Case No. SC95758

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI, EX REL. TIVOL PLAZA, INC.,

Appellant,

v.

MISSOURI COMMISSION ON HUMAN RIGHTS, ET AL.,

Respondents.

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Tivol Plaza, Inc. ("Tivol") appeals from a Judgment entered on February 18, 2015, by the Honorable Patricia S. Joyce, in the Cole County Circuit Court dismissing Tivol's Petition for Preliminary and Permanent Writ of Mandamus ("Petition") for failure to state a claim upon which relief may be granted.

On April 21, 2016, in a 6-5 *en banc* decision, the Missouri Court of Appeals Western District dismissed Tivol's appeal because the circuit court failed to follow the writ of mandamus procedures set forth in Missouri Supreme Court Rule 94.04. (Majority Opinion ("Op."), pp. 4-7.) In pertinent part, the Court of Appeals reasoned:

> Thus, while we have the discretion to hear appeals on the merits in cases in which the circuit court issues a summons rather than a preliminary order, as an intermediate appellate court charged with the duty to enforce the Supreme Court Rules, we do not believe it is our place to continually excuse compliance with the procedural rules written by the Missouri Supreme Court.

(Op., p. 7.)

The Court of Appeals decision, however, is inconsistent with the opinions rendered by this Court in *State ex rel. Ashby Road Partners, LLC v. State Tax Commission*, 297 S.W.3d 80, 83-84 (Mo. banc 2009) and *United States Dept. of Veterans Affairs v. Boresi*, 396 S.W.3d 356, 358-359 (Mo. banc 2013).

In *Ashby*, in the parallel context of a writ of prohibition proceeding, the circuit court violated the same procedure as in this case by issuing a summons rather than a

preliminary order. This Court held, however, that, relators are "entitled to appeal, on the merits, the circuit court's judgment denying their petition in prohibition" where a summons rather than a preliminary order is issued. 297 S.W.3d at 84. In *Boresi*, this Court similarly held:

> An appeal will lie from the denial of a writ petition when a lower court has issued a preliminary order in mandamus but then denies a permanent writ. ***Likewise, when the lower court issues a summons, the functional equivalent of a preliminary order, and then denies a permanent writ, appellate review is available.***

396 S.W.3d at 358-359 (emphasis added) (internal citations omitted).

Despite this Court's precedent regarding the availability of appellate review where the circuit court issues a summons in lieu of a preliminary writ of mandamus and subsequently reaches a determination on the merits of the writ, the Court of Appeals has taken an increasingly hardline stance in contravention of this Court's opinions.

Tivol filed its Application for Transfer to the Supreme Court of Missouri pursuant to Rule 83.02 on April 26, 2016. Respondents Missouri Commission on Human Rights ("MCHR") and Karen Norton ("Norton") also filed applications for transfer to this Court. All three requests for transfer were denied on May 31, 2016.

On June 15, 2016, Tivol, Norton, and the MCHR filed their Applications for Transfer in this Court. Tivol, Norton, and the MCHR's applications were granted on August 23, 2016.

This Court has jurisdiction to hear this case pursuant to Article V, Section 10 of the Missouri Constitution as this Court ordered transfer after opinion by the Missouri Court of Appeals Western District. *See* Mo. Const. Art. V, § 10 (amended 1976); *see also* Mo. Sup. Ct. R. 83.04.

STATEMENT OF FACTS

Tivol is a family-owned retail jeweler that has done business in the Kansas City, Missouri area since 1910. [*Legal File* (hereinafter, "*LF*") 15.] On July 6, 2011, Tivol hired Norton ("Norton") as a commissioned sales associate at a store that was then located in the Briarcliff shopping center in North Kansas City, Missouri. [*LF* 15-16.] Norton received regular performance-related coaching from the Tivol management during her employment at Tivol for her inability to generate enough sales to cover the monthly draw which Tivol uses to "settle-up" against actual commissions earned. [*LF* 16, 17.] Norton's supervisors also documented, among other things, her difficulty understanding Tivol's day-to-day procedures and her own job duties. [*Id.*]

Following the close of Tivol's Briarcliff store in January 2013, Norton was transferred to Tivol's store located on Kansas City's Country Club Plaza (the "Plaza store"). [*LF* 16.] Norton consistently failed to meet her sales objectives despite being given lower sales goals than other employees at the Plaza store. [*LF* 17.] Based on the foregoing, Norton's employment was terminated on November 18, 2013. [*Id.*]

