NO. SC96683

IN THE
SUPREME COURT OF MISSOURI

R.M.A. b/n/f RACHELLE APPLEBERRY,

Appellant/Plaintiff,

v.

BLUE SPRINGS R-IV SCHOOL DISTRICT, et al.,

Respondents/Defendants.

Appeal from the Circuit Court of Jackson County
Division 15, Hon. Marco A. Roldan

SUBSTITUTE BRIEF OF RESPONDENTS/DEFENDANTS

Steven F. Coronado Mo. Bar No. 36392
Mark D. Katz Mo. Bar No. 35776
CORONADO KATZ LLC
14 West Third Street, Suite 200
Kansas City, Missouri 64105
Telephone: (816) 410-6600
Facsimile: (816) 337-3892
steve@coronadokatz.com
mark@corondokatz.com

ATTORNEYS FOR RESPONDENTS/DEFENDANTS
BLUE SPRINGS R-IV SCHOOL DISTRICT and
BLUE SPRINGS SCHOOL DISTRICT BOARD OF
EDUCATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

STATEMENT OF FACTS[1]

In 2000, RMA was born a female. L.F. 11, 17. He asserts he is transgender and began transitioning from female to male in 2009. L.F. 11. In 2010, RMA's first name was legally changed to a male-sounding name, L.F. 11, and on December 10, 2014, RMA obtained an order amending his birth certificate to his present legal name and changing his gender from female to male. L.F. 11-12. In accordance with the wishes of RMA and his parents, the School District[2] changed its records to reflect RMA's legal name. L.F. 11. In fact, the School District accepted and accommodated RMA's gender transition in almost all respects. Supp. L.F. 000153. The School District permitted RMA to participate in physical education and football and track teams with other boys. L.F. 13. Beginning in middle school, RMA asked to use the boys' locker room and bathrooms. L.F. 12. However, because RMA has female genitalia, the School District did not allow RMA to use the boys' bathrooms and locker rooms—either at the middle school level or the School District's Freshmen Center or high school. L.F. 12. "Other boys attending school within Defendant School District ha[d] regular, unrestricted access to the boys' locker rooms and restrooms in schools operated by Defendants." L.F. 12. During eight grade football and

[1] Since the judgment of the trial court was rendered on a motion to dismiss, L.F. the facts in the Petition for Damages and attachments thereto are taken as true. L.F. 8-20.

[2] The Petition for Damages refers to the Blue Springs R-IV School District and the Blue Springs School District Board of Education collectively as "Defendants." For the purposes of this brief, they are referred to together as "the School District."

track, RMA dressed out for practice and games in a separate, unisex bathroom outside of the boys' locker room. L.F. 13. However, he chose not to participate in fall sports at the School District's Freshman Center, because he was denied access to the boys' locker room and bathrooms. L.F. 13. The School District denied RMA access to boys' changing facilities and bathrooms because of his transgender status and his female genitalia. L.F. 12.

In October of 2014, while he was awaiting changes to his birth certificate, RMA filed a Charge of Discrimination with the Missouri Commission on Human Rights describing the refusal of the middle school to allow him to use the boys' locker room and bathrooms. L.F. 17-18. He attributed this refusal as being "based on my sex and gender identity." L.F. 18. In his Petition for Damages, RMA put it this way: he is a transgender male, and he "was discriminated against in his use of a public accommodation on the grounds of his sex." L.F. 14.

POINTS RELIED ON

I. THE TRIAL COURT CORRECTLY GRANTED RESPONDENTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM BECAUSE THE PUBLIC ACCOMMODATION SECTION OF THE MISSOURI HUMAN RIGHTS ACT PROSCRIBES ACTIVITIES OF "PERSONS" AND PUBLIC ENTITIES SUCH AS RESPONDENTS ARE NOT "PERSONS" AS THAT TERM IS DEFINED IN THE ACT. (Response to Appellant's Point II)

Carpenter v. King, 679 S.W.2d 866 (Mo. banc 1984)

State ex rel. Ormerod v. Hamilton, 130 S.W.3d 571 (Mo. banc 2004)

St. Joseph Light & Power Co. v. Nodaway Worth Elec. Co-op., Inc., 822 S.W.2d 574 (Mo. App. 1992)

Norberg v. Montgomery, 351 Mo. 180, 173 S.W.2d 387 (Mo. 1947)

Section 213.010(7), RSMo [3]

Section 213.010(8), RSMo

Section 213.010(14), RSMo

Section 213.010(15), RSMo

Section 213.055, RSMo

Section 213.065.2, RSMo

[3] All statutory citations are to the version of the Revised Statutes of Missouri in force at the time the lawsuit was filed, unless otherwise indicated.

Section 213.070(3), RSMo

II. THE TRIAL COURT CORRECTLY GRANTED RESPONDENTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM BECAUSE THE MISSOURI HUMAN RIGHTS ACT'S PROHIBITION AGAINST SEX DISCRIMINATION DOES NOT EXTEND PROTECTION TO CLAIMS BASED ON GENDER IDENTITY OR TRANSGENDER STATUS. (Response to Appellant's Point I)

Pittman v. Cook Paper Recycling Corp., 478 S.W.3d 479 (Mo. App. 2015)

RMA by Appleberry v. Blue Springs R-IV School Dist., WD 80005, 2017 WL 3026757 (July 18, 2017)

Johnston v. Univ. of Pittsburg of Com. Systems of Higher Educ., 97 F.Supp.3d 657 (D. Penn. 2015)

Section 213.065.2, RSMo

III. APPELLANT'S POINT III IS NOT CONTESTED.

King General Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints, 821 S.W.2d 495 (Mo. banc 1991)

