

**MISSOURI COURT OF APPEALS-WESTERN DISTRICT
DIVISION 4
CYNTHIA L. MARTIN, CHIEF JUDGE-PRESIDING
THOMAS NICHOLS CHAPMAN, JUDGE
W. DOUGLAS THOMSON, JUDGE
MARCH 23, 2022
UNIVERSITY OF MISSOURI-KANSAS CITY SCHOOL OF LAW
KANSAS CITY, MISSOURI**

WD84433

Cynthia P. Svehla, et al., Appellants,

v.

Park Hill School District, Respondent.

Cynthia and Thomas Svehla appeal from the circuit court's judgment entering summary judgment in favor of Park Hill School District. The Svehlas filed a petition for damages against Park Hill School District claiming that the district was negligent in maintaining an area in or around a staircase where Cynthia Svehla fell and was injured. As alleged in her petition, Cynthia Svehla was an assistant band director with the Liberty School District and attended a band festival at Congress Middle School, a Park Hill School District school. While at Congress Middle School, Cynthia Svehla told the Congress Middle School Band Director that she needed to use the restroom. The director suggested that she use the restroom in the girls' locker room. The locker room had a light panel that required the lights to be turned on with a special key. The custodians had not turned on the lights to the locker room that day. The door to the locker room, however, was unlocked. Cynthia Svehla alleged that, upon entering the locker room, she waived her hands assuming that the lights were motion activated. She continued into the locker room even though the lights did not turn on. There was no natural light in the room, and, when the door closed, Cynthia Svehla was unable to see. Cynthia Svehla fell down steps inside the locker room and sustained injuries. Cynthia Svehla and her husband, Thomas, filed a petition against the Park Hill School District. Cynthia Svehla brought a claim for premises liability, and Thomas Svehla brought a claim for loss of consortium. Park Hill School District filed a Motion for Summary Judgment claiming that it had sovereign immunity from the suit. The circuit court granted the district's motion and entered judgement in the district's favor. This appeal followed.

Appellant's point on appeal:

The trial court erred in granting Defendant's motion for summary judgment because the court failed to find that the Defendant, Park Hill School District, had waived sovereign immunity by maintaining a dangerous condition on the premises at Congress Middle School, in that plaintiffs pled and produced substantial evidence of a dangerous condition in the entrance to the girls' locker room at Congress Middle School, where plaintiff, Cynthia Svehla, fell down the stairs and sustained injuries.

WD84214
George R. Wagner, et al., Appellants,
v.
Barry L. Nolan, Respondent.

George and Lila Wagner appeal from the circuit court judgment allowing Barry Nolan to operate a tow-truck service from his residence. The facts as alleged claim that the Wagners and Nolan reside in Peaceful Valley Subdivision. In 2016, the subdivision lots were subject to restrictive covenants. Those covenants included restrictions that the properties can only be used as single-family residences and that no “unlicensed highway vehicle” may remain on or adjacent to a lot for more than ten days. The covenants also stated that the restrictions run with the land unless a majority of the tracts agree to modify the restrictions. At some point following Nolan’s purchase of his residence in Peaceful Valley Subdivision, he allegedly began operating a tow-truck business from his residence. In 2016, the Wagners sought and were granted a permanent injunction preventing Nolan from conducting the tow business from his residence and from storing any unlicensed vehicles on his property for more than ten days. In 2018, a document purporting to terminate and release the subdivision properties from the restrictive covenants was filed with the Office of the Recorder of Deeds for Johnson County, Missouri. In 2019, Nolan filed a motion for relief from the injunction barring his towing business. The circuit court entered judgment finding that a majority of the owners agreed to release the lots from the restrictive covenants and that Nolan was entitled to relief from the prior injunction. This appeal followed.