Norton dual-filed her Charge of Discrimination ("Charge") against Tivol with the MCHR and the Equal Employment Opportunity Commission on or about December 18, 2013. [*LF* 9.] Norton alleged four distinct claims of discrimination: (1) retaliation; (2) sex discrimination; (3) age discrimination; and (4) hostile work environment. [*Id.*] The factual details alleged in support of Norton's Charge included a series of conclusory allegations which allegedly support a "continuing violation" beginning in April 2012 and continuing until Norton's termination on November 18, 2013. [*See LF* 10-13.] It is clear

from the face of Norton's Charge, however, that the vast majority of the asserted discriminatory acts did not occur within 180 days of Norton filing her Charge. [*Id.*]

The MCHR docketed Norton's Charge as E-12/13-43192. [*LF* 9.] Tivol submitted its Response to Initial Respondent Interrogatory ("Tivol's Statement of Position") on February 27, 2014. [*See LF* 14-19.] Tivol's Statement of Position challenged the timeliness of a number of Norton's allegations. [*LF* 14-15.] Further, Tivol expressly requested that: (1) the MCHR make specific factual findings concerning the timeliness of Norton's claims under the Missouri Human Rights Act ("MHRA"); and (2) the MCHR dismiss any claims occurring more than 180 days prior to the filing of Norton's Charge. [*Id.*] Tivol made it clear that it would regard the MCHR's failure to make specific factual findings detailing the basis for any subsequent right to sue letter to constitute an arbitrary or capricious administrative action and an abuse of the MCHR's discretion under RSMo. § 536.150.1. [*Id.*; *see also* Appendix ("App.") p. A18.]

Nevertheless, on June 30, 2014, at Norton's request, the MCHR administratively terminated its proceedings on Norton's Charge and issued a right to sue letter which conceded that the "***administrative process of this complaint, including determinations of jurisdiction, has not been completed.***" [*LF* 20 (emphasis in original).] The right to sue letter contained no factual findings demonstrating that the agency made any effort to determine whether Norton's allegations were timely under the MHRA. [*Id.*]

Tivol filed its Petition on July 28, 2014, challenging the MCHR's issuance of a right to sue letter. [*LF* 3-8.] The MCHR filed its Motion to Dismiss on October 9, 2014.

[*LF* 41-53.] The Circuit Court entered Judgment on February 18, 2015, dismissing Tivol's Petition for failure to state a claim upon which relief may be granted. [*LF* 81-85.]

In its Judgment, the Circuit Court found the MCHR's issuance of a right to sue letter was consistent with its obligations under the RSMo. § 213.111 and that this Court's ruling in *Farrow v. Saint Francis Med. Ctr.*, 407 S.W.3d 579 (Mo. banc 2013), did not apply because, unlike the defendant in *Farrow*, Tivol had effectively raised a challenge to the timeliness of Norton's Charge in its Statement of Position as contemplated by 8 C.S.R. 60-2.025(9). [*LF* 83-84; App. A6-A7.] Put differently, the circuit court determined Tivol preserved its right to raise the issue of timeliness as a defense in any subsequent civil action between the parties and reasoned Tivol had no need to challenge the MCHR's issuance of a right to sue letter by an action for writ of mandamus pursuant to RSMo. §§ 213.085.2 and 536.150.1. [*LF* 84; App. A6.] Indeed, the circuit court found any such action would be duplicative and unnecessary. [*Id.*]

Concerned that the circuit court's findings were inconsistent with this Court's mandate in *Farrow*, Tivol took the underlying appeal of the circuit court's Judgment to ensure that it was taking all steps required under *Farrow* to preserve its timeliness defenses to Norton's claims.

POINTS RELIED ON

I. THE CIRCUIT COURT ERRED IN DISMISSING APPELLANTS' PETITION FOR PRELIMINARY AND PERMANENT WRIT OF MANDAMUS BECAUSE RESPONDENTS MCHR AND WARREN HAD A MINISTERIAL DUTY TO DETERMINE THEIR JURISDICTION TO ISSUE A RIGHT TO SUE LETTER AND TO DISMISS ANY OF NORTON'S UNTIMELY CLAIMS, IN THAT NORTON'S CHARGE OF DISCRIMINATION INCLUDED UNTIMELY CLAIMS.

Farrow v. Saint Francis Med. Ctr., 407 S.W.3d 579 (Mo. banc 2013).