STANDARD OF REVIEW APPLICABLE TO POINTS I AND II

This case comes to the Court on appeal from the trial court's dismissal of the plaintiff's petition for failure to state a claim and is subject to *de novo* review. *Bromwell v. Nixon*, 361 S.W.3d 393, 398 (Mo. banc 2012). Where, as in this case, the trial court's judgment does not specify the reason for dismissal, the Court should affirm if the dismissal was appropriate on any ground stated in the motion to dismiss. *Costa v. Allen*, 274 S.W.3d 461, 462 (Mo. banc 2009). A motion to dismiss for failure to state a claim attacks the plaintiff's pleadings. *State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 329 (Mo. banc 2009). It is solely a test of the adequacy of the petition. *Id*. The plaintiff's factual allegations are assumed to be true and, and the plaintiff is liberally granted all reasonable inferences that flow from the allegations. *Id*. The allegations are not weighed for credibility or persuasiveness; rather, they are considered in an academic manner to determine if they "meet the elements of a recognized cause of action or a cause that might be adopted in that case." *Id*. (citations omitted). To avoid dismissal, the petition must invoke "substantive principles of law entitling plaintiff to relief …." *Id*.

In Points I and II of the Appellant's brief, whether the petition invokes substantive principles of law entitling RMA to relief depends on the interpretation of the Missouri Human Rights Act ("MHRA"); specifically: whether statutory prohibitions against discrimination on the grounds of sex extend to gender identity or transgender status; and whether public entities are included in the statutory definition of the term "person." Statutory interpretation is an issue of law subject to *de novo* review. *Newsome v. Kansas City, Mo. School District*, 520 S.W.3d 769, 780 (Mo. banc 2017)(citation omitted). The

"primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute at issue." *Id*. (quotation marks and citation omitted). "Courts lack authority to read into a statute a legislative intent contrary to the intent made evident by the plain language. There is no room for construction, even when the court may prefer a policy different from that enunciated by the legislature." *Keeney v. Hereford Concrete Products, Inc.*, 911 S.W.2d 622, 624 (Mo. banc 1995)(quotation marks and citation omitted). "In construing a statute, courts cannot add statutory language where it does not exist; rather, courts must interpret the statutory language as written by the legislature." *Peters v. Wady Industries, Inc.*, 489 S.W.3d 784, 793 (Mo. banc 2016)(quotation marks and citation omitted). "Undefined words are given their plain and ordinary meaning as found in the dictionary to ascertain the intent of lawmakers." *Howard v. City of Kansas City*, 332 S.W.3d 772, 780 (Mo. banc 2011).

ARGUMENT

The arguments submitted by Appellant and many of the *amici* that support him encourage the Court to see this case in the broad haze of societal change, when it is more properly considered in the narrow light of statutory interpretation. Fundamentally, this case demands the Court determine what the Missouri legislature meant when it defined the word "person" in the MHRA and what it meant when it included the term "sex" as a characteristic protected from discrimination.

This task does not require—in fact, it should not include—philosophical hypothesizing about the evolution of language and thought about what the term "sex" means; nor does it require reference to how federal courts have construed the term "sex"

as used in federal statutes. The plain meaning of the word "sex," now and in 1986 when the MHRA was enacted, was not thought to include gender identity or transgender status; rather it referred to "either of the two divisions, male or female." Academic articles confirm this vision of the MHRA, and as recently as last year, the Missouri legislature considered and refused amendments to the MHRA that, if enacted, would have added gender identity and sexual orientation to the characteristics statutorily protected from discrimination. The Court's allegiance to legislative intent does not allow it to accept the Appellant's invitation to expand the meaning of the word "sex" to include characteristics that were not meant to be contained in the MHRA.

Likewise, the Court should eschew the invitation to deviate from its prior rulings that require the legislature to use explicit statutory language to demonstrate its intent to subject the state and its subdivisions to the application of a statute. Respondents are public entities, and the legislature has explicitly applied some, but not all, of the prohibitions in the provisions of the MHRA to public entities. The legislature elected to apply the prohibitions in section 213.065.2, RSMo only to "any person," knowing that public entities are not included in the MHRA definition of "person." The absence of explicit inclusion prohibits the Court from applying the proscriptions in section 213.065.2, RSMo to public entities, such as Respondents.

At bottom, these are the two questions before the Court: Did the legislature intend to make public entities legally liable under the MHRA for discrimination in public accommodation? Does the prohibition against sex discrimination in a public accommodation in the MHRA require a public school district to allow a transgender student

who identifies as male but has female genitalia to use the boys locker room? The plain language of the statute, rules of statutory interpretation, actions of the legislature, and the Court's prior rulings demonstrate that the answer to these questions is "No."

I. THE TRIAL COURT CORRECTLY GRANTED RESPONDENTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM BECAUSE THE PUBLIC ACCOMMODATION SECTION OF THE MISSOURI HUMAN RIGHTS ACT PROSCRIBES ACTIVITIES OF "PERSONS" AND PUBLIC ENTITIES SUCH AS RESPONDENTS ARE NOT "PERSONS" AS THAT TERM IS DEFINED IN THE ACT. (Response to Appellant's Point II)

A. The Legislature Did Not Include Public Entities in § 213.065.2.

The School District is not a "person" whose activities are proscribed by the MHRA's public accommodation section. The plain language of section 213.065.2, RSMo restricts its application to "a person," and the MHRA definition of "person" does not include the state and its subdivisions. § 213.010(14), RSMo. Since the legislature did not explicitly include public entities in the definition and did not otherwise demonstrate its intent to make public entities liable for discrimination in public accommodations under section 213.065.2, RSMo, the trial court correctly dismissed the plaintiff's petition.

