.W.3d at 347. The specific facts on which liability is based must be pleaded with particularity where the defendant's actions fall within a category generally not considered actionable such as discharge of an at-will employee. Sivigliano v. Harrah's North Kansas City Corp., 188 S.W.3d 46, 49 (Mo.App.W.D. 2006); Adolphsen v. Hallmark Cards, 907 S.W.2d 333, 338 (Mo.App.W.D. 1995).

**B. Appellant Has Failed To Plead A Wrongful Discharge Claim Based On The Nursing Practice Act With The Required Particularity.**

In Count V of the First Amended Petition, Appellant asserts a common law wrongful discharge claim premised on the Nursing Practice Act (“NPA”) against Respondents. Appellant cites to Kirk v. Mercy Hosp. Tri-County, 851 S.W.2d 617 (Mo.App.S.D. 1993) for the contention that she can simply cite generally to the NPA to establish a common law wrongful discharge claim. However, any such argument ignores controlling case law as this Court stated in 2010 that:

“a wrongful discharge action must be based on a constitutional provision, a statute, a regulation based on a statute or a rule promulgated by a governmental body. Absent such explicit authority, the wrongful discharge action fails as a matter of law. Moreover, not every statute or regulation gives rise to an at-will wrongful termination action. A vague or general statute, regulation, or rule cannot be successfully pled under the at-will wrongful termination theory, because it would force the court to decide on its own what public policy requires. Such vagueness would also cause ‘the duties imposed upon employers to become more vague’ and create difficulties ‘for employers to plan around liability based on the vagaries of judges.’” Margiotta, 315 S.W.3d. at 346.

Margiotta further states that “[f]or Margiotta to prevail, he must show that he ‘reported to superiors or to public authorities serious misconduct that constitutes a violation of the law and of . . . well established and clearly mandated public policy.’” Id.

at 347. In fact, Kirk was only cited in the *dissenting* opinion in Margiotta in support of an argument that the principal opinion's interpretation of the public policy exception to the at-will doctrine is too narrow and that plaintiffs should be able to rely on a statutory or regulatory "scheme." *See Id.* at 349. Thus, any argument that a plaintiff can still rely on vague statutory schemes or policies, rather than sufficiently specific statutes or regulations, to support a public policy wrongful discharge claim flies in the face of the clear language of this Court's Margiotta opinion.

For purposes of Respondents' Motion at the trial court level, Respondents accepted as true Appellant's allegations in the First Amended Petition concerning her wrongful discharge claim. In the First Amended Petition, Appellant alleges she "refused to go along with the practice of removing trained nurses from the insertion of PICC lines . . . and complained to supervisors about Defendants efforts with respect to the program in order to comply with the policies established by the NPA and related regulations described above." (LF 30 - First Amended Petition, § 117). In support of this allegation, Appellant's First Amended Petition merely cites to vague general policies which are allegedly embodied within the Nursing Practice Act and the regulations enacted thereunder. For example, Appellant states that 4 CSR 200-2.010(1)(A).1 "emphasizes the policy of promoting safe practices." (LF 29-30 - First Amended Petition, § 116); *see Margiotta*, 315 S.W.3d. at 348 (finding the plaintiff's wrongful discharge claim failed inasmuch as, *inter alia*, the federal regulation cited by the plaintiff, stating "[t]he patient has the right to receive care in a safe setting," was too vague too support a wrongful discharge action). Thus, pursuant to Margiotta, the general policies of the NPA relied

upon by Plaintiff are clearly too vague to support a public policy wrongful discharge claim.

In this case, Plaintiff's First Amended Petition sets forth absolutely no allegation that demonstrate her removal from a nursing PICC line program and the disbanding of the PICC program violates a sufficiently definite portion of the NPA or a sufficiently definite regulation enacted thereunder. Margiotta, 315 S.W.3d. 342, 348 (finding plaintiff's mere citation to a Missouri Department of Health and Senior Services regulation without a demonstration of how the reported conduct violated the regulation cannot form the basis for a wrongful discharge claim). Appellant simply does not sufficiently plead the alleged decision made by Saint Francis to have physician assistants rather than nurses insert PICC lines violates a specific provision of a statute or regulation or even violates the public policy reflected by any such specific statute or regulation. Instead, Appellant asserts in her First Amended Petition that she "had a very strong sense of pride" in the PICC line program she allegedly had a role in establishing and did not like the alleged decision made to remove her from PICC line duties. (LF 10, 13 - First Amended Petition, ¶¶ 21, 40(a)). However, Margiotta establishes that, in general, "there is no whistleblowing protection for an employee who merely disagrees personally with an employer's legally-allowed policy." Margiotta, 315 S.W.3d at 347. Appellant's argument that her First Amended Petition nonetheless sets forth a valid wrongful discharge claim would lead to a scenario in which any nurse who disagrees with a decision made by her employer would have a valid wrongful discharge claim simply by citing to the NPA. This is exactly the type of vague claim prevented by Margiotta.

Thus, Appellant clearly failed to state an actionable wrongful discharge claim in her First Amended Petition and the trial court's decision to grant judgment in Respondents favor on this claim should be upheld.

**C. Appellant's Attempt To Rely On Mo. Rev. Stat. § 335.017 and Mo. Rev. Stat. § 334.735, et seq. Is Waived And Meritless.**

On appeal, Appellant cited to Mo. Rev. Stat. § 335.017 and Mo Rev. Stat. § 334.735, *et seq.* for the first time in support of her wrongful discharge claim. Mo Rev. Stat. § 335.017 and Mo Rev. Stat. § 334.735, *et seq.* were not referenced in Appellant's First Amended Petition nor were the statutes even referenced in Appellant's briefs submitted at the trial court level in response to Respondents' Motion. As a result, Appellant has waived any argument relying on Mo. Rev. Stat. § 335.017 and Mo Rev. Stat. § 334.735, *et seq.* See State ex rel. Nixon v. Am. Tobacco Co., Inc., 34 S.W.3d 122, 129 (Mo.banc 2001) (“[a]n issue that was never presented to or decided by the trial court is not preserved for appellate review.”).

