Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

No. SC100298

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI *ex rel.*
TYLER TECHNOLOGIES, INC.,

Realtor,

v.
THE HONORABLE DAVID CHAMBERLAIN,

Respondent.

Original Proceeding in Prohibition

BRIEF OF RESPONDENT

KENNETH B. McCLAIN #32430
JONATHAN M. SOPER #61204
NICHELLE L. OXLEY #65839
HUMPHREY FARRINGTON & MCCLAIN
221 West Lexington, Suite 400
Independence, Missouri 64050
T: 816-836-5050
F: 816-836-8966

ATTORNEYS FOR RESPONDENT

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

TABLE OF CONTENTS

TABLE OF AUTHORITIES 4

INTRODUCTION 7

STATEMENT OF FACTS 9

ARGUMENT 13

I. Legal Standard 13

II. Response to Point Relied On I: Plaintiffs Were Not Required to Exhaust Administrative Remedies. 14

A. There is No Administrative Remedy for Plaintiffs' Negligence Claims Against Tyler Technologies 14

B. Even if there Was an Administrative Remedy for Plaintiffs' Claims Against Tyler, Plaintiffs Were Not Required to Exhaust Administrative Remedies 17

C. Tyler's cases do not support its argument. 24

D. Missouri Regulation 12 CSR 30-3.010(1)(B)1(a) does not overrule the prior holdings from the Missouri Supreme Court and Western District Court of Appeals. 28

E. In Missouri, courts have discretion to find an equitable exception to the requirement to exhaust administrative remedies exists when, like here, the defendants violated statutory mandates. 33

III. Response to Point Relied On II: Plaintiffs Stated Viable Claims of Negligence Because Tyler Owed Plaintiffs a Duty. 35

A. Because injury to Plaintiffs was foreseeable, Tyler owed a common-law duty to Plaintiffs. 35

B. When Tyler Contracted with Jackson County to Perform Appraisal and Reassessment Services, it Assumed a Duty to Plaintiffs. 41

C. The *Westerhold* Factors Compel the Conclusion that Tyler Had a Duty to Plaintiffs 48

IV. A Writ Would Improperly Deny Plaintiffs the Opportunity to Appeal the Dismissal of their Counts for Breach of Contract Against Tyler. 50

CONCLUSION 52

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

TABLE OF AUTHORITIES

Page(s)

Cases

Aluma Kraft Mfg. Co. v. Elmer Fox & Co., 493 S.W.2d 378 (Mo. App. 1973) 46

Armstrong-Trotwood, LLC v. State Tax Comm'n, 516 S.W.3d 830 (Mo. 2017) 32

Bartlett v. Ross, 891 S.W.2d 114 (Mo. 1995) 16, 17

Bodenhausen v. Missouri Bd. of Registration for Healing Arts, 900 S.W.2d 621 (Mo. 1995) 31

Bowan ex rel. Bowan v. Express Med. Transporters, Inc., 135 S.W.3d 452 (Mo.App. E.D. 2004) 37

Brown v. Michigan Millers Mut. Ins. Co., Inc., 665 S.W.2d 630 (Mo.App. W.D. 1983) .. 45

Brown v. Nat'l Supermarkets, Inc., 679 S.W.2d 307 (Mo.App. E.D. 1984) 44, 48

Bus. Men's Assur. Co. of Am. v. Graham, 891 S.W.2d 438 (Mo.App. W.D. 1994) 46

Children's Wish Found. Int'l, Inc. v. Mayer Hoffman McCann, P.C., 331 S.W.3d 648 (Mo. 2011) 46

Christopher A. Jackson Revocable Inter Vivos Tr. of 19 July 1995 v. Abeles & Hoffman, P.C., 595 S.W.3d 156 (Mo.App. E.D. 2020) 47

Chubb Group of Ins. Companies v. C.F. Murphy & Associates, Inc., 656 S.W.2d 766 (Mo.App. W.D. 1983) 40

Colbert v. State, Family Support Div., 264 S.W.3d 699 (Mo.App. W.D. 2008) 42

Crest Communications v. Kuehle, 754 S.W.2d 563 (Mo. 1988) 22

Derfelt v. Yocom, 692 S.W.2d 300 (Mo. 1985) 14

Devinki v. Takacs, 875 S.W.2d 648 (Mo.App. W.D. 1994) 16, 25

Eaton v. St. Charles Cnty., 76 Mo. 492 (1882) 27

Eaves Brooks Costume Co., Inc. v. Y.B.H. Realty Corp., 76 N.Y.2d 220, 556 N.E.2d 1093 (1990) 48

Ex parte McLaughlin, 105 S.W.2d 1020 (Mo. App. 1937) 28

Farmer v. Barlow Truck Lines, Inc., 979 S.W.2d 169 (Mo. 1998) 31

Fleischer v. Hellmuth, Obata & Kassabaum, Inc., 870 S.W.2d 832, 834 (Mo. App. E.D. 1993)..... 50
Foster Bros. Mfg. Co. v. State Tax Comm'n of Mo., 319 S.W.2d 590 (Mo. 1958) 32, 33
Gallagher v. Magner, 619 F.3d 823 (8th Cir. 2010)..... 26
Gen. Motors Corp. v. City of Kansas City, 895 S.W.2d 59 (Mo.App. W.D. 1995)..... 22
Grote Meat Co. v. Goldenberg, 735 S.W.2d 379 (Mo.App.1987)..... 23
Helm v. Inter-Insurance Exchange for Automobile Club of Missouri, 354 Mo. 935, 192 S.W.2d 417, 167 A.L.R. 238 49
Hoover's Dairy, Inc. v. Mid-Am. Dairymen, Inc./Special Products, Inc., 700 S.W.2d 426 (Mo. 1985)..... 38, 39, 43, 45
Hull v. Gillioz, 344 Mo. 1227, 130 S.W.2d 623 50
Hunt v. Jefferson Arms Apartment Co., 679 S.W.2d 875 (Mo.App. E.D. 1984)..... 44
Ingels v. Noel, 804 S.W.2d 808 (Mo.App. W.D. 1991) 22, 23
John Calvin Manor, Inc. v. Aylward, 517 S.W.2d 59 (Mo. 1974).. 12, 19, 20, 22, 23, 27, 30
Johnson v. Auto Handling Corp., 523 S.W.3d 452 (Mo. 2017)..... 41
Kaplan v. U.S. Bank, N.A., 166 S.W.3d 60 (Mo.App. E.D. 2003) 43, 44, 45
Kraus v. Hy-Vee, Inc., 147 S.W.3d 907 (Mo.App. W.D. 2004) 45
L.A.C. ex rel. D.C. v. Ward Parkway Shopping Ctr. Co., L.P., 75 S.W.3d 247 (Mo. 2002) 44, 48
Lake St. Louis Cmty. Ass'n v. State Tax Comm'n, 759 S.W.2d 843 (Mo. 1988) 29, 30
Lambert v. Jones, 339 Mo. 677, 98 S.W.2d 752..... 49
Lopez v. Three Rivers Elec. Co-op., Inc., 26 S.W.3d 151 (Mo. 2000) 37
Lough by Lough v. Rolla Women's Clinic, Inc., 866 S.W.2d 851 (Mo. 1993)..... 37
Lowery v. Kansas City, 337 Mo. 47, 85 S.W.2d 104 49
Madden v. C & K Barbecue Carryout, Inc., 758 S.W.2d 59 (Mo. 1988)..... 36, 39, 44, 48
McGhee v. Dixon, 973 S.W.2d 847 (Mo. 1998) 28
McGraw-Edison Co. v. Curry, 485 S.W.2d 175 (Mo. App. 1972) 20, 21, 34
Miles ex rel. Miles v. Rich, 347 S.W.3d 477 (Mo.App. E.D. 2011)..... 37, 38
Miller v. Big River Concrete, LLC, 14 S.W.3d 129 (Mo.App. E.D. 2000)..... 45, 47

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

Norval v. Whitesell, 605 S.W.2d 789 (Mo. 1980) 14
Pentecostal Church of God v. Hughlett, 737 S.W.2d 728 (Mo. 1987) 16
PharmFlex, Inc. v. Div. of Employment Sec., 964 S.W.2d 825 (Mo.App. W.D. 1997) 31, 32
Ramsey v. Huck, 267 Mo. 333, 184 S.W. 966 (1916) 27
Robinson v. Health Midwest Dev. Group, 58 S.W.3d 519 (Mo. 2001) 41
Roddy v. Missouri Pac. Ry. Co., 104 Mo. 234, 15 S.W. 1112 (1891) 47
Sch. Dist. of Kansas City v. State, 317 S.W.3d 599 (Mo. 2010) 22
Sperry Corp. v. Wiles, 695 S.W.2d 471 (Mo. 1985) 17
St. Louis Cnty., to Use of Mississippi Valley Tr. Co. v. Menke, 95 S.W.2d 818 (Mo. App. 1936) 27
St. Louis Concessions, Inc. v. City of St. Louis, 926 S.W.2d 495 (Mo.App. E.D. 1996) .. 24
State ex rel. Brentwood Sch. Dist. v. State Tax Comm'n, 589 S.W.2d 613 (Mo. 1979) 14, 17
State ex rel. Cassilly v. Riney, 576 S.W.2d 325 (Mo. 1979) 16
State ex rel. Chassaing v. Mummert, 887 S.W.2d 573 (Mo. 1994) 14
State ex rel. Com'rs of State Tax Comm'n v. Schneider, 609 S.W.2d 149 (Mo. 1980) 14
State ex rel. Douglas Toyota III, Inc. v. Keeter, 804 S.W.2d 750 (Mo. 1991) 15
State ex rel. Eggers v. Enright, 609 S.W.2d 381 (Mo. 1980) 15
State ex rel. Hannah v. Seier, 654 S.W.2d 894 (Mo. 1983) 14
State ex rel. Henley v. Bickel, 285 S.W.3d 327 (Mo. 2009) 15, 41
State ex rel. Hilleary & Partners, Ltd. v. Kelly, 448 S.W.2d 926 (Mo.App.1969) 23
State ex rel. Horton v. Bourke, 344 Mo. 826, 129 S.W.2d 866 (1939) 14
State ex rel. Kerr v. Landwehr, 32 S.W.2d 83 (Mo. 1930) 28
State ex rel. Lane v. Corneli, 351 Mo. 1, 171 S.W.2d 687 (1943) 21, 27
State ex rel. Lemon v. Bd. of Equalization of Buchanan Cnty., 108 Mo. 235, 18 S.W. 782 (1891) 21
State ex rel. Sayad v. Zych, 642 S.W.2d 907 (Mo. 1982) 14
State ex rel. SLAH, L.L.C. v. City of Woodson Terrace, 378 S.W.3d 357 (Mo. 2012) 21, 22
State ex rel. St. Francois Cnty. Sch. Dist. R-III v. Lalumondier, 518 S.W.2d 638 (Mo. 1975) 16