The state and its subdivisions do not fall within the purview of a statute, "inclusive though the language of the enactment may be, unless the intention to include the them is clear." *Krasney v. Curators of Univ. of Mo.*, 765 S.W.2d 646, 650 (Mo. App. 1989).

> The rule reflects the notion that the state is a unique entity in our society as the reservoir of the power and rights of all people. Narrowly construing the

> general provisions of a statute in favor of the state serves to preserve the state's sovereign rights and protect its capacity to perform necessary governmental functions.

Carpenter v. King, 679 S.W.2d 866, 868 (Mo. banc 1984). The issue is whether the intention to include public entities is "clearly manifest, as where they are expressly named therein, or included by necessary implication." *Id*. (citation omitted). Neither condition exists here, so the School District is entitled to summary judgment in the underlying case.

Section 213.065.2, RSMo specifies that "[i]t is an unlawful discriminatory practice for any ***person*** … to refuse, withhold from or deny any other ***person*** … any of the accommodations … services or privileges made available in any place of public accommodation … on the grounds of … sex …." § 213.065.2, RSMo (emphasis supplied). The MHRA limits the definition of "person" to the following: "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." § 213.010(14), RSMo. The definition of "person" does not include phrases such as "the state and its subdivisions," "public corporations," or "public entities." Accordingly, there is no express intention to include public entities in the definition of "person." Therefore, public entities are not included among the "persons" whose actions are proscribed or the "persons" who are protected by the statute.

B. The Use of the Term "Corporations" in the Definition of "Person" Does Not Include Public Corporations Such as School Districts.

Appellant has taken the position that, since the MHRA definition of "person" includes "corporations," and school districts are considered to be public corporations, *see, e.g. Doe ex rel. Subia*, 372 S.W.3d 43, 48 (Mo. App. 2012), school districts therefore come within the definition of "person" in section 213.010(14). This rationale fails, because the Supreme Court requires that "[u]nless otherwise specified, where the term 'corporation' is used in our statutes and Constitution it uniformly refers to private or business organizations, ***not to public corporations***." *State ex rel. Ormerod v. Hamilton*, 130 S.W.3d 571, 572 (Mo. banc 2004)(emphasis supplied). *State ex rel. Ormerod*, involved the application of Missouri's venue statute, and this principle has been applied to the term "corporation," as used in the Missouri Constitution, as well. *City of Webster Groves v. Smith*, 340 Mo. 798, 800-801, 102 S.W.2d 618, 619 (1937); and *Casualty Reciprocal Exchange v. Missouri Employers Mut. Ins. Co.*, 956 S.W.2d 249, 253 (Mo. banc 1997).

The Supreme Court's decision in *State ex rel. Ormerod* was applied by a court to exclude public corporations from being included in the Missouri Minimum Wage Act (MMWA), even though the MMWA includes the term "corporation" in the definition of "employer." *See Davis v. Board of Trustees of North Kansas City Hospital*, No. 14-0625-W-CV-ODS, 2015 WL 8811516 *4 (W.D.Mo. March 2, 2015). In *Davis*, the plaintiff filed numerous counts against the defendant related to alleged failures to pay proper wages. One of the counts was based on the MMWA. The defendant asserted it was not an "employer" under the statute, because the definition of "employer" referred to "a person," and the

definition of "person" did not include public corporations. Under the MMWA, a "person" was defined as "any individual, partnership, association, corporation, business, business trust, legal representative, or any organized group of persons." *Id*. (citation omitted). Following *State ex rel. Ormerod*, the court held the defendant—although a public corporation—was not a corporation under the MMWA. *Id*. Further, the court rejected the plaintiff's assertion that the defendant fell into the category of an "organized group of persons," and resisted the plaintiff's plea to construe the statutory definition broadly, so as to give effect to the MMWA's remedial intent. *Id*. at *5.

At least one *amicus* in support of Appellant cites *Lockhart v. Kansas City*, 351 Mo. 1218, 175 S.W.2d 814 (Mo. 1943), to suggest that the unqualified term "corporation" may be applied to a public corporation. *Lockhart* has no application to this case. The Court in *Lockhart* applied the Occupational Disease Act to a municipal corporation because the entity was "engaged in furnishing public utility services in its ***private corporate*** capacity…." *Id*. at 1227 (emphasis supplied). This rationale merely acknowledged the longstanding distinction between a municipal corporation acting in its governmental capacity and one operating in its proprietary capacity. Municipal corporations engaged in governmental functions are afforded sovereign immunity, while those engaged in proprietary functions are not. *Johnson v. Bi-State Dev. Agency*, 793 S.W.2d 864, 866 (Mo. banc 1990). Hence, in *Lockhart*, a municipal corporation acting in its private corporate capacity was held liable because it was acting as a private corporation, where it would not have been liable had it been acting in a governmental capacity. The governmental-proprietary dichotomy does not likely apply to school districts; however, even if it does,

"supervising students while at school [is] simply part of a school district's overall purpose of educating the students and, therefore, [is a] governmental function[]." *A.F. v. Hazelwood School Dist.*, 491 S.W.3d 628, 634 (Mo. App. 2016). Therefore, the distinction that applied in *Lockhart* does not apply to the School District in this case.

C. Related Statutes Show the Legislature Did Not Intend to Create a Cause of Action Against Public Entities for Discrimination in a Public Accommodation.

"It is appropriate to take into consideration statutes involving similar or related subject matter when such statutes shed light upon the meaning of the statute being construed." *St. Joseph Light & Power Co. v. Nodaway Worth Elec. Co-op., Inc.*, 822 S.W.2d 574, 576 (Mo. App. 1992). In this vein, additional evidence of the legislature's intent to exclude public entities from liability for discrimination in a public accommodation may be found by looking to other employment discrimination sections of the MHRA.