Regardless, even assuming *agruendo*, but incorrectly, Mo. Rev. Stat. § 335.017 and Mo Rev. Stat. § 334.735, *et seq.* were properly before this Court they do not support a wrongful discharge claim. Mo. Rev. Stat. § 335.017 indicates “licensed practical nurses” who have been instructed and trained may administer intravenous fluid and that nothing in the statute prohibits the administering of intravenous fluid by “registered professional nurses.” However, the statute is specifically focused on the activities that “nurses” can perform. Appellant asserted in a supplemental affidavit attached to her sur-reply at the trial court level that Respondents allowed Chuck Barwick, a radiologist

physician assistant, to perform the PICC line procedure which had previously been performed by Appellant. (LF 325 – Supplemental Affidavit of Appellant). However, Mo. Rev. Stat. § 335.017 does not specify any professions, including physician assistants, which are prohibited from administering intravenous fluid. Rather, the NPA focuses specifically on what tasks nurses must be licensed to perform. Moreover, the Missouri statutes, Mo. Rev. Stat. § 334.735, *et seq.*, which pertain specifically to physician assistants do not prohibit physician assistants from administering intravenous fluid. Furthermore, as indicated above, Appellant does not allege anywhere in her First Amended Petition that performance of a PICC line procedure by a physician assistant violates the NPA or any other Missouri statutes or regulations.

**D. Appellant Cannot Establish A Valid Wrongful Discharge Claim Against Dr. Strange As An Individual.**

The common law wrongful discharge claim was asserted against only Saint Francis in the Original Petition, but Dr. Strange was added as a defendant to the claim in the First Amended Petition. No Missouri cases extend liability in wrongful discharge cases to individuals. *See Irvine v. City of Pleasant Valley, MO*, 2010 WL 1611030, \*3 (W.D.Mo.) (granting motion to dismiss common law wrongful discharge claim as to individual defendants). Additionally, several states which have directly addressed the issue have found that an individual cannot be held personally liable for common law wrongful discharge. *See Physio, Ltd. v. Naifeh*, 306 S.W.3d 886 (Tex.App. 2010); *Miklosy v. Regents Univ. of Cal.*, 44 Cal.4<sup>th</sup> 876 (Cal. 2008); *Buckner v. Atl. Plant Maint., Inc.*, 182 Ill.2d 12 (Ill. 1998); *Schram v. Albertson's, Inc.*, 146 Or.App. 415 (Or.

Ct. App. 1997). As these cases have stated, employees and agents of an employer cannot, in their personal capacity, wrongfully discharge an employee because only the employer has the power to hire and fire and supervisors merely exercise that power on the employer's behalf. Physio, 306 S.W.3d at 888-89.

Additionally, Plaintiff does not allege that an employee-employer relationship existed between her and Dr. Strange. “[T]o be liable in an action for wrongful discharge, an employee-employer relationship must exist between plaintiff and each named defendant, unless there is statutory authority establishing individual liability.” Brooks v. City of Sugar Creek, 340 S.W.3d 201, 213 (Mo.App.W.D. 2011), *citing* Hill v. Ford Motor Co., 277 S.W.3d 659, 699 (Mo. banc 2009). Furthermore, there is not even an allegation that Dr. Strange informed Appellant she was discharged nor is there an allegation that he was involved in the final decision to discharge Appellant. At the trial court and appellate level, Appellant has not attempted to refute Dr. Strange's position that Appellant's potentially inadvertent addition of him as a defendant on the wrongful discharge claim is not permissible under the law. Thus, for this additional reason, the trial court did not err in entering judgment in favor of Dr. Strange on Count V.

#### POINT V

**The Trial Court Erred In Granting Judgment Against Farrow On Count IV Of Her First Amended Petition Alleging Separate Discrimination And Retaliation In The Post-Discharge Internal Appeal Process In That Respondents Had Only Moved To Dismiss The Same For Failure To State A Claim, Discrimination By An Employer In Its Internal Post-Termination Appeal Process Is Actionable Under The Missouri**

**Human Rights Act, The Right To Sue Letter Issued By The MCHR Was Legally Sufficient To Include Such Claim, The Claim Was Properly Pled, And The Record Established Questions Of Fact On All Elements Precluding Summary Judgment In Any Event.**

**The Trial Court Did Not Err In Granting Summary Judgment In Favor Of Respondents On Count IV (MHRA Retaliatory Discharge) Of Appellant's First Amended Petition.**

**A. Appellant Failed To Exhaust Her Administrative Remedies As To Count IV Because Plaintiff Failed To File A Charge Of Discrimination Regarding The Denial Of Her Grievance.**

In a desperate attempt to avoid a determination that all of her MHRA claims are time barred, Appellant asserted a new MHRA retaliatory discharge claim (Count IV) in her First Amended Petition which alleges she was discriminated and/or retaliated against after her discharge when Saint Francis allegedly failed and refused to objectively and properly consider her internal appeal/grievance of her discharge. This claim was not present in the Original Petition filed by Appellant, but was only asserted in the First Amended Petition after Respondent had already filed a Motion to Dismiss, or, in the alternative, Motion for Summary Judgment asserting all MHRA claims based on events occurring on or before Appellant's discharge are time barred. For the following reasons, Appellant failed to exhaust her administrative remedies as to Count IV.

In deciding a case under the MHRA, appellate courts are guided by both Missouri and federal employment discrimination case law that is consistent with Missouri law. Alhalabi, 300 S.W.3d at 524.

The MHRA requires that a plaintiff exhaust all of her administrative remedies by before filing a lawsuit. Reed v. McDonald's Corp., 363 S.W.3d 134, 143 (Mo.App.E.D. 2012). Exhaustion of administrative remedies requires a claimant to give notice of all claims of discrimination in the administrative complaint. Id.; *see also* Alhalabi, 300 S.W.3d at 525. Administrative remedies are deemed exhausted as to all incidents of discrimination that are like or reasonably related to the allegations in the charge filed with the MCHR. Reed, 363 S.W.3d at 143. The breadth of the civil suit may be as broad as the scope of any investigation that reasonably could have been expected to result from the charge of discrimination. Id. at 143-144. However, there is a difference between liberally reading a claim which lacks specificity and inventing a claim which simply was not made. Gates v. City of Lebanon, 585 F.Supp.2d 1096, 1099 (W.D.Mo. 2008). Allowing complaints beyond the Charge would both deprive the charged party of notice of the allegations against it and circumscribe the agency's investigatory role. Nichols v. ABB DE, Inc., 324 F.Supp.2d 1036, 1046 (E.D.Mo. 2004) (holding plaintiff failed to exhaust administrative remedies as to his MHRA retaliation claim where he did not mention the alleged retaliation in the charge).