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

State ex rel. T.J. v. Cundiff, 632 S.W.3d 353 (Mo. 2021) 14
State ex rel. Union Elec. Co. v. Dolan, 256 S.W.3d 77 (Mo. 2008) 15
State ex rel. Zahnd v. Van Amburg, 533 S.W.3d 227 (Mo. 2017) 14
State on inf. Barker ex rel. Kansas City v. Kansas City Gas Co., 254 Mo. 515, 163 S.W. 854 (1913) 14
State, on Inf. of Killam, v. Colbert, 273 Mo. 198, 201 S.W. 52 (1918) 27
United Missouri Bank of Kansas City v. March, 650 S.W.2d 678 (Mo.App. W.D. 1983) 12,19
Virginia D. v. Madesco Inv. Corp., 648 S.W.2d 881 (Mo. 1983) 44
Westerhold v. Carroll, 419 S.W.2d 73 (Mo. 1967) 47, 49, 50
Westglen Vill. Associates v. Leachman, 654 S.W.2d 897 (Mo. 1983) 16
Westside Neighborhood Ass'n v. Beatty, 643 S.W.3d 539 (Mo.App. W.D. 2021) . 16, 26, 27
Wolfmeyer v. Otis Elevator Co., 262 S.W.2d 18 (Mo. 1953) 44, 49
Zuber v. Clarkson Const. Co., 363 Mo. 352, 251 S.W.2d 52 (1952) 37

Statutes

42 U.S.C § 1983 25
R.S. Mo. § 137.243 11
R.S.Mo. § 138.430 ..... 27, 28
R.S.Mo. § 536.014 30
R.S.Mo. §531.010 15

Regulations

12 CSR 30-3.010(1)(B)1(a) 29, 30, 32, 33

Other Authorities

38 A.L.R. 403 49
57 Am.Jur.2d Negligence § 45 (1971) 43
57 Am.Jur.2d Negligence § 47 (1971) 43
Recovery for Negligent Interference with Prospective Economic Advantage, 12 Stanford Law Review 509 50
Restatement Second of Torts, § 324A 44

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

INTRODUCTION

Tyler seeks to avoid liability for the foreseeable harm its negligence caused to these Plaintiffs and all similarly situated Jackson County taxpayers. Tyler's negligence and dereliction of duty directly caused the 2023 property tax bills to be based on incorrect values and directly caused Plaintiffs to not receive notice of the increase in their assessed value, and/or notice of a physical inspection so that Plaintiffs could request an interior inspection be performed during the physical inspection. It also directly caused Plaintiffs and similarly situated property owners to spend time and expenses performing the work Tyler was already paid $17.8 Million to perform as a prerequisite to filing an appeal, because the County still needed this work to be done in order to justify the assessed value placed on each property.

Tyler has raised a number of creative arguments in an attempt to avoid liability for its negligence. It first argued to Respondent that sovereign immunity barred Plaintiffs' negligence claims (See Tyler's Motion to Dismiss at Ex. 221-224). It later abandoned that argument, instead filing a Petition for Writ of Prohibition relying solely on the argument that because Tyler owed no duty to Plaintiffs, the Amended Petition failed to state a viable claim for negligence (See Tyler's Petition for Writ of Prohibition). It now raises a new argument in its Brief: that Plaintiffs were required to exhaust their administrative remedies before filing suit against Tyler (See Tyler's Brief, p. 12 ("The Court may address this issue in considering whether to make permanent the preliminary writ, even though the issue was not raised in Tyler's petition.")).

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

Tyler's position is that no one can hold it accountable for its negligence in the performance of its assessment services except for the party it contracted with. Tyler asks this Court to excuse it from any liability for the taxpayers its negligence has harmed. Tyler has even sought to set aside a civil investigative demand served by the Missouri Attorney General pursuant to the Merchandising Practices Act. *See Tyler Technologies, Inc. v Andrew T Bailey*, Case No. 23AC-CC06909. In Tyler's view, it is protected and shielded from any and all civil liability, save for breach of contract brought by Jackson County.

This, however, is not the law in Missouri. When a party undertakes to perform acts in Missouri, it can be held liable for injuries caused by its negligence when such injuries were reasonably foreseeable. And, to the extent an exhaustion of administrative remedies argument can even apply to Tyler, long-established Missouri jurisprudence holds that when the required statutory notice is not provided, property owners do not need to exhaust administrative remedies but instead can seek relief directly in circuit court. Respondent Judge Chamberlain properly denied Tyler's Motion to Dismiss Plaintiffs' negligence claims. This Court should accordingly quash its Preliminary Writ.

STATEMENT OF FACTS

Jackson County, Missouri paid Realtor Tyler Technologies, Inc. $17.8 million to provide "Appraisal and Reassessment Services" for the 2023 General Reassessment (Exh. 4, Amended Petition, ¶ 23). Tyler's services included conducting the actual reassessments of properties and providing market values of each property to the County (*Id*. at ¶ 27). While the contract set January 31, 2023 as Tyler's deadline in which to complete all of the property reassessments, Tyler missed its deadline (*Id*. at ¶ 29), leading to disastrous results

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

for the entire reassessment process. Because Tyler did not complete the reassessments on time, R.S. Mo. § 137.243 was violated in that the Jackson County Assessor did not provide the clerk with the assessment book containing the real estate values for that year (*Id*. at ¶ 32). The Jackson County Assessor, Realtor Beatty, publicly admitted that this statutory deadline had been missed and that as of March 22, 2023, neither the residential nor commercial properties reassessments had been completed (*Id.* at ¶ 33). This led to political subdivisions, including the Amici Curiae who have filed a brief in the companion case SC100304 involving Jackson County, projecting tax levies based on incorrect figures, and not the true reassessed values (*Id.* at ¶ 43-45). In short, because Tyler missed the first deadline, it denied all Jackson County property owners their right to receive a notice of assessment increase that contained a projected tax liability based on the difference between 2022 property values and 2023 property values. (*Id.* at ¶ 45). Instead, property owners who received a notice of increased assessment at all were given an inaccurate and grossly inflated projected tax liability, so high that it would violate the Hancock Amendment. Id. (*Id.* at ¶ 34-35, 45).

While the Contract required Tyler to have the "Notice of Assessment Mailers" completed in March 2023 (*Id.* at ¶ 25), these notices, as they relate to commercial property owners, only began being prepared on June 12—a mere three days before the statutory deadline for property owners to receive notice (*Id*. at ¶ 60). Due to Tyler's negligence, most if not all owners of commercial real property in Jackson County, as well as a significant number of residential and agricultural property owners, did not receive notice of the

increase in the assessed value of their properties on or before June 15, 2023 as required by Missouri statute (*Id.* at ¶ 61).

The June 15, 2023 deadline is jurisdictional, meaning that if the deadline is not met, Jackson County lacked the authority to raise the assessed value of real property: 'Compliance with the notice provision of § 137.180, supra, is mandatory and failure by an assessor to give the requisite notice of an increase in the assessed valuation of property renders any increase in valuation and any tax computed thereon void.'" (*Id*. at ¶ 57 (citing *United Missouri Bank of Kansas City v. March*, 650 S.W.2d 678, 679 (Mo.App. W.D. 1983) (citing *John Calvin Manor, Inc. v. Aylward*, 517 S.W.2d 59 (Mo. 1974)).

Similarly, Tyler failed to provide residential property owners 30 days' notice before performing physical inspections on the properties, thereby denying property owners the "opportunity to 'request that an interior inspection be performed during the physical inspection' in violation of section 137.115." (*Id*. at ¶ 157, see also ¶¶ 154-156).

Because Tyler did not perform the work they were paid to do, the County required property owners to perform it as a prerequisite for appealing their assessed value. The contract between Tyler and the County required Tyler to, among other things, complete a parcel-by-parcel review to gather data on each parcel within Jackosn County (*Id.* at ¶ 99). This includes specific tasks with specific deadline such as "data collecting," "image gathering," "sales verification," and "final value." (*Id.* at ¶ 25). Based on all of this, Tyler was then to prepare "[m]arket value estimates … for each parcel … [a]ll work, except support of values, shall be completed no later than January 31, 2023." (*Id.* at ¶ 27). Tyler negligently missed this deadline, setting in motion the entire chain of events that gives rise

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

to this lawsuit, including the many failures of the County Realtors[1] to comply with the mandatory requirements of Chapters 137 and 138, including notice. (*Id*. at ¶¶ 29-30).

One of the consequences triggered by Tyler's negligence was that, because Tyler failed to perform the work it was required to do, the County does not have the evidence it needs to meet its burden of proof to justify the assessed value. (*Id.* at ¶¶ 88-93). So, the County began requiring property owners to supply this information before they are allowed to appeal. (*Id.*) The County does this by not allowing the appeal to be submitted on-line unless the property owner submits their own opinion of what the true value of their home is. (*Id.* at ¶ 106). Property owners are also told at their "informal" hearings (which, recall, they go into believing are their actual hearings) that they need to present the evidence they have to support their property value. (*Id.* at ¶¶ 81-83). This is true even for property owners who are not challenging the assessed value, but rather are challenging the lawfulness of the increased to the assessed value, including under the theories Plaintiffs seek to pursue in this case. (*Id.*).

In short, one of the foreseeable outcomes of Tyler's negligence is that the County is requiring property owners to, at their own time and expense, gather the data and information Tyler has already been paid (with the property owners' tax money) $17.8 Million to gather. This is because the County still needs this information to justify the assessed value assigned to each property. This time and expense are part of the damages Plaintiffs are claiming against Tyler. (*Id.* at ¶¶ 1, 136, 204, and 215).

[1] "The County Realtors" as used in this brief refers to the Realtors in the companion case, SC100304, involving Jackson County.

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

ARGUMENT

I. Legal Standard

A Writ of Mandamus is issued only in extraordinary emergencies and even then, only to enforce, not adjudicate, an already established clear and specific legal right. "Mandamus will lie only when there is a clear, unequivocal, and specific right." *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 576 (Mo. 1994), citing *State ex rel. Sayad v. Zych*, 642 S.W.2d 907, 911 (Mo. 1982). "A writ of mandamus is not appropriate to establish a legal right, but only to compel performance of a right that already exists." *Id.*, citing *State ex rel. Brentwood Sch. Dist. v. State Tax Comm'n*, 589 S.W.2d 613, 614 (Mo. 1979). "A writ of mandamus is a hard and fast unreasoning writ, and is reserved for extraordinary emergencies." *Norval v. Whitesell*, 605 S.W.2d 789, 791 (Mo. 1980), citing *State on inf. Barker ex rel. Kansas City v. Kansas City Gas Co.*, 254 Mo. 515, 163 S.W. 854 (1913), and *State ex rel. Horton v. Bourke*, 344 Mo. 826, 129 S.W.2d 866 (1939). "Mandamus is a discretionary writ, not a writ of right." *State ex rel. Chassaing*, 887 S.W.2d at 576, citing *Norval*, 605 S.W.2d at 791. "As this Court has often stated, the purpose of the writ is to execute, not adjudicate." *Id.*, citing *State ex rel. Com'rs of State Tax Comm'n v. Schneider*, 609 S.W.2d 149, 151 (Mo. 1980).