In *St. Joseph Light & Power*, the court was faced with a similar definitional issue. The plaintiff sought an injunction to prohibit the defendant from supplying electricity to two school districts. The case hinged on the statutory definition of "person," just as in the underlying case. The statute limited the definition to "a natural person, cooperative or private corporation, association, firm, partnership, receiver, trustee, agency, or business trust," *St. Joseph Light & Power Co.*, 822 S.W.2d at 575, and the court determined school districts were not included in the definition. In coming to its decision, the court contrasted the applicable statutory definition with another, related statute, in which "person" was defined to include "state or political subdivision or agency thereof, or any body politic." It

found the variations in language showed the legislature did not intend to include public entities in the statute at issue, and therefore, school districts were not "persons" under the statute. *Id*. at 577.

In the case at bar, as in *St. Joseph Light & Power*, there are related statutes which provide guidance to that the legislature did not intend to include public school districts in the definition of "person" under the MHRA. As an example, the definition of "employer" includes the term "person," but it also includes "the state, or any political or civil subdivision thereof." § 213.010(7), RSMo. Later in the Act, when the legislature provides that it is "an unlawful employment practice for an employer" to engage in employment discrimination, § 213.055.1(1), RSMo, it makes clear its intent to create liability for public entities engaged in employment discrimination. Likewise, an "employment agency" is "any person or agency, ***public or private***." § 213.010(8), RSMo (emphasis supplied). Accordingly, it is clear a public entity may be held liable for violations of the Act related to employment agencies. *See* § 213.055.1(3), RSMo.

The court of appeals has determined that public school districts are "places of public accommodation" under section 213.010(15). *See Doe ex rel. Subia*, 372 S.W.3d at 48-50. However, had the legislature intended to hold a school district liable for public accommodation discrimination, instead of making it unlawful for "a person" to discriminate, it could have made it unlawful for "any person or state and its political subdivision to refuse, withhold from or deny …." If it had done so, the legislature would have been adding language to explicitly include public entities in the same way it included language to explicitly include public entities as "employers" in the employment

discrimination section of the Act—and it would have clearly shown its intent to hold public entities liable for public accommodation discrimination. But the legislature did not include "the state and its political subdivisions" to identify the people and entities whose actions it intended to proscribe, it chose the word "person," instead.

Similarly, it would have been an easy matter to include public entities in the definition of "person," or to add the phrase, "or subdivision of the state" after the word "person" in section 213.065.2, but the legislature chose not to do so. The legislature's choices demonstrate that it did not intend to make public entities such as the School District legally liable for discrimination in public accommodation.

D. The School District is not Liable for Public Accommodation Discrimination under § 213.070(3).

Appellant attempts to use *dicta* from *Doe ex rel. Subia v. Kansas City, Mo. School Dist.*, 372 S.W.3d 43, 50-51 (Mo. App. 2012), to "clarify" the language in section 213.070(3), RSMo, so as to apply its regulatory terms to all forms of discrimination. App. Br., p. 38. Therefore, a review of both the statute and the *dicta* is required. The statute provides:

> 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.

§ 213.070(3), RSMo. The words "public accommodation" do not appear in the statute. In fact, the statement of law in section 213.070(3), RSMo is consistent with the legislature's

intent to open up the state and its subdivisions to liability for unlawful discrimination in employment (*see* section 213.055, RSMo) and housing (*see* section 213.040, RSMo)—but not public accommodation.

Appellant's citation to *Doe ex rel. Subia* refers to similar, but not identical language in sections 213.010(5) and 213.070(3), RSMo, apparently in the hope that the "last antecedent rule" will apply. The last antecedent rule advises that "words, phrases, and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote." *Norberg v. Montgomery*, 351 Mo. 180, 187, 173 S.W.2d 387, 390 (Mo. 1947). However, the rule does not apply "[w]here several words are followed by a clause as much applicable to the first and other words as to the last." *Id.* In that instance, "the clause should be read as applicable to all." *Id.*; *see also*, *Spradling v. SSM Health Care St. Louis*, 313 S.W.3d 683 (Mo. banc 2010)(forgoing the use of the last antecedent rule because the resulting meaning did not comport with the intent of the legislature). In section 213.070(3), RSMo, the phrase, "as it relates to employment," applies to "race," the first word in the string of nouns, as it does "age," the last word, and every word in between. Therefore, the last antecedent rule has no application. Further, this reading is consistent with the inclusion of the state and its subdivisions in the definition of "employer," § 213.010(14), RSMo, because it confirms the legislative intent to allow liability to be asserted against public entities under the employment discrimination section of the MHRA.

Context is also important. The point of the court's argument in *Doe ex rel. Subia* was to refute the argument that the Commission had no jurisdiction over public

accommodation claims under section 213.030.1(1), RSMo. The court found the statutory language gave the Commission jurisdiction over all types of discrimination prohibited by the MHRA. This reading was consistent with additional language in section 213.030.1(1), RSMo, which included the following expansive language: "… and to take other actions against discrimination because of race, color, religion, national origin, ancestry, sex, age, disability, or familial status as provided by law; and the commission is hereby given general jurisdiction and power for such purposes." *Id*. The proscriptive language in section 213.070(3), RSMo is narrow in comparison to the broad jurisdiction granted to the commission.

E. Conclusion.

The plain language of the MHRA shows that the legislature did not intend to create a cause of action for public accommodation discrimination against public entities such as school districts. Therefore, Appellant is unable to state a claim for public accommodation against the School District, and his petition fails to state a viable claim for relief. The trial court's dismissal should therefore be affirmed.