Grissom v. First Nat. Ins. Agency, 364 S.W.3d 728, 731 (Mo. Ct. App. S.D. 2012)

Halloran v. Houlihan's Restaurants, Inc., 2013 WL 3353870, *4-5 (W.D. Mo. July 3, 2013)

Hodges v. Northwest Airlines, Inc., 990 F.2d 1030 (8th Cir. 1993)

Igoe v. Dep't of Labor and Indus. Relations of State of Mo., 152 S.W.3d 284, 287 (Mo. 2005)

Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002)

Norton v. Tivol Plaza, Inc., Case No. 1416-CV23141

Pollock v. Wetterau Food Dist. Group, 11 S.W.3d 754, 763 (Mo. Ct. App. E.D. 1999)

Public School Retirement System of School Dist. of Kansas City v. Missouri Comm'n on Human Rights, 188 S.W. 3d 35 (Mo. Ct. App. W.D. 2006),

Tisch v. DST Systems, Inc., 368 S.W.3d 245 (Mo. App. W.D. 2012)

Thompson v. Western Southern Life Assur. Co., 82 S.W.3d 203, 206 (Mo. Ct. App. E.D. 2002)

Wallingsford v. City of Maryland, 287 S.W.3d 682, 685 (Mo. banc 2009)

RSMo. § 213.030(7)

RSMo. § 213.075.1

RSMo. § 213.111.1

8 C.S.R. 60-2.025(7)(B)

8 C.S.R. 60-2.025(9)

II. THE CIRCUIT COURT ERRED IN DISMISSING APPELLANTS' PETITION FOR PRELIMINARY AND PERMANENT WRIT OF MANDAMUS BECAUSE MANDAMUS WAS APPROPRIATE PURSUANT TO RSMO. § 213.085.2, § 536.150.1, AND *FARROW V. SAINT FRANCIS MED. CTR.*, IN THAT APPELLANTS SOUGHT REVIEW OF RESPONDENTS' ISSUANCE OF A RIGHT TO SUE LETTER ON NORTON'S UNTIMELY CLAIMS.

Farrow v. Saint Francis Med. Ctr., 407 S.W.3d 579 (Mo. banc 2013).

Forlong Cos., Ins. v. City of Kansas City, 189 S.W.3d 157, 165 (Mo. banc 2006)

Public School Retirement System of School Dist. of Kansas City v. Missouri Comm'n on Human Rights, 188 S.W. 3d 35 (Mo. Ct. App. W.D. 2006),

State ex rel. Martin Erb v. Missouri Comm'n on Human Rights, 77 S.W.3d 600 (Mo. banc 2002).

State ex rel. Missouri Public Defender Com'n v. Waters, 370 S.W.3d 592, 598 (Mo. banc 2012)

RSMo. § 213.085.2.

RSMo. § 213.111.1

RSMo. § 536.150.1.

III. THE CIRCUIT COURT ERRED IN FINDING THAT APPELLANTS PRESERVED THEIR RIGHT TO RAISE THE ISSUE IN ANY SUBSEQUENT CIVIL ACTION BY RAISING THE TIMELINESS ISSUE BEFORE THE MCHR BECAUSE *FARROW V. SAINT FRANCIS MED. CTR.*, MANDATES THAT THE PROPER PROCEDURE FOR CHALLENGING THE MCHR'S ISSUANCE OF A RIGHT TO SUE LETTER ON UNTIMELY CLAIMS IS BY SEEKING JUDICIAL REVIEW OF THE MCHR'S ADMINISTRATIVE ACTION, IN THAT SUCH PROCESS IS PRESCRIBED BY RSMO. § 213.085.2 AND § 536.150.

Farrow v. Saint Francis Med. Ctr., 407 S.W.3d 579 (Mo. banc 2013).

RSMo. § 213.085.2

RSMo. § 213.111.1

RSMo. § 536.150.1

ARGUMENT

Standard of Review for all Claims

This Court reviews *de novo* a circuit court's judgment dismissing an action for failure to state a claim. *Crocker v. Crocker*, 126 S.W.3d 724, 726 (Mo. Ct. App. 2008). "A motion to dismiss a petition for writ of mandamus for failure to state a cause of action, like any motion to dismiss for failure to state a claim is solely a test of the adequacy of the relator's petition." *Lemay Fire Prot. Dist. v. St. Louis County*, 340 S.W.3d 292, 294 (Mo. App. E.D. 2011). All facts alleged in the pleading are assumed to be true and those facts are to be construed liberally in favor of the plaintiff. *Id.* Statutory construction is also a matter of law to which appellate courts apply their independent judgment. *Crocker*, 126 S.W.3d at 726 (*citing City of St. Joseph v. Vill. of Country Club*, 163 S.W.3d 905, 907 (Mo. banc 2005)).