Similarly, "[a] writ of prohibition does not issue as a matter of right." *Derfelt v. Yocom*, 692 S.W.2d 300, 301 (Mo. 1985), citing *State ex rel. Hannah v. Seier*, 654 S.W.2d 894, 895 (Mo. 1983). "The writ of prohibition, an extraordinary remedy, is to be used with great caution and forbearance and only in cases of extreme necessity." *State ex rel. T.J. v. Cundiff*, 632 S.W.3d 353, 355 (Mo. 2021), citing *State ex rel. Zahnd v. Van Amburg*, 533

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

S.W.3d 227, 229 (Mo. 2017) (quoting *State ex rel. Douglas Toyota III, Inc. v. Keeter*, 804 S.W.2d 750, 752 (Mo. 1991)). The primary purpose of a writ of prohibition is to prevent the usurpation of judicial power. R.S.Mo. §531.010. The purpose of prohibition is not to provide a remedy for all legal difficulties, nor to serve as a substitute for an appeal. *State ex rel. Eggers v. Enright*, 609 S.W.2d 381, 382 (Mo. 1980).

Finally, "[i]n the context of a motion to dismiss for failure to state a cause of action, it has long been held that 'where a petition reveals that the pleader has not stated and cannot state a cause of action of which the circuit court would have jurisdiction, then prohibition will lie." *State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 330 (Mo. 2009) (quoting *State ex rel. Union Elec. Co. v. Dolan*, 256 S.W.3d 77, 81 (Mo. 2008)). One of the reasons for this is that in Missouri, leave to amend "shall be freely given when justice so requires." Mo. Sup. R. 55.33. Hence, unless the First Amended Petition proves conclusively that no set of facts exists that would allow Plaintiffs to bring their claims against Tyler, Tyler is not entitled to the extraordinary remedy of a writ from this Court.

II. Response to Point Relied On I: Plaintiffs Were Not Required to Exhaust Administrative Remedies.

A. There is No Administrative Remedy for Plaintiffs' Negligence Claims Against Tyler Technologies

Tyler Technologies, a self-described "private third-party vendor" (Tyler's Brief, p. 8), raises a new argument to this Court that it never made in support of its Motion to Dismiss below: that Plaintiffs were required to exhaust their administrative remedies before suing Tyler in civil court. Tyler does not cite a single case where courts have required

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

plaintiffs to exhaust administrative remedies before pursuing negligence claims against a private third-party vendor, likely because none exists.

Instead, in all the cases where exhaustion of administrative remedies was found to be required, the party the plaintiff was seeking relief from was the County, the Assessor, or another governmental party. *See Westglen Vill. Associates v. Leachman*, 654 S.W.2d 897, 900 (Mo. 1983) (Defendant was County Collector); *Bartlett v. Ross*, 891 S.W.2d 114, 116 (Mo. 1995) (Defendant was County Collector); *State ex rel. St. Francois Cnty. Sch. Dist. R-III v. Lalumondier*, 518 S.W.2d 638, 640 (Mo. 1975) (Defendant was Board of Equalization); *Pentecostal Church of God v. Hughlett*, 737 S.W.2d 728, 729 (Mo. 1987) (Defendant was County Collector); *State ex rel. Cassilly v. Riney*, 576 S.W.2d 325, 328 (Mo. 1979) (Defendants were director of revenue and assessor of county); *Devinki v. Takacs*, 875 S.W.2d 648, 650–51 (Mo.App. W.D. 1994) Defendants were three Jackson County government officials); *Westside Neighborhood Ass'n v. Beatty*, 643 S.W.3d 539, 544 (Mo.App. W.D. 2021) (Defendants were Jackson County and Assessor Gail McCann Beatty, also Defendants here), all cited by Tyler in its Brief. N other words, parties against whom the plaintiff had an administrative remedy.

This makes sense, considering there is simply no administrative remedy available for the damages incurred by Tyler's negligence. Even if Plaintiffs had filed an appeal with the Board of Equalization (which they were not required to do, as explained more fully below and in Plaintiffs' Brief in the companion case, SC100304, involving Jackson County), neither the BOE nor the State Tax Commission has any authority to grant Plaintiffs relief as against Tyler Technologies, nor can those entities award damages at all.

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

"The doctrine of exhaustion of administrative remedies requires that **where a remedy before an administrative agency is provided**, relief must be sought by exhausting this remedy before the courts will act." *Sperry Corp. v. Wiles*, 695 S.W.2d 471, 472 (Mo. 1985) (emphasis added).

Tyler does not cite a single case where exhaustion of administrative remedies was held to be required as against a third-party who would not be a party to the administrative procedures. Instead, it cites cases involving claims between the same parties who would be parties in the administrative appeal. Instead, the precedent it relies upon makes clear there is no administrative review process for Plaintiffs' claims against Tyler (*See* Tyler's Brief, p. 13, citing *Bartlett v. Ross*, 891 S.W.2d 114, 116 (Mo. 1995)). In *Bartlett*, this Court held that the only two parties to the administrative appeal process are the taxpayer and the collector. *Id*. There, this Court determined that a school district lacked standing to challenge an order from a suit to recover funds paid under protest because the school district was not a proper party to the administrative appeal process. *Id*.

The *Bartlett* Court concluded:

> School districts likewise do not have the right to intervene before the State Tax Commission—and thus no standing to appeal—because the legislature has determined that "the school board's interests are adequately represented by the county assessor, who is the party respondent." *State ex rel. Brentwood School Dist.*, 589 S.W.2d at 614.

Id.

Here, just like the school district in *Bartlett*, Tyler is not a party to the administrative appeal process. Accordingly, there is no administrative remedy for the monetary damages Plaintiffs seek from Tyler in their negligence claims. Plaintiffs cannot be required to

exhaust an administrative remedy where none exists. Because neither the Board of Equalization nor the State Tax Commission is authorized to adjudicate any dispute with Tyler Technologies, or award Plaintiffs compensatory damages, Plaintiffs' claims seeking such damages are not subject to the doctrine of exhaustion of administrative remedies.

Because there is no administrative remedy for Plaintiffs' damages claims, Respondent properly denied Tyler's Motion to Dismiss.

B. Even if there Was an Administrative Remedy for Plaintiffs' Claims Against Tyler, Plaintiffs Were Not Required to Exhaust Administrative Remedies

Tyler spends many pages of its Brief detailing the specific administrative procedures set forth in Chapters 137 and 138 taxpayers who are unhappy with their assessed property value may follow in order to receive a lower assessed value through the appeal process (Tyler's Brief, p. 12-16). Tyler argues that Plaintiffs in the present case are in the precise same scenario as every other taxpayer who wants to challenge an assessment and have incurred the same damages every taxpayer experiences in challenging their assessed value (Tyler's Brief, p. 17).

Plaintiffs here are simply not like every other taxpayer who, unhappy with their assessed value, wish to appeal the result in order to receive a lower amount. Here, any increases in Plaintiffs' assessed values are void as a matter of law due to Tyler and its co-Defendants' failure to follow their mandatory duties in the provision of notice to Plaintiffs.

All of the administrative procedures Tyler touts in its Brief necessarily assume that the people performing the assessment followed the required statutory mandates in doing so. Tyler's argument ignores the reality that it and its co-Defendants, not Plaintiffs, violated

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

these Chapters at the outset when they failed to send Plaintiffs timely notice as required by § 137.180. "It is apparent that the failure to give the notice required by § 137.180 completely frustrates the statutory scheme at the very outset." *John Calvin Manor, Inc.*, 517 S.W.2d at 62. And this failure to follow section 137.180's notice requirements renders the Plaintiffs' increased valuations, and any taxes based thereon, void. "Compliance with the notice provision of § 137.180, supra, is mandatory and failure by an assessor to give the requisite notice of an increase in the assessed valuation of property renders any increase in valuation and any tax computed thereon void." *United Missouri Bank of Kansas City v. March*, 650 S.W.2d 678, 679 (Mo.App. W.D. 1983), citing *John Calvin Manor, Inc.*, 517 S.W.2d 59.

This language from *March* is directly on point and confirms that Plaintiffs have the clear and specific right to bring this case and pursue these claims. Again: "Compliance with the notice provision of § 137.180, supra, is mandatory and failure by an assessor to give the requisite notice of an increase in the assessed valuation of property renders any increase in valuation and any tax computed thereon void." *March* at 679. Plaintiffs set forth this language in their Amended Petition as it clearly establishes that they have the right to the relief they seek. Tyler ignores it; it does not mention *March* even once in its Brief to this Court.

Plaintiffs also specifically cited *John Calvin Manor* in their Amended Petition (see Exhibit 4, Amended Petition, p. 012 at ¶ 57). There, Jackson County failed to give the plaintiff timely notice of an increase in the assessed value of its property. *John Calvin Manor, Inc.*, 517 S.W.2d at 60. Due to this failure, the trial court declared the increase void,

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

ordered the County to return the value back to the prior year's value, and permanently enjoined the collection of taxes on any amount above the prior year's value. *Id.* at 61.

This Court affirmed the trial court's judgment and held that the failure to give timely notice places the property owner in a different position than those who received such notice, and therefore grants them the right to seek relief directly from the courts. "The consequence of failing to give the required notice places the taxpayer in a markedly different position than if proper notice is given and bears directly on the adequacy of the remedies argued for by defendants." *Id.* at 61. The County, having violated its own statutory duties, thereby compromising the administrative relief available to the plaintiff, could not escape accountability in court. "It is apparent that the failure to give the notice required by § 137.180 completely frustrates the statutory scheme at the very outset." *Id.* at 62. Hence, as this Court explained, the trial court in *John Calvin Manor* did not err when it recognized this legal reality and granted the relief sought: "Upon finding the increased assessment to be void, the circuit court properly ordered the increase stricken from the records and let the prior assessment stand. The orders of the circuit court were necessary to afford complete relief once it was determined that the increased assessment was invalid." *Id.* at 59.

The right of a taxpayer to seek relief directly from the courts was established well before this Court's holding in *John Calvin Manor*. For instance, in *John Calvin Manor* this Court cited with approval to *McGraw-Edison Co. v. Curry*, 485 S.W.2d 175, 180 (Mo.

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

App. 1972).[2] There, the Missouri Court of Appeals upheld the trial court's findings of law, including "that by reason of the failure to give plaintiff the required statutory notice the County Board of Equalization's action in raising the valuation was without its jurisdiction and void," and "that subsequent acts of defendants in assessing, collecting and disbursing the tax were without jurisdiction, authority and power and were void." *Id.* at 177-78. The court also held that the trial court "is empowered to grant the relief sought," which is the same relief sought here. *Id.* at 178.

The right of taxpayers to seek relief directly from the court when proper statutory notice is not given was established long before the holding in *McGraw*. The court there relied on authority from this Court to hold that "[w]ithout proof of notice, the Board lacked jurisdiction and its proceedings raising plaintiff's valuation were void. *Id.* at 179, citing *State ex rel. Lane v. Corneli*, 351 Mo. 1, 171 S.W.2d 687 (1943).[3] In *Corneli*¸ this Court held: "In tax proceedings, as in other proceedings, notice is a prerequisite to the validity of such proceedings. 'Provision for notice is part and parcel of 'due process of law.'" *Corneli*, 351 Mo. at 7 (quoting *State ex rel. Lemon v. Bd. of Equalization of Buchanan Cnty.*, 108 Mo. 235, 18 S.W. 782, 784 (1891)).