In this case, Appellant limited the scope of her Charge of Discrimination to events ending with her December 2008 discharge. (LF 44). There is absolutely no mention of any alleged post-discharge discrimination/retaliation, nor is there any reference to

Appellant's utilization of the post-discharge grievance procedure in her Charge of Discrimination. Instead, as indicated above, her separate claim of alleged post-discharge discrimination/retaliation was not made until Appellant filed her First Amended Petition on August 31, 2010.

Appellant cannot recover for the alleged post-discharge retaliatory conduct as she did not mention it in the charge. *See Reed*, 363 S.W.3d at 144 (holding plaintiff failed to exhaust administrative remedies as to her constructive discharge claim where she failed to include any facts reasonably related to the claim in her charge); *see also Stuart v. Gen. Motors Corp.*, 217 F.3d 621, 631 (8<sup>th</sup> Cir. 2000) (employee failed to exhaust MCHR and EEOC administrative remedies prior to bringing claim of retaliation by discipline where retaliation by discipline was not reasonably related to the retaliation by termination alleged in the charge and the retaliation by discipline was not specifically mentioned or even alluded to in the charge). Furthermore, Appellant's contention that she mentioned the post-discharge grievance to the EEOC investigator prior to signing the Charge is irrelevant. *See Russell v. TG MO Corp.*, 340 F.3d 735, 747 (8<sup>th</sup> Cir. 2003) (information in "initial complainant interview" submitted to MCHR was irrelevant to whether the plaintiff exhausted her administrative remedies as it was not part of the charge).<sup>2</sup> As indicated by the aforementioned case law, exhaustion of administrative remedies requires

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<sup>2</sup> Curiously, Appellant did not include any EEOC intake questionnaire as evidence despite her unsupported contention she alerted the EEOC of her post-discharge grievance prior to signing the Charge.

a claimant to give notice of all claims of discrimination “in the administrative complaint.” Alhalabi, 300 S.W.3d at 525; *see also* Reed, 363 S.W.3d at 143.

Further, Appellant’s post-discharge retaliation claim premised on the grievance of her discharge is not like or reasonably related to the allegations in her Charge. The allegations in the Charge exclusively relate to events that occurred on or before the date of Appellant’s discharge. There can be no reasonable contention Respondents should have been aware that an agency investigation may also cover a claim premised on the denial of Appellant’s post-discharge grievance. There is no mention of the post-discharge grievance or the Saint Francis grievance process within the Charge. Additionally, the alleged “date(s) discrimination took place” that are listed on the Charge do not extend beyond the date of Appellant’s discharge.

For the foregoing reasons, Appellant failed to exhaust her administrative remedies as to a claim of post-discharge discrimination/retaliation and, for this additional reason, the trial court did not err in granting judgment in Respondents favor on Count IV.

**B. Additionally, Count IV Of Appellant’s First Amended Petition Fails To State A Valid MHRA Claim.**

Even assuming *arguendo*, but incorrectly, Appellant satisfied the procedural requirements for filing her Count IV retaliatory discharge claim, she has clearly failed to state a valid claim. As conceded by Appellant in her Substitute Brief, the title of Appellant’s Count IV claim is confusing at best inasmuch as Appellant is attempting to assert an MHRA “retaliatory discharge” claim based on events that occurred after her discharge. In particular, Appellant premises her Count IV retaliatory discharge claim on

an allegation that Saint Francis discriminated against her after the December 10, 2008 discharge by failing to provide her with a meaningful review of her discharge. (LF 26, 27 - First Amended Petition, ¶¶ 104-05).

To the extent Appellant is attempting to assert in Count IV that discrimination occurred after her December 10, 2008 discharge, such a claim is meritless inasmuch as Missouri case law states in order for continual employment discrimination to be established, it must be found a continued employment relationship existed, and if the employment relationship be severed by discharge, any alleged employment discrimination ceases to exist. MO Pac. R.R. Co., 606 S.W.2d at 501; *see also* Conner v. Reckitt & Colman, Inc., 84 F.3d 1100, 1102 (8<sup>th</sup> Cir. 1996) (employer cannot continue to discriminate against an employee when it no longer employs her). Plaintiff was discharged on December 10, 2008 and there is no allegation or evidence she was ever re-hired after said discharge. (LF 18 - First Amended Petition, ¶ 64; LF 195).

Additionally, Appellant does not cite any Missouri case law which extends MHRA retaliation protection to claims based on denial of a post-discharge grievance. In fact, as stated by the U.S. Supreme Court, providing a person the ability to file a grievance “does not suggest the earlier decision was in any respect tentative. The grievance procedure, by its nature, is a *remedy* for a prior decision.” DE State Coll. v. Ricks, 449 U.S. 250, 261 (1980). The remedies provided by a grievance procedure are independent of those provided by anti-discrimination statutes. Gray v. Int’l Tel. and Tel. Corp., 428 F. Supp. 199 (E.D. Mo. 1977).

In this case, Appellant essentially attempts to assert an MHRA claim based on her failure to receive the remedy she requested in her post-discharge grievance. Appellant's unsuccessful use of the Saint Francis grievance procedure does not give rise to a new claim of MHRA retaliation. To hold otherwise would discourage employers from providing disgruntled former employees with the ability to file grievances after a discharge. The employer would be concerned that if it denied a grievance it could give rise to a new claim of retaliation in addition to any potential claim of discrimination/retaliation related to the actual discharge.

Therefore, the trial court did not err in granting judgment in Respondents favor on Count IV.

**C. In The Alternative, Count IV Of Appellant's First Amended Petition Fails Because Respondents Are Not "Employers" As Defined By The MHRA.**

Count IV of Appellant's First Amended Petition also fails because, for all the reasons set forth above in section D of Respondents' response to Appellant's Point I, Saint Francis and Dr. Strange are not "employers" covered by the MHRA. Accordingly, for this alternative reason, the trial court did not err in granting judgment in favor of Respondents on Count IV.