Analysis

I. THE CIRCUIT COURT ERRED IN DISMISSING APPELLANTS' PETITION FOR PRELIMINARY AND PERMANENT WRIT OF MANDAMUS BECAUSE RESPONDENTS MCHR AND WARREN HAD A MINISTERIAL DUTY TO DETERMINE THEIR JURISDICTION TO ISSUE A RIGHT TO SUE LETTER AND TO DISMISS ANY OF NORTON'S UNTIMELY CLAIMS, IN THAT NORTON'S CHARGE OF DISCRIMINATION INCLUDED UNTIMELY CLAIMS.

In *Farrow*, this Court, in pertinent part, reversed and remanded a circuit court's order granting summary judgment where the plaintiff employee failed to file her charge of discrimination within 180 days of the alleged discriminatory acts giving rise to her claims under the MHRA. *See* 407 S.W.3d at 588 [App. A33-A34]; *see also* RSMo. § 213.075.1 [App. A6] ("[a]ny person claiming to be aggrieved by an unlawful discriminatory practice may make . . . a verified complaint in writing, within one hundred eighty days of the alleged act of discrimination[.]"). The defendant employer argued, and the circuit court agreed, that the plaintiff was required to file her administrative charge within 180 days of any alleged discriminatory acts as a condition for pursing those claims in a civil lawsuit. *Farrow*, 407 S.W.3d at 588 [App. A34].

On appeal, plaintiff argued that the MCHR's issuance of a right to sue letter was an implicit finding that the MCHR had jurisdiction over her claims and that they were timely filed. *Id.* Defendant – like Respondents and the circuit court in this action – argued the MCHR has a statutory duty to issue a right to sue notice after 180 days,

regardless of whether it has determined that it has jurisdiction over the underlying claim. *Id.* This Court unambiguously disagreed, holding: "Defendants argue the Commission had a duty to issue the right to sue letter pursuant to statute regardless of whether it had proper jurisdiction over Farrow's claims. ***This Court disagrees with Defendants' contention.***" *Id.* (emphasis supplied).

In reversing the circuit court's judgment, this Court also noted: (1) that Section 213.030(7) directs the Commission to "receive, investigate, initiate, and pass upon complaints alleging discrimination . . ."; (2) after a charge of discrimination is filed the MCHR's executive director has an obligation to promptly investigate the charge; and (3) MCHR regulation 8 C.S.R. 60-2.025(7)(B) directs the MCHR to dismiss a charge at any stage for lack of jurisdiction or in the absence of any remedy available to complainant. *Id.* at 588-89 [App. A34-A34]. "Hence, the [MCHR] [is] required to determine its own jurisdiction ***even if it [does] not make a decision on the merits of [complainant's] claims***." *Id.* at 589 [App. A34] (emphasis supplied). Accordingly, this Court held that when the MCHR exercises its authority to issue a right to sue letter, ***regardless of whether it has completed its investigation***, it has made an implicit finding of timeliness. *Id.*

Here, the circuit court attempted to narrow the scope of *Farrow's* holding to only those instances where, "[d]efendants took no action whatsoever to challenge the timeliness of [employee's] complaint while it was pending prior the issuance of right to sue letter, despite having notice of the complaint." [*LF* 84; App. A6 (quoting *Farrow*, 407 S.W.3d at 589).] Put differently, the circuit court distinguished *Farrow* from the

instant case because Tivol challenged the timeliness of Norton's allegations in the Statement of Position it submitted to the MCHR pursuant to 8 C.S.R. 60-2.025(9). [App. A21-A22] The circuit court noted, "to interpret *Farrow* to require a relator to bring a writ action in every instance the [MCHR] does not complete its jurisdictional analysis 180-days after receiving a complaint, would be contrary to the text of the [MHRA] and would result in unnecessary and duplicative litigation." [*LF* 4; App. A6.]

The circuit court's finding that an employer preserves its right to raise timeliness as a defense in civil litigation by raising the issue during the charge phase is an attractive one (and, frankly, a procedure that would be preferable to Tivol and most employers defending MHRA claims). For many years employers in MHRA lawsuits routinely asserted challenges to the timeliness of an employee's administrative charge as a defense in the employee's subsequent discrimination lawsuit.[1] Similarly, employers under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, can raise the timeliness of

[1] *See e.g.*, *Wallingsford v. City of Maryland*, 287 S.W.3d 682, 685 (Mo. banc 2009); *Tisch v. DST Systems, Inc.*, 368 S.W.3d 245, 250-51 (Mo. Ct. App. W.D. 2012); *Halloran v. Houlihan's Restaurants, Inc.*, 2013 WL 3353870, *4-5 (W.D. Mo. July 3, 2013); *Grissom v. First Nat. Ins. Agency*, 364 S.W.3d 728, 731 (Mo. Ct. App. S.D. 2012); *Thompson v. Western Southern Life Assur. Co.*, 82 S.W.3d 203, 206 (Mo. Ct. App. E.D. 2002); and *Pollock v. Wetterau Food Dist. Group*, 11 S.W.3d 754, 763 (Mo. Ct. App. E.D. 1999).

an administrative charge in the course of litigating an employee's discrimination lawsuit brought under federal law.[2] This process streamlines litigation under the MCHR and affords parties the opportunity to resolve more complex questions of timeliness with the benefit of formal discovery and a robust evidentiary record.