And this Court continues to cite *John Calvin Manor* with approval to hold that when taxpayers do not receive proper statutory notice, they can bring a claim directly in court. In *State ex rel. SLAH, L.L.C. v. City of Woodson Terrace*, 378 S.W.3d 357 (Mo. 2012), this

[2] Tyler also ignores the holding in *McGraw-Edison*, again choosing not to mention it once in their Brief.
[3] Tyler ignores the holding in *Corneli* as well.

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

Court endorsed its holding in *John Calvin Manor* along with two more recent holdings from this Court and two more recent holdings from the Missouri Court of Appeals when listing different avenues of relief that are available to taxpayers: "For instance, a taxpayer can maintain a declaratory judgment action to contest the legality of an increased assessed valuation of property when the taxpayer was deprived of administrative remedies due to the assessor's failure to give the required statutory notice." *Id.* at 363, citing *John Calvin Manor, Inc.*, 517 S.W.2d 59; *Sch. Dist. of Kansas City v. State*, 317 S.W.3d 599, 606 (Mo. 2010) n. 6 (Mo. 2010); *Crest Communications v. Kuehle*, 754 S.W.2d 563 (Mo. 1988); *Gen. Motors Corp. v. City of Kansas City*, 895 S.W.2d 59 (Mo.App. W.D. 1995); and *Ingels v. Noel*, 804 S.W.2d 808 (Mo.App. W.D. 1991).

In *Ingels v. Noel*, 804 S.W.2d 808 (Mo.App. W.D. 1991)[4], the first time the taxpayers received notice of the newly assessed valuation and increased taxes for their property was upon receipt of a tax bill in late November or early December. *Id.* at 809. The taxpayers delivered checks for payment of the taxes and letters of protest. *Id*. Ultimately, the checks were returned to the taxpayers. *Id*. The taxpayers then filed suit in circuit court, where the court ruled in favor of the taxpayers and declared that the increased real estate tax assessments and the tax computed thereon were void and enjoined the defendants from collecting them. *Id*.

The County appealed, arguing that § 139.031, which allows taxpayers to pay certain taxes under protest and then seek to recover damages, required dismissal. The County

[4] *Ingles* is another case Tyler ignores.

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

argued that because plaintiffs had failed to "strictly comply" with this section, they could not pursue any cause of action. 139.031. *Id*. The Western District Court of Appeals held that § 139.031 is not the only option for aggrieved taxpayers, as they can pursue equitable relief as well:

> Taxpayers are not limited to the procedures of that statute. Equitable relief is available in certain cases. *John Calvin Manor, Inc. v. Aylward*, 517 S.W.2d 59, 63 (Mo.1974).
>
> Assuming that at least two possible remedies exist, a litigant has not finally elected his remedy until there has been something gained by him or lost by his opponent. As such, even the institution of suit is not a conclusive and irrevocable election of remedies. *Grote Meat Co. v. Goldenberg*, 735 S.W.2d 379, 386 (Mo.App.1987); *see also State ex rel. Hilleary & Partners, Ltd. v. Kelly*, 448 S.W.2d 926, 931 (Mo.App.1969).
>
> In *John Calvin Manor*, the first notice which the taxpayer had of the increased valuation of the real estate was upon receipt of the tax statement in December of that year. In upholding the taxpayer's successful injunction action, the Missouri Supreme Court held that equitable actions remain a viable source of relief in addition to statutory provisions for review, particularly when the taxpayer has been deprived of prior notice of the increased assessment. 517 S.W.2d at 63.
>
> Therefore, two avenues of relief were available to the Ingels. While it may have seemed in the first instance that the respondents chose the statutory method, technically, they failed to consumate their protest in accordance with the statute. **Instead, these taxpayers elected the equitable cause of action. The court correctly assumed jurisdiction of this equity action.**

Ingels, 804 S.W.2d at 809–10 (emphasis added).

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

This holding is applicable here, and Plaintiffs have two avenues of relief available to them. Their equitable causes of action[5] have been expressly approved of by this Court in instances such as this, where the taxpayers were deprived of timely notice of their increased assessments as a result of the County Realtors' actions and omissions.

Ingels and the other three holdings cited by this Court in *City of Woodson Terrace* are not the only examples of Missouri courts endorsing this Court's holding and logic of *John Calvin Manor*. In *St. Louis Concessions, Inc. v. City of St. Louis*, 926 S.W.2d 495, 496–97 (Mo.App. E.D. 1996)[6], the Eastern District determined that the taxpayer did not receive the statutory notice where the assessor's office "corrected" an error in assessment by replacing a mistakenly entered assessment value with a much higher value. *St. Louis Concessions, Inc.*, 926 S.W.2d at 496–97. This correction was deemed an increase in valuation, which the taxpayer had not received proper statutory notice of. *Id*. The court found that the defendants' failure to provide the proper notice permitted the taxpayer to bring suit directly in court. *Id.* at 497–98. The court of appeals held that "the court correctly enjoined the City from enforcing the 1994 tax liability based on the increased but 'void' assessment," and remanded the case with instructions "to simply enjoin the City from collecting the 1994 tax liability based on the increased assessment." *Id.* at 498.

Tyler argues that both this Court and the Missouri legislature have determined that "no matter the form of relief requested," any challenges to increases in property assessment

[5] While Plaintiffs do not have equitable causes of action against Tyler, Tyler's argument seems to be that because they failed to exhaust their administrative remedies against the County Realtors, they cannot bring their negligence claims against Tyler.
[6] Also ignored by Tyler.

must first go through the administrative appeal process (Tyler's Brief, p. 7, 12). This argument ignores all of the above precedent. There is not a single case holding that a property owner who receives untimely notice cannot seek relief directly in court. That is why Tyler is forced to cite in its Brief cases that involve discrimination and other non-notice issues, as explained more fully below. Notice, though, is different. And the General Assembly has not responded to the holding in *John Calvin Manor* by granting the State Tax Commission the authority to hear direct appeals, and the State Tax Commission cannot create for itself authority not granted to it by statute. Even if it could, no court—including this Court—has called into question the holdings of *John Calvin Manor* and the many cases that continue to rely on it with approval.

C. Tyler's cases do not support its argument.

None of Tyler's cited cases are analogous to the present case. It cites *Devinki*, 875 S.W.2d at 650–51, for the proposition that exhaustion of administrative remedies is required, regardless of the form of relief requested (Tyler's Brief, p. 18). Tyler appears to argue that in *Devinki* a § 1983 claim was sought for actual damages. Not so. Instead, the plaintiffs in *Devinki* filed a declaratory judgment action against three Jackson County government officials arguing that their case was not a tax assessment case but instead was an action seeking a declaration that their property should be classified as a condominium. *Id*. at 649-50. While the plaintiffs argued the defendants had violated their constitutional rights in violation of 42 U.S.C § 1983, the plaintiffs never sought monetary damages, like Plaintiffs seek here. *Devinki* is no help to Tyler and is readily distinguishable from Plaintiffs' negligence claims seeking monetary damages.

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

Tyler also cites *Westside Neighborhood Association,* 643 S.W.3d at 544, arguing that the distinction of prospective relief as opposed to a tax refund is irrelevant to the exhaustion analysis (Tyler's Brief, p. 18). There, the claims were focused on discrimination and no monetary damages were sought by the Plaintiffs. The plaintiffs alleged the defendants' assessment actions violated the federal Fair Housing Act and that the assessment policies had an adverse disparate impact on minority property owners. *Id*. at 540. The present case does not ask Respondent to review any assessment policy or to make findings on whether the Assessor improperly assessed properties. Instead, this case is about notice, not assessment. In a footnote, the Western District helps explain the difference between this case and one that improperly asks courts to rule on the reasonableness of the assessment methodologies:

> The Associations assert in their reply brief that an "examination of the amount of the underlying assessments is not needed," and that they "need show only that the objected-to policy, assuming it is neutral on its face, had a 'significant adverse impact on members of a protected minority group.'" (Reply Br. 10 (citing *Gallagher v. Magner*, 619 F.3d 823, 833 (8th Cir. 2010))). In *Gallagher*, the U.S. Court of Appeals for the Eighth Circuit set forth a three-step, burden-shifting analysis for disparate-impact FHA claims. *See* 619 F.3d at 833. In step one, the plaintiff "must show a facially neutral policy had a significant adverse impact on members of a protected minority group." *Id.* (internal marks omitted). If the plaintiff makes that showing, "the burden shifts to the [defendant] to demonstrate that its policy or practice had 'manifest relationship' to a legitimate, non discriminatory policy objective and was necessary to the attainment of that objective." *Id.* at 834. Finally, if the defendant shows its actions were justified, the burden shifts back to the plaintiff "to show 'a viable alternative means' was available to achieve the legitimate policy objective without discriminatory effects." *Id.*
>
> In arguing that they need only show the 2019 policy had a significant adverse impact on minorities, the Associations fail to acknowledge the remaining steps of the *Gallagher* analysis, steps which would necessarily

> involve determinations regarding the reasonableness of the Assessor's methods of assessment and whether there existed viable alternative assessment methods she could have employed.

Westside Neighborhood Association, 643 S.W.3d at 545.

In other words, and as argued by Plaintiffs' counsel when Respondent heard oral argument on the Motions to Dismiss, discrimination cases involve more than just pure legal questions concerning the outcome of the assessment process. While that is the first step, the burden then shifts to defendants to argue the reasonableness of the assessment methods. Assessment methods are the domain of the Board of Equalization and the State Tax Commission, and courts are not to interfere in that domain. But here, there is no second step that asks Respondent to weigh different methods of assessment. The only questions Plaintiffs are asking Respondent to decide in their claims are purely legal questions concerning notice, not assessment.

In fact, while R.S.Mo. § 138.430 specifically reserves the power to determine questions of discrimination to the State Tax Commission, notably absent from this section is the power of the State Tax Commission to hear questions concerning notice. This is not by coincidence. Questions of notice are, and have always been, questions for the courts. "Such boards are statutory tribunals and derive their jurisdiction, powers and duties from the statutes." *John Calvin Manor, Inc.*, 517 S.W.2d at 64 (citing *State ex rel. Lane v. Corneli*, 351 Mo. 1, 7, 171 S.W.2d 687, 690 (1943) ("Where notice is jurisdictional, as it is here, it must affirmatively appear of record, unless waived, or the proceedings are void.") (citing *Eaton v. St. Charles Cnty.*, 76 Mo. 492 (1882); *Ramsey v. Huck*, 267 Mo. 333, 184 S.W. 966 (1916); *State, on Inf. of Killam, v. Colbert*, 273 Mo. 198, 201 S.W. 52 (1918); *St.*

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

Louis Cnty., to Use of Mississippi Valley Tr. Co. v. Menke, 95 S.W.2d 818 (Mo. App. 1936); *Ex parte McLaughlin*, 105 S.W.2d 1020 (Mo. App. 1937); *State ex rel. Kerr v. Landwehr*, 32 S.W.2d 83 (Mo. 1930)).