**POINT VI**

**Assuming Arguendo That The Question Of The Timeliness Of Farrow's Presentation Of Her Claim To The MCHR Was A Matter For The Court To Generally Consider, It Would Still Have Been Error For The Trial Court To Enter Judgment Against Farrow On Counts I-IV Of Her Amended Petition In That**

**Questions Of Material Fact Would Have Still Existed As To Whether Farrow's Filing With The Agency Was Timely And, If It Were Not Timely For Any Reason, Whether Respondents Were Estopped From Raising, Had Waived Any Right To Waive, Or Were Otherwise Equitably Precluded From Raising Any Infirmity That Might Exist.**

**The Trial Court Did Not Err In Granting Summary Judgment In Favor Of Respondents On Counts I-IV Of Appellant's First Amended Petition Inasmuch as Appellant's Contentions That Equitable Defenses Preserve Her Claims Are Without Merit.**

Appellant cites to Webb for the proposition that, because pre-filing conditions are not jurisdictional, Appellant can now assert equitable defenses, including tolling, even where her claims are untimely. Respondents have never disputed that the MHRA 180-day time limitation is subject to equitable exceptions. However, as indicated by the below legal analysis, an equitable exception simply does not apply to this particular case.

**A. The Continuing Violation Doctrine Asserted By Appellant Does Not Convert Appellant's Untimely Claims Raised In Counts I-III Of The First Amended Petition To Timely Claims.**

As indicated in response to Point I above, there can be no dispute that Counts I-III of Appellant's First Amended Petition are untimely inasmuch as these counts relate to events occurring on or before Appellant's December 10, 2008 discharge yet Appellant filed her Charge of Discrimination more than 180 days after her discharge. Appellant cannot use the continuing violation doctrine to convert her untimely claims set forth in

Counts I-III of Appellant's First Amended Petition to timely claims. Appellant's attempt to rely on cases in which the continuing violation theory was applied to a sequence of harassment during employment is meritless. None of the cases cited by Appellant supports her attempt to apply the continuing violation doctrine to a discrete allegedly retaliatory act, denial of her grievance, which occurred subsequent to discharge. See Tisch, 368 S.W.3d at 255 (“[D]iscrete acts that fall within the statutory time period do not make timely acts that fall outside the time period.”). Furthermore, Appellant cannot save her discrimination and harassment claims via alleged acts of discrimination and retaliation that allegedly occurred after her discharge, because, as indicate above, Missouri case law states that in order for continual employment discrimination to be established, it must be found a continued employment relationship existed, and if the employment relationship be severed by discharge, any alleged employment discrimination ceases to exist. See MO Pac. R.R. Co., 606 S.W.2d at 501.

Moreover, in Hammond v. Mun. Corr. Inst., the Missouri Court of Appeals for the Western District stated: “a ‘continuing violation’ would provide no way around the limitations period. A ‘continuing violation’ allows a plaintiff to plead events that occurred prior to the 180 day statute of limitations for filing a claim of discrimination with the MCHR. It allows the plaintiff to recover only for discrimination that occurred within the statutory period. The continuing violation theory only allows earlier events to be used to support the current claims of discrimination.” Id., 117 S.W.3d 130, 137-38 (Mo.App.W.D. 2003). Thus, even assuming *arguendo*, but incorrectly, Appellant made a successful continuing violation doctrine argument, it would just potentially allow

Appellant to use certain evidence of pre-discharge discrimination/harassment/retaliation to support the post-discharge claim asserted in Count IV (assuming *arguendo*, but incorrectly, Appellant had actually stated an actionable MHRA claim in Count IV).

**B. Appellant's Evidence Does Not Support Her Argument That Saint Francis Took Affirmative Steps To Delay Appellant's Filing Of A Charge Of Discrimination.**

“The essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts.” Etheridge v. TierOne Bank, 226 S.W.3d 127, 133 (Mo. banc 2007). The doctrine of equitable estoppel is not a favorite of the law and can only be used when each element clearly appears, and the burden of proof is upon the party asserting it to establish the essential facts by clear and satisfactory evidence. Farmland Industries, Inc. v. Bittner, 920 S.W.2d 581, 583 (Mo.App.W.D. 1996).

Appellant's assertion that Respondents took affirmative steps which they understood would prevent Appellant from filing a timely Charge of Discrimination by providing delayed responses after she filed her post-discharge grievance is meritless as it is simply not supported by the record. Appellant's own exhibits, which were attached to her Statement of Additional Material Facts That Remain in Dispute, establish Appellant:

(1) filed a grievance five days after her discharge through the appropriate channel; (2) received a response within three days to each of the first four steps she initiated in the grievance process; and (3) received a response within thirteen days of initiating the fifth and final step in the grievance process. [LF 214-223]. Saint Francis' final response was issued March 2, 2009, only 83 days after Appellant's December 10, 2008 termination. [LF 223]. This left Appellant with almost 100 additional days to file a timely Charge of Discrimination even if she wanted to wait until after the grievance was completely processed to file a Charge. Instead, Appellant inexplicably did not file her Charge until July 27, 2009.

As indicated by the Court of Appeals for the Eastern District of Missouri, the record does not support a contention that Respondents made a false representation or engaged in concealment of material facts. Likewise, there is no evidence the Respondents engaged in conduct calculated to convey the impression the facts were otherwise than, and inconsistent with, those which Respondents subsequently attempted to assert. There is not even an allegation or evidence that Appellant informed Respondents during the grievance process that she intended to file a Charge of Discrimination.

Further, as indicated below in Respondents' response to Point VII, the grievance procedure provides remedies independent of those provided by anti-discrimination statutes and there is nothing which prevents an individual from filing a Charge of Discrimination during a pending grievance. *See Int'l Union of Elec., Radio & Mach. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976); *and Ricks*, 449 U.S. at 261.

Thus, even assuming *arguendo*, but incorrectly, Respondents provided delayed grievance responses, it would be meritless to argue Respondents had knowledge that such actions would delay Appellant's filing of a Charge of Discrimination where case law dating back to the 1970s has clarified that an individual can file a Charge during the pendency of a post-discharge grievance. "[O]ne cannot set up another's act or conduct as the ground of an estoppel when he knew or had the same means of knowledge as the other to the truth." Farmland Industries, Inc., 920 S.W.2d at 583.

