IN THE MISSOURI SUPEME COURT

R.M.A., (a minor child),	)	
By his next friend:	)	
RACHELLE APPLEBERRY	)	
	)	
Appellant/Plaintiff,	)	
	)	**Case No. SC96683**
v.	)	
	)	
BLUE SPRINGS R-IV SCHOOL	)	
DISTRICT, ET AL.	)	
	)	
Respondents/Defendants.	)	
	)	

ON APPEAL FROM THE
CIRCUIT COURT OF JACKSON COUNTY
HONORABLE MARCO A. ROLDAN

SUBSTITUTE BRIEF OF APPELLANT R.M.A.

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered by Judge Marco A. Roldan of the Jackson County Circuit Court (the "Trial Court") on claims for relief under the Missouri Human Rights Act (hereinafter, the "MHRA") for public accommodation discrimination on the basis of sex. The Trial Court entered a judgment dismissing all claims with prejudice against Appellant/Plaintiff R.M.A. ("Appellant") and in favor of Respondents/Defendants Blue Springs R-IV School District ("Respondent School District") and Blue Springs School District Board of Education, Inc. ("Respondent School Board") (collectively, "Respondents").

Appellant filed a timely appeal with the Missouri Court of Appeals Western District. This case does not involve the validity of a statute or constitutional provision, nor does it involve the construction of revenue laws or title to any state office. Therefore, the grounds for conferring exclusive jurisdiction in the Missouri Supreme Court do not apply and jurisdiction of the Court of Appeals was properly invoked pursuant to Article V, Section 3 of the Missouri Constitution. The Court of Appeals assigned this case No. WD80005.

On July 18, 2017, the Court of Appeals issued an opinion affirming the trial court's judgment. Appellant filed a timely Motion for Rehearing and Application for Transfer in the Court of Appeals, both of which were denied. Appellant then filed a timely Application for Transfer in this Court pursuant to Rule 83.04. On January 23, 2018, the Court sustained that application and transferred this case.

Therefore, pursuant to Article V, Section 10 of the Missouri Constitution, which gives this Court authority to transfer a case from the Court of Appeals "before or after opinion because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule," this Court has jurisdiction.

STATEMENT OF FACTS

a. Nature of the Case

This is a claim under the Missouri Human Rights Act for discrimination in public accommodation on the basis of sex.

b. Denial of Public Accommodation

At the time this matter was filed, Appellant was a school-aged boy living within the geographic boundaries of Respondent School District, attending Blue Springs South High School. (L.F. 11). When he was born, Appellant was assigned the sex of female. (*Id.*). However, Appellant transitioned to living as a boy in September 2009, while attending Respondent School District as a fourth grader. (*Id.*). Appellant's change of name and gender was recognized by the state of Missouri, which issued a new birth certificate pursuant to a Court order. (L.F. 11-12).

Respondents have recognized this transition, changing Appellants' school records to reflect his traditionally male name and permitting him to participate in sex-segregated physical education and athletics with other boys. (L.F. 11, 13). However, they have denied, and continue to deny, Appellant access to the boys' restrooms and locker rooms. (L.F. 12-14). As a result of such denial, Appellant suffered emotional distress from being singled out for different and inferior access to the public accommodations provided by Respondents to all other boys. (L.F. 13-14).

c. Procedural History

Initially, Respondents indicated that they might be willing to resolve this matter without judicial intervention, and Appellant originally sought redress from the unlawful conduct of Respondents through a negotiated settlement. However, Respondent School Board indicated they wished to have the guidance of a court on this issue. To meet that request, Appellant (with Respondents' cooperation) filed a Petition for a Writ of Mandamus before the Sixteenth Judicial Circuit at Independence on or about July 23, 2014. (S.L.F. 151). That court entered a Judgment in Respondents' favor on that petition. Appellant filed an appeal with the Court of Appeals, which the Court dismissed because no preliminary order had been issued. *R.M.A. v. Blue Springs R-IV School District et al.*, 477 S.W.3d 185, 189 (Mo. App. W.D. 2015) (citing *Powell v. Department of Corrections*, 463 S.W.3d 838, 841 n.3 (Mo. App. W.D. 2015)) (hereinafter "*R.M.A. I*").

At the same time, on or about October 24, 2014, Appellant filed a Charge of Discrimination with the Missouri Commission on Human Rights (hereinafter, the "MCHR") alleging sex discrimination on behalf of Respondents. (L.F. 17). On or about July 8, 2015, the MCHR issued a Right to Sue letter, authorizing Appellant to bring an action against the Respondents. (L.F. 19). Appellant timely filed his Petition for Damages on October 2, 2015. (L.F. 8).

On November 20, 2015, Respondents jointly filed a Motion to Dismiss. (L.F. 21). On June 28, 2016, the Trial Court entered an Order of Dismissal and Entry of Judgment, dismissing Appellant's Petition for Damages with prejudice. (L.F. 93) (A3). Within thirty (30) days, Appellant filed an authorized post-trial motion, specifically a motion to vacate

the judgment (although Appellant titled the filing a Motion to Reconsider). (L.F. 95). On August 18, 2016 the Trial Court denied Appellant's Motion to Reconsider. (L.F. 138). On August 25, 2016 Appellant filed his Notice of Appeal, accompanied by the proper supporting documents. (L.F. 140).

On July 18, 2017, the Court of Appeals issued its ruling affirming the decision of the Circuit Court. *R.M.A. v. Blue Springs R-IV District et al.*, No. WD80005 (Mo. App. W.D. Jul. 18, 2017) (hereinafter "*R.M.A. II*"). On August 1, 2017 Appellant filed a Motion for Rehearing and Application for Transfer in the Court of Appeals. (Motion attached to the Application for Transfer). The Court of Appeals overruled Appellant's motion and denied his application for transfer on September 5, 2017. (Order Attached to the Application for Transfer). On September 19, 2017, Appellant filed an Application for Transfer with this Court pursuant to Rule 83.04. On January 23, 2018, the Court sustained that application and granted transfer in this case.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN GRANTING RESPONDENTS' MOTION TO DISMISS BECAUSE THE PETITION STATED A CLAIM FOR WHICH RELIEF CAN BE GRANTED, IN THAT THE MISSOURI HUMAN RIGHTS ACT PROHIBITS SEX DISCRIMINATION IN PUBLIC ACCOMMODATION, INCLUDING DISCRIMINATION ON THE BASIS OF GENDER-RELATED TRAITS.

Self v. Midwest Orthopedics Foot & Ankle, 272 S.W.3d 364 (Mo. App. W.D. 2008)

Doe ex rel. Subia v. Kansas City, Missouri School District, 372. S.W.3d 43 (Mo. App. W.D. 2012)

Daugherty v. City of Maryland Heights, 231 S.W.3d 814 (Mo. banc 2007)

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)

RSMo. § 213.065 (2016)

II. THE TRIAL COURT ERRED IN GRANTING RESPONDENTS' MOTION TO DISMISS BECAUSE THE PETITION STATED A CLAIM FOR WHICH RELIEF CAN BE GRANTED AGAINST EACH DEFENDANT, IN THAT BOTH SCHOOL DISTRICTS AND BOARDS OF EDUCATION ARE "PERSONS" UNDER THE MISSOURI HUMAN RIGHTS ACT.

HS v. Board of Regents, 967 SW 2d 665 (Mo. App. E.D. 1998)

Akins v. Director of Revenue, 303 S.W.3d 563 (Mo. banc 2010)

Mo. Comm'n on Human Rights v. Red Dragon Rest., Inc., 991 S.W.2d 161 (Mo. App. W.D. 1999)

RSMo. § 213.010 (2016)

RSMo. § 213.065 (2016)

RSMo. § 213.070 (3) (2016)

RSMo. § 213.075 (2016)

III. THE TRIAL COURT ERRED IN GRANTING RESPONDENTS' MOTION TO DISMISS BECAUSE THE DOCTRINE OF COLLATERAL ESTOPPEL IS NOT APPLICABLE TO THE CASE, IN THAT THE DOCTRINE OF DOES NOT APPLY TO INTERPRETATIONS OF LAW AND BECAUSE THE DOCTRINE WAS NOT PROPERLY RAISED.

