SC95758

IN THE SUPREME COURT OF MISSOURI

TIVOL PLAZA, INC., et al.,

Appellants,

v.

MISSOURI COMMISSION ON HUMAN RIGHTS, et al.,

Respondents.

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Patricia S. Joyce, Circuit Judge

RESPONDENTS' SUBSTITUTE BRIEF

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SUMMARY OF ARGUMENT

This appeal first presents questions that divided the Court of Appeals: whether appellate courts should take up an appeal from a denial of a request, in a case brought under § 536.150[1], when the circuit court issued summons (*i.e.*, treated the case as a civil action) rather than a preliminary writ (*i.e.*, treated the case as a common law writ petition). That is an area that merits this Court's clarification. But even if the circuit court got it wrong, this Court should proceed to the merits of the appeal.

The administrative action Tivol is challenging is the issuance by the Missouri Commission on Human Rights of a right-to-sue letter under § 213.111, RSMo. Under that statute, three conditions must be met for the Commission to issue a "right-to-sue" letter: 1) 180 days have passed since a charge of discrimination was filed with the Commission; 2) the Commission has not completed its administrative processing of the charge; and 3) the person that filed the charge requests the letter. Here, it is undisputed that these three conditions were satisfied when the Commission issued the right-to-sue letter.

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[1] All references are to the Revised Statutes of Missouri as amended through the 2016 Supplement unless noted otherwise.

Tivol wants a writ of mandamus compelling the Commission to withdraw the letter. But because the Commission had a clear duty to issue the letter, Tivol was properly denied a writ that could only be issued if there were a clear duty to the contrary.

Tivol finds support for its position in this Court's language in *Farrow v. Saint Francis Med. Ctr.*, 407 S.W.3d 579 (Mo. 2013). But the pertinent language is not found in the *Farrow* holding—and the *Farrow* facts are distinguishable. This Court should either distinguish or modify *Farrow* to ensure that the Commission can do what the statute unambiguously requires—and to avoid the complications that Tivol's reading of *Farrow* creates: a system of dueling civil and writ actions that benefits no one, including Tivol.

STATEMENT OF FACTS

On December 18, 2013, Karen Norton filed a charge of discrimination with the Missouri Commission on Human Rights ("Commission") against Tivol, alleging discrimination in violation of the Missouri Human Rights Act—Chapter 213, RSMo. *See* LF p. 9. In her charge, Norton set forth a series of events that culminated with the termination of her employment. *See* LF pp. 9-13. Norton alleged that she was terminated on November 18, 2013. *See* LF pp. 11, 13.

In response, Tivol requested that the Commission determine that any claim occurring more than 180 days before the charge was filed was untimely. *See* LF pp. 5-6, 14-19.

On June 30, 2014, the Commission issued a right-to-sue letter to Norton, upon her request. *See* LF p. 6. In the right-to-sue letter, the Commission explained that it had not completed its administrative processing of the complaint. *See* LF pp. 6, 20.

Tivol then filed a petition, seeking relief in the form of a writ of mandamus that would compel the Commission to withdraw the right-to-sue letter. *See* LF pp. 3-8. Tivol alleged that the Commission lacked the authority to issue the right-to-sue letter because the Commission was required to

determine, before issuing the letter, whether some of the claims in Norton's complaint were untimely. *See* LF pp. 7-8. Tivol did not identify what claims were untimely. *See* LF p. 6. To the contrary, Tivol conceded that "[i]t cannot be determined from the face of the Charge which, if any of the alleged inappropriate conduct allegedly occurred within the 180 days preceding Norton's filing of the Charge." *Id.* But it is undisputed that Norton was terminated on November 18, 2013, and that she filed her complaint with the Commission on December 18, 2013. *See* LF pp. 5, 9-13.

After Tivol filed the petition for mandamus, rather than issue a preliminary order in mandamus, the circuit court issued summonses. *See* LF pp. 28-34. The circuit court then dismissed the petition for failure to state a claim. *See* LF pp. 81-85. Tivol appealed the circuit court's dismissal. *See* LF pp. 86-90.