#### POINT VII

**Assuming Arguendo That The Question Of The Timeliness Of Farrow's Presentation Of Her Claim To The MCHR Was A Matter For The Court To Generally Consider Even Though It Had Not Been Presented To The Agency, That Respondents Had Not Waived And Were Not Estopped Or Equitably Precluded From Raising Such Arguments, And It Was Determined That Farrow Had Not Timely Presented Her Claim To The Agency, The Trial Court Would Still Have Erred In Entering Judgment Against Farrow On Counts I, II, III And IV Of Her Amended Petition In That The Missouri Public Policy Of Encouraging Resort To Internal Appeal Procedures Before Turning To State Agencies Or Courts Would Militate In Favor Of A Rule Of Law Tolling The Time Period For Reporting Discrimination To The MHCR Until After Any Employer-Provided Internal Appeal Procedure Had Been Completed.**

**The Trial Court Did Not Err In Granting Summary Judgment  
In Favor Of Respondents On Counts I-IV Of Appellant's First**

**Amended Petition Inasmuch as Appellant's Contentions That  
Equitable Defenses Preserve Her Claims Are Without Merit.**

**Appellant's Use of Saint Francis' Internal Grievance Process Subsequent To Her  
Discharge Did Not Toll The Running Of The Statutory Time Limitations For Filing  
a Charge Of Discrimination.**

In St. Louis-San Francisco Railway Co. v. Mayor's Comm'n on Human Rights And Cmty. Relations of the City of Springfield, 572 S.W.2d 492 (Mo.App.S.D. 1978), the Missouri Court of Appeals for the Southern District found the requirement for filing a discrimination complaint under the Springfield ordinance at issue "was not tolled during the pendency of the unsuccessful grievance the former employee filed." St. Louis-San Francis 572 S.W.2d at 493 (emphasis added). The U.S. Supreme Court has also held that the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations period for filing a Charge of Discrimination. Ricks, 449 U.S. at 261, *citing* Int'l Union of Elec., Radio & Mach. Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976). In Ricks, the U.S. Supreme Court found the limitations period for filing a Charge of Discrimination with the EEOC began to run by the date on which the college board made it clear to the plaintiff that his tenure bid had been rejected and the limitations period was not subsequently tolled when the plaintiff filed a grievance complaining of the tenure decision. Id. at 261-62.

Similarly, in this case, the time period for filing Appellant's Charge was not tolled during her use of Saint Francis' grievance process subsequent to her discharge.

Appellant does not and cannot cite to any Missouri state or federal case which finds the filing of an internal grievance tolls the running of the limitations period for filing a Charge of Discrimination. Instead, Appellant argues the aforementioned case law should be revisited in light of Webb (a case that did not involve employment discrimination claims) without any legitimate explanation as to why Webb requires such a response from this Court. There is absolutely no provision in the MHRA which prevented Appellant from filing her Charge of Discrimination during the time she was allegedly utilizing the grievance process. Rather, the remedies provided by a grievance procedure are independent of those provided by anti-discrimination statutes. Gray v. Int'l Tel. & Tel. Corp., 428 F. Supp. 199 (E.D. Mo. 1977). The decisions discussed above in St. Louis-San Francis Railway Co., Ricks, and Int'l Union of Elec., Radio & Mach. Workers are clearly logical and reasonable when taking into consideration the fact that the use of a grievance procedure does not prevent an individual from at any time seeking independent, additional remedies under the MHRA or Title VII.

#### **POINT VIII**

**The Trial Court Erred In Granting Motion For Judgment In Favor Of Strange On Farrow's Defamation Claim (Count VI In Her First Amended Petition), In That (A) Strange Had Moved To Dismiss The Count, Not For Summary Judgment (B) Such Claim Was Properly Pled And Stated A Claim, And (C) Even If The Motion Was Viewed As One For Summary Judgment, The Record Established There Were At Least Questions Of Material Fact On All Elements Which Would Preclude The Grant Of Summary Judgment At This Early Juncture.**

**The Trial Court Did Not Err In Granting Judgment In Favor Of  
Dr. Strange On Appellant's Defamation Claim.**

**A. A Two-Year Statute Of Limitation Applies To Defamation Claims.**

Defamation claims of libel and slander are subject to a two-year statute of limitations. Mo. Rev. Stat. § 516.140; Sullivan v. Pulitzer Broad. Co., 709 S.W.2d 475, 476 (Mo.banc 1986).

**B. Appellant's Defamation Claim Is Barred By The Two-Year Statute of Limitations.**

For purposes of Respondents' Motion at the trial court level, Respondents accepted as true Appellant's allegations in the First Amended Petition concerning her defamation claim. Appellant's defamation claim is asserted against only Dr. Strange. Appellant premises her defamation claim on the allegedly false statements of Dr. Strange that Plaintiff was not writing up the activity of the day on the board when required, was not following orders out, and had altered doctor's orders and ignored instructions. (LF 12, 13, 31 - First Amended Petition, ¶¶ 38, 125). Appellant alleges Dr. Strange made these statements in retaliation for "her rebuff of his unwanted advances." (LF 12, 13 - First Amended Petition, ¶ 38). Appellant's First Amended Petition alleges that on **October 16, 2006**, she placed documentation into her personnel file concerning these "retaliatory acts of Dr. Strange," which include the allegedly defamatory statements about Appellant. (LF 14 - First Amended Petition, ¶ 43 (emphasis added)). Appellant's First Amended Petition further alleges that, after the transfer from her area of primary responsibility at Saint Francis, "[s]till concerned for her job, worried about continued

retaliation, and suffering from anxiety and insomnia, [Appellant] placed additional documentation into her personnel file in **January, 2007** regarding the prior actions of Defendants.” (LF 15 - First Amended Petition, ¶ 46 (emphasis added)). However, Appellant did not file the instant lawsuit until **March 18, 2010**, more than three years after having placed documentation into her personnel file concerning the allegedly defamatory statements of Dr. Strange.

Mo. Rev. Stat. § 516.100 provides that the defamation cause of action “shall not be deemed to accrue when the wrong is done or the technical breach occurs, but when the damage resulting therefrom is sustained and capable of ascertainment . . . .” Case law interpreting Mo. Rev. Stat. § 516.100 establishes that “[d]amages are ascertained when the fact of damage appears, **not when the extent or the amount of the damage is determined.**” Thurston v. Ballinger, 884 S.W.2d 22, 26 (Mo.App.W.D. 1994) (emphasis added); Kennedy v. Microsurgery and Brain Research Inst., 18 S.W.3d 39, 42 (Mo.App.E.D. 2000). The statute of limitations begins to run when the evidence was such to place a reasonably prudent person on notice of a potentially actionable injury. Powel v. Chaminade Coll. Preparatory, Inc., 197 S.W.3d 576, 582 (Mo. banc 2006).