II. THE TRIAL COURT CORRECTLY GRANTED RESPONDENTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM BECAUSE THE MISSOURI HUMAN RIGHTS ACT'S PROHIBITION AGAINST SEX DISCRIMINATION DOES NOT EXTEND PROTECTION TO CLAIMS BASED ON GENDER IDENTITY OR TRANSGENDER STATUS. (Response to Appellant's Point I)

A. In the MHRA, the Word "Sex" Means Male and Female and Does Not Include Gender Identity.

The MHRA uses the term "sex" often. In section 213.010(5), RSMo, it defines "discrimination" and includes "sex" as a protected characteristic; and it prohibits discrimination in public accommodations based on "sex," §213.065.2, RSMo, Nevertheless, the word "sex" is not defined in the MHRA, so to determine the legislature's intent when it set out to prohibit discrimination based on "sex," the Court must look to the "plain and ordinary meaning as found in the dictionary." *Howard*, 332 S.W.3d at 780. In 1986, when the Missouri Human Rights Act was enacted, the dictionary definition of the word "sex" was: "1. Either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions." Webster's NewWorld Dictionary, 2nd College Ed., p. 1305 (1986). Neither transgender status nor gender identity are mentioned in the dictionary definition of "sex"; rather, the definition limits the term to an organism's category of male or female and its reproductive function.

In fact, Missouri courts have hewed to the dictionary definition of sex, when presented with the opportunity to expand the definition. In *Pittman v. Cook Paper*

Recycling Corp., 478 S.W.3d 479 (Mo. App. 2015), the court upheld the dismissal of a claim brought under the MHRA asserting the plaintiff had suffered "an objectively hostile and abusive environment based on sexual preference." *Id*. at 480. The court adhered to the dictionary definition of "sex" to reject the idea that the MHRA prohibited discrimination based on sexual orientation. *Id*. at 482-83. Rather, the court noted the MHRA "is not a general bad acts statute but lists categories of discrimination that are unlawful"; in contrast to other states that have explicitly added sexual orientation to categories protected by their anti-discrimination laws. *Id*. at 483, n. 4. In the decision rendered by the court of appeals in the case at bar, Judge Martin ably recounted the history of the MHRA and its predecessor statute, the Fair Employment Practices Act, and demonstrated that the legislative intent at the time the MHRA was passed was to ensure equal treatment as between men and women. *RMA by Appleberry v. Blue Springs R-IV School Dist.*, WD 80005, 2017 WL 3026757 *5-7 (July 18, 2017).

Similarly, the Missouri Commission on Human Rights' regulations show the word "sex" is interpreted to refer to the distinction between men and women. 8 CSR 60-3.040 pertains to "Employment Practices Related to Men and Women." This rule was originally filed as 4 CSR 180-3.040 in 1973 and was most recently amended in 2001. The purpose of the rule is to set "forth guidelines and interpretations governing, but not limited to, the major aspects of employment practices in relation to sex." It discourages labeling jobs as "men's jobs" and "women's jobs"; it prohibits refusing to hire women based on assumptions of turnover rates; it encourages recruiting employees of "both sexes"; and, it prohibits distinguishing between married and unmarried persons of one sex when the same

distinction is not applied to "married and unmarried persons of the opposite sex." Further, apropos of this case, "[t]he employer's policies and practices must assure the appropriate physical facilities to both sexes. The employer may not refuse to hire men or women or deny men or women a particular job because there are no restrooms or associated facilities." 8 CSR 60-3.040(12). The entire focus of the regulation is on preventing unequal treatment in the workplace of males and females. The regulation makes no attempt to regulate the workplace based on gender identity or sexual orientation—these characteristics are not even mentioned.

Likewise, scholarship generated from a Missouri law school has specifically decried the MHRA's failure to protect against discrimination based on gender identity and sexual orientation. *See* Alex Edelman, Show-Me No Discrimination: The Missouri Non-Discrimination Act and Expanding Civil Rights Protection to Sexual Orientation or Gender Identity, 79 UMKC L.Rev. 741 (2011). In Show-Me No Discrimination, the author, quoting a Missouri legislator, lamented that "it's legal to fire someone for being gay," and characterized the then-proposed Missouri Non-Discrimination Act ("MONA"), as "expand[ing] the coverage of Missouri's human rights statutes to cover sexual orientation and gender identity." *Id*. The author held:

> As long as the existing human rights laws fail to protect against discrimination on the basis of sexual orientation or gender identity, some citizens will continue to live in fear of discrimination. To achieve the goal of legal equality for all people, the Missouri Legislature should pass MONA into law.

Id. at 741-42. The introduction described its final argument that "lesbian, gay, bisexual, and transgender ("LGBT") Missourians need MONA to protect them from discrimination." *Id*. Hence, as recently as 2011, Missouri academics recognized that legislative action was required to add sexual orientation and gender identity to the characteristics protected by the MHRA; in other words, "sex" did not include sexual orientation or transgender status.