ARGUMENT

I. The Court should determine whether § 536.150 is a gateway to the filing of petitions for common-law writs against agencies, or creates its own civil cause of action against agencies in which writs are available remedies—and thus whether the first step by the circuit court in a § 536.150 action must be a preliminary writ or summons, and whether jurisdiction of an appellate court is properly invoked by filing a new writ petition or by filing a notice of appeal. (Responds to Appellants' Jurisdictional Statement.)

The Court of Appeals, Western District, addressed a question the answer to which, according to that Court, precluded review: whether the suit below was a common-law writ petition, denied without a preliminary writ being issued, and thus was not appealable (though the same issue could be raised in the appellate court through an original writ). *See* slip op. at 3-7. In doing so, the Court of Appeals skipped an essential analytical step: determining what a Petition invoking § 536.150 and requesting mandamus

is: a common law petition for writ of mandamus, or a civil action in which mandamus is one possible remedy.

One way to read § 536.150 is as a gateway to permitting the use of common law writs against administrative agencies. At least in modern Missouri jurisprudence, there is no question that the common law writs may be issued against lower courts. Their availability with regard to agencies, however, is less well established. That was shown in the Court of Appeals' thoughtful discussion in *State ex rel. Mississippi Lime Co. v. Missouri Air Conservation Comm'n*, 159 S.W.3d 376, 382–83 (Mo. App. W.D. 2004).

Mississippi Lime involved a request for a writ of prohibition directed to a commission. The Court of Appeals observed that courts (including this Court) have often issued such writs. But the Court of Appeals questioned the courts' authority to do so. Nonetheless, relying on the premise that this Court always considers its own authority, at least implicitly, the Court of Appeals derived from *State ex rel. Riverside Joint Venture v. Missouri Gaming Comm'n*, 969 S.W.2d 218 (Mo. 1998), the rule that prohibition is available. At the same time, the Court of Appeals expressed its skepticism: "Hence, we must assume that it examined its jurisdiction in *Missouri Gaming Commission* and concluded, without noting the issue, that the circuit court

had jurisdiction to issue a writ of prohibition directed to an administrative agency although no basis for jurisdiction is apparent to us." *Id.* at 382–83.

If § 536.150 is a gateway to permit a court to issue a common-law writ (in *Mississippi Lime*, prohibition; here, mandamus), then a petitioner cites that statute and files a petition for a writ. The proper first step for the court, then, is to grant a preliminary order. Rule 94.05. Denial of the petition would not be appealable; the way to get to an appellate court would be filing a petition in that court for an original writ, just as the Court of Appeals said here.

There is another way of looking at § 536.150: as a civil action with a list of available remedies that includes the listed writs. If that is the proper reading, then the court's first step is to issue summons. And a judgment denying the requested relief, even if the request included or was limited to mandamus or prohibition, would be appealable, just as a judgment in any other civil action is appealable.

This Court has never told lower courts which reading of § 536.150 is correct. Not surprisingly, then, circuit courts inconsistently choose between preliminary writs and summons in § 536.150 cases. In this appeal, this Court should provide guidance.

If the Court reads § 536.150 as establishing a cause of action with mandamus as an available remedy, the analysis of the Court of Appeals' majority becomes inapplicable.

If the Court chooses the reading of § 536.150 that treats suits seeking writs against agencies as common-law writ proceedings rather than as civil actions, that does not decide the case. It just means that the Court moves to the next question: whether it should nonetheless take up the merits of this appeal.

That question divided the Court of Appeals, Western District, *en banc*. A majority of the Court of Appeals held that the court had the authority to hear an appeal in this circumstance—but refused to exercise that authority. Slip op. at 7. Four judges in the minority would have exercised the court's authority to hear the appeal. Slip op. at 1-2 (Newton, J. dissenting). A fifth judge would have held that there was a right to an appeal. Slip op. at 1. (Ahuja, C.J. dissenting)—the logical result of reading § 536.150 to create a civil cause of action rather than merely open the gate to petitions for common law writs.