Conversely, in the wake of *Farrow*, employers facing MHRA litigation have sought extraordinary writs at an increasing rate across Missouri. Such actions are time-consuming, burdensome, and expensive for everyone involved—employers, employees, the circuit courts, and the MCHR. Nonetheless, and while Tivol recognizes (and agrees with) the circuit court's concerns about the time and costs associated with collateral writ litigation, it is difficult to reconcile the circuit court's Judgment with this Court's directive in *Farrow*. So, to ensure that Tivol was taking all steps appropriate to preserve its timeliness defenses to Norton's claims, Tivol proceeded with this writ action given the clear roadmap for doing so as provided by *Farrow*.

As a foremost matter, there is no language in *Farrow* supporting the circuit court's finding that an employer's objections to the timeliness of the administrative charge are preserved when raised at the earliest opportunity – *i.e.*, while the charge is pending before the MCHR. Instead, *Farrow* appears to have recognized that a meaningful distinction can be made between "completing an investigation" as contemplated by RSMo. §

[2] *See e.g., Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *Hodges v. Northwest Airlines, Inc.*, 990 F.2d 1030 (8th Cir. 1993).

213.111.1[3] and "completing a jurisdictional analysis," or, more to the point, "completing a determination of the timeliness of a complainant's claims." *See Farrow*, 407 S.W.3d at 588-589 [App. A33-A34].

Nonetheless, the MCHR argues, despite its obligation to "receive, investigate, initiate, and pass upon complaints alleging discrimination in employment[,]" (*see* RSMo. § 213.030(7)), that it 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." *Igoe v. Dep't of Labor and Indus. Relations of State of Mo.*, 152 S.W.3d 284, 287 (Mo. 2005). Given the number of discrimination complaints the MCHR receives each year and the fact intensive nature questions of timeliness can implicate, the MCHR contends it cannot make a determination of every issue related to its jurisdiction, including questions of timeliness, before issuing a right to sue letter in every case.

While Tivol is sympathetic to the various obstacles the MCHR faces, Tivol is compelled to follow the directives contained within this Court's analysis of the MCHR's ministerial obligations and duties:

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[3] In pertinent part, RSMo. § 213.111.1 requires that, "[i]f, after one hundred eighty days from the filing of a complaint . . . the commission has not completed its administrative processing and the person aggrieved so requests in writing, the commission ***shall*** issue to the person claiming to be aggrieved a letter indicating his or her right to bring a civil action within ninety days of such notice[.]" [App. 16 (emphasis added).]

> Section 213.030(7) ***directs*** the Commission to "receive, investigate, initiate, and pass upon complaints alleging discrimination . . ." After the filing of the complaint, the Commission's executive director ***shall*** investigate ***promptly*** the complaint. Section 213.075.3. Commission regulation 8 C.S.R. 60-2.025(7)(B) ***directs*** the Commission to dismiss or close a complaint at any stage for lack of jurisdiction or in the absence of any remedy available to the complainant.

Farrow, 407 S.W.3d 588-589 (emphasis supplied) [App. A33-A34].

Alternatively, the MCHR cites *Public School Retirement System of School Dist. of Kansas City v. Missouri Comm'n on Human Rights*, 188 S.W. 3d 35 (Mo. Ct. App. W.D. 2006), to support its argument that it is not required to complete a jurisdictional assessment within 180 days of receiving a charge of discrimination or prior to issuing a right to sue letter pursuant to § 213.111.1. *Public School Retirement System*, however, is distinguishable from *Farrow*.