Meanwhile, the Missouri legislature has never enacted legislation that would add gender identity or sexual orientation to protected characteristics under the MHRA.[4] As

[4] Senate Bill No. 962 was first read on February 27, 2014 and proposed to amend the Missouri Human Rights Act to prohibit discrimination based on a person's sexual orientation or gender identity. The last action on the bill was on April 9, 2014, when a hearing was conducted by the Senate Progress and Development Committee. The 2014 Session closed with no further action on the bill and it failed to become a law. The bill is identical to SB 96 (2013) and SB 798 (2012) and similar to SB 757 (2014), SS/HCS/HB 320 (2013), SB 239 (2011), SB 626 (2010), SB 109 (2009), SB 824 (2008) and SB 266 (2007), all of which failed to be enacted into law. *See* Missouri Senate website at www.senate.mo.gov/14info/BTS_Web/Bill.aspx?SessionType=R&BillID=31478595. (Appendix A234). Other identical and/or similar bills were considered in 2015 (SB 237) and 2016 (SB653), but none were enacted into law. *See* Missouri Senate website at www.senate.mo.gov/15info/BTS_Web/Bill.aspx?SessionType=R&BillID=1123609 and www.senate.mo.gov/16info/BTS_Web/Bill.aspx?SessionType=R&BillID=22246562. (Appendix A235-A236).

recently as 2017, floor amendments were offered to include sexual orientation, gender identity, and veteran status as characteristics protected by the MHRA, but these amendments failed. *See e.g.*, SS/SCS/Senate Bill No. 43, p. 3, sect. 213.010, line 9, http://www.senate.mo.gov/17info/BTS_ web/amendments/0524S06.12S.pdf.

House Bill No. 1930 was first read on February 20, 2014 and would have revised the definition of "discrimination" under the Missouri Human Rights Act to include any unfair treatment based on sexual orientation or gender identity. The last action on this bill occurred on March 13, 2014 when a public hearing was completed in the Missouri House of Representatives. The session closed with no future action on the bill and it failed to become a law. *See* Missouri House website at www.house.mo. gov/Bill.aspx?bill=HB1930&year=2014&code=R. (Appendix A227). Other identical and/or similar bills were considered in 2015 (HB407) and 2016 (HB1924, 2279, 2319, 2414 and 2478), but none were enacted into law. *See* Missouri House website at www.house.mo.gov/Bill.aspx?bill=HB407&year=2015&code=R, www.house.mo.gov/ Bill. aspx?bill=HB1924&year=2016&code=R, www.house.mo.gov/Bill.aspx?bill =HB2279&year=2016&code=R, www.house.mo.gov/Bill.aspx?bill=HB2319&year= 2016&code=R, www.house.mo.gov/Bill.aspx?bill=HB2414&year=2016&code=R and www.house.mo.gov/Bill.aspx?bill=HB2478&year=2016&code=R. (Appendix A229-A233).

Some states have decided to explicitly identify gender identity as a specifically protected characteristic.[5] However, Missouri is not among them. The legislative history makes clear the Act does not presently extend its protection to gender identity or transgender status. Whether or not to include gender identity or transgender status as a protected class under anti-discrimination statutes is an ongoing debate, and whether society demands a change in the statutes should be taken up, not in the courts, but in the legislature. In the meantime, the word "sex," as it exists in the MHRA, refers to male and female, not gender identity or sexual orientation. The Missouri Commission on Human Rights has interpreted the term "sex" in this fashion, as have Missouri courts, and academic writings are in accord. Likewise, the legislature has had ample opportunity to amend the MHRA to expand its protections to gender identity and sexual orientation and has chosen not to. Wherever sympathies lie in the ongoing societal debate, the Court is tasked with "giv[ing] effect to legislative intent as reflected in the plain language of the statute at issue."

[5] According to the ACLU, the nineteen states that currently recognize gender identity as a protected class are Washington, Oregon, California, Nevada, Utah, Colorado, New Mexico, Hawaii, Minnesota, Iowa, Illinois, Vermont, Maine, Massachusetts, Rhode Island, Connecticut, New Jersey, Delaware, Maryland and the District of Columbia. *See* ACLU—Non-Discrimination Laws: State by State Information at www.aclu.org/maps/non-discrimination-laws-state-state-information-map.

Newsome, 520 S.W.3d at 780. The word "sex" in the MHRA simply does not include "gender identity."

B. Gender-Related Trait and Sex Stereotyping Analyses Do Not Apply to these Facts.

Appellant's argument is an effort to shift the focus of the MHRA protections from discrimination on the basis of sex to protection from discrimination on the basis of gender-related traits—or, at the very least, it attempts to conflate the two concepts. Appellant encourages the Court to see his circumstances in light of pregnancy discrimination cases, such as *Self v. Midwest Orthopedics Foot & Ankle*, 272 S.W.3d 364 (Mo. App. 2008) and *Midstate Oil Co. v. Mo. Comm'n on Human Rights*, 679 S.W.2d 842 (Mo. banc 1984). However, in *Midstate Oil* (decided under the predecessor to the MHRA) and *Self*, the "gender-related trait" was a female employee's pregnancy. Certainly, pregnancy is a trait that, if it is present, is exclusive to women. Further, pregnancy and the potential for future pregnancy were historic reasons for treating women differently from men in the workplace. Discrimination on the basis of pregnancy was considered by Missouri regulations to be a violation of the predecessor to the MHRA as early as 1973. 4 CSR 180-3.040(16). This concept was incorporated into the MHRA when it was enacted in 1986.

Appellant's circumstances do not invoke "gender-related trait analysis." He is transitioning from his birth sex, female, to male. His name change, birth certificate change, and other changes accompanying his transgender status have been acknowledged by the School District. However, his transition does not yet include changes to his birth genitals. Hence, the "gender-related trait" referenced by Appellant are female genitalia. Putting

RMA's complaint in context, he identifies as a boy, and the School District treats him as a boy, but RMA complains he is being treated differently from other boys because he is transgender and alleged to have female genitalia. He does not allege that he is a member of one sex and being treated differently from the other sex; rather, he complains he is being treated differently from others of the **same** sex. This does not constitute discrimination on the grounds of sex.