Whether there is a right to appeal rather than the requirement to seek an original writ matters. And whether a circuit court is to issue a preliminary

order instead of a summons matters. The choice affects procedure in the circuit court—and the means to obtain review in an appellate court and, perhaps, the standard of review to be applied there. *Compare Lee's Summit License, LLC v. Office of Admin.*, 486 S.W.3d 409, 415–16 (Mo. App. W.D. 2016) ("Appellate review of the circuit court's judgment in a noncontested case is essentially the same as the review for a court-tried case. . . . Thus, the scope of appellate review is governed by Rule 73.01 as construed in *Murphy v. Carron* . . . .") (citation and internal quotation omitted) *with State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 631 (Mo. 2007) ("The standard of review for writs of mandamus and prohibition . . . is abuse of discretion, and an abuse of discretion occurs where the circuit court fails to follow applicable statutes.").

This Court explained the purpose of § 536.150. "It is particularly to be noted that the the [sic] intent of the bill was that the several types of action specified therein were to be made more flexible and adaptable so as to mould them to fit the needs of those aggrieved by non-contested administrative decisions by making provision for taking evidence, and thus permit the court to determine for itself the facts relevant to the question at issue—a sort of statutory certiorari, for instance." *State ex rel. State Tax Comm'n v. Walsh*,

315 S.W.2d 830, 835 (Mo. banc 1958) (applying the provisions of the general venue and process requirements of §§ 506.110 and 508.010 to a case brought under § 536.150 (known at the time as § 536.105)). Though *Walsh* does not tell us whether the proper reading of the statute is as a gateway or as a new civil action, it seems to suggest the latter. But this is an instance in which having a clear answer—stating what procedure should be applied—may be more important than which answer the Court gives.

II. To obtain a writ of mandamus the petitioner must show a clear duty by the agency—and the denial of a writ is reviewed for abuse of discretion. (Responds to Appellants' Points I-III in part.)

Assuming this Court disagrees with the Court of Appeals majority and thus reaches the merits of the claims on appeal, the next questions will go to what burden the plaintiff or relator bears in the circuit court in order to obtain relief in the form of mandamus, and what standard of review applies to the circuit court's decision whether to grant that relief.

Under the common law, a relator seeking mandamus must show that the respondent has a clear duty to do what the relator asks:

> A litigant seeking mandamus must "allege and prove that he has a clear, unequivocal, specific right to a thing claimed." … A court will only issue the writ if the "ministerial duty sought to be coerced is definite, arising under conditions admitted or proved and imposed by law." … This Court reviews the circuit court's actions for an abuse of discretion, including failure to follow applicable statutes.

State ex rel. Young v. Wood, 254 S.W.3d 871, 872 (Mo. 2008), quoting *Furlong Companies, Inc. v. City of Kansas City*, 189 S.W.3d 157, 166 (Mo. banc 2006). If § 536.150 is a gateway to seeking a common law writ, that is the standard that the relator must meet.

There is no reason to apply a different standard to a civil action brought under § 536.150 seeking mandamus as the form of relief. There is no hint in § 536.150 that the General Assembly sought to redefine the writ or loosen the criteria to be used in deciding whether to grant it. And by providing for "injunction, certiorari, mandamus, prohibition or other appropriate action," the General Assembly left plenty of options for the plaintiff who cannot make the case for mandamus but still merits relief. This

Court should confirm, if it decides that § 536.150 establishes its own civil action, that the availability of the specific remedy of mandamus—and the alternative remedies named: injunction, certiorari, and prohibition—are to be granted or denied based on the longstanding common law and equitable rules that apply to those remedies.

The Court must then consider what standard of review to apply to the denial of mandamus relief in a § 536.150 case. In the past, there has been some inconsistency with regard to the standard of review in § 536.150 cases. *Compare Lee's Summit License, LLC v. Office of Admin.,* 486 S.W.3d 409, 415–16 (Mo. App. W.D. 2016) ("Appellate review of the circuit court's judgment in a noncontested case is essentially the same as the review for a court-tried case. . . . Thus, the scope of appellate review is governed by Rule 73.01 as construed in *Murphy v. Carron* . . . .") (citation and internal quotation omitted) with *U.S. Dep't of Veterans Affairs v. Boresi*, 396 S.W.3d 356, 358 (Mo. 2013) (*Boresi*) ("An appellate court reviews the denial of a petition for a writ of mandamus for an abuse of discretion."). That inconsistency may be the result of different views as to what § 536.150 does, and may be ameliorated by this Court adopting one view or the other.