Bi-State Development Agency v. Whelan Security Company, 679 S.W.2d 332 (Mo. App. E.D. 1984)

Bresnahan v. May Dept. Stores Co., 726 S.W.2d 327 (Mo. banc 1987)

Johnson v. Missouri Dept. of Health and Senior Services, 174 S.W.3d 568 (Mo. App. W.D. 2005)

ARGUMENT

I. STANDARD OF REVIEW

Where a trial court has granted a motion to dismiss, the decision is reviewed *de novo*. *Conway v. CitiMortgage, Inc.*, 438 S.W.3d 410, 413 (Mo. banc 2014). Where, as here, the motion to dismiss is for failure to state a claim, the issue is solely a question of the adequacy of the Petition, which "is reviewed in an almost academic manner to determine if the plaintiff has alleged facts that meet the elements of a recognized cause of action" and the "facts alleged in the petition are assumed to be true and are construed liberally in favor of the plaintiff." *Id.* at 414 (citations omitted).

II. POINT I – THE TRIAL COURT ERRED IN GRANTING RESPONDENTS' MOTION TO DISMISS BECAUSE THE PETITION STATED A CLAIM FOR WHICH RELIEF CAN BE GRANTED, IN THAT THE MISSOURI HUMAN RIGHTS ACT PROHIBITS SEX DISCRIMINATION IN PUBLIC ACCOMMODATION, INCLUDING DISCRIMINATION ON THE BASIS OF GENDER-RELATED TRAITS

a. Sex discrimination in public accommodation under the MHRA includes discrimination based on gender-related traits

Appellant has pled that Respondents have engaged in public accommodation discrimination against Appellant R.M.A. on the basis of his sex.

"All persons within the jurisdiction of the state of Missouri are free and equal" the MHRA tells us, and therefore are "entitled to the full and equal use and enjoyment" of "any place of public accommodation" within this state without being subject to

"discrimination or segregation on the grounds of race, color, religion, national origin, *sex*, ancestry, or disability." RSMo. § 213.065.1. (2016)[1] (emphasis added). Therefore:

> It is an unlawful discriminatory practice for any person, directly or indirectly, to refuse, withhold from or deny any other person, or to attempt to refuse, withhold from or deny any other person, any of the accommodations, advantages, facilities, services, or privileges made available in any place of public accommodation . . . or to segregate or discriminate against any such person in the use thereof on the grounds of race, color, religion, national origin, *sex*, ancestry, or disability.

RSMo. § 213.065.2. (emphasis added). Because Appellant clearly alleges discrimination on the basis of sex in his Petition, the Trial Court should not have granted Respondents' Motion to Dismiss.

Sex discrimination occurs when a plaintiff's sex or gender is a contributing factor in a defendant's decision against a plaintiff. *Hill v. Ford Motor Co.*, 277 S.W.3d 659, 665 (Mo. banc 2009). The MHRA prohibits sex discrimination in public accommodations. *Doe ex rel. Subia v. Kansas City, Missouri School District*, 372 S.W.3d 43, 50 (Mo. App. W.D. 2012). Also, it is well-established that discrimination because of "sex" includes

[1] All reference to the Revised Statutes of Missouri are to the versions of the statute at the time the lawsuit was filed, and the Order of Dismissal and Entry of Judgment was filed, unless otherwise indicated. The MHRA was substantially amended by the Missouri legislature in 2017. S.B. 43 (Mo. 2017).

discrimination because of "gender," as courts use the two terms interchangeably. *See, e.g., id.* at 56 ("the sexual harassment and sexual assaults occurred on the basis of his gender and constituted sex discrimination"); see also *Hill*, 277 S.W.3d at 666 (Mo. banc 2009) ("[t]o prevail on a . . . sexual harassment claim, a plaintiff must prove . . . her gender was a contributing factor in the harassment"); *Green v. City of St. Louis*, 870 S.W.2d 794, 795 (Mo. banc 1994) ("Chapter 213 specifically provides that it shall be unlawful practice for an employer to discriminate because . . . gender"); *Tisch v. DST Systems, Inc.*, 368 S.W.3d 245, 250 (Mo. App. W.D. 2012) (plaintiff "filed suit under the MHRA, alleging employment discrimination based on gender, age, and retaliation").

Nothing in the language of the MHRA indicates that in prohibiting sex discrimination, the law forbids only discrimination that distinguishes between males and females. It is well-settled law that a plaintiff may state "an actionable claim under the MHRA" by alleging that a "gender-related trait . . . was a factor" in the discriminatory act against the plaintiff. *Self v. Midwest Orthopedics Foot & Ankle*, 272 S.W.3d 364, 371 (Mo. App. W.D. 2008) (quoting *Midstate Oil Co. v. Mo. Comm'n on Human Rights*, 679 S.W.2d 842, 846 (Mo. banc 1984)).

In finding against Appellant, the majority opinion by the Missouri Court of Appeals tried to limit this clear authority, holding discrimination because of sex only encompasses the discrimination between men and women, and that a "gender-related trait" is only one that, like pregnancy, "is inherently unique to one sex and that is thus susceptible to misuse to deprive women from a right or privilege afforded to men." *R.M.A. II* at *16. In support of this, the decision focuses on the regulations promulgated

by the MCHR (under the previous version of the statute, the Fair Employment Practices Act) on sex discrimination, which have a heading of "Employment Practices Related to Men and Women." *Id.* at *13 (quoting 4 C.S.R. 180-3.040 (1973) (A23)). Thus, the MCHR is said to have "signaled that 'sex' meant male or female." *R.M.A. II* at *13.

However, the regulations interpreting the MHRA are far from comprehensive, and no such inference should be drawn. For example, the section on religious discrimination, promulgated in 1980 and never amended, only discusses the need for employers to provide reasonable accommodations for religious belief. 8 C.S.R. 60-3.050 (current version); 4 C.S.R. 180-3.050 (1980) (A28). This does not suggest that to "discriminate . . . because of . . . religion" as defined by the MHRA does not encompass an express refusal to hire employees of a certain faith. Moreover, there are no regulations whatsoever related to race discrimination; yet such discrimination is clearly prohibited by the statute, the absence of regulations notwithstanding. Put simply, the scope of the regulations is not coequal with the scope of the statute, so the fact that the sex discrimination regulations cover practices "Related to Men and Women" does not mean that "discrimination . . . because of . . . sex" is only discrimination between men and women.

Beyond those regulations, prior to the enactment of the MHRA in 1986, there had been a "paucity of precedents construing our fair employment practices act." *RT French Co. v. Springfield Mayor's Commission*, 650 S.W.2d 717, 721 (Mo. App. S.D. 1983) (uncapitalized in the original). Thus, this is truly a question of first impression, and there is nothing to indicate that the legislature intended Respondents' limited reading of the

statute. Their interpretation severely narrows a remedial law, which Missouri courts have long recognized should be interpreted "liberally to include those cases which are within the spirit of the law and all reasonable doubts should be construed in favor of applicability to the case." *Doe*, 372 S.W.3d at 48 (quoting *Mo. Comm'n on Human Rights v. Red Dragon Rest., Inc.*, 991 S.W.2d 161, 166-67 (Mo. App. W.D. 1999)) (internal quotations omitted).

The Court of Appeals opinion also stresses the importance of analyzing the "operative phrase" in the statute, which the opinion quotes as "discriminate . . .on the grounds . . . of sex," rather than only analyzing the individual word "sex." *R.M.A. II* at *9. However, this diminishes the full scope of the prohibition, which makes it "an unlawful discriminatory practice" to, either directly or indirectly, "refuse, withhold from or deny any other person, or to attempt" to do so, "any of the accommodations, advantages, facilities, services, or privileges" that are available in places of public accommodation, "or to segregate or discriminate against any such person in the use thereof on the grounds of . . . sex." RSMo. § 213.065. Thus, the public accommodation provision forbids not just discriminating, but also segregating, refusing, withholding, and denying either the entirety of a public accommodation, or any part thereof.