Westside Neighborhood is clearly distinguishable from the present case. None of the cases Tyler cites deal with a lack of notice. Unlike issues of discrimination, questions of notice are not identified in section 138.430 as those which are reserved for the State Tax Commission. As such, by the statute's plain language, and consistent with the holding in *Westside Neighborhood Ass'n,* the questions raised in this case properly belong in front of the Respondent Circuit Court, not the State Tax Commission.

Finally, Tyler confuses exhaustion of administrative remedies with preemption when it cites *McGhee v. Dixon*, 973 S.W.2d 847, 849 (Mo. 1998) as, in Tyler's words, holding "that statutes preempt common law claims and remedies when they 'fully comprehend[] and envelope[] the remedies provided by common law.' " Tyler's Brief, pp. 17-18. *McGhee* is not a preemption case; the word does not appear once in the holding. But that holding does make it clear that, because there is no language in Chapters 137 or 138 superseding the right to bring a common law cause of action for negligence against a private entity, the failure to exhaust administrative remedies does not apply to Tyler: "Generally, a statutory right of action shall not be deemed to supersede and displace remedies otherwise available at common law in the absence of language to that effect." *McGhee* at 849.

Neither the State Tax Commission nor the Board of Equalization has any authority to hear charges of negligence against Tyler or to award any damages for injuries caused

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

thereby. If Tyler, for instance, negligently damaged part of Plaintiffs' property during a "parcel-by-parcel" review, it could not escape suit by arguing that Plaintiffs first had to pursue their claims to the BOE and then the State Tax Commission.[7]

Plaintiffs were not required to exhaust their administrative remedies prior to pursuing relief in circuit court, Respondent did not err in denying Tyler's Motion to Dismiss.

D. Missouri Regulation 12 CSR 30-3.010(1)(B)1(a) does not overrule the prior holdings from the Missouri Supreme Court and Western District Court of Appeals.

In a footnote, Tyler suggests the State Tax Commission overruled this Court's holding in *John Calvin Manor* when it passed 12 CSR 30-3.010(1)(b)1(a). This regulation, however, does not change the above analysis, nor can it overrule the above decisions. Even after this rule became effective in 1984, as discussed above this Court continued to cite to *John Calvin Manor* with approval to hold that property owners who receive late notice do not need to exhaust any administrative remedy and can file directly in court. Administrative agencies such as the State Tax Commission cannot pass rules that conflict with state law or go beyond the agency's statutory authority. This rule does both. It is therefore invalid, and Respondent could not rely on it to overlook the above caselaw and dismiss this case, nor can it serve as the basis for the extraordinary relief Tyler requests from this Court.

In *Lake St. Louis Cmty. Ass'n v. State Tax Comm'n*, 759 S.W.2d 843 (Mo. 1988), this Court cited to *John Calvin* with approval and summarized the case as follows: "Suit

[7] Nor, for that matter, could it escape suit by arguing only the County had the right to sue because only the County is a party to the contract.

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

for injunction to prevent collection of taxes in excess of amount due on valuation submitted by taxpayer, because assessor failed to give notice of increased valuation." *Id.* at 846, f.n. 2. The plaintiff in *Lake St. Louis*, like the plaintiff in *John Calvin Manor* and the Plaintiffs here did not receive timely notice of an increase in the assessed value of its property. *Id.* at 844. The Court held that this meant it "may have had several options," including filing directly in court. *Id.* at 845 (citing *John Calvin Manor, Inc.*, 517 S.W.2d at 62). Because the disputed assessment at issue occurred in 1986, 12 CSR 30-3.010(1)(b)1(a) was in effect (it was enacted in 1983 and went into effect in 1984), and this holding is dispositive of Tyler's suggestion that *John Calvin Manor* ceased to be controlling on this issue beginning in 1984. On the contrary, the State Tax Commission did not nullify the holding in *John Calvin Manor* when it passed this rule.

Nor could it have, as agency rules are invalid to the extent to which they conflict with state law or go beyond the agency's statutory authority. R.S.Mo. § 536.014 is entitled "Rules invalid, when" and provides that:

> No department, agency, commission or board rule shall be valid in the event that:
>
> (1) There is an absence of statutory authority for the rule or any portion thereof; or
>
> (2) The rule is in conflict with state law; or
>
> (3) The rule is so arbitrary and capricious as to create such substantial inequity as to be unreasonably burdensome on persons affected.

Both the Court of Appeals for the Western District and this Court confirm this statute prevents departments, agencies, commissions, and boards from passing rules or regulations

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

which expand their own authority beyond that which is provided by statute. "The key principle is that administrative agencies—legislative creations—possess only those powers expressly conferred or necessarily implied by statute." *Bodenhausen v. Missouri Bd. of Registration for Healing Arts*, 900 S.W.2d 621, 622 (Mo. 1995). *See also Farmer v. Barlow Truck Lines, Inc.*, 979 S.W.2d 169, 170 (Mo. 1998) ("A cardinal principle of all administrative law cases is that an administrative tribunal is a creature of statute and exercises only that authority invested by legislative enactment.") and *PharmFlex, Inc. v. Div. of Employment Sec.*, 964 S.W.2d 825, 829 (Mo.App. W.D. 1997) ("The rules or regulations of a state agency are invalid if they are beyond the scope of authority conferred upon the agency, or if they attempt to expand or modify statutes. Further, regulations may not conflict with the statutes and if a regulation does, it must fail.").

In *Bodenhausen*, the Court held that the Board of Healing Arts' disciplinary action against a physician was invalid because the Board of Healing Arts exceeded its statutory authority when it disciplined the physician without first filing a complaint with the Administrative Hearing Commission. The Court explained that the relevant statutes required the Board of Healing Arts to first file a complaint with the Administrative Hearing Commission. *Id.* at 622 (citing § 334.100). Only after it files its complaint and the Administrative Hearing Commission finds cause for discipline, can the Board of Healing Arts discipline a physician. *Id*. (citing §§ 621.045 and 621.110). Because the Board of Healing Arts failed to file a complaint and instead entered into a discipline agreement directly with the physician, it lacked the authority to do so, and the discipline was invalid. "Because the Commission never made findings of fact and conclusions of law, as mandated

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

by §§ 621.045.1 & 621.110 and § 334.100.3 RSMo Supp.1989, the Board could not impose additional discipline on Dr. Bodenhausen in 1992." *Id.* Administrative agencies cannot grant themselves permission to skip statutory prerequisites via administrative rules.

This means the State Tax Commission cannot circumvent the holdings of Missouri courts, including this Court, by passing a rule granting itself permission to skip the statutory prerequisite of hearings in front of local Boards of Equalization. Boards of Equalization and the State Tax Commission "have only such powers and jurisdiction as is specified in the applicable statutes." *Armstrong-Trotwood, LLC v. State Tax Comm'n*, 516 S.W.3d 830, 837 (Mo. 2017) (citing *Foster Bros. Mfg. Co. v. State Tax Comm'n of Mo.*, 319 S.W.2d 590, 594 (Mo. 1958). And by statute, the State Tax Commission does not have jurisdiction to change the value of an assessment except on appeal from a local Board of Equalization. Section 138.430, from which the State Tax Commission purports to get its authority to issue Rule 12 CSR 30-3.010(1)(B)1(a), provides in relevant part:

> Every owner of real property or tangible personal property ***shall have the right to appeal from the local boards of equalization to the state tax commission*** under rules prescribed by the state tax commission, within the time prescribed in this chapter or thirty days following the final action of the local board of equalization, whichever date later occurs, concerning all questions and disputes involving the assessment against such property, the correct valuation to be placed on such property, the method or formula used in determining the valuation of such property, or the assignment of a discriminatory assessment to such property.

(emphasis added).

This Court recognizes this limitation on the State Tax Commission's jurisdiction in assessment matters: "It should be noted that ***the Commission is not granted the power to raise or lower the valuation of a specific unit of property within a class, except upon***

appeal from the Board, in which case its jurisdiction is derivative." *Foster Bros. Mfg. Co.*, 319 S.W.2d at 595 (emphasis added).

The language of Rule 12 CSR 30-3.010(1)(B)1(a) providing that "the owner may appeal directly to the State Tax Commission … where the assessor fails to notify the current owner of the property of an initial assessment or an increase in assessment from the previous year, prior to thirty (30) days before the deadline for filing an appeal to the board of equalization," exceeds the State Tax Commission's statutory authority and is therefore invalid. Just as the Board of Healing Arts cannot skip the statutory prerequisite of a hearing before the Administrative Hearing Commission, neither can the State Tax Commission skip the statutory prerequisite of hearing before the local Board of Equalization.

In sum, Tyler's argument that Plaintiffs have failed to exhaust administrative remedies depends upon 12 CSR 30-3.010(1)(B)1(a) being a valid rule that overruled Missouri Supreme Court and Western District Court of Appeals precedent. It is not and it did not. Administrative agencies such as the State Tax Commission and local Boards of Equalization cannot escape the holdings from this Court that they disagree with via passing an administrative rule that grants themselves more authority than the Missouri General Assembly has. The binding decisions of the Western District and this Court that hold property owners who receive late notice are entitled to direct injunctive relief from the courts stand even in the face of the 1984 administrative rule that Tyler's argument exclusively relies on. Respondent did not err when he failed to dismiss Plaintiffs' claims against Tyler based on the argument Tyler never made—that Plaintiffs must exhaust administrative remedies before they can proceed against Tyler.

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

E. In Missouri, courts have discretion to find an equitable exception to the requirement to exhaust administrative remedies exists when, like here, the defendants violated statutory mandates.

As discussed above, in *McGraw-Edison*, the Missouri Court of Appeals held that notice is jurisdictional and the failure to send a notice that complies with the statutes allows a plaintiff to obtain injunctive relief directly in court. But the *McGraw-Edison* court also held a second, independent reason existed to permit the property owner to seek relief directly in court; there exists an equitable exception to the requirement of exhausting administrative remedies:

> It is neither logical nor morally justifiable that such a state agency be permitted to disregard such definite legislative directions and still retain any defense to an action to correct its void revaluation order, either upon the theory of governmental immunity or failure of plaintiff to exhaust administrative remedies.

McGraw-Edison Co. v. Curry, 485 S.W.2d 175, 180 (Mo. App. 1972).

Here, as detailed throughout the First Amended Petition, both Tyler and the County Realtors' failures to comply with the statutory requirements of Chapters 137 and 138 go far beyond the failure to give proper notice. They began missing statutory deadlines in March, which directly led to property owners receiving falsely inflated projected tax liabilities, which contributed to a record number of appeals being filed. They then misrepresented property owner's procedural and substantive rights in connection with the appeal process, and convinced them to miss work and make accommodations to attend an appeal hearing under false pretenses, all in an effort to get them to just give up and accept unlawful increases in assessments and, therefore, taxes (*See* Ex. A, ¶¶ 74-87, 107-114, 136, 179, 192, 199, 204 and 210). They also would not allow property owners to appeal until

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

they submitted information on their properties that Tyler failed to gather, even though Tyler was paid millions of dollars from the property owners' tax money to do so (*See Id.* ¶ 92 (Realtor Beatty explaining that you cannot file an appeal without providing certain information on your property)).