But we are not aware of any inconsistency as to the standard of review for mandamus decisions, regardless of how § 536.150 is viewed. The standard of review for a decision by a circuit court whether to grant a petition for writ of mandamus has been and should remain abuse of discretion. *See Boresi*, 396 S.W.3d at 358; *State ex rel. Valentine v. Orr*, 366 S.W.3d 534, 538 (Mo. 2012).

III. Despite language this Court used in *Farrow*, the "clear duty" of the Missouri Commission on Human Rights was to do exactly what it did: to issue a "right to sue letter." (Responds to Appellants' Points I-III in part.)

On the merits, then, the question here is whether it was an abuse of discretion for the circuit court to deny the relator or plaintiff a writ of mandamus. And it could be an abuse of discretion only if the plaintiff or relator had shown that the Commission had a clear duty to withdraw the "right to sue letter" issued to Norton.

As discussed in (A), rather than having a duty to withdraw the letter, the Commission had an unequivocal statutory duty to issue it. The alleged duty to withdraw it is derived from this Court's language in *Farrow v. Saint Francis Med. Ctr.*, 407 S.W.3d 579 (Mo. 2013). As discussed in (B), this Court

should reject the conclusion that Tivol and many others have derived from *Farrow*.

A. The Missouri Commission on Human Rights had a clear duty to issue the "right to sue letter"—and has neither a statutory duty nor statutory authority to withdraw it.

The Missouri Human Rights Act ("Act") authorizes the Commission to receive, investigate, and pass upon complaints alleging discrimination. § 213.030.1(7), RSMo. After receiving a complaint, the Commission is to initiate an investigation, and if probable cause exists for crediting the allegations of the complaint, the Commission is to take steps to eliminate the unlawful discriminatory practice, including holding a hearing concerning the allegations. § 213.075, RSMo.

If the Commission proceeds with resolving the dispute through its process, a party aggrieved by a final action of the Commission may seek judicial review under Chapter 536, RSMo. *See* § 213.085, RSMo.

Under the Act, however, a complainant is provided the option of moving the case to a different venue before the Commission has completed its process. Once 180 days have passed from the date of the complaint, a

complainant may request a right-to-sue letter that allows the complainant to file a civil action in circuit court. § 213.111, RSMo. If the Commission has not completed its investigation, it must issue the letter. *Id.* And upon issuance of the letter, "the [C]ommission shall terminate all proceedings relating to the complaint." *Id.*

Here, Norton filed her charge of discrimination with the Commission on December 18, 2013. *See* LF p. 9. More than 180 days later, on June 30, 2014, the Commission issued the right-to-sue letter to Norton, upon request, explaining that it had not completed its administrative processing of the complaint. *See* LF pp. 6, 20.

Tivol has never disputed that the Commission did not complete its investigation of Norton's complaint, and the Commission is neither required, nor able, to complete an investigation for every complaint within 180 days. *See*, *e.g.*, *Igoe v. Dep't of Labor and Indus. Relations of State of Mo.*, 152 S.W.3d 284, 287 (Mo. 2005); *State ex rel. Washington Univ. v. Richardson*, 396 S.W.3d 387, 396-97 (Mo. App. W.D. 2013); *Pub. Sch. Ret. Sys. of Sch. Dist. of Kansas City v. Missouri Comm'n on Human Rights*, 188 S.W.3d 35, 46 (Mo. App. W.D. 2006).

The Commission receives numerous complaints, and whether a complaint (or a particular claim in a complaint) is timely—the issue Tivol raised—is case specific and can turn on fact intensive inquiries. *See generally Tisch v. DST Sys., Inc.*, 368 S.W.3d 245, 252 (Mo. App. W.D. 2012) ("[T]he timely filing requirement is subject to the principles of waiver, estoppel, and equitable tolling, including the 'continuing violation' theory exception.").