The MHRA prohibits all forms of sex discrimination, including the discriminatory actions taken by Respondent against Appellant. Nothing in the language of the statute or the established precedent suggests otherwise.

b. Appellant's Petition pled a cause of action for sex discrimination

Appellant's Petition stated a claim for sex discrimination. Appellant pled that he was denied access to school facilities based on his gender-related traits. He pled that he has been recognized as a boy by a Missouri court and had his state birth certificate amended to reflect his sex, but despite that recognition, the school district has created other barriers that it does not create for other students based on his gender-related traits. Each of these is an unlawful discriminatory act under the MHRA.

Appellant specifically pled that Respondents denied Appellant R.M.A. access to the boys' restrooms and locker rooms within the Blue Springs R-IV School District based on his sex. (L.F. 14, ¶ 42). It is clear that these are accommodations or facilities, and that Respondents are withholding access to those facilities and discriminating in their provision of them to Appellant R.M.A. because of his sex. Respondents are also segregating Appellant from his fellow students because of his gender-related traits. Appellant further alleged that "Defendants reasons for denying Plaintiff R.M.A. access to the same accommodations as other boys is that Plaintiff R.M.A. is transgender and is alleged to have female genitalia." (L.F. 12, ¶ 33). These are both gender-related traits.

Further, Appellant alleged that despite his being broadly recognized as a boy, he was treated differently from other boys because of his gender-related traits. He pled that he Petitioned a court for an order amending his birth certificate, that such an order was granted by a court, and that a new birth certificate was issued identifying his sex as male. (L.F. 11-12, ¶¶ 23-25). Missouri law provides for such a change. RSMo. § 193.215.9. As far as appellant is aware, there is no other provision in Missouri law under which a

recognition of one's sex may occur, and no basis for recognizing someone's sex apart from what is recorded on their birth certificate or other identity documents. By all legal definitions, Appellant is a boy. Despite this, Respondents treated him differently than other students in their provision of access to facilities based his gender-related traits, as he pled, "[u]pon information and belief, Defendants do not speculate, inspect, or otherwise inquire as to the genitalia of other male students." (L.F. 13, ¶ 34). A person's genitalia is a gender-related trait. Therefore, Appellant has clearly pled a claim for sex discrimination in public accommodation under the MHRA.

c. There has been a growing recognition of sex discrimination by many courts in similar cases

Federal courts have also begun to recognize that discrimination of the type Appellant has faced is "discrimination because of sex." *Schroer v. Billington*, 577 F.Supp. 2d 293, 302 (2008). In *Schroer*, a case brought under Title VII of the Civil Rights Act of 1964 ("Title VII"), the court made an apt analogy in the context of religious discrimination:

> Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only "converts." That would be a clear case of discrimination "because of religion." No court would take seriously the notion that "converts" are not covered by the statute. Discrimination "because of religion" easily encompasses discrimination because of a *change* of religion.

Id. at 306.

Other courts have followed suit, recognizing that discrimination connected to gender identity is sex discrimination. *See, e.g. G.G. v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016) (finding a school district is required to allow a male student to use the proper restrooms); *Kastl v. Maricopa Cty. Comm. Coll. Dist*, 325 Fed. Appx. 492, 493 (9th Cir. 2009) (summary judgment affirmed on other grounds); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 572 (6th Cir. 2004).

Additionally, federal courts continue to find that discrimination involving sexual orientation is sex discrimination. While these cases are not directly on point, some of the language about the nature of sex discrimination is illustrative. The Seventh Circuit, sitting en banc, overturned a three-judge panel to find that "[i]t would require considerable calisthenics to remove the 'sex' from 'sexual orientation'" and "that such an effort cannot be reconciled with the straightforward language of Title VII." *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339, 350 (7th Cir. 2017). Therefore, "a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes." *Id.* at 351-52. In explaining why this understanding must follow, despite the fact that the legislators who passed the Title VII would not have specifically foreseen this application, an analogy was made to "the Sherman Antitrust Act, enacted in 1890, long before there was a sophisticated understanding of the economics of monopoly and competition," nonetheless "for more than thirty years the Act has been interpreted in conformity to the modern, not the nineteenth-century, understanding of the relevant economics." *Id.* at 352

(Posner, J., concurring). Similarly, "today 'sex' has a broader meaning than the genitalia you're born with," and it is equally appropriate that such understanding inform the interpretation of laws that prohibit sex discrimination. *Id.* at 354.

The day before this brief was filed, the Second Circuit issued a similar ruling, holding "that Title VII prohibits discrimination on the basis of sexual orientation as discrimination 'because of . . . sex.' To the extent that our prior precedents held otherwise, they are overruled." *Zarda v. Altitude Express, Inc.*, No. 15-3775, *10 (2nd Cir. Feb. 26, 2018) (A98). The Court recognized that "sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination." *Id.* at *20-21 (A108-A109). Looking at the text of Title VII, "the most natural reading of the statute's prohibition on discrimination 'because of . . . sex' is that it extends to sexual orientation discrimination because sex is necessarily a factor in sexual orientation." *Id.* at *21 (A109).

While federal discrimination law is not binding on Missouri Courts' understanding of the MHRA, when it is "not inconsistent" with Missouri law, it may be used for guidance. *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 818 (Mo. banc 2007). Thus, Appellant urges this Court to be guided by this precedent and continue its long history of giving the MHRA its broadest understanding.

d. The Discrimination against R.M.A. is also sex discrimination because it discriminates on the basis of stereotypes based on sex

Numerous courts have also held that discrimination against transgender persons is sex-stereotype discrimination, which is sex discrimination. These courts have recognized

the obvious fact that discrimination against a person simply because that person is transgender or undergoing gender transition is, by definition, discrimination based on that person's gender nonconformity. "A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. [T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior." *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (internal quotations omitted).

Almost thirty years ago, the United States Supreme Court held that the Price Waterhouse accounting firm discriminated against Ann Hopkins on the basis of sex when it denied her a promotion based, in part, on her failure to conform to stereotypes associated with women. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989). For example, she was advised that if she wanted to advance in her career she should be less "macho" and learn to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id*. at 235.

In the instant case, the Court of Appeals downplayed the importance of *Price Waterhouse*, saying it "was not a watershed case, but simply confirmed" that sex discrimination is "the deprivation of one sex of a right or privilege afforded the other sex," including such deprivations "based on traits perceived as unique to one sex." *R.M.A. II* at * 17. This fails to recognize both the holding and the import of *Price Waterhouse*. The decision expanded the understanding of sex discrimination to encompass discrimination based on the failure of a person to conform to expectations of their sex. It has been recognized as a landmark ruling for doing so. *See EEOC v. Boh*

Bros. Const. Co., LLC, 689 F.3d 458, 462 (5th Cir. 2012); *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 49 (1st Cir. 2009).

At the time of its decision, the Court of Appeals also downplayed the import of *Price Waterhouse* by observing that "no Missouri case has yet concluded that sexual stereotyping falls within the intended scope of the MHRA," and it declined to do so at the time. *R.M.A. II* at *17. Subsequently, that issue has been decided, and it has been held that the MHRA *does* cover discrimination based on sex stereotyping. *Lampley v. Mo. Comm'n on Human Rights*, No. WD80288, *5 (Mo. App. W.D. Oct. 24, 2017) (application for transfer granted Jan. 23, 2018). Thus, to the extent that the treatment Appellant faced was sex stereotyping, it was discrimination because of sex under the MHRA. Respondents' denying Appellant access to the boys' restrooms and locker rooms was sex stereotyping.