In *Public School Retirement System*, the complainant sought a right to sue letter after 180 days had expired since complainant had filed her charge of discrimination. 188 S.W.3d at 38. Complainant subsequently filed a lawsuit alleging age discrimination against her employer. *Id.* In a separate action, the employer sought a writ of mandamus requesting that the circuit court vacate the MCHR's right to sue letter because: (1) the MCHR failed to notify the Public School Retirement System ("PSRS") of complainant's claims; and (2) the MCHR failed to "promptly investigate" the merits of complainant's

charge. *Id.* The circuit court denied PSRS's motion for summary judgment and entered an order granting the MCHR's competing motion for summary judgment. *Id.*

The Court of Appeals affirmed the PSRS's right to seek judicial review by way of mandamus of the MCHR's decision to issue a right to sue letter, but found the circuit court properly denied the writ because: (1) PSRS was not prejudiced by the failure of the MCHR to notify the PSRS of the age discrimination complaint; and (2) the MCHR did not breach a ministerial duty by failing to complete its investigation within 180 days after receipt of complainant's charge. *Id.* at 42-45. Notably, *Public School Retirement System* is silent on the question of whether the MCHR has an obligation to complete a ***jurisdictional assessment*** within 180 days after receipt of a charge of discrimination or prior to issuing a right to sue letter and instead merely affirms the limitations on the MCHR's ministerial obligations required by § 213.111.1. [App. A16]

When properly limited, *Public School Retirement System* can be read in harmony with *Farrow*. However, to the extent that *Public School Retirement System* has been interpreted to excuse the MCHR's failure to complete a jurisdictional assessment within 180 days of the filing of a charge, such reasoning is no longer tenable under *Farrow* because, as written, *Farrow* appears to hold that the MCHR has no duty to issue a notice of right after 180 days where the MCHR does not have proper jurisdiction over the employee's charge of discrimination. *See Farrow*, 407 S.W.3d at 588 [App. A33] ("Defendants argue the Commission had a duty to issue the right to sue letter pursuant to the statute regardless of whether it had proper jurisdiction over Farrow's claims. This Court disagrees with Defendants' contention.")

The MCHR has also claimed Tivol suffered no prejudice based on the MCHR's ministerial inaction because at least one of the alleged discriminatory acts – Norton's termination from employment on November 13, 2013 – occurred within the 180-day time period for timely filing a charge of discrimination making civil litigation inevitable and proper. [*LF* 49.] Contrary to this assertion, the prejudice arising from the MCHR's failure to comply with *Farrow* is clear: *i.e.*, based on an unauthorized right to sue letter, Norton was able to bring a lawsuit against Tivol that included a number of untimely claims.[4] The prejudice to Tivol is compounded by the fact that, but for the relief requested in its Petition and so long as *Farrow* remains the law in Missouri, Tivol would have no other avenue for challenging Norton's untimely claims.

A number of the alleged occurrences included in Norton's pending lawsuit are facially untimely. [*See LF* 10-14.] Absent a specific jurisdictional determination by the MCHR that the alleged bad acts constitute a "continuing violation" under Missouri law, none of the acts of discrimination alleged in Norton's Charge occurring more than 180 days preceding her filing of the administrative complaint are timely. For the reasons set forth above, and as set forth in *Farrow*, it is the MCHR's responsibility to make this determination as it relates to ***all*** of Norton's claims.

[4] *See Norton v. Tivol Plaza, Inc.*, Case No. 1416-CV23141, pending in the Circuit Court of Jackson County, Missouri at Kansas City.

II. THE CIRCUIT COURT ERRED IN DISMISSING APPELLANTS' PETITION FOR PRELIMINARY AND PERMANENT WRIT OF MANDAMUS BECAUSE MANDAMUS WAS APPROPRIATE PURSUANT TO RSMO. § 213.085.2, § 536.150, AND *FARROW V. SAINT FRANCIS MED. CTR.*, IN THAT APPELLANTS SOUGHT REVIEW OF RESPONDENTS' ISSUANCE OF A RIGHT TO SUE LETTER ON NORTON'S UNTIMELY CLAIMS.

"The law of mandamus is well settled. Mandamus is a discretionary writ, and there is no right to have the writ issued." *Public School Retirement System of School Dist. Of Kansas City*, 188 S.W.3d at 41 (internal citations omitted). "The purpose of the extraordinary writ of mandamus is to compel the performance of a ministerial duty that one charged with the duty has refused to perform." *Forlong Cos., Ins. v. City of Kansas City*, 189 S.W.3d 157, 165 (Mo. banc 2006). "A litigant asking relief by mandamus must allege and prove that he has a clear, unequivocal, specific right to the thing claimed." *Id.* at 166.

In pertinent part, the MHRA allows a person "aggrieved by a final decision, finding, rule or order of the [MCHR] [to] obtain judicial review by filing a petition in the circuit court of the county of proper venue within thirty days after the mailing or delivery of notice of the commission's final decision." RSMo. § 213.085.2 [App. A14]. A right to sue letter issued by the MCHR is a final decision within the meaning of § 213.085.2. *Farrow*, 407 S.W.3d at 590, n.5 [App. A45] ("The right to sue letter states the Commission made a determination it is unlikely that it will complete its investigation

within the allotted time period. Thus, for all intents and purposes, the Commission has issued a 'finding' regarding its ability to investigate that results in the issuance of the right to sue letter, which in turn terminates the proceedings.").