And as this Court has explained, the Commission is an agency with "very limited resources" that must determine "which few cases to investigate thoroughly in order to proceed with its own hearing and determination of the claims" or allow to be litigated in court after issuance of a right-to-sue letter. *Igoe v. Dept. of Labor and Industrial Relations of the State of Missouri*, 152 S.W.3d 284, 287 (Mo. 2005).

This is accomplished in one of two ways. "[I]f the [C]ommission does not elect to pursue the complaint under its own procedures, it can terminate the administrative proceedings by issuing a right-to-sue letter." *Id.* n. 5 (citing §§ 213.075 and 213.111, RSMo). "This can be done *sua sponte* at any time within the statute of limitations period, without completing an investigation." *Igoe*, 152 S.W.3d 284, 287 n. 5. "Alternatively, a complainant is entitled to receive, upon request, a letter giving notice of his right to sue after his claim

has been pending with the [C]ommission for 180 days or more where the [C]ommission has not completed its administrative processing and has not already issued a right-to-sue letter during that period." *Id.*

Here, after 180 days the Commission had not completed its administrative process. The Commission, therefore, was required to issue the letter to Norton upon request and had no authority to delay issuing the letter to resolve issues related to the timeliness of the claims in the charge. *See Farrow*, 407 S.W.3d 579, 589 ("As a creature of statute, an administrative agency's authority is limited to that given it by the legislature.") (citation and internal quotations omitted).

If the Commission had continued processing the charge of discrimination to determine whether some of the claims were timely, as Tivol contends it was required to do, the Commission would have violated the express command of § 213.111, which states that

> [i]f, after one hundred eighty days from the filing of a complaint alleging an unlawful discriminatory practice . . . , 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 against the respondent named in the complaint. . . . Upon issuance of this notice, the commission shall terminate all proceedings relating to the complaint."

(Emphasis added).

B. The Court should clarify or reverse the problematic language in *Farrow*.

Tivol argues that *Farrow v. Saint Francis Med. Ctr.*, 407 S.W.3d 579 (Mo. 2013) requires the Commission to determine, even after Norton had waited 180 days, whether some of Norton's claims were timely before issuing the right-to-sue letter.

For the reasons explained below, this position is not only unwarranted but if adopted will place the Commission in an untenable position where no matter what it does one party may feel compelled to bring an action against the Commission—creating an unnecessary, burdensome system of dueling civil and writ actions.

To begin, *Farrow* involved a motion to dismiss that was filed in an employment discrimination lawsuit that the Commission was not a party to. And the question in *Farrow* was not whether the Commission was required to determine the timeliness of each claim in a charge of discrimination before issuing a right-to-sue letter.

Rather, this Court refused to consider whether a charge filed with the Commission was timely where "Defendants took no action whatsoever to challenge the timeliness of [the] complaint while it was pending prior to the issuance of the right to sue letter, despite having notice of the complaint." 407 S.W.3d 579, 589. The Court explained that the defendants had waived the issue because they could have raised it earlier.

In addition to the procedural differences between this case and *Farrow*, there are also differences in the factual circumstances. For example, the time between when the charge was filed with the Commission and when the Commission issued the right-to-sue letter is different. In *Farrow*, the right-to-sue letter was issued before 180 days from when the complaint was filed, but in this case it was issued after 180 days. Further, in this case, unlike in *Farrow*, Tivol did raise the timeliness of the complaint to the Commission but before the Commission could resolve the dispute between Tivol and Norton

concerning the timeliness of the claims, 180 days passed and Norton requested the right-to-sue letter. Therefore, the circuit court correctly concluded that Tivol preserved its right to contest the timeliness of the complaint at trial.

For these reasons, *Farrow* technically speaking has no bearing on this case. However, it is necessary to address *Farrow* because, as the *Tivol Plaza* dissenters explained, "discrimination litigants have been misdirected by *Farrow's obiter dictum* discussion of cases addressing when a writ of mandamus can be secured to require the Commission to follow the law, and have improperly concluded that a writ of mandamus must be sought to require the Commission to determine the timeliness of an employee's administrative complaint after a right-to-sue notice has issued." Dissenting Opinion, Newton, J., Slip op. at 3.