A growing number of Courts have recognized this. Thus, "it would seem that any discrimination against [transgender persons]—individuals who, by definition, do not conform to gender stereotypes—is . . . discrimination on the basis of sex as interpreted by *Price Waterhouse.*" *Finkle v. Howard County*, 12 F.Supp. 3d 780, 788 (D. Md. 2014); *see also Rumble v. Fairview Health Servs.*, No. 14-CV-2037 SRN/FLN, 2015 WL 1197415, at *2 (D. Minn. Mar. 16, 2015) ("Because the term 'transgender' describes people whose gender expression differs from their assigned sex at birth, discrimination based on an individual's transgender status constitutes discrimination based on gender stereotyping."); *Schroer*, 577 F.Supp. at 305 (D.D.C. 2008) (for purposes of *Price Waterhouse* it does not matter whether an employee is perceived "to be an insufficiently

masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual"); *Smith*, 378 F.3d at 575 (*Price Waterhouse* applies when an individual "fails to act and/or identify with his or her gender").

Another recent case involved an almost identical set of facts, and the Seventh Circuit—ruling in a case brought under Title IX of the Education Amendment of 1972 and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution—held that a school policy that "requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance," and was thus impermissible discrimination because of sex under both the statute and the constitutional provision. *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034, 1050 (7th Cir. 2017).

The EEOC has also specifically recognized that excluding a transgender person from restrooms that correlate with that person's gender identity and requiring them to use only separate, different facilities is sex discrimination because it necessarily subjects them to different treatment based on the lack of congruence between their gender identity and their physical anatomy. *See Lusardi v. McHugh*, EEOC DOC 0120133395 at *9 (Apr. 1, 2015) (A75) (agency could not limit transgender employee's access to the restroom based on belief she was not truly female unless she had undergone genital surgery); *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, No. 2:02-cv-01531-SRB at *6 (D. Ariz. June 3, 2004) (A42) ("neither a woman with male genitalia nor a man with stereotypically female anatomy, such as breasts, may be deprived of a benefit or privilege

of employment by reason of that nonconforming trait. Application of this rule may not be avoided merely because restroom availability is the benefit at issue.").

The term "transgender" is used to describe a set of sex-based characteristics of an individual. These sex-based characteristics vary from individual to individual. The characteristics do not conform to the traditional notions of "male" and "female," thus discrimination due to one being "transgender" is sex-stereotyping discrimination, which is discrimination based on a gender-related trait. Discrimination based on gender-related traits is recognized as sex discrimination under the MHRA. *Self*, 272 S.W.3d at 371. Therefore, the discrimination practiced by Respondents in denying Appellant access to the boys' restrooms is sex discrimination under the MHRA.

e. The plain language of the MHRA prohibits the discrimination to which Appellant was subjected

The MHRA's plain language prohibits Respondents' discriminatory acts against the Appellant. As the Court of Appeals correctly noted, Missouri Courts may not "read into a statute a legislative intent contrary to the intent made evident by the plain language." *R.M.A. II*, at *9, (quoting *Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479, 482 (Mo. App. W.D. 2015) (quoting *Keeney v. Hereford Concrete Prods., Inc.*, 911 S.W.2d 622, 624 (Mo. banc 1995) (additional quotation and citation omitted))). Indeed, as this Court explained in *Keeney*, when "the language of the statute is unambiguous, courts must give effect to the language used by the legislature," and may not infer a meaning that runs contrary to what is written in the statute, even if it might better reflect the legislators' expected outcome. *Keeney*, 911 S.W.2d at 624 (rejecting the

argument to limit the reach of the MHRA's retaliation provision even when the defendant claimed it went beyond the legislature's intended scope). Thus, because the plain meaning of the MHRA making it unlawful to "discriminate . . . because of . . . sex" is that one is only liable if one was to discriminate *between* the sexes, it is improper for a court to apply that alternative meaning. This is the case even if such court believes the latter is what the legislature intended. Instead, courts must follow the plain language of the statute, which prohibits discrimination because of a plaintiff's sex, whether that is because he is male or female, or because of the kind of male or female he is. As Justice Scalia observed in recognizing that same-sex sexual harassment was actionable as sex discrimination under Title VII, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998).

Respondents emphasize the absence of the words "transgender" and "gender identity" in the MHRA to argue that Appellant is not protected against discrimination on the basis of "sex." (L.F., 30). Appellant did not plead a claim of "transgender discrimination." He pled a claim of "sex discrimination." (L.F. 14). The fact that Appellant is transgender is nothing more than a term for gender related traits Appellant possesses. The term "transgender" and "gender identity" do not need to be included in the MHRA because gender-related traits are already covered under the MHRA's prohibition on "discrimination . . . because of sex." Appellant has alleged that Respondents have

discriminated against him due to his presumed lack of genitalia traditionally associated with a male. This is sex discrimination and it is prohibited by the MHRA.

The fact that a subcategory of discrimination can be separately identified by a different term does not change the fact that it falls under the larger category. As the Sixth Circuit explained, Respondents may not "superimpose classifications such as 'transsexual' on a plaintiff, and then legitimize discrimination based on the plaintiff's gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification." *Smith*, 378 F.3d at 574.

The MHRA does not enumerate pregnancy discrimination, but Missouri courts have repeatedly held that pregnancy discrimination is sex discrimination under the MHRA. *Midstate Oil*, 679 S.W.2d at 846 (affirmed in *Self*, 272 S.W.3d at 371; *Loethen v. Cent. Mo. Urology Clinic, Inc.*, 48 S.W.3d 126, 131 (Mo. App. S.D. 2001); *McMullin v. McRaven*, 882 S.W.2d 772, 774 (Mo. App. E.D.1994)). Like pregnancy, the fact that Appellant R.M.A. is transgender is a gender-related trait, and therefore a sufficient basis to state a claim for sex discrimination under the MHRA. *Self*, 272 S.W.3d at 371.

Similarly, sexual harassment was once considered outside the scope of sex discrimination claims. It now broadly understood to be a form of sex discrimination, despite the fact that the terms "sexual harassment" and "hostile work environment" appear nowhere in either the MHRA or Title VII. Both Missouri and federal law have come to recognize this form of discrimination over time.

In 1974, a federal district court dismissed a claim sexual harassment because "[t]he substance" of the plaintiff's complaint was "that she was discriminated against, not

because she was a woman, but because she refused to engage in a sexual affair with her supervisor," and although such conduct was "inexcusable," it was "not encompassed" by Title VII's prohibition on sex discrimination. *Barnes v. Train*, No. 1828-73, 1974 WL 10628, at *1 (D.D.C. Aug. 9, 1974). The D.C. Circuit reversed, recognizing that "gender cannot be eliminated from the formulation" of the discriminatory acts, and "that formulation [of sexual harassment] advances a prima facie case of sex discrimination within the purview of Title VII." *Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977). Title VII's prohibition on discrimination because of sex "is not confined to differentials founded wholly upon an employee's gender," but rather "it is enough that gender is a factor contributing to the discrimination." *Id.* "Today, the Supreme Court and lower courts 'uniformly' recognize sexual harassment claims as a violation of Title VII, notwithstanding the fact that, as evidenced by the district court decision in Barnes, this was not necessarily obvious from the face of the statute." *Zarda*, *25-26 (2nd Cir. Feb. 26, 2018) (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66-67 (1986)) (A129-A130).

Similarly, Missouri does not seem to have initially recognize that sexual harassment was a form of sex discrimination. The MCHR's regulations currently address sexual harassment. 8 C.S.R. 60-3.040 (17). However, this was not always the case. Their initial regulations on sex discrimination, promulgated in 1973, did not include a section on sexual harassment. 4 C.S.R. 180-3.040 (1973) (A23). This regulation was added in 1980, on a timeline roughly analogous to recognition by federal courts. 4 C.S.R. 180-3.040 (17) (1980) (A28). Similarly, Appellant can find no reported cases (at least at the

appellate level) of a claim for sexual harassment under the MHRA prior to 1990. *Hill v. John Chezik Imports*, 797 S.W.2d 528, 529 (Mo. App. E.D. 1990).