In other words, property owners who want to appeal based on the allegations contained in this lawsuit—that the failure to follow the statutes renders any increase void, and/or any increase beyond 15% void—cannot do so without providing evidence as to what the true assessed value of their property should be. And that evidence is then being used against them at the hearings. This due process violation, requiring property owners to submit evidence against their own argument before they are permitted to appeal, alone warrants the equitable exception to the requirement to exhaust administrative remedies. Especially for Plaintiffs and putative class members whose claims are not based on what the true value of their property should be, but rather on the consequences of the County Realtors' statutory violations.

It is neither logical nor morally justifiable to permit Tyler and/or the County Realtors to retain their failure to exhaust administrative remedies defense here in light of their own disregard for their definite, legislative directions, as well as the Plaintiffs' right not to be forced to present evidence against their own interests before they can even file an appeal

with the Board of Equalization. Accordingly, Respondent properly denied their Motion to Dismiss; a writ is not warranted.[8]

III. Response to Point Relied On II: Plaintiffs Stated Viable Claims of Negligence Because Tyler Owed Plaintiffs a Duty.

Tyler's remaining argument in support of its request that this Court make permanent its preliminary writ of prohibition is that Plaintiffs' negligence claims fail in that Tyler owed no duty to Plaintiffs, despite Plaintiffs specifically pleading as such in their Amended Petition (see Exhibit 4, Amended Petition at ¶¶ 125, 127, 128, 131, 202, 213). Tyler's duty owed to Plaintiffs arose both from common law principles of foreseeability, as well as pursuant to the duties Tyler assumed when it contracted with Jackson County. Accordingly, Respondent Judge Chamberlain properly denied Tyler's Motion to Dismiss, and this Court should quash its preliminary order.

A. Because injury to Plaintiffs was foreseeable, Tyler owed a common-law duty to Plaintiffs.

Tyler owed Plaintiffs a common-law duty because it was foreseeable that Plaintiffs would be harmed by Tyler's failure to exercise reasonable care. "The touchstone for the creation of a duty is foreseeability. A duty of care arises out of circumstances in which there is a foreseeable likelihood that particular acts or omissions will cause harm or injury." *Madden v. C & K Barbecue Carryout, Inc.*, 758 S.W.2d 59, 62 (Mo. 1988).

[8]To the extent Tyler is arguing that, in the absence of an administrative remedy against Tyler, Plaintiffs still must first exhaust their administrative remedies against the County Realtors before they can bring their claims against Tyler, Plaintiffs incorporate by reference the arguments made in their brief in companion case SC100304, which explain why they do not need to exhaust administrative remedies against the County Realtors.

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

It is well established that a duty of care can be: 1) imposed by a controlling statute or ordinance; 2) assumed by contract; or 3) imposed by common law under the circumstances of a given case. *Bowan ex rel. Bowan v. Express Med. Transporters, Inc.*, 135 S.W.3d 452, 457 (Mo.App. E.D. 2004). This third duty, imposed by common law, exists to require parties to use reasonable care whenever it is foreseeable that the failure to do so is likely to cause harm. "Under the principles of general negligence law, whether a duty exists in a given situation depends upon whether a risk was foreseeable. In the absence of a particular relationship recognized by law to create a duty, the concept of foreseeability is paramount in determining whether a duty exists." *Lopez v. Three Rivers Elec. Co-op., Inc.*, 26 S.W.3d 151, 156 (Mo. 2000). "Foreseeability for purposes of establishing whether a defendant's conduct created a duty to a plaintiff depends on whether the defendant should have foreseen a risk in a given set of circumstances." *Id.* (citing *Zuber v. Clarkson Const. Co.*, 363 Mo. 352, 251 S.W.2d 52 (1952) (if, under the circumstances, a reasonably prudent person would have anticipated danger and provided against it, courts will recognize a legal duty to prevent harm).

Tyler argues that "foreseeability alone is insufficient to create a duty," (Tyler's Brief, p. 30) citing *Miles ex rel. Miles v. Rich*, 347 S.W.3d 477 (Mo.App. E.D. 2011). There, the Eastern District Court of Appeals held: "'[f]oreseeability is the paramount factor in determining existence of a duty,'" but foreseeability alone is not enough to establish a duty. There must also be some right or obligation to control the activity that presents the danger of injury." *Id*. at 483, citing *Lough by Lough v. Rolla Women's Clinic, Inc.*, 866 S.W.2d 851, 854 (Mo. 1993). The *Miles* court explained that in cases involving injuries

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

caused by domestic animals, a person is not liable for injuries inflicted by a domestic animal which he does not own, harbor, or control. *Id.*

This rationale is clearly distinguishable from Tyler's breach of duty in the present case. Here, it was Tyler's dog, so to speak, which harmed Plaintiffs. But for Tyler's negligence during the reassessment process, Plaintiffs would not have been harmed. It is Tyler's own actions, not the actions of another it did not own, harbor, or control, that harmed Plaintiffs.

In arguing that injury to Plaintiffs was not foreseeable to Tyler, Tyler's only argument in its Brief is simply that "Tyler could not have foreseen harm supposedly caused by it to Plaintiffs under these circumstances." (Tyler's Brief, p. 30). This conclusory and self-serving statement is refuted by the allegations contained in the First Amended Petition.

In deciding if the injury was reasonably foreseeable, courts examine what the defendant knew or should have known. *Hoover's Dairy, Inc. v. Mid-Am. Dairymen, Inc./Special Products, Inc.*, 700 S.W.2d 426, 431 (Mo. 1985). Here, the Amended Petition makes clear that Tyler knew any misconduct on its part created foreseeable harm to Plaintiffs and class members, and Tyler therefore owed Plaintiffs a duty to govern itself within the standard of care. The Amended Petition states, in pertinent part:

Tyler knew it would inflict serious injury on property owners if it failed to do its job.

> 124. Tyler also knew, or should have known, that the failure to properly conduct assessments would result in direct harm to property owners. When it agreed to perform Appraisal and Reassessment Services, Tyler knew that if it did not perform its work correctly (or did not perform its work at all) it could inflict serious financial injury upon Jackson County taxpayers.

125. At all times relevant hereto, Tyler understood the importance of its work on the reassessment to Jackson County property owners, and acknowledged it owed them a duty and responsibility to do the work properly and within the applicable standard of care.

126. On the very first page of the Statement of Work for Maintenance of Assessment Records and Data And Reassessment Services, under the section entitled "Project Schedule," the Contract provided:

> Tyler understands the importance of the County's assessment roll and having accurate assessing records is the foundation of economic development efforts that will be necessary for the County's continued future economic vitality. Also, Tyler understands the accuracy of assessment information is of paramount importance to minimize valuation appeals and to ensure and restore citizen confidence in their government.

Id. at 105.

127. That section continued, with Tyler assuming the duty to complete its work on schedule in light of the importance to property owners of having accurate assessments:

> Since the last appropriately staffed and funded reassessment was many years ago, a vast number of the property records may not have been kept up to date with the rapidly changing property market, as is evidenced with the 2019 Reassessment results.
>
> To that end, we are providing reassessment services which will include data collection, analytical review of the data collected, ongoing sales and new construction service, final valuation, and support of values produced. The timeframe for completion is 2023 and is detailed in the Plan Approach and Timeline section of this statement of work.

Id.

128. Tyler at all times continued to be well aware that it owed a duty to the property owners of Jackson County, as its work for the County under the Contract directly impacts property owner's finances. As it explained in a FAQ that it published to Jackson County homeowners, the more Tyler raises the value of their homes, the more they pay in taxes:

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

> 3. Why is a reassessment necessary?
>
> This process is necessary to determine fair market value, and to ensure taxpayers across the jurisdiction are paying the appropriate amount for their individual properties. Let's put it this way — you wouldn't want to split a check at a restaurant if you ordered salad and your friend ordered a full meal, would you? So, for that same reason, properties must go through a reassessment or revaluation to arrive at values equitably.

129. Doubling down on the salad analogy, in the very last sentence of the FAQ, Tyler confirmed that it has the power to greatly reduce or greatly increase each homeowner's property value: "Remember the restaurant example — if you order a salad, your bill will be based on the salad, even though you may have spent years paying for steak, or vice versa."

130. Tyler knew it was doing important, time-sensitive work, knew it was obligated to follow all applicable statutes and ordinances, and knew its work directly impacted the finances of Jackson County property owners.

131. Tyler owed a duty to Jackson County property owners to perform its Appraisal and Reassessment services within the standard of care, including following the applicable statutes and ordinances, and it was reasonably foreseeable that a breach of this duty will cause harm to Jackson County property owners.

First Amended Petition, ¶¶ 128-31.

Plaintiffs clearly pled that it was foreseeable to Tyler that it could harm Plaintiffs and the other Class Members by being negligent in its actions. To draw from its restaurant analogy, Tyler knew that if it violated the standard of care, Plaintiffs who ordered and received a salad could very well be billed for a steak. This foreseeable harm to Plaintiffs placed a duty on Tyler. *See e.g., Chubb Group of Ins. Companies v. C.F. Murphy & Associates, Inc.*, 656 S.W.2d 766, 774 (Mo.App. W.D. 1983) ("architects and contractors owe a duty to exercise the care required of their professions to persons with whom they are not in privity when the injury to those third parties is foreseeable.").

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

For Tyler's Brief in support of its request for Writ of Prohibition, it argues that Plaintiffs did not plead that Tyler's duty arose out of common law principles instead of pursuant to its contract with Jackson County (see Tyler's Brief, p. 29-30). Tyler fails to cite a single case to support its argument that a plaintiff needs to not only plead the existence of a duty, but also plead how that duty arose. "To make a submissible case for negligence, a plaintiff 'must plead and prove that the defendant had a duty to protect [him] from injury, that the defendant breached that duty, and that the defendant's failure directly and proximately caused her injury.'" *Johnson v. Auto Handling Corp.*, 523 S.W.3d 452, 460 (Mo. 2017), as modified (Aug. 22, 2017), citing *Robinson v. Health Midwest Dev. Group*, 58 S.W.3d 519, 521 (Mo. 2001). The specific source of a defendant's duty owed to a plaintiff is not a required element that must be pled and proven, and Tyler's argument to the contrary fails.