In Thurston, the Court found the statute of limitations began to run on the plaintiff’s defamation claim after he “had learned of Ballinger’s false statements and had begun to suffer the loss of business.” Thurston, 884 S.W.2d at 26. Furthermore, in Jordan v. Greene, the Western District Court of Appeals held that the plaintiff had knowledge of the allegedly defamatory acts more than two years before bringing his defamation action, and thus, his claim was time barred. Jordan, 903 S.W.2d 252, 254-55

(Mo.App.W.D. 1995). Likewise, in this case, Appellant's First Amended Petition establishes Appellant filed her defamation claim more than two years after she learned of the allegedly defamatory statements made by Dr. Strange and had begun to suffer alleged damages.

Appellant cites to an allegation in her defamation claim asserting "[s]uch damages were imposed upon Madonna at least as late as the confirmation of her termination by St. Francis, and only became known and ascertainable at that time." (LF 32 - First Amended Petition, ¶ 131). This allegation was added to the First Amended Petition after Dr. Strange had already made the argument that Appellant's defamation claim is barred by the statute of limitations. Regardless, it is simply a legal conclusion which is not supported by the factual allegations and, thus, must be disregarded in determining whether the First Amended Petition states an actionable defamation claim. *See Berkowski*, 854 S.W.2d at 823; *and Schott*, 950 S.W.2d at 629. As indicated above, the specific allegations asserted in the First Amended Petition establish Appellant learned of the alleged defamatory statements and began to suffer alleged significant damages more than three years before filing the Original Petition. Appellant's allegations demonstrate a reasonably prudent person would have been placed on notice of a potential actionable injury more than three years prior to the filing of her Original Petition.

Therefore, Appellant's defamation claim is time barred by the applicable two-year statute of limitations and judgment in favor of Dr. Strange should be affirmed on this ground.

**POINT IX**

**The Trial Court Erred In Granting Strange’s Motion For Summary Judgment On Farrow’s False Light Invasion Of Privacy Claim (Count VII In Her First Amended Petition), In That (A) Strange Had Moved To Dismiss The Count, Not For Summary Judgment (B) Such Claim Was Properly Plead And Stated A Claim, And (C) Even If The Motion Was Viewed As One For Summary Judgment, The Record Established There Were At Least Questions Of Material Fact On All Elements Which Would Preclude The Grant Of Summary Judgment At This Early Juncture.**

**The Trial Court Did Not Err In Granting Summary Judgment  
In Favor Of Dr. Strange On Appellant’s False Light Invasion Of  
Privacy Claim.**

**A. Appellant Has Failed To State A Valid False Light Invasion Of Privacy Claim.**

For purposes of Respondents’ Motion at the trial court level, Respondents accepted as true Appellant’s allegations in the First Amended Petition concerning her false light invasion of privacy claim. Appellant’s false light invasion of privacy claim is asserted against only Dr. Strange.

The Missouri Supreme Court has never recognized the legal claim of false light invasion of privacy. *See Sullivan v. Pulitzer Broad. Co.*, 709 S.W.2d 475, 478 (Mo. banc 1986). The only Missouri Court of Appeals that has explicitly recognized the separate tort claim of false light invasion of privacy is the Eastern District in Meyerkord v. Zipatonia Co., 276 S.W.3d 319 (Mo.App.E.D. 2008). Appellant’s false light invasion of

privacy claim based on allegedly defamatory statements is completely different than the claim in Meyerkord in which a former employee sued her former employer for false light invasion of privacy because the employer used the employee's name to register a viral marketing website Internet domain without the employee's permission. In this case, it is beyond dispute Appellant is attempting to establish a separate false light invasion of privacy claim based upon the alleged untrue statements made about her by Dr. Strange. (LF 33 - First Amended Petition, ¶ 135).

The Missouri Supreme Court has made it clear that in cases that involve nothing more than the classic defamation action – one party alleges that the other published a false accusation concerning a statement of fact – a separate cause of action for false light invasion of privacy does not exist. Sullivan, 709 S.W.2d at 481 (claim that defendant aired five news broadcasts which purportedly related false information concerning plaintiff and that plaintiff was damaged thereby was a defamation claim); *see also* Nazeri v. MO Valley Coll., 860 S.W.2d 303, 317 (Mo. banc 1993) (plaintiff's false light invasion of privacy claim which was attempt to recover damages for allegedly untrue statements made to reporters about plaintiff was properly dismissed). Stated another way, an action alleging damages based upon untrue statements sounds in defamation, not invasion of privacy. Henry v. Taft Television & Radio Co., Inc., 774 S.W.2d 889, 892 (Mo.App.W.D. 1989) (trial court did not err in dismissing plaintiff's false light invasion of privacy claim where plaintiff's allegation that words used in a broadcast concerning her were untrue was a classic illustration of a defamation action); Shurn v. Monteleone, 769 S.W.2d 188, 191 (Mo.App.E.D. 1989) (trial court did not err in dismissing plaintiff's

invasion of privacy claim which was based upon child abuse report that allegedly contained false statements).

In this case, as indicated above, Appellant attempts to establish a separate false light invasion of privacy claim based upon the alleged untrue statements made about her by Dr. Strange. In particular, in an effort to establish a false light invasion of privacy claim, Appellant relies on the same alleged statements of Dr. Strange asserted in her defamation claim. (LF 33 - First Amended Petition, ¶ 135). Appellant's assertions in the Substitute Brief that she just wanted to be "left alone" are merely a desperate attempt to create a false light invasion of privacy claim where the alleged facts clearly do not support such a claim. Thus, Appellant has not asserted a valid separate false light invasion of privacy claim but, rather, the classic defamation action premised on allegedly false statements made about Appellant.

Moreover, Appellant's claim fails for the additional reason that in Meyerkord it was stated that the false light invasion of privacy tort applies only when the publicity given to the plaintiff has placed him in a false light before the public of a kind that would be "highly offensive to a reasonable person." Meyerkord v. Zipatonia Co., 276 S.W.3d at 323 (Mo.App.E.D. 2008). As indicated by the Missouri Court of Appeals for the Eastern District, Dr. Strange's alleged negative comments about Appellant's job performance based upon his personal knowledge and opinion do not rise to the level of seriousness required for the false light invasion of privacy tort contemplated in Meyerkord.

Therefore, for the foregoing reasons, Appellant has not alleged an actionable false light invasion of privacy claim and judgment in favor of Dr. Strange should be affirmed on this ground.