The plain language of "discriminate . . . because of . . . sex" covers far more than simply distinctions made between men and women, and a long line of cases reported at both the state and federal level make that clear. The absence of express language regarding pregnancy discrimination and sexual harassment has never kept Missouri Courts from recognizing them as sex discrimination. There is no reason the absence of express language regarding gender identity should keep this court from recognizing that the discrimination against Appellant is sex discrimination as well. Any interpretation of the MHRA that limits sex discrimination to that between men and women should be rejected by this Court in favor of one that better fits the statute's plain meaning and clear objective.

f. Respondents' other arguments are similarly unsupported by relevant precedent

Respondents have also suggested that a recent ruling involving sexual orientation controls. (L.F. 56) (citing *Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479 (Mo. App. W.D. 2015), citation updated). However, in that case the Petition failed to state a claim because "the petition truly does not allege discrimination or harassment on the basis of sex. Pittman merely alleges that [Cook Paper] caused the workplace to be an objectively hostile and abusive environment based on sexual preference." *Pittman*, 478 S.W.3d at 483 (internal quotations omitted).

By contrast, Appellant has repeatedly pled that Respondents discriminated against him because of his sex. (L.F. 13-14, ¶¶ 35, 37, 42, 43, 50). The Court of Appeals has made clear that even in the wake of *Pittman*, if a claim by someone who experienced discrimination on the basis of sexual orientation "alleged discrimination on the basis of . . . sex . . . [the] claim would be recognized under the MHRA." *Moore v. Lift for Life Academy, Inc.*, 489 S.W.3d 843, 847 n.1 (Mo. App. E.D. 2016). Finally, Appellant's claims implicate gender identity, which is a distinct matter from sexual orientation.

Respondents also suggest that the question of whether Appellant can state a claim for sex discrimination "has been addressed by the Missouri legislature" who have settled the issue by considering enumerating "sexual orientation" and "gender identity" in the MHRA, then declining to do so. (Respondents' Brief before the Court of Appeals [hereinafter "Resp. Brief"] at 10-12). Respondents cite no authority under Missouri law for the proposition that the Missouri Legislature's subsequent failure to pass a particular piece of legislation amending an existing statute is persuasive evidence for the proposition that the prior legislature (who enacted the statute in to law) intended that the statute not carry the meaning it would have had the amendments been successful. The United States Supreme Court has expressed severe skepticism for such an understanding, writing

> [S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law. Congressional inaction lacks persuasive

> significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.

Pension Benefit Guaranty Corporation v. LTV Corp., 496 US 633, 650 (1990) (internal citations omitted). While such precedent is not binding on this Court, Appellant finds its reasoning highly persuasive.

Moreover, were we to accept Respondents' proposition that the Missouri Legislature's failure to pass a bill should be understood to mean they intend the bill's effect not to be in place, two bills introduced but not passed in Missouri's 2016 legislative session support Appellant's position. Each of the bills would have restricted access to restrooms for transgender students in Missouri public schools. H.B. 1624 (Mo. 2016) (A33); S.B. 720 (Mo. 2016) (A35). Neither bill was enacted into law. By Respondents' logic, the legislature intended for Appellant to have the access he is seeking.

g. Conclusion

The Respondents have taken the position that only discrimination between men and women constitutes sex discrimination under the MHRA. Such an interpretation is contrary to broad, consistent trends in the understanding of civil rights statutes, as well as specific case law in Missouri. If Respondents' denial of access to restrooms was found not to be sex discrimination, nothing would prevent them from denying Appellant access to restrooms entirely. This would severely impinge not only on his use of the restrooms, but his ability to access any facilities at the school. Further, nothing would prevent

Respondents from treating other students in the same manner as they have treated Appellant or selecting another non-conforming gender-related trait of any student and using it as the basis to discriminate. Such a conclusion would be entirely inconsistent with the law's mandate, that Appellant, like all Missourians, is "free and equal" and "entitled to the full and equal use and enjoyment" of public accommodations. RSMo. § 213.065.1.

In reviewing the applicable law, it is clear that Appellant has stated a cognizable claim of sex discrimination under the MHRA. Respondents have denied Appellant R.M.A. access to a public accommodation because of a gender-related trait, and therefore engaged in sex discrimination in violation of the MHRA. Consequently, this Court should reverse the Trial Court's Order of Dismissal and Entry of Judgment and remand the case for further proceedings.

III. POINT II – THE TRIAL COURT ERRED IN GRANTING RESPONDENTS' MOTION TO DISMISS BECAUSE THE PETITION STATED A CLAIM FOR WHICH RELIEF CAN BE GRANTED AGAINST EACH DEFENDANT, IN THAT BOTH SCHOOL DISTRICTS AND BOARDS OF EDUCATION ARE "PERSONS" UNDER THE MISSOURI HUMAN RIGHTS ACT

The Trial Court erred in granting Respondents' Motion to Dismiss to the extent that it was based on Respondents' argument that the MHRA does not prohibit public accommodation discrimination by the state and its political subdivisions because they are not included in the definition of "person."

According to the MHRA's definition section, when the term "person" is used in the chapter, it "includes one or more individuals, corporations, partnerships, associations, organizations, labor organizations, legal representatives, mutual companies, joint stock companies, trusts, trustees, trustees in bankruptcy, receivers, fiduciaries, or other organized groups of persons." RSMo. § 213.010 (14). The term employer "includes the state, or any political or civil subdivision thereof, or any person employing six or more persons within the state, and any person directly acting in the interest of an employer." RSMo. § 213.010 (7). In the section describing the filing of a complaint under the MHRA, the term "respondent" is used to mean "the person named in the complaint." RSMo. § 213.075.5.

Respondents argue that they are not "persons" for the purposes of Sections 213.010(14) and 213.065.2 of the MHRA. (L.F. 26). However, Respondents' claim that the legislature intended to allow them (and other public entities) to discriminate on the basis of race, color, religion, national origin, sex, ancestry, or disability in their provision of public accommodations is unsupported by precedent and based on a selective reading of the MHRA that ignores other portions of the statute and is contradicted by current case law.

Respondents argue that because the definition of "person" does not explicitly list "the state, or any political or civil subdivision thereof" in its definition, it excludes them as a school district and school board, respectively. (L.F., 6). However, it is clear from looking at the entirety of the statute that the legislature intended the state and its

subdivisions to be subject to the MHRA and considered "persons" for the purpose of the statute.

a. The statute expressly contemplates liability for political subdivisions

Respondent's assertions that the MHRA does not prohibit public accommodation discrimination by the state and its political subdivisions is expressly contradicted by the plain language of the MHRA.

Respondents correctly averred that the "state and its agencies are not to be considered as within the purview of a statute . . . unless an intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication." *Carpenter v. King*, 679 S.W.2d 866 (Mo. banc 1984). However, they fail to point out that the MHRA does exactly this:

> It shall be an unlawful discriminatory practice . . . [f]or the state or any political subdivision of this state to discriminate on the basis of race, color, religion, national origin, sex, ancestry, age, as it relates to employment, disability, or familial status as it relates to housing

RSMo. § 213.070 (3) (2016); see also *Doe*, 372 S.W.3d at 50-51 (clarifying that most protected classes, including sex, are protected from all forms of discrimination, while the phrase "as it relates to employment" only applies to "age" and "as it relates to housing" limits only "familial status").

Thus, Respondents, as a political subdivision, are unambiguously included in the statute, and their discrimination because of sex is an unlawful discriminatory act. To find otherwise would be to ignore the plain meaning of the MHRA.

b. Other provisions of the MHRA also make clear that the state and its political subdivisions cannot discriminate in the provision of public accommodations

In addition to RSMo. § 213.070 (3), the MHRA contains additional explicit language prohibiting the state and its subdivisions from engaging in public accommodation discrimination. The MHRA section addressing public accommodation discrimination clearly manifests the legislature's intent to hold the state accountable. *See* RSMo. § 213.065.