The MHRA further directs that judicial review sought under § 213.085.2 must be in the manner provided in RSMo. § 536.150.1. In pertinent part, § 536.150.1 permits "a claimant to seek a writ of mandamus when the procedures set forth in chapter 213 were not followed by the Commission's executive director." *Farrow*, 407 S.W.3d at 590 [App. A36] (*citing State ex rel. Martin Erb v. Missouri Comm'n on Human Rights*, 77 S.W.3d 600, 607 (Mo. banc 2002)) (holding that the MCHR has prescribed procedural rules and that, where an aggrieved party makes specific allegations showing the executive director failed to follow those rules, then § 536.150.1 gives that party the right to file a mandamus action to determine whether the executive director's actions where accomplished under the prescribed procedures and were lawful); *see also, Public School Retirement System of School Dist. of Kansas City*, 188 S.W.3d at 41 (holding mandamus would lie where the MCHR's executive director's issuance of a right to sue letter was in violation of the MCHR's prescribed procedures and applicable law).

While § 536.150.1 provides a number of potential mechanisms by which a party can seek judicial review of a final decision by an administrative officer, this Court made clear in *Farrow* that, in the context of challenging the timeliness of complainant's claims in a charge of discrimination, where (as here) ***the MCHR made no express findings related to the timeliness of a complaint's claims, mandamus is the appropriate remedy.*** *Farrow*, 407 S.W.3d at 590 [App. A36] ("Thus, Defendants' argument that it challenged

the timeliness of Farrow's complaint at the earliest opportunity is unavailing because they had ample opportunity to do so before the Commission issued the right to sue letter ***and in the time between its issuance and the filing of Farrow's state court action by way of writ of mandamus***"). Accordingly, and contrary to the findings of the circuit court, Tivol was required under *Farrow* to seek judicial review of the MCHR's issuance of a right to sue letter and mandamus was the proper method by which to do so.

The MCHR argues mandamus is not appropriate remedy in the instant case because it was required to issue Norton her right to sue letter after the expiration of 180 days pursuant to RSMo.§ 213.111.1. As shown above, *supra* pp. 11-18, the MCHR's compulsory issuance of a notice of right to sue under § 213.111.1 is limited by its competing ministerial obligation to assess its own jurisdiction over a complainant's charge of discrimination prior to issuing a right to sue letter.

In this case, the MCHR specifically sought to abdicate its ministerial obligation to complete a jurisdiction analysis prior to issuing Norton a right to sue letter by explicitly disclosing its ministerial inaction. The MCHR issued Norton a right to sue letter that included this proviso: "This notice of right to sue is being issued as required by Section 213.111.1, RSMo., because it has been requested in writing 180 days after filing of the complaint. Please note that administrative processing of this complaint, including determinations of jurisdiction, has not been completed." [*LF*, p. 20.] In accordance with this Court's express directive in *Farrow*, Tivol sought a writ of mandamus compelling the MCHR to vacate the right to sue letter issued to Norton on June 30, 2014, and

demanding that the MCHR determine whether it has jurisdiction over Norton's ambiguous allegations which were not timely-filed on their face.

The nature of the relief sought in this case is of particular importance because, "the writ [of mandamus]'s purpose is to execute, not to adjudicate." *Lemay v. Fire Protection Dist.*, 340 S.W.3d 292, 295 (Mo. Ct. App. E.D. 2011). "As a creature of statute, an administrative agency's authority is limited to that given it by the legislature." *State ex rel. Missouri Public Defender Com'n v. Waters*, 370 S.W.3d 592, 598 (Mo. banc 2012).

The particular right to sue letter that the MCHR issued in this case was a clear effort by the MCHR to avoid its obligations imposed by *Farrow*. In seeking mandamus relief, Tivol sought to force the MCHR to execute its duties and make an affirmative determination about which, if any, of Norton's claims were timely filed. The process invoked by Tivol was consistent with the directives of *Farrow* and controlling Missouri law. *See e.g. Martin-Erb*, 77 S.W.3d at 607-608 (holding that a failure to follow proper procedures in the exercise of discretion is an abuse of discretion controllable by mandamus and that a circuit court can compel the MCHR's executive director to exercise that discretion).