**B. Two-Year Statute Of Limitation Applies To False Light Invasion Of Privacy Claims.**

A number of courts that have recognized the false light claim or assumed the existence of the claim apply the statute of limitations for defamation actions. *See Sullivan*, 709 S.W.2d at 480, *citing Gashgai v. Lebowitz*, 703 F.2d 10 (1st Cir. 1983); *Wiener v. Superior Court*, 58 Cal.App.3d 525 (2<sup>nd</sup> Dist. 1976). Additionally, *in dicta*, the Missouri Supreme Court has explicitly stated: “It can be argued that if the defamation statute of limitations is not applied, such a statute will become meaningless because parties will invariably claim a “false light” invasion of privacy instead of defamation.” *Sullivan v. Pulitzer Broadcasting Co.*, 709 S.W.2d 475, 480 (Mo. banc. 1986).

Furthermore, applying Missouri law, the District Court for the Eastern District of Missouri has found that Missouri’s two-year statute of limitations applied to what the plaintiff attempted to classify as an invasion of privacy claim. *White v. Fawcett Publ’ns*, 324 F.Supp. 403, 407 (W.D. Mo. 1971). In so finding, the District Court stated that the inclusion of right of privacy claims within defamation claims cannot be used to avoid the two-year Missouri statute of limitations. *Id.* The District Court further stated that “Missouri Courts are not disposed to approve reclassification of a cause of action in order to avoid an otherwise applicable statute of limitation.” *Id.*

Similarly, in this case, Appellant should not be allowed to avoid the two-year statute of limitations for defamation claims simply by attempting to plead a separate but analogous claim of false light invasion of privacy. Therefore, applying the Missouri two-year statute of limitations to Appellant's false light invasion of privacy claims, Appellant's claim fails for the additional reason that it is time-barred for the same reasons Appellant's defamation claim is time-barred.

### POINT X

**The Trial Court Erred In Granting Summary Judgment In Favor Of Strange On Farrow's Tortious Interference With A Business Expectancy Claim (Count VIII In Her First Amended Petition), In That (A) Strange Had Moved To Dismiss The Count, Not For Summary Judgment (B) Such Claim Was Properly Pled And Stated A Claim, And (C) Even If The Motion Was Viewed As One For Summary Judgment, The Record Established There Were At Least Questions Of Material Fact On All Elements Which Would Preclude The Grant Of Summary Judgment At This Early Juncture.**

**The Trial Court Did Not Err In Granting Summary Judgment  
In Favor Of Dr. Strange On Appellant's Tortious Interference  
With Business Expectancy Claim.**

**A. Appellant Cannot Establish A Tortious Interference Claim Inasmuch As She Has Not Brought Her Claim Against A Third Party.**

For purposes of Respondents' Motion at the trial court level, Respondents accepted as true Appellant's allegations in the First Amended Petition concerning her

tortious interference claim. Appellant's tortious interference claim is asserted against only Dr. Strange.

Tortious interference with a contract or business expectancy requires: (1) a contract or valid business expectancy; (2) defendant's knowledge of the contract or relationship; (3) a breach induced or caused by defendant's intentional interference; (4) absence of justification; and (5) damages. Nazeri v. Missouri Valley Coll., 860 S.W.2d at 316.

Appellant cannot establish a valid tortious interference with contract claim inasmuch as she cannot allege she was anything other than an at-will employee. Fields v. R.S.C.D.B., Inc., 865 S.W.2d 877, 879 (Mo.App.E.D. 1993). Furthermore, Appellant cannot establish a tortious interference with business expectancy claim because "[a]n action for tortious interference with a business expectancy will lie against a third party only." Zipper v. Health Midwest, 978 S.W.2d 398, 419 (Mo.App.W.D. 1998); *see also* Century Mgmt., Inc. v. Spring, 905 S.W.2d 109 (Mo.App.W.D. 1995). Where the individual being sued is an officer or agent of the defendant corporation, the officer or agent acting for the corporation is the corporation for purposes of tortious interference. Zipper, 978 S.W.2d at 419; *see also* Fields, 865 S.W.2d at 879.

In this case, Appellant specifically alleges in her First Amended Petition that Dr. Strange was the Medical Director of Radiology for Saint Francis who had supervisory authority over Appellant and that Dr. Strange was an agent for Saint Francis. (LF 7-8 - First Amended Petition, ¶¶ 4-5). In other words, as the alleged Medical Director of Radiology and agent of Saint Francis, Dr. Strange is Saint Francis for purposes of the

tortious interference claim. Thus, Appellant's attempt to assert a claim based on a business expectancy in her continued employment with Saint Francis fails inasmuch as she has not brought the tortious interference claim against a third party. *See Fields*, 865 S.W.2d at 879; *see also Zipper*, 978 S.W.2d at 419 (plaintiff failed to state tortious interference with business expectancy claim against medical center corporation, its board of directors, its officers, and a doctor alleged to have acted as an agent for corporation, where the officers, directors, and doctor were the corporation for purposes of the claim).

*Stehno v. Spring Spectrum, L.P.*, 186 S.W.3d 247 (Mo. banc 2006) and *Topper v. Midwest Div., Inc.*, 306 S.W.3d 117 (Mo.App.W.D. 2010), which are cited by Appellant, did not concern allegations that the defendants to the tortious interference claims were agents of the employer. Regardless, Appellant made no effort in the entire First Amended Petition to allege which actions, if any, were allegedly taken by Dr. Strange outside the scope of his agency. Instead, in Count VIII, in addition to alleging in conclusory fashion the elements of a tortious interference claim, Appellant merely refers the Court to the previous 142 paragraphs of her First Amended Petition. Because Appellant does not ever allege what specific actions she relies on in support of her tortious interference claim and which of these actions were allegedly taken by Dr. Strange outside the scope of his agency and for his own benefit, any attempt to apply case law concerning actions taken outside the scope of agency and for the individual's own purposes is without merit.

Therefore, for the foregoing reasons, the trial court did not err in granting judgment in favor of Dr. Strange on Appellant's tortious interference claim.