While the definition of "person" does not explicitly include language regarding the state and its subdivisions, the definition of "public accommodations" does. The statute defines "Places of public accommodation" to include "[a]ny public facility owned, operated, or managed by or on behalf of this state or any agency or subdivision thereof, or any public corporation." RSMo. § 213.010 (15)(e) (2015). This language clearly manifests the intent to include the state and its subdivisions in the prohibition on public accommodation discrimination in Section 213.065 by expressly naming them in the statute.

To include public facilities as places of public accommodation, but not permit an action to be brought against the entities providing such accommodation renders sub-section (15)(e) meaningless. Because courts are "required to give meaning to every word of the legislative enactment," when a proposed statutory reading renders certain words or phrases into "mere surplusage, included for no reason, [s]uch a construction is not favored." *State ex rel. SSM Health Care St. Louis v. Neill*, 78 S.W.3d 140, 144 (Mo. banc 2002). As such, Respondents' interpretation of the statute should be rejected.

Because the MHRA is clear in including the state or any agency or subdivision thereof in the portion of the Act dealing with public accommodation discrimination, Respondents cannot argue they are immune from liability for their discriminatory acts.

c. Respondents' proposed construction would lead to the absurd result of insulating public entities from liability under the statute while making at least some of their conduct unlawful

This Court should reject the claim that Respondents (and other public entities) are not "persons" because it would lead to the illogical result of their being employers who can commit acts of unlawful discrimination under the MHRA, but who cannot have any action taken against them under the law's remedial provisions. The definitions in Section 213.010 apply to every use of those terms in the chapter. Respondents argue that they are excluded from the definition of "person" in that section. In the section of the act that creates the procedure for filing a charge of discrimination, such a charge is filed against a "person." If Respondents are not persons, then no charge of discrimination can be filed against them, meaning no administrative or civil action can be taken against them. However, Respondents acknowledge that they are "employers" under the act, and employers can engage in unlawful employment discrimination. If this Court were to adopt Respondents' interpretation of the statute to exclude them as persons, it would create a situation in which their conduct could be explicitly defined as discrimination, but they could not be subject to the remedies the MHRA creates.

The MHRA is an expansive statute that creates a legal infrastructure to protect the citizens of Missouri from unlawful discrimination. In addition to creating the MCHR, the

statute defines various forms of unlawful discriminatory acts, including "unlawful employment practice[s]" (RSMo. § 213.055), unlawful public accommodation discrimination, (RSMo. § 213.065), and "unlawful housing practice[s]" (RSMo. § 213.040), among others. Recourse for such discrimination is had through an administrative process, which requires those claiming to have been discriminated against to file a complaint with the MCHR. RSMo. § 213.075. From there, the Commission may hold a hearing and make a finding regarding the claim. RSMo. § 213.085. Alternatively, after one hundred and eighty days following the filing of a complaint, an aggrieved party may request the MCHR issue a right to sue letter, which authorizes him to bring a private cause of action in circuit court. RSMo. § 213.111. However, none of these remedies are available without the filing of a charge of discrimination.

By Respondents' own admission, they are included in the definition of employer under the act, and therefore are liable for employment discrimination. (L.F. 49) (citing RSMo. § 213.055). This understanding of the MHRA is long-established. *HS v. Board of Regents*, 967 SW 2d 665, 673 (Mo. App. E.D. 1998). There is no question that a public school district or school board engaging in conduct that violates Section 213.055 is an unlawful employment practice. In order to seek remedy under the MHRA, the employee being subjected to discrimination is required to file a charge of discrimination. However, such a charge must "state the name and address of the *person* alleged to have committed the unlawful discriminatory practice," and therefore can only be filed against a person. RSMo. § 213.075.1 (emphasis added). Similarly, a civil action under the statute is brought "against the respondent named in the complaint." RSMo. § 213.075. As this can

only be a person, any entity that is not a person could not have a complaint or civil action filed against them.

It is a common cannon of statutory construction that courts will reject any interpretations that "lead to an absurd or illogical result." *Akins v. Director of Revenue*, 303 S.W.3d 563, 565 (Mo. banc 2010). The definitions, including the definition of "person," apply everywhere the term is "used in this chapter." RSMo. § 213.010. If public entities such as the Respondents are not included in the definition of person, no charge of discrimination could be filed against them, and those discriminated against as employees would have no relief from the discrimination that even Respondents agree constitutes unlawful employment discrimination under the MHRA. This is precisely the type of absurd and illogical result the legislature could not have intended, and therefore the interpretation put forth by Respondents should be rejected by the Court.

The only way for a party to gain relief under the MHRA is to file a charge of discrimination, and such charges can only be filed against a "person." It is clear that the legislature intended for all entities that were defined as employers to also be defined as persons, and that includes Respondents.

d. Respondents' reliance on *Nodaway Worth* is misguided, as they are clearly covered by the MHRA's definition of "person"

Respondents also extensively cite another case for the proposition that "[t]he legislature's failure to include political or civil subdivisions of the state, such as school districts and boards, is a clear sign that such entities are not a person." (L.F. 27) (citing *St. Joseph Light & Power Company v. Nodaway Worth Electric Cooperative*, 822 S.W.2d

574 (Mo. App. W.D. 1992)). This point is largely irrelevant since, as discussed above, the legislature does expressly include public entities in the language of the statute. RSMo. § 213.070 (3); RSMo. § 213.010(15)(e).

Respondents do not, and cannot, claim that the statute discussed in *Nodaway Worth* has any direct bearing upon whether they are "persons." The statute analyzed in the case, a previous version of section 394.315 of the Revised Statutes of Missouri, governed the activities of Rural Electric Cooperatives, and was amended during the pendency of the appeal to remove the relevant definition. *Nodaway Worth*, 822 S.W.2d at 575 (citing to a prior version of RSMo. § 394.315, available in relevant part in the text of *Nodaway Worth*, 822 S.W.2d at 575, and not included in Appellant's Table of Authorities to avoid confusion with the current version of the statute). Respondents can only analogize or compare the statutes. Even by analogy, the decision does not support their argument.

The definition of "person" in the MHRA includes several categories of entities not covered by the statute at issue in *Nodaway Worth*, including "organizations," "legal representatives," "fiduciaries," and "other organized groups of persons." *See Nodaway Worth*, 822 S.W.2d at 575; RSMo. § 213.010(14). Also, while the definition in section 394.315 is limited to a "cooperative or private corporation," the definition in § 213.010 includes "corporations" generally. *Id.* Thus, even if a school district was not a "person" under 394.315, it would be under the MHRA, since it could fit under any number of those categories.

While *Nodaway Worth* does not directly address the question of a board of education, Respondent Board also clearly fits at least one of the categories listed. For example, a board of education could be considered a fiduciary. A fiduciary is someone "who is required to act for the benefit of another person on all matters within the scope of their relationship." Black's Law Dictionary, Third Pocket Edition. This describes the obligation of the school board—or at least its members—to the school. And indeed, school board members have been held to have a fiduciary relationship to the school. *State ex rel. Brickey v. Nolte*, 169 S.W.2d 50, 56 (Mo. 1943). If a board of education's members are fiduciaries, and therefore persons under the statute, a school board is an "organized groups of persons," and therefore a person itself.

Finally, the definition of "person" is not a comprehensive list, it only "includes" those categories enumerated. RSMo. § 213.010(14). Therefore, even if it does not fit any such category, a board of education could still be a person under the MHRA. Respondent School Board is a "person" under the meaning of the MHRA.