In *Farrow*, given the circumstances, this Court reasoned that when the Commission issued the right-to-sue letter to Farrow, the Commission implicitly found that the complaint was timely; otherwise, the Commission would not have had the authority to issue the letter, and, thus, the defendants could have challenged that finding via a petition for mandamus relief under § 536.150 instead of waiting to raise the issue until after the

plaintiff brought the civil action against them. 407 S.W.3d 579, 589. Here, where the action was taken after 180 days, there is no such implicit finding.

Section 213.111 allows the complainant to shut down the Commission's process and move the matter to circuit court before the Commission has made findings, and the Commission's authority—its mandate—to issue a letter arises when the conditions of the statute are present regardless of whether some or all of the claims in the complaint are timely.

Here, when the Commission issued the letter, the Commission had not completed its administrative process, and it was more than 180 days from when the charge of discrimination was filed. The Commission, therefore, made no finding regarding the claims implicit or otherwise. The Commission had not just the authority but a duty to issue the letter because the conditions of § 213.111 had been met.

Further, practical reasons tilt heavily in favor of not extending *Farrow*'s reasoning to this case.

First, and foremost, a contrary holding would conflict with the Missouri Human Rights Act and multiple past appellate opinions.

Second, a contrary holding will lead to a costly, burdensome system of dueling writ and civil actions where no matter what the Commission does, in

every case for every issue related to the Commission's jurisdiction, the plaintiffs, the defendants, and the Commission will be required to litigate the issues in separate actions before the primary lawsuit between the plaintiff and defendant can proceed.

Two common scenarios will show why this is so.

Scenario 1 – Complainant brings writ action against the Commission:

It is not uncommon for the Commission's consideration of even the initial, jurisdictional questions raised by a complaint to extend more than 180 days. The Commission receives many complaints, but has few investigators. And, again, whether a complaint (or a particular claim in a complaint) is timely is case specific and can turn on fact intensive inquiries.

When at the 180-day mark the complainant requests the right-to-sue letter, and the Commission has not determined which claims are timely yet, the Commission cannot hold onto the complaint until it resolves the timeliness issues. If the Commission were to refuse to issue the letter as requested, the complainant may seek mandamus relief compelling the Commission to do so. *See* § 213.111, RSMo.

Scenario 2 – Respondent (and possibly also the Complainant) brings petition(s) against the Commission:

This time, the Commission complies with the statute and issues a right-to-sue letter without making any findings as commanded by § 213.111, RSMo (this is what happened in Tivol's case).

The respondent, fearing that under *Farrow* it will be waiving a defense to potentially untimely claims, feels compelled to seek a writ against the Commission.

Meanwhile, having the right-to-sue letter, the complainant cannot wait for the writ proceeding to be resolved. *See* § 213.111, RSMo (complainant has 90 days to file a civil action). That action need not be brought where the respondent's petition is pending. And the circuit judges in the respective counties may not be bound by the other's decision.

Take this case for example. In Norton's complaint filed with the Commission she set forth matters that occurred before and after the 180 day time period. *See* LF pp. 9-13. Therefore, there are some claims that are necessarily timely, but others that could potentially be untimely.

If Tivol's view were correct that *Farrow*'s reasoning should be extended to this case, then the Commission would have been required to hold onto the complaint and determine all issues related to its jurisdiction before issuing the right-to-sue letter (contrary to the command of § 213.111 to stop processing after 180 days upon request).

Then, whichever party was unhappy with how the issues were resolved (possibly both) would have been required to bring a separate mandamus action(s) before the primary civil action between the complainant and respondent could proceed. Such a result is contrary to the text of the Missouri Human Rights Act and would result in costly, unnecessary litigation.

CONCLUSION

For the reasons explained above, the Missouri Commission on Human Rights requests that the Court affirm the circuit court's judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

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I further certify that Respondents' brief complies with the limitations contained in Rule 84.06 and that the entire brief contains 5,189 words.

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