Finally, even if Tyler is correct and Plaintiffs need to specifically plead that Tyler's common-law duty owed to Plaintiffs arose via foreseeability, and even if it is correct that Plaintiffs did not specifically plead it, a writ would still not be proper. Again, "[i]n the context of a motion to dismiss for failure to state a cause of action, it has long been held that where a petition reveals that the pleader has not stated and cannot state a cause of action of which the circuit court would have jurisdiction, then prohibition will lie." *State ex rel. Henley*, 285 S.W.3d at 330. One of the reasons for this is that in Missouri, leave to amend shall be freely given as justice so requires. Hence, even if Plaintiffs did not plead common law negligence, a writ is not appropriate because the petition does not reveal that such an allegation cannot be made. In fact, as shown above it reveals that harm to Plaintiffs

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

and others similarly situated was clearly foreseeable. And even should Respondent ultimately not allow Plaintiffs leave to amend but still award relief on an unpled claim, Tyler still has an adequate remedy at law—an appeal. *See Colbert v. State, Family Support Div.*, 264 S.W.3d 699, 702 (Mo.App. W.D. 2008) (cited by Tyler in its Petition for Writ at ¶ 38 as "reversing circuit court's judgment because it 'lacked authority to rule on an issue not raised by the parties through the pleadings.'").

The Respondent properly refused to dismiss Plaintiffs' negligence claims because Tyler owed Plaintiffs a common-law duty of care arising from the foreseeability of harm to Plaintiffs. The source of Tyler's duty—from common law principles of foreseeability or from the duties assumed when it contracted with Jackson County—is not a required element of a claim for negligence. Because harm to Plaintiffs was foreseeable to Tyler, its Motion to Dismiss was properly denied and this Court should quash the preliminary order to the contrary.

B. When Tyler Contracted with Jackson County to Perform Appraisal and Reassessment Services, it Assumed a Duty to Plaintiffs.

Tyler's argument in support of its Motion to Dismiss, as well as its argument in support of its request for Writ of Prohibition, is that because Tyler was not in privity with Plaintiffs and other Jackson County property owners, it owed them absolutely zero duty while reassessing the value of their properties. Tyler performed several reassessment services including providing the "Final Value" of each assessed property to the County, providing "Notice of Assessment Mailers," and participating in the various stages of the administrative appeals process (Amended Petition, ¶ 25). It is clear that Tyler's assessment

activities, if negligently performed, could directly and proximately cause harm to taxpayers in the form of illegal taxes not supported by law, in violation of Missouri's Hancock Amendment.

The agreement between Tyler and Jackson County served as the "inducement creating the state of things which furnishes the occasion of the tort." *Hoover's Dairy, Inc.*, 700 S.W.2d at 432, citing 57 Am.Jur.2d Negligence § 47 (1971). "Once it undertook to render services, [Tyler] was obligated to exercise reasonable care in performing the service." *Id.* "The law imposes an obligation upon everyone who attempts to do anything, even gratuitously, for another, to exercise some degree of care and skill in the performance of what he has undertaken." *Id.,* citing 57 Am.Jur.2d Negligence § 45 (1971) and W. Prosser & W. Keeton, supra, at §§ 56, 92–93.

Tyler recognizes that there are exceptions to the general privity rule (See Tyler's Brief, p. 23-24). With respect to the privity rule, "when application of this rule is not necessary to protect the contractual parties, or when it would produce results contrary to justice and public policy, our courts make exceptions." *Kaplan v. U.S. Bank, N.A.*, 166 S.W.3d 60, 70 (Mo.App. E.D. 2003).

Tyler argues that exceptions to the privity rule are limited to "criminal wrongdoing." (Tyler's Brief, p. 24). To the contrary, a number of cases, not dealing with criminal actions, have found a duty existed to a third party not in privity with the defendant when harm to the third party was foreseeable.

The cases Tyler cites in support of its Petition for Writ deal with Section 344 of the Restatement (Second) of Torts, which recognizes a duty to protect invitees from criminal

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

actions of third persons. *See* Tyler's Brief p. 23-24, citing *Madden*, 758 S.W.2d at 62; *Brown v. Nat'l Supermarkets, Inc.*, 679 S.W.2d 307, 309 (Mo.App. E.D. 1984); *Virginia D. v. Madesco Inv. Corp.*, 648 S.W.2d 881, 887 (Mo. 1983); and *L.A.C. ex rel. D.C. v. Ward Parkway Shopping Ctr. Co., L.P.*, 75 S.W.3d 247, 262 (Mo. 2002). Both *Madden* and *Virginia* cite § 344 of Restatement (Second) of Torts. This is not the only exception to the privity rule, however.

Many Missouri decisions discussing the various exceptions to the privity rule endorse and rely upon a different section of the Restatement Second of Torts, § 324A. This well-recognized exception to the privity rule includes "situations where the alleged negligence involves harm to others." *Kaplan*, 166 S.W.3d at 70 (citing *L.A.C. ex rel. D.C.*, 75 S.W.3d at 262). "When a defendant undertakes to do something that the defendant knew or should have foreseen would harm others or increase the risk of harm to others, the defendant has the duty to exercise reasonable care in the undertaking." *Id*. (citing *Wolfmeyer v. Otis Elevator Co.*, 262 S.W.2d 18, 21 (Mo. 1953); *L.A.C. ex rel. D.C.*, 75 S.W.3d at 262; Restatement (Second) of Torts section 324A (1965)). The existence and scope of the duty is determined by the contractual obligations the defendant undertook and the circumstances of the case." *Id.*, citing *Hunt v. Jefferson Arms Apartment Co.*, 679 S.W.2d 875, 882–83 (Mo.App. E.D. 1984); *see also L.A.C. ex rel. D.C.*, 75 S.W.3d at 263. "The proper inquiry is whether the defendant has assumed a duty of reasonable care to prevent foreseeable harm to the plaintiff." *Id.*

Consistent with this section of the Restatement, even in the absence of privity—the rendering of services, whether done gratuitously or for consideration—can give rise to a

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

legal duty of care. *See Brown v. Michigan Millers Mut. Ins. Co., Inc.*, 665 S.W.2d 630, 634 (Mo.App. W.D. 1983) (Proof of undertaking to inspect for hazards prior to grain elevator explosion and a failure to discover hazard was sufficient to survive motion for judgment notwithstanding the verdict); *Kraus v. Hy-Vee, Inc.*, 147 S.W.3d 907, 924–25 (Mo.App. W.D. 2004) (Allegations of harm caused by undertaking to perform traffic study and failure to recommend installation of traffic control sufficiently states cause of action); *Hoover's Dairy, Inc.*, 700 S.W.2d at 432–33 (evidence of negligent performance of undertaking to install milking system sufficient to present jury question).

In *Miller v. Big River Concrete, LLC*, the defendant tested concrete at the plaintiffs' construction site at the request of the concrete supplier. *Miller v. Big River Concrete, LLC*, 14 S.W.3d 129, 131 (Mo.App. E.D. 2000). Although the plaintiff was not in privity with the defendant, the court nonetheless imposed a duty because the evidence supported a finding that the defendant knew the plaintiffs would rely upon the results and could foresee the harm to plaintiffs if the results were inaccurate. *Id*. at 134.

The court in *Kaplan v. U.S. Bank, N.A*., similarly found a duty despite the lack of privity. There, the defendant dumped contaminated materials onto the plaintiffs' property while performing contracted work for a third-party. *Kaplan*, 166 S.W.3d at 70. In holding that the defendant had a duty the court stated: "The harm that could befall property owners from the dumping of contaminated materials without the owners' permission, including these plaintiffs, was foreseeable." *Id*. In such a situation imposing the privity requirement "would produce results contrary to justice and public policy." *Kaplan*, 166 S.W.3d at 71.

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

In *Aluma Kraft Mfg. Co. v. Elmer Fox & Co.*, 493 S.W.2d 378 (Mo. App. 1973), the buyer of stock sued the accountants who prepared an audit that the buyer alleged was negligently prepared. *Id.* at 379. The defendants moved to dismiss, arguing identical to Tyler here, that there was a lack of privity between the buyer and the accountants. *Id*. While the trial court had granted the motion to dismiss, the court of appeals reversed and remanded, rejecting the argument that a third party not in privity was barred from recovering for ordinary negligence. *Id*. The court explained:

> We also reject the privity requirement when, as alleged in the petition, the accountant knows the audit is to be used by the plaintiff for its benefit and guidance, or knows the recipient intends to supply the information to prospective users, such as the plaintiff here. Therefore, we hold that a third party in such situations, although not in privity, has a claim for the alleged negligence of an accountant who renders an unqualified opinion upon which the third person relies to its detriment.

Aluma Kraft Mfg. Co., 493 S.W.2d at 383. Here, just like the accountants in *Aluma Kraft*, Tyler knew that its reassessment figures would be supplied to Plaintiffs and used to calculate their tax bills. Even though Plaintiffs were not in privity with Tyler, Plaintiffs have a claim for Tyler's negligence.

Plaintiffs' claims here are similar to claims involving professional malpractice. Tyler Technologies, a professional in assessment software and services, was negligent in the provision of such services. Many Missouri cases have found a duty existed to protect third parties from harm when the defendant was a professional. *See Children's Wish Found. Int'l, Inc. v. Mayer Hoffman McCann, P.C.*, 331 S.W.3d 648, 653 (Mo. 2011), citing *Bus. Men's Assur. Co. of Am. v. Graham*, 891 S.W.2d 438, 453 (Mo.App. W.D. 1994) (tort

recovery permitted when a client "sues for breach of a duty recognized by law as arising from the relationship or status the parties have created by their agreement"). "In certain cases, we have held that that a third party, although not in privity, has a claim for the alleged negligence of a professional who renders an opinion upon which the third person relies to its detriment." *Christopher A. Jackson Revocable Inter Vivos Tr. of 19 July 1995 v. Abeles & Hoffman, P.C.*, 595 S.W.3d 156, 160 (Mo.App. E.D. 2020), citing *Miller*, 14 S.W.3d at 134; *Westerhold v. Carroll*, 419 S.W.2d 73, 81 (Mo. 1967).

Tyler's reliance on *Roddy v. Missouri Pac. Ry. Co.*, 104 Mo. 234, 15 S.W. 1112 (1891) is unavailing because there this Court held that even though the plaintiff was not a party to the contract at issue, the defendant owed a duty to him to perform the contract without negligence. The Court analyzed the issues and determined that, given the relationship between the parties, it was foreseeable that the defendant could cause harm to plaintiff by negligently performing its contractual work. Therefore, because the defendant was in a joint undertaking with the plaintiffs' employer but between the two of them was exclusively to do the work at issue, it owed a duty to plaintiff not to perform the work in a negligent manner:

> We think each of these contracting parties owed to the other and his employes the duty of properly discharging his part of the joint undertaking in respect to any matter exclusively devolving upon him. Pickle had nothing to do with selecting or providing the cars. That duty was entrusted entirely to defendant. They were intended for the use of Pickle and his servants in discharging his part of the contract, and we think the obligation rested upon defendant to use ordinary care to provide such as would be reasonably safe for such use.

Roddy, 15 S.W. at 1115.

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

Likewise, Tyler relies on *Brown*, 679 S.W.2d at 309 but there the court exclusively analyzed the duty to protect a person from criminal conduct by a third-party, and not any duty assumed or undertaken via contract. Tyler also continues to mischaracterize the holding in *Madden,* 758 S.W.2d at 62 by selectively quoting from it. This Court in *Madden* discusses "special facts" only the context of a duty to guard against criminal acts of a third-party. Far from stressing that the privity rule only applies when there are "special facts," neither the words "privity rule" nor "contract" appear even once in this Court's opinion in *Madden*.