The fact that the definition of person in *Nodaway Worth* did not cover a school district does not mean the much more expansive definition under the MHRA does not include Respondents. Their extensive reliance on the case is misplaced, and they should be considered persons under the MHRA.

e. Conclusion

Respondents seek a categorical rule excluding them and all other public entities from liability for public accommodation discrimination. As with their desire to narrow the definition of sex discrimination, this proposed construction is unsupported by

precedent and antithetical to Missouri court's broad imperative to interpret this and other remedial statutes to encompass as many claims as possible. See *Red Dragon*, 991 S.W.2d at 166-67.

Because the Respondents are persons under the MHRA and can be held liable for public accommodation discrimination in their capacities as public entities, the judgment of the Trial Court should be reversed.

IV. POINT III – THE TRIAL COURT ERRED IN GRANTING RESPONDENTS' MOTION TO DISMISS BECAUSE THE DOCTRINE OF ISSUE PRECLUSION IS NOT APPLICABLE TO THE CASE, IN THAT THE DOCTRINE OF COLLATERAL ESTOPPEL DOES NOT APPLY TO INTERPRETATIONS OF LAW AND BECAUSE THE DOCTRINE WAS NOT PROPERLY RAISED

Respondents argue that they are entitled to dismissal on the basis of the doctrine of collateral estoppel. (L.F. 69). However, this assertion was not properly before the Trial Court when it was decided, and if it had been, it would not be applicable. Collateral estoppel applies to conclusions of fact, or the application of facts to the law, not to interpretations of law, and Respondents failed to make the necessary showing that would entitle them to such relief.

a. Respondents failed to properly raise the affirmative defense of collateral estoppel

Respondents are not entitled to dismissal on the basis of collateral estoppel because they have not properly raised the issue. Collateral estoppel is an affirmative defense. *See Bresnahan v. May Dept. Stores Co.*, 726 S.W.2d 327 (Mo. banc 1987); *Woodson v. City of Independence*, 124 S.W.3d 20, 26 (Mo. App. W.D. 2004).

The Missouri Supreme Court Rules require that an affirmative defense be raised "[i]n pleading to a preceding pleading," and must "contain a short and plain statement of the facts showing that the pleader is entitled to the defense." Rule 55.08. An affirmative defense is "not a defense that may be raised in a motion to dismiss . . . [a] pre-trial dismissal based on an affirmative defense must be granted under the standards of summary judgment." *Treaster v. Betts*, 324 SW 3d 487, 490 (Mo. App. W.D. 2010).

Because Respondents failed to meet the pleading standards required, they were not entitled to relief on the affirmative defense of collateral estoppel, and the Trial Court erred in granting such relief.

b. Collateral estoppel bars the re-adjudication of facts, not the interpretation of the law

Even if it had been properly raised, Respondents cannot use the defense in the manner they desire. The doctrine of collateral estoppel cannot render a prior trial court's interpretation of a statute binding on a party in another matter. "The nature of collateral estoppel is such that a *fact* appropriately determined in one law suit is given effect in another case involving different issues." *Bi-State Development Agency v. Whelan*

Security Company, 679 S.W.2d 332, 335 (Mo. App. E.D. 1984) (emphasis added) (citing *Hudson v. Carr*, 668 S.W.2d 68, 70 (Mo. banc 1984)); see also *Bresnahan*, 726 S.W.2d 327. While some cases refer to "issue of fact or law" when discussing collateral estoppel, it is clear that they refer to the application of the law to the facts in the case, rather than an interpretation of a law. See, e.g., *Bi-State*, 679 S.W.2d 332 ("In the prior case the primary issue was whether the absence of respondents' security guard caused or contributed to cause the fire and resultant destruction of Bi-State's hangar and the contents therein"); *Johnson v. Raban*, 702 S.W.2d 134, 137 (Mo. App. E.D. 1985) (in a claim for legal malpractice, "the adequacy of defendant's representation" of the plaintiff in a prior criminal trial, decided in the denial of a motion to vacate for inadequate assistance of counsel, was "the same issue of fact present in the malpractice case").

In response to this argument, Respondents have consistently failed to cite authority from Missouri law suggesting that a pure question of law is subject to the doctrine of estoppel. Instead, in their brief in the Court of Appeals they cited a single federal case, in which the United States Supreme Court agreed that the federal government was estopped from arguing as to whether private contractors met a certain definition within a federal statute. (Resp. Brief at 47) (citing *United States v. Stauffer Chemical Company*, 464 US 165 (1984)). Appellant can find no Missouri court following this precedent. Moreover, the case provides an exception for "unmixed questions of law." *Stauffer*, 464 US at 170. In discussing these unmixed questions of law, the *Stauffer* court cites *United States v. Moser*, which explains that when "a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting

that the law is otherwise, merely because the parties are the same in both cases." 266 US 236, 242 (1924). Here, in deciding whether Appellant was entitled to a writ of mandamus, Respondents assert that the previous trial court enunciated a rule of law regarding claims of sex discrimination under the MHRA. Appellant, bringing a different demand, is not estopped from insisting the law is otherwise.

Finally, the doctrine of collateral estoppel can only apply where "a court has decided an issue of fact or law *necessary* to its judgment." *Bi-State*, 679 S.W.2d at 335. Because the "findings" upon which Respondents' claim of collateral estoppel are based were not necessary to the judgment, collateral estoppel in inapplicable.

The prior case, number 1416-CV17208, was an action seeking a writ of mandamus. (S.L.F. 151). A party seeking a writ of mandamus must demonstrate, "(1) an existing, clear, unconditional legal right in the relator; (2) a corresponding, present, imperative, unconditional duty upon respondent; and (3) a default by respondent in meeting that duty." *State ex rel. Belle Starr Saloon, Inc. v. Patterson*, 659 S.W.2d 789, 790 (Mo. App. E.D. 1983). Any finding not necessary to reach those elements cannot be the subject of collateral estoppel.

The prior court issued a judgment denying mandamus because "Relators have failed to provide any statutory or legal basis establishing an existing, clear, unconditional legal right" allowing Appellant access to the restrooms. (the prior trial court's decision in 1416-CV17208 [hereinafter "Judgment"], p. 1, S.L.F. 326). This conclusion is clearly necessary for the prior court to issue such a ruling. However, other language contained in its Legal Conclusions section are not. Specifically, the prior court did not need to

conclude that Appellant is wholly without a cause of action under the MHRA, only that he lacks "an existing, clear and unconditional legal right based upon the MHRA and upon which a writ of mandamus could issue." (Judgment, p. 11, S.L.F. 336). To the extent the prior court held the former, in addition to the latter, it is not a proper subject for collateral estoppel.

Respondents argue that because the court in the prior case "held that the [MHRA] does not provide protection to Plaintiff R.M.A.'s transgender status," Appellant is "collaterally estopped" from bringing this action. (L.F. 73). Even if this were the prior trial court's ruling (it was not), the doctrine of collateral estoppel does not entitle them to import this purported statutory interpretation from the prior case to this one. Therefore, Respondents cannot prevail on a claim of collateral estoppel, and the trial court's grant of summary judgment was in error.

c. The prior decision did not hold that the MHRA does not cover sex discrimination in cases implicating gender identity

Respondents' assertion that the prior trial court ruled the MHRA does not extend its protection to claims implicating gender identity (L.F. 73) is incorrect. The prior trial court ruled that "at the present time the MHRA does not provide a basis for the issuance of a writ of mandamus in this case," which is not the same as ruling the MHRA does not extend its protections to claims based on gender identity. (Judgment, p. 12, S.L.F. 337). The Judgment denied Appellant's Petition for Writ of Mandamus for two reasons. First, it held that Appellant had not established a clear and unequivocal existing legal right entitling him to enforcement of that right under a writ of mandamus. (Judgment, p. 6-8,

S.L.F. 331-333). Second, it held that there remained adequate remedies at law for Appellant to pursue, which included this present action under the MHRA. (Judgment, p. 12-13, S.L.F. 337-338). The prior trial court's discussion of the MHRA and its provisions concluded that because the MHRA does not specifically include the words "transgender" or "gender identity" as explicit protection, a writ of mandamus, which requires showing of a "clear and unconditional legal right in the relator," will not lie. (Judgment, p. 8, S.L.F. 333).

