
**IN THE SUPREME COURT
OF THE STATE OF MISSOURI**

Harold Lampley and Rene Frost,

Appellants,

vs.

The Missouri Commission on Human Rights and
Alisa Warren, Executive Director,

Respondents.

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

Appellants' Supplemental Brief

SOWERS & WOLF, LLC
Jill A. Silverstein, 34433
js@sowerswolf.com
Ferne P. Wolf, 29326
fw@sowerswolf.com
D. Eric Sowers, 24970
es@sowerswolf.com
Joshua M. Pierson, 65105
jp@sowerswolf.com
530 Maryville Centre Dr., Suite 460
St. Louis, MO 63141
Phone: (314) 744-4010
Facsimile: (314) 744-4026

Attorneys for Appellants

Appellants address the Court's two questions in four subparts. The headings numbered with roman numerals set out the Court's questions nearly verbatim. A brief answer follows the headings with elaboration and citation beneath.

I. Did Appellants adequately seek non-contested case review via mandamus in the circuit court?

Answer: Appellants adequately sought non-contested case review through their Petition for Judicial Review or in the Alternative for Mandamus.

Appellants filed a Petition for Judicial Review or in the Alternative for Mandamus and adequately challenged the agency's determination.

Appellants' right to judicial review is governed by statute and the Missouri Constitution. This case arises under the Missouri Human Rights Act, and § 213.085.2 allows any person "aggrieved by a final decision... of the commission" to obtain judicial review by "filing a petition in the circuit court of the county of proper venue...." The section goes on: "Judicial review shall be in the manner provided by chapter 536."

Section 536.150 of the Administrative Procedure and Review Act allows judicial review of administrative decisions "by suit for injunction, certiorari, mandamus, prohibition or other appropriate action." The section "furthers the constitutional purpose" of Mo.Const.Art.V, §18, guaranteeing judicial review of administrative decisions. *Mo. Nat'l Educ. Ass'n v. Mo. State Bd. of Educ.*, 34 S.W.3d 266, 275 (Mo.App.W.D. 2000).

Taken together, Chapter 213, Chapter 536, and the Missouri Constitution do not require litigants to challenge administrative actions through writs of mandamus. Instead, by authorizing "other appropriate" actions, § 536.150 allows a straightforward civil

petition for judicial review. *Ard v. Shannon County Comm'n*, 424 S.W.3d 468, 475 (Mo.App.S.D. 2014). Appellants so pleaded.¹

II. Should their appeal be dismissed pursuant to *Bartlett v. Missouri Department of Insurance*, 528 S.W.3d 911 (Mo. banc 2017), or reviewed on the merits pursuant to *State ex rel. Tivol Plaza, Inc. v. Missouri Commission on Human Rights*, 527 S.W.3d 837 (Mo. banc 2017)?

Answer: If the Court considers appellants' petition one for mandamus, or determines mandamus is required, it should still address the merits.

This Court should review the case on its merits for three reasons. First, as in *Tivol*, the parties litigated on the merits. Second, respondents did not challenge the form of appellants' action. Third, the case presents issues of general importance. These differences set the case apart from *Bartlett*.

Respondents urged the circuit court to grant summary judgment arguing sexual orientation discrimination is lawful in Missouri. LF 146-49. They made no issue of the form of the action and never asked any court to dismiss because the circuit court issued summonses rather than writs. Thus the circuit court, court of appeals, and the parties addressed the merits.

Like *Tivol*, this case is about issues of general importance. *Tivol* addressed the practice of challenging Commission decisions through writs of mandamus and the more

¹ Appellants sought review under § 536.140 “or, in the alternative, mandamus, pursuant to RSMo 536.150(1).” LF 9, ¶10. Review under § 536.140 was unavailable. *State ex rel. Martin-Erb v. MCHR*, 77 S.W.3d 600, 602 (Mo. banc 2002). And, though appellants sought mandamus, the circuit court issued summonses and entered judgment, treating the case as one for judicial review not mandamus. The court could do so. *Smith v. City of St. Louis*, 409 S.W.3d 404, 423 (Mo.App.E.D. 2013)(“When determining a plaintiff’s theory of recovery we look to the substance of the factual allegations in the petition, along with the relief sought, rather than the form of the petition.”)

than 100 petitions then pending. *Tivol*, 527 S.W.3d at 845. Here, the parties address fundamental questions about the rights the Human Rights Act secures. Namely, whether the Human Rights Act permits sex stereotyping and whether the act prohibits sexual orientation discrimination. This Court should not avoid such important questions on procedural grounds. Instead, this Court should decide whether Missouri tolerates sex discrimination in the form alleged here.