**B. Appellant Cannot Establish A Tortious Interference With Business Expectancy Claim Inasmuch As Her Allegations Are Conclusory In Nature.**

Additionally, Appellant's tortious interference claim is not supported by sufficient factual allegations. Missouri Supreme Court Rule 55.05 states a pleading "shall" contain "a short and plain statement of the *facts* showing that the pleader is entitled to relief." Mo. Sup. Ct. Rule 55.05 (emphasis added). Mere conclusions of the plaintiff not supported by factual allegations cannot be taken as true and must be disregarded in determining whether a petition states a tortious interference claim on which relief can be granted. Albers v. Cardinal Glennon Children's Hosp., 729 S.W.2d 519, 523-24 (Mo.App.E.D. 1987) (trial court properly dismissed the plaintiff's tortious interference claim which was devoid of factual allegations supporting the averments); *see also* Schott v. Beussink, 950 S.W.2d 621, 629 (Mo.App.E.D. 1997) (dismissal of tortious interference claim affirmed where the plaintiff merely asserted allegations which were conclusory in nature and not supported by factual allegations).

In this case, as discussed to some extent in the previous section, Appellant does not provide any factual allegations to support a tortious interference claim. In fact, despite having been provided with an opportunity to file a First Amended Petition, Appellant did not make any additions to her tortious interference claim. Rather, Appellant made the same conclusory allegation that she had agreements with Saint Francis and/or a valid business expectancy "attendant to her employment." (LF 7-8 - First Amended Petition, ¶¶ 4-5). Appellant also made conclusory allegations that Dr. Strange interfered with her agreements and/or business expectancies "by taking the

actions set forth herein, and did so without justification or excuse.” (LF 145 - First Amended Petition, ¶ 145). However, Appellant still does not allege what specific actions she relies on in support of her tortious interference claim and which of these actions, if any, were allegedly taken by Dr. Strange outside the scope of his agency and for his own benefit. Appellant also does not assert allegations supporting her conclusory statement that Dr. Strange lacked justification for the alleged critical comments he made about her work performance.

Appellant further makes the conclusory allegation that “[a]s a result of Defendant Strange’s interference, Defendant Employer breached and violated and terminated Madonna’s agreements and expectancies.” (LF 35 - First Amended Petition, ¶ 146). Thus, Appellant does not provide any factual allegations to support her conclusory allegation that Dr. Strange caused the termination of her at-will employment relationship with Saint Francis. The allegations in the “factual background” section of the First Amended Petition allege that Appellant transferred out of the radiology department, where Dr. Strange worked, and was already reporting to the progressive cardiac floor prior to placing documents in her personnel file in January 2007. (LF 15 - First Amended Petition, ¶¶ 45-46). When Appellant reported to the progressive cardiac floor, she had a new supervisor, Linda Schlick. (LF 15 - First Amended Petition, ¶ 45). Appellant worked on the progressive cardiac floor until her December 10, 2008 discharge. (LF 15, 18 - First Amended Petition, ¶¶ 45, 64). Thus, Appellant did not even work in the same department as Dr. Strange during her last two years of employment.

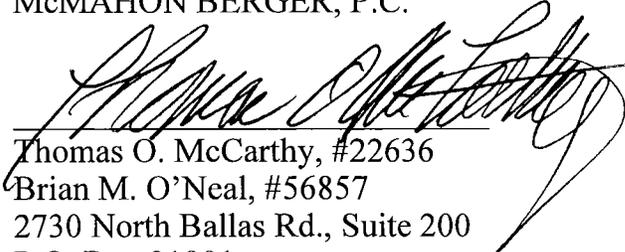
The “factual background” section of the First Amended Petition also contains allegations that it was Saint Francis who allegedly retaliated against Appellant for her complaints and decided to attempt to force Appellant to leave its employ. (LF 17 - First Amended Petition, ¶ 61). In her next paragraph of allegations, Appellant proceeds to provide specific allegations as to actions **Saint Francis** allegedly took in the attempt to make Appellant quit her job. (LF 17, 18 - First Amended Petition, ¶ 62). Appellant further alleges that, when Saint Francis’ attempts to cause Appellant to quit were not successful, Saint Francis directly terminated her. (LF 18 - First Amended Petition, ¶ 64). Furthermore, there are no allegations in the First Amended Petition that Dr. Strange was involved in any way in the decision to discharge Plaintiff or consulted by Saint Francis about the decision to discharge Plaintiff. In sum, it is readily apparent from review of Appellant’s First Amended Petition that the specific allegations in the “factual background” section of the First Amended Petition assert it was Saint Francis not Dr. Strange which allegedly took specific actions in the attempt to force Appellant to quit her job before terminating her more than two years after she had stopped working in Dr. Strange’s department. (LF 17, 18 - First Amended Petition, ¶ 61-64).

Because Appellant has completely failed to assert factual allegations in support of her conclusory averments, judgment in favor of Dr. Strange on Appellant’s tortious interference claim should be affirmed.

**IV. CONCLUSION**

For all of the foregoing reasons, the trial court did not err in granting judgment in favor of Respondents. As such, Respondents respectfully request that this Court enter an order affirming the judgment of the trial court.

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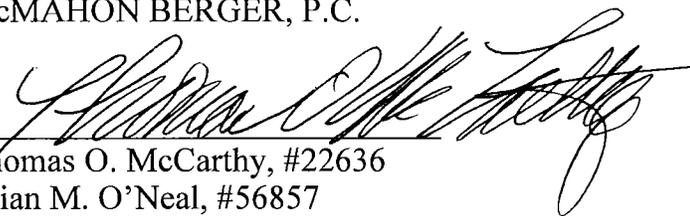
**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was served via electronic mail and via United States mail, postage prepaid, this 10th day of December, 2012, to:

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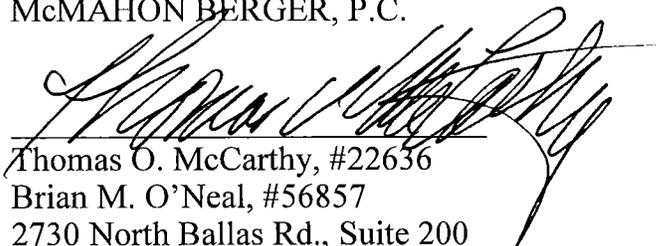
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**CERTIFICATE OF COMPLIANCE**

I certify that I signed the original of this brief, which is typed in Times New Roman, 13 point type, Microsoft Word. This brief contains 17,620 words and 1,586 lines, which is in compliance with Mo. Supreme Court Rule 84.06(b). I also certify that the copy provided to this Court via electronic mail was scanned for viruses and was found to be virus free.

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