The Judgment stopped far short of concluding that the MHRA does not extend protections to transgender persons. Rather, the court simply ruled that at the time there was not a clearly existing unequivocal right under the law supporting issuance of a writ of mandamus, finding that Appellant was "seeking this Court's adjudication on an unsettled area of law." (Judgment, p. 7, S.L.F. 332).

Because Respondents mischaracterized the nature of the prior trial court's ruling—which never decided whether the MHRA extends its protections to Appellant under the protected class of "sex" in its Judgment—Respondents' assertion of collateral estoppel as a defense to Appellant's Petition for Damages under the MHRA is unsupported.

d. Respondents have not and cannot prove most of the elements of collateral estoppel

To the extent an analysis of collateral estoppel is necessary, its application to the case below is inappropriate as there had been no prior adjudication between these parties,

or any decision of which Appellant is aware in the state of Missouri, stating that the MHRA does not protect gender identity under the class of sex.

Furthermore, there has been no full and fair opportunity to litigate the issue as required by the doctrine of collateral estoppel. Respondents correctly state that collateral estoppel, or issue preclusion, applies when 1) the issue presented is identical to an issue previously adjudicated; 2) the prior adjudication resulted in a judgment on the merits; 3) the party against whom the doctrine is asserted was either a party to or in privity with a party to the previous litigation; and 4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior adjudication. (L.F. 70) (citing *Johnson v. Missouri Dept. of Health and Senior Services*, 174 S.W.3d 568, 580 (Mo. App. W.D. 2005)). Because collateral estoppel is an affirmative defense, Respondents had the burden of proving all four elements. *Warren v. Paragon Techs. Group, Inc.*, 950 S.W.2d 844, 846 (Mo. banc 1997). They failed to do so.

1. Identity of issues

The first element of collateral estoppel is the identity of issues. The doctrine is only applicable where "the issue presented is identical to an issue previously adjudicated." *Johnson*, 174 S.W.3d at 580. While both the present case and Appellant's prior Petition for Writ of Mandamus stem from the same general set of facts, the legal issues in each case are distinct. The present case is an action for damages under the MHRA, while the prior action sought a writ of mandamus. A party seeking a writ of mandamus must demonstrate, "(1) an existing, clear, unconditional legal right in the relator; (2) a corresponding, present, imperative, unconditional duty upon respondent;

and (3) a default by respondent in meeting that duty." *Belle Starr Saloon,*, 659 S.W.2d at 790. By contrast, to bring an action for public accommodation discrimination under the MHRA, a plaintiff must show that (1) he was discriminated against in the provision of a public accommodation; (2) his sex or gender was a contributing factor in that discrimination; and (3) as a direct result of such conduct, he sustained damage. *See Daugherty*, 231 S.W.3d at 820 (laying out the elements of employment discrimination); *Doe*, 372 S.W.3d at 52-53 (applying employment discrimination elements to a public accommodation case).

These standards certainly cannot be said to be identical. The denial of a Writ of Mandamus does not preclude or foreclose a different valid cause of action. To the contrary, where another adequate cause of action is available, mandamus will not lie. *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261, 265 (Mo. 1980).

Additionally, the relevant precedent makes clear that in order for collateral estoppel to apply, the legal standard being applied to the same set of facts must be identical. See, e.g., *Raban*, 702 S.W.2d at 137 (finding that the standards in the two cases were "virtually identical"). Here, the standard Appellant was required to meet in pursuing a writ of mandamus is far higher, and much different, than the standard he is required to meet under the MHRA. Courts have recognized that where, as here, "the party against whom estoppel is sought had to satisfy a significantly higher burden of persuasion in the preceding action," there is no "identity of issues and the doctrine of collateral estoppel cannot apply." *In Interest of TG*, 965 S.W.2d 326, 334 (Mo. App. W.D. 1998).

2. Judgment on the merits

In the prior case there had been no adjudication on the merits affirmatively denying Appellant's claims under the MHRA. The former case involved an Application for Writ of Mandamus seeking enforcement of a clearly existing legal right. "[T]he purpose of mandamus is to enforce and not to adjudicate." (Judgment, p. 7, S.L.F. 332) (citing *State ex rel. Mason v. Cnty. Legislature*, 75 S.W.3d 884, 887 (Mo. App. W.D. 2002)). As the purpose of mandamus is to enforce, the denial of a writ of mandamus does not constitute an adjudication on the merits of a discrimination claim for damages under the MHRA.

3. Identity of parties

Appellant does not dispute that he is the same party to the prior litigation, and this element was met by the Respondents. However, they have failed to meet their burden on any other element.

4. Full and fair opportunity to litigate the issue

Finally, there had been no full and fair opportunity to litigate the issue of whether the MHRA extends its protections to transgender persons under the protected class of "sex." The only issue that has been litigated is whether there was a clearly established existing right in Appellant to use the restrooms such that enforcement through mandamus would be appropriate. Because there had been neither an adjudication of the issue on the merits, nor an opportunity to fully and fairly litigate the issue presently before the court, collateral estoppel was improper.

In its judgment denying mandamus, the prior court pointed out that "relators are seeking this Court's adjudication on an unsettled area of law." (Judgment, p. 7, S.L.F. 332). Such questions are most frequently settled in Courts of Appeals. However, Appellant did not have the opportunity to have his arguments on the merits heard before this Court. His appeal was dismissed for procedural reasons, namely, the failure to initiate the action with the issuance of a preliminary writ, as contemplated in Supreme Court Rule 94. *R.M.A. I*, 477 S.W.3d at 190. Because his Petition for Mandamus was not decided on the merits before the Court of Appeals, Appellant was denied a full and fair opportunity to present his case.

Because they cannot show they are entitled to judgment on each of the elements of collateral estoppel, Respondents are not entitled to dismissal, and the trial court erred in granting it.

e. The equitable doctrine of collateral estoppel cannot lie because it would be fundamentally unfair to Appellant

Finally, collateral estoppel is inappropriate because it would be unfair to use the Judgment to deny Appellant the ability to bring a cause of action under the MHRA. "Fairness is the overriding consideration in determining" whether collateral estoppel should apply. *Bi-State*, 679 S.W.2d at 335. Central to the prior trial court's ruling was the idea that another adequate remedy was available to Appellant: namely, the present action under the MHRA. (*See*, Judgment, p. 13, S.L.F. 338).

For one decision to hold that Appellant was not entitled to mandamus because he had a claim under the MHRA and another decision to hold that Appellant has no claim

under the MHRA because he had been denied mandamus would put Appellant in a legal "catch-22," the very antithesis of fairness. As collateral estoppel is an equitable doctrine, it cannot be applied in the way Respondents seek, and therefore should not have been a basis for dismissal in the Trial Court.

Respondents have clearly failed to establish their right to dismissal on the basis of collateral estoppel. Therefore, the Trial Court erred in granting dismissal on that basis.

CONCLUSION

Because none of the bases listed by the Trial Court in its Order of Dismissal and Entry of Judgment were a proper basis for dismissal, that court erred in dismissing the case. Appellant requests this Court reverse the judgment of the Trial Court dismissing his claims and remand the case for further proceeding.

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CERTIFICATE UNDER RULE 84.06(c)

I, Alexander Edelman, hereby certify that I am one of the attorneys for Appellant R.M.A., and that the foregoing Brief of Appellant:

(1) Includes the information required by Rule 55.03;

(2) Complies with the limitations contained in Rule 84.06(b); and

(3) Contains twelve thousand nine hundred eighty-five (12,860) words.

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CERTIFICATE OF SERVICE

I, Alexander Edelman, hereby certify that I am one of the attorneys for Appellant R.M.A., and that on the 27th day of February, 2018, I caused a copy of the aforesaid Brief of Appellant and a copy of the appendix thereto to be served upon counsel for the Respondents by electronic mail, sent to:

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