III. Was the executive director’s decision that the complaints pleaded discrimination based on sexual orientation subject to review by the circuit court as authorized by § 536.150.1, subject to the general standard for mandamus, or subject to both?

Answer: Section 536.150.1 governed the circuit court’s review but both standards could apply.

The differences between review under § 536.150 and through mandamus are subtle but important. To begin with, § 536.150 guarantees judicial review of administrative decisions while mandamus is only one of several mechanisms for seeking that review. RSMo 536.150.1 (“such decision may be reviewed by suit for injunction, certiorari, mandamus, prohibition, or other appropriate action”). Thus it stands to reason that should a petitioner seek § 536.150 review through mandamus, the standards applicable to both should apply.

Here, under § 536.150, the circuit court should have decided whether the director’s decision was “unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involve[d] an abuse of discretion.” Instead, the circuit court cited only the standard for mandamus and decided whether the director’s actions “violated prescribed procedures and applicable law.” LF 174-175. This likely made no difference because the case

presented the circuit court with a question of law, and even appellate review is *de novo*.
Tivol, 527 S.W.3d at 841.

IV. Is the general standard for mandamus inconsistent with review authorized by § 536.150.1?

Answer: Yes. The standards for mandamus, particularly its discretionary nature, make the writ an imperfect tool for implementing § 536.150.

Review under § 536.150 and through writ of mandamus differ in at least two ways. First, § 536.150 and Missouri’s Constitution guarantee judicial review of administrative actions, but Appellants have no right to mandamus. Second, the writ affords more limited relief than § 536.150.

A. Discretionary writs don’t secure constitutionally-guaranteed rights

Missouri’s Constitution guarantees review of administrative decisions. So too does § 536.150. But writs are discretionary. *Curtis v. Mo. Democratic Party*, 548 S.W.3d 909, 914 (Mo. 2018)(finding no right to a writ). And no appeal lies from the denial of a preliminary writ. *Bartlett*, 528 S.W.3d at 913. Constitutional guarantees cannot be secured this way.

B. Section 536.150 provides broader relief than mandamus

Section 536.150 provides greater protections than mandamus. “Mandamus will lie only when there is a clear, unequivocal, specific right to be enforced” and “cannot be used to control the judgment or discretion of a public official.” LF 174; *Mo. Growth Ass’n v. State Tax Comm’n*, 998 S.W.2d 786, 788 (Mo. banc 1999).

In contrast, § 536.150 relief is appropriate not only if the agency’s decision was “unconstitutional or unlawful” but also if the decision was “unreasonable, arbitrary, or

capricious.” RSMo 536.150. The standard for mandamus may preclude relief in the later instances.²

The differences between § 536.150 and mandamus are more apparent when a hearing is held. Section 536.150 allows a court to “hear evidence on the merits of the case, [make] a record, [determine] the facts, and [decide] whether, in view of those facts, the agency’s decision is unconstitutional, unlawful, unreasonable, arbitrary, capricious, or otherwise involves an abuse of discretion.” *Mo. Nat’l Educ. Ass’n*, 34 S.W.3d at 274. This conflicts with the limited role of mandamus to only “require the performance of a ministerial act” and this Court’s directive that “[t]he purpose of the writ is to execute, not adjudicate.” *Mo. Growth Ass’n*, 998 S.W.2d at 788.

V. Conclusion

Petitioners adequately sought relief and the Court should reach the merits of the arguments.

² Writs may also be available when review under § 536.150 is not. The power to issue writs exists independently from the Administrative Procedures and Review Act. See Rule 94.01. And appellants’ right to review exists here because the Executive Director’s decision was “not subject to administrative review” and had the effect of “determining [appellants’] legal rights.” *Mo. Nat’l Educ. Ass’n*, 34 S.W.3d at 275 (describing requirements for non-contested case review). Courts are not so bound when issuing writs of mandamus.

/s/ Jill A. Silverstein
SOWERS & WOLF, LLC
Jill A. Silverstein, 34433
js@sowerswolf.com
Ferne P. Wolf, 29326
fw@sowerswolf.com
D. Eric Sowers, 24970
es@sowerswolf.com
Joshua M. Pierson, 65105
jp@sowerswolf.com
530 Maryville Centre Dr., Suite 460
St. Louis, MO 63141
Phone: (314) 744-4010
Facsimile: (314) 744-4026

CERTIFICATE OF SERVICE

I certify that a true and correct copy of Appellants' Supplemental Brief was served via the Missouri CaseNet e-filing system on August 27, 2018 to:

Julie Marie Blake, Office of the Attorney General

D. John Sauer, Office of the Attorney General

/s/ Jill A. Silverstein