The decision in *Midstate Oil* and the subsequent decision in *Self* were meant to redress a gender-related trait that historically had been used to treat women less favorably than men. Appellant's effort to use female genitalia as an equivalent "gender-related trait" ignores the historical context of pregnancy as a basis for discrimination on the grounds of sex and distorts Missouri decisions on pregnancy to address an issue not contemplated by the statute or the courts.

Appellant also encourages the Court to apply gender stereotyping analysis to his petition; however, he failed to plead such a claim. His petition does not allege facts that he was denied a public accommodation because he failed to fulfill a sex stereotype. The lead sex stereotype case is *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The plaintiff brought a Title VII claim alleging that she was denied partnership in the accounting firm because she was "macho" and did not subscribe to stereotypically feminine mannerisms, such as walking, talking, and dressing in a feminine way. Appellant's petition fails to allege facts analogous to a sex stereotyping claim, and in fact, Appellant's counsel denied RMA was making such a claim during oral argument in front of the court of appeals. *RMA by Appleberry*, 2017 WL 3026757 *8. RMA's complaint is not that he is treated differently

because his mannerisms do not fit a particular stereotype; rather, he complains he is not permitted to use the boys' facilities because he has female genitals. This is not a sex stereotype; it is a physical characteristic.

Appellant's assertion mirrors the facts in *Johnston v. Univ. of Pittsburg of Com. Systems of Higher Educ.*, 97 F.Supp.3d 657 (D. Penn. 2015), where a transgender male was denied access to men's bathrooms. The court addressed the plaintiff's sex stereotyping claim noting the plaintiff had not alleged he was discriminated against because of the way he looked, acted or spoke and indicated:

> Instead, Plaintiff alleges only that the University refused to permit him to use the bathrooms and locker rooms consistent with his gender identity rather than his birth sex. Such an allegation is insufficient to state a claim of discrimination under a sex stereotyping theory. *See, e.g., Eure v. Sage Corp.*, 61 F.Supp.3d 651, 661, No. 5:12-cv-1119-DAE, 2015 WL 6611997, at *6 (W.D. Tex. Nov. 19, 2014)("courts have been reluctant to extend the sex stereotyping theory to cover circumstances where the plaintiff is discriminated against because the plaintiff's status as a transgender man or woman, without any additional evidence related to gender stereotype non-conformity"); *Etissy v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007)(*Price Waterhouse* does not require "employers to allow biological males to use women's restrooms. Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes."); *Johnson v. Fresh Mark, Inc.*, 337 F.Supp.2d 996, 1000 (N.D.

> Ohio 2003) *aff'd*, 98 Fed. Appx. 461 (6th Cir. 2002)(finding no discrimination where employer did not require plaintiff to conform her appearance to a particular gender stereotype, but instead only required plaintiff to conform to the accepted principles established for gender-distinct public restrooms).

Id. at 680-81. The court noted plaintiff had not alleged discrimination because he did not behave, walk, talk or dress in a manner inconsistent with preconceived notions of gender stereotypes. Accordingly, the plaintiff's claim was not based on sex stereotyping, and the same holds true for Appellant's.

C. The Evolution of Cases in Other Jurisdictions Should Do Not Overrule the Intent of the Legislature

Appellant and his supporting *amici* have noted a variety of cases that have been decided under Title VII and Title IX that suggest an evolution of thought on how expansively to treat the word "sex." Importantly, none of the cases cited interpret the MHRA. However, "evolution of thought" is not a hallmark of statutory interpretation or construction. In fact, this vaunted "evolution" has proceeded in fits and starts, at best. One of the cases touted by Appellant and others, *G.G. ex rel. Grimm v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016), is a cautionary tale that suggests the "evolution of thought" should play out in the legislative rather than judicial branch.

The case originated as a Title IX case in which a transgender high school student challenged a school board's policy requiring students to use the restroom consistent with their birth sex. The trial judge dismissed the Title IX claim, and the Fourth Circuit reversed in part, based on a Department of Education's opinion letter requiring that if a school elects

to treat students differently based on sex, transgender students must be treated consistently with their gender identity. *Id*. at 715. The opinion letter played a significant role in the Fourth Circuit's decision. After the decision was handed down, the letter was revoked by the Department of Education in February 2017, and the United States Supreme Court vacated the Fourth Circuit's decision for further consideration in light of the Department's new position. *Gloucester County School Board v. G.G. ex rel. Grimm*, 137 S.Ct. 1239 (2017). By the time the Fourth Circuit received the case, the student had graduated, and the court was concerned that the case had become moot and remanded to the trial court for further consideration. *Grimm v. Gloucester County School Board*, 869 F.3d 286 (4th Cir. 2017). Accordingly, the decision originally reached by the Fourth Circuit is no longer operative.

There is no Department of Education guidance for the Court to rely on in this case. There is only the MHRA, with the word "sex," undefined and unchanged since 1986. Missouri courts and scholarly articles have defined the word in accordance with its dictionary definition, and the Missouri legislature has refused many opportunities to change it. There is no basis for the Court to indulge evolutionary, philosophical, or other bases for reinterpreting the word "sex." A change as broad as requested by Appellant is properly the province of the legislature.

D. Conclusion

The plain language of the MHRA shows that gender identity or transgender status is not a protected characteristic. The words do not appear in the statute, and the legislature has refused to include them in spite of many opportunities. Meanwhile, the word "sex"

cannot be stretched outside the confines of the dictionary definition to include gender identity. Therefore, Appellant's petition failed to state a claim under the MHRA and was properly dismissed by the trial court.