Finally, in *L.A.C.* the Court emphasized that duty is an issue of foreseeability: "The touchstone for the creation of a duty is foreseeability. A duty of care arises out of circumstances in which there is a foreseeable likelihood that particular acts or omissions will cause harm or injury." *L.A.C. ex rel. D.C.*, 75 S.W.3d at 257 (quoting *Madden*, 758 S.W.2d at 62). The Court also held in *L.A.C.* that even in the context of a duty owed to a non-contracting party, the issue is still one of foreseeability: "The existence of a duty will turn on the terms of the contract and the circumstances." *Id*. "[T]he proper inquiry is simply whether the defendant has assumed a duty to exercise reasonable care to prevent foreseeable harm to the plaintiff." *L.A.C.*, 75 S.W.3d at 263 (quoting *Eaves Brooks Costume Co., Inc. v. Y.B.H. Realty Corp.*, 76 N.Y.2d 220, 556 N.E.2d 1093, 1096 (1990)).[9]

[9] In *Eaves Brooks*, the court clarified that while a contracting party always has the duty not to engage in affirmative negligent acts that will foreseeably harm non-parties when performing contractual duties ("misfeasance"), mere inaction ("nonfeasance") will not give rise to a duty unless "performance of contractual obligations has induced detrimental reliance on continued performance." *Eaves Brooks,* 556 N.E.2d at 1096. Because Plaintiffs

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

Based on the overwhelming weight of authority, even in the absence of privity, a duty is imposed to perform services under a contract without negligence where there is a foreseeable risk of injury. Here, the harm that could befall Plaintiffs from Tyler negligently failing to timely perform its duties, negligently failing to provide notice, including notice of the physical inspections it was supposed to conduct, and negligently making misrepresentations about the appeals process, as well as the informal review process, was foreseeable. Thus, Tyler had a duty, and dismissal was not warranted.

C. The *Westerhold* Factors Compel the Conclusion that Tyler Had a Duty to Plaintiffs

In *Westerhold*, cited by Tyler in its Brief, this Court reversed the trial court's dismissal and held that defendant owed a duty to plaintiff, despite plaintiff not being a party to the contract at issue. *Westerhold*, 419 S.W.2d at 80. The Court explained that parties to a contract have a duty to use reasonable care to avoid foreseeable harm to third-parties not in privity to the contract:

> It is clear that an obligation may be assumed by contract out of which may arise a duty to others than parties to the contract. *Helm v. Inter-Insurance Exchange for Automobile Club of Missouri*, 354 Mo. 935, 192 S.W.2d 417, 167 A.L.R. 238; *Lowery v. Kansas City*, 337 Mo. 47, 85 S.W.2d 104, 110; 38 A.L.R. 403, 487—505. That is, ***a party by entering into a contract may place himself in such a relation toward third persons as to impose upon him an obligation to act in such a way that the third persons will not be damaged***. *Wolfmeyer v. Otis Elevator Co., Mo*., 262 S.W.2d 18.
>
> In *Lambert v. Jones*, 339 Mo. 677, 98 S.W.2d 752, 758, it was stated that where one under contract with another assumes responsibility for property or instrumentalities and agrees under his contract to do certain things in

---

claims against Tyler involve misfeasance, and not just nonfeasance, this Court's citation to *Eaves Brooks* with approval confirms that Tyler owed a duty to Plaintiffs and Respondent did not err when he denied Tyler's motion to dismiss.

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

> connection therewith which, if left undone, would likely injure third persons, '***there seems to be no good reason why (he) should not be held liable to third persons injured thereby for his failure to do that which he agreed to do, which he assumed responsibility for, and which was reasonably necessary to be done for their protection.***' *See also the Comment, Recovery for Negligent Interference with Prospective Economic Advantage*, 12 Stanford Law Review 509. A basic principle is that 'Most duties, imposed by the law of torts, arise out of circumstances and are based on 'foreseeability' or reasonable anticipation that harm or injury is a likely result of acts or omissions.' *Hull v. Gillioz*, 344 Mo. 1227, 130 S.W.2d 623, 628.

Westerhold, 419 S.W.2d at 80 (emphasis added).

In *Fleischer*, the Eastern District Court of Appeals cited *Westerhold* with approval while acknowledging that the Supreme Court "recognize[es] exceptions" to the general rule that a party to a contract owes no duty to non-parties. *Fleischer v. Hellmuth, Obata & Kassabaum, Inc*., 870 S.W.2d 832, 834 (Mo. App. E.D. 1993). These exceptions are determined on a case-by-case basis and doing so "involves the balancing of various factors," such as whether or not the work performed under the contract "was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to defendant's conduct, and the policy of preventing future harm." *Id.* at 835 (quoting *Westerhold*, 419 S.W.2d at 81).

Here, all of these factors are met. The subject of the contract, a general reassessment of all real property value for tax purposes, clearly and unavoidably intends to affect Plaintiffs (*See* Exhibit A to Exhibit 4, First Amended Petition). The foreseeability of harm is clear, and the degree of certainty of injury high; a plaintiff will certainly be harmed if they become the victim of an unlawful or inaccurate increases in their property's valuation,

as such increases will directly result in unwarranted higher taxes (*See* First Amended Petition ¶¶ 124-31). Hence, there is also a direct connection between Tyler's behavior on the injury suffered. Tyler's behavior is morally blameworthy—as detailed in the Amended Petition, it charged Jackson County taxpayers $17.8 million to perform services, failed to perform the services, and is now working with Jackson County to force property owners to perform these services on their own, after already paying Tyler to do so (*Id.* at ¶¶ 74-93). Finally, recognizing that Tyler owes a duty to Plaintiffs to perform their services in a non-negligent manner will protect against future harm; as things currently stand Tyler is set to attempt to perform the same services for the 2025 general reassessment.

The fact that Plaintiffs did not sign onto Tyler's contract with the County does not prevent them from holding Tyler to the duties it assumed in the contract by seeking compensation for the foreseeable harm Tyler caused when it negligently failed to fulfill its assumed duties. Respondent properly denied Tyler's Motion to Dismiss Plaintiffs' negligence claims on lack of duty grounds.

IV. A Writ Would Improperly Deny Plaintiffs the Opportunity to Appeal the Dismissal of their Counts for Breach of Contract Against Tyler.

Because the County contracted with Tyler to assist in its duties owed to Plaintiffs and all Jackson County property owners in performing the 2023 general reassessment, Plaintiffs are creditor beneficiaries under this Supreme Court precedent and can recover from Tyler upon proving it caused damage to them by breaching the contract. The First Amended Petition makes clear that this is a purpose of the contract. For instance, the contract provides that "Tyler understands the accuracy of assessment information is of

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

paramount importance to minimize valuation appeals and to ensure and restore citizen confidence in their government." (Exh. A to First Amended Petition, ¶ 126). The contract also announces that because "the last appropriately staffed and funded reassessment was many years ago," Tyler is not only providing a wide range of reassessment services but agrees that "[t]he timeframe for completion is 2023 and is detailed in the Plan Approach and Timeline section of this statement." (*Id.*, ¶ 127). Compare this language with the contractual language the Supreme Court found especially convincing in *L.A.C.*: "We especially note the language of the IPC contract, paragraph VI. 5, indicating that 'Upon agreement, the staffing level shall be conclusively deemed for all purposes to be a material representation by Contractor to Manager that the staffing level is one which will provide full and adequate security to Mall [sic].'"

Jackson County had struggled to fulfill its duties for years due to inadequate staff levels. Just as the defendant in *L.A.C.* contracted with a party to provide sufficient staffing to adequately fulfill its duties to its patrons, so too did the County hire Tyler to provide sufficient staffing to adequately fulfill its duties to its citizens. Plaintiffs are creditor beneficiaries and can sue to enforce the contract.

Respondent's dismissal of Plaintiffs' Breach of Contract claims is interlocutory and as such he can revisit them. Even if he does not, Plaintiffs have the right to appellate review of this dismissal and therefore a writ is not appropriate, as it would be denying Plaintiffs their clearly established right to an appeal on claims that are not even the subject of this writ.

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

CONCLUSION

Tyler knew the work it assumed to undertake, if performed negligently, could harm Plaintiffs and others similarly situated. It engaged in a public campaign to inform Jackson County property owners about the importance of its work and the impact its work would have on them, including the financial impact. Then, it negligently failed to do that work, kicking off a chain of events that, predictably, harmed Plaintiffs and others similarly situated. This includes being forced to spend time and money performing the same work that Tyler was paid to do because the County Realtors insisted it needed to be done, one way or the other. Tyler owed a duty to Plaintiffs and breached that duty; Plaintiffs' First Amended Petition states a cause of action. It certainly does not prove that Plaintiffs have not, and cannot, state a cause of action, which is the high burden Tyler must meet in this court. Nor must Plaintiffs exhaust a nonexistent administrative remedy before bringing these claims against Tyler. A writ is not warranted.

Respectfully Submitted,

HUMPHREY, FARRINGTON & McCLAIN, P.C.

/s/ *Nichelle L. Oxley*
KENNETH B. McCLAIN #32430
JONATHAN M. SOPER #61204
NICHELLE L. OXLEY #65839
221 W. Lexington, Suite 400
Independence, Missouri 64050
Telephone: (816) 836-5050
Facsimile: (816) 836-8966
kbm@hfmlegal.com
jms@hfmlegal.com
nlo@hfmlegal.com
ATTORNEYS FOR RESPONDENT

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Rule 84.06(c), that the foregoing Brief of Respondent: complies with Rule 55.03; complies with the length limitations set forth in Rule 84.06(b), in that it contains 14,782 words (as determined by Microsoft Word); was prepared using Microsoft Word in 13-point Times New Roman font; and was electronically served on all counsel of record via Case.net.

/s/ *Nichelle L. Oxley*
Attorney for Respondent

Electronically Filed - SUPREME COURT OF MISSOURI - November 30, 2023 - 03:43 PM

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 30, 2023, I electronically filed the foregoing with the Clerk of Court via CaseNet and emailed the same to the following:

Bryan Covinsky, #47132
D. Ryan Taylor, #63284
Joshua Haner, #69115
Office of the County Counselor
Jackson County, Missouri
415 East 12th Street, Suite 200
Kansas City, Missouri 64106
(816) 881-3279
(FAX) 881-3398
JHaner@jacksongov.org
Attorneys for Relators

Respondent, Hon. David P. Chamberlain, Circuit Judge,
415 E. 12th Street Kansas City, Missouri
Tel. (816) 881-3934
E-mail: kaitlin.fox@courts.mo.gov

Robert M. Thompson, #38156
Robert J. Hoffman, #44486
Jesus A. Osete, #69267
1200 Main Street, Suite 3800
Kansas City, MO 64105
Tel. (816) 374-3200
Fax (816) 374-3300
rmthompson@bclplaw.com
rjhoffman@bclplaw.com
jesus.osete@bclplaw.com
Attorneys for Defendant Tyler Technologies, Inc.

/s/ *Nichelle L. Oxley*
ATTORNEY FOR RESPONDENT