III. THE CIRCUIT COURT ERRED IN FINDING THAT APPELLANTS PRESERVED THEIR RIGHT TO RAISE THE ISSUE IN ANY SUBSEQUENT CIVIL ACTION BY RAISING THE TIMELINESS ISSUE BEFORE THE MCHR BECAUSE *FARROW V. SAINT FRANCIS MED. CTR.*, MANDATES THAT THE PROPER PROCEDURE FOR CHALLENGING THE MCHR'S ISSUANCE OF A RIGHT TO SUE LETTER ON UNTIMELY CLAIMS IS BY SEEKING JUDICIAL REVIEW OF THE MCHR'S ADMINISTRATIVE ACTION, IN THAT SUCH PROCESS IS PRESCRIBED BY RSMO. § 213.085.2 AND § 536.150.

Finally, given the roadmap for challenging untimely MHRA claims as detailed in *Farrow*, the circuit court's judgment erroneously found that, by raising timeliness at the earliest opportunity, Tivol preserved their right to assert timeliness as a defense in the pending civil litigation. [*See LF* 84-85; App. A6-A7.] Accordingly, Tivol sought this appeal.

In *Farrow,* this Court held that an employer must raise any claims relating to the timeliness of an employee's claims before the MCHR ***and*** through judicial review under § 536.150.1. *Farrow*, 407 S.W.3d at 589-590 [App. A34-35]. Importantly, and in contravention of the circuit court's Judgment in this case, *Farrow* also held that an employer ***could not*** raise the issue of timeliness in the underlying discrimination lawsuit. *Id.* More specifically, in *Farrow*, employee argued the untimeliness of a charge of discrimination did not support a dismissal of her discrimination claims. *Id.* at 589 [App.

A34]. This Court agreed concluding that the only statutory prerequisites a claimant must satisfy to bring a civil action under the MHRA are those set forth in RSMo. § 213.111.1: (1) an employee must file a charge with the Commission prior to filing a state court action; (2) the Commission must issue a right to sue letter to the claimant; and (3) the state court action must then be filed within ninety days of the issuance of the right to sue, but no later than two years after the alleged cause occurred or its reasonable discovery by the allegedly injured party. *Farrow*, 407 S.W.3d at 591 [App. A35-A36].

By expressly rejecting an expansion of the prerequisites for filing suit under the MHRA to include a requirement that claimants timely file their charges of discrimination, this Court unambiguously established judicial review under § 536.150 as the only permissible method through which an employer can challenge the timeliness of a complainant's charge of discrimination. *Id.* ("The statute does not read, 'If after one hundred eighty days from the filing of a *timely* complaint . . .' ***This Court will not reach such a requirement into the plain statutory language***" (emphasis supplied).). Based on the foregoing, Tivol's only remedy for challenging the timeliness of Norton's claims was to follow the procedures set forth in § 213.085.2 and § 536.150. Until such time as this Court clarifies this issue, the only reasonable conclusion is that the circuit court erred by dismissing Tivol's challenge to the MCHR's issuance of the right to sue letter.

CONCLUSION

For the foregoing reasons, Tivol respectfully requests that this Court either: (1) hold unequivocally that Tivol's timeliness defenses to Norton's claims are preserved because it raised the defenses during the administrative proceedings before the MCHR issued Norton's notice of right to sue; or (2) reverse the circuit court's judgment dismissing Tivol's Petition for Preliminary and Permanent Writ of Mandamus, and remand the case with instructions to the circuit court to issue a writ of mandamus compelling the MCHR to vacate the right to sue letter issued to Norton on June 30, 2014, and requiring that the MCHR determine whether it has jurisdiction over Norton's ambiguous allegations which are untimely filed on their face.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Missouri Supreme Court Rule 84.06(c), counsel for Appellant states that this Appellant's Substitute Brief complies with the provisions of Missouri Supreme Court Rule 84.06(b), in that beginning with the Jurisdictional Statement and concluding with the last sentence before the signature block, Appellant's Substitute Brief contains 5,666 words. The word count was generated by Microsoft Word 2010, and complies with the word limitations contained in Rule 84.06(b). This brief complies with Missouri Supreme Court Rule 84.06(a)(6) in that it was prepared using Century Schoolbook size 13 font, which is not smaller than Times New Roman, 13-point font. Furthermore, in compliance with Missouri Supreme Court Rule 84.06(c), Appellant's Substitute Brief has been scanned for viruses, and it is virus-free.

/s/ Nickalaus Seacord
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2016, the foregoing APPELLANT'S SUBSTITUTE BRIEF was filed with the Clerk of the Supreme Court of Missouri using the Missouri eFiling System, and service paper copies were sent via U.S. mail, postage prepaid and addressed to the following:

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