III. APPELLANT'S POINT III IS NOT CONTESTED.

Appellant's Point III addresses the third issue raised in the School District's motion to dismiss: issue preclusion. The School District disagrees with the merits of Appellant's arguments; however, in evaluating the standard of review applicable to motions to dismiss because of issue preclusion, it became clear that, if the court below had intended to dismiss Appellant's claim based on *res judicata* or collateral estoppel, it should have treated the motion to dismiss as one for summary judgment. *See e.g.*, *King General Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S.W.2d 495, 498-99 (Mo. banc 1991); and *Stegner v. Milligan*, 523 S.W.3d 538, 541 (Mo. App. 2017). In its *de novo* review, the Court will affirm a dismissal if appropriate on any ground stated in the motion to dismiss. *Costa*, 274 S.W.3d at 462. Since the motion on issue preclusion was not presented in accordance with Rule 74.04(c) and the court below did not convert the motion from one seeking dismissal to one seeking summary judgment, a dismissal based on *res judicata* or collateral estoppel would not have been appropriate. *King General Contractors, Inc.*, 821 S.W.2d at 498-99; and *Stegner*, 523 S.W.3d at 541. Accordingly, the School District does not seek affirmance of the trial court's dismissal based on issue preclusion; rather it relies on the failure of Appellant's petition to state a claim for relief, as detailed in response to Points I and II of Appellant's Brief.

CONCLUSION

The trial court's decision to dismiss Appellant's petition for failure to state a claim should be affirmed. Appellant's assertion that his transgender status entitled him to relief against the School District under the MHRA simply is not supported by the statutory language. Further, the School District is not a "person" who may be held liable for discrimination in a public accommodation under the MHRA. Under these circumstances, the petition fails to invoke substantive principles of law entitling Appellant to relief.

Respectfully submitted,

CORONADO KATZ LLC

/s/ Mark D. Katz

Steven F. Coronado Mo. Bar No. 36392
Mark D. Katz Mo. Bar No. 35776
14 West Third Street, Suite 200
Kansas City, MO 64105
Telephone: (816) 410-6600
Facsimile: (816) 337-3892
steve@coronadokatz.com
mark@coronadokatz.com
ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 84.06(c), I certify that, to the best of my knowledge:

1. The Substitute Brief of Respondents/Appellants includes all information required by Rule 55.03, including an attorney of record's signature, a certificate verifying that the attorney of record signed the original, the attorney of record's name, Missouri bar number, address, telephone and facsimile numbers, and email address; and,

2. The Substitute Brief of Respondents/Defendants complies with the limitations contained in Rule 84.06(b); and,

3. According to Microsoft Word, the Brief of Relator contains 8,701 words.

Respectfully submitted,

CORONADO KATZ LLC

/s/ Mark D. Katz

Steven F. Coronado Mo. Bar No. 36392
Mark D. Katz Mo. Bar No. 35776
14 West Third Street, Suite 200
Kansas City, MO 64105
Telephone: (816) 410-6600
Facsimile: (816) 337-3892
steve@coronadokatz.com
mark@coronadokatz.com
ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

I certify that the original of the Substitute Brief of Respondents/Defendants was signed by an attorney of record and shall be maintained in the client files of Coronado Katz LLC, pursuant to Rule 43.02(c). I further certify that on March 27, 2018, a true and correct copy of the Substitute Brief of Respondents/Defendants was filed via the Court's electronic filing system, which will transmit notice to the following case participants:

Alexander Edelman
EDELMAN, LIESEN & MYERS, L.L.P.
4051 Broadway, Suite 4
Kansas City, MO 64111
Attorney for Appellant

Donna Harper
SEDEY HARPER WESTHOFF, P.C.
2711 Clifton Avenue, Suite 200
St. Louis, MO 63139
Attorney for Amicus Curiae The National Women's Law Center

Anthony Rothert
ACLU OF MISSOURI FOUNDATION
906 Olive Street, Suite 1130
St. Louis, MO 63101
Attorney for Amici Curiae American Civil Liberties Union, ACLU of Missouri, and Transgender Law Center

Kristen Dunnett
MARTA J. PAPA, P.C.
800 Maryland #950
St. Louis, MO 63105
Attorney for Amici Curiae Pflag, Inc., Trans Youth Equality Foundation, Gender Spectrum, and Gender Diversity

LaRue Robinson
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
Attorney for Amici Curiae American Academy of Child and Adolescent Psychiatry, American Academy of Nursing, American Medical Association, Association of Medical School Pediatric Department Chairs, American Nurses Association, Endocrine Society, GMLA: Health Professionals Advancing LGBT Equality, Mental Health America,

National Association of Social Workers, American Medical Women's Association, and American Academy of Pediatrics

Sarah Brown
BROWN & CURRY, LLC
406 W. 34th Street, Suite 623
Kansas City, MO 64111
Attorney for Amicus Curiae St. Louis & Kansas City Chapters of Nat'l Employment Lawyers

Denise Lieberman
6047 Waterman Boulevard
St. Louis, MO 63112
Attorney for Amicus Curiae Promo

Natalie Lorenz
MATHIS, MARIFIAN & RICHTER, LTD.
413 Micahs Way
Columbia, IL 62236
Attorney for Amici Curiae Lambda Legal and GLBTQ Legal Advocates and Defenders

Jonathan R. Whitehead
LAW OFFICE OF JONATHAN R. WHITEHEAD, LLC
229 S.E. Douglas St., Suite 210
Lee's Summit, MO 64063

CORONADO KATZ LLC

/s/ Mark D. Katz

Steven F. Coronado Mo. Bar No. 36392
Mark D. Katz Mo. Bar No. 35776
14 West Third Street, Suite 200
Kansas City, MO 64105
Telephone: (816) 410-6600
Facsimile: (816) 337-3892
steve@coronadokatz.com
mark@coronadokatz.com
ATTORNEYS FOR RESPONDENTS