Appellant’s point on appeal:

The trial court erred in finding the restrictive covenants of Peaceful Valley had been terminated and by allowing Barry L. Nolan to conduct a tow business as well as to keep any unlicensed motor vehicles upon his property in Peaceful Valley Subdivision, *because* the Court’s finding that a majority of the tracts in the Peaceful Valley Subdivision had filed a “Termination and Release of Restrictive Covenant” terminating, releasing and discharging the subdivision’s restrictive covenants in their entirety was against the weight of the evidence in that the “Termination and Release...” relied upon by the trial court was not signed by a “majority” (defined as “a number greater than half of a total”) of the lot owners in the Subdivision.

WD84161
State of Missouri, Respondent,
v.
Thomas Steve Higgs, Appellant.

Thomas Higgs appeals from the circuit court's judgment convicting him of the class D felony of possession of a firearm. The facts as alleged at trial established that a Columbia Police Officer, Joshua Popielarz, stopped Higgs outside an apartment complex. The officer testified that he saw a man in a parking lot of the residence holding a bicycle. When the officer saw the man take the bicycle behind the residence, the officer stopped to speak with the man who he then identified as Higgs. The officer had previously arrested Higgs. The officer asked Higgs several questions about what he was doing, including questions about the bicycle and whether Higgs owned the bicycle. When the officer approached the bicycle, Higgs started to leave. The officer instructed Higgs to not leave and to sit down. The officer called in the bicycle serial number to check to see if it had been reported stolen and also called another officer to assist. According to the officer's testimony, the officer asked Higgs for permission to search Higgs and Higgs informed the officer that he had drug paraphernalia. The officer then instructed Higgs to stand up so that he could place him under arrest. Higgs did so and began to reach towards his jacket, saying that he would give it to the officer. The officer instructed Higgs to stop reaching in his pocket. A struggle followed with the officers taking Higgs to the ground, handcuffing him, and placing him under arrest. The officers searched Higgs and found a gun. Prior to trial, Higgs filed a motion to suppress the physical evidence and the statements alleging that Higgs was illegally detained and arrested. The circuit court denied the motion finding that the officer had articulable facts leading to a reasonable suspicion that criminal activity was occurring. Following a bench trial, the court found Higgs guilty of unlawful possession of a firearm and sentenced him to ten years' imprisonment. This appeal followed.

Appellant's points on appeal:

1. The trial court clearly erred in overruling the motion to suppress evidence and trial objections renewing the motion to suppress evidence and further erred in admitting into evidence Mr. Higgs' paraphernalia statements, the seized gun, and the seized ammunition at trial because those actions denied Mr. Higgs his rights to be free from unreasonable searches and seizures and violated his rights to due process and equal protection U.S. Const. Amends. IV and XIV and Mo. Const. Art. I, §2, §10, and §15, in that Popielarz testified that a 52 year old Black man having a "nice" new bicycle was a suspicious factor warranting a *Terry* search where such racial profiling is impermissible and without Popielarz's having immediately identified the impermissible race profiled grounds the *Terry* stop would never have progressed to the point that Mr. Higgs said he had paraphernalia thereby causing the gun and ammunition to be discovered such that Mr. Higgs' paraphernalia statements, the gun, and the ammunition all were the fruit of the illegal Fourth Amendment violation and done in violation of his right to Equal Protection.

2. The trial court clearly erred in overruling the motion to suppress evidence and trial objections made renewing the motion to suppress evidence and further erred in admitting into evidence Mr. Higgs' paraphernalia statements, the seized gun, and the seized ammunition at trial because those actions denied Mr. Higgs his right to be free from unreasonable searches and seizures and violated due process and equal protection, U.S. Const. Amends. IV and XIV and Mo. Const. Art. I, §2, §10, and §15, in that even considering Popielarz's compilation of alleged reasons given individually and collectively there was not reasonable suspicion to *Terry* stop Mr. Higgs such that Mr. Higgs' paraphernalia statements, the gun, and the ammunition all were the fruit of the illegal Fourth Amendment violation and done in violation of his right to Equal Protection.
3. The trial court clearly erred in overruling the motion to suppress evidence and trial objections made renewing the motion to suppress evidence and further erred in admitting into evidence Mr. Higgs' paraphernalia statements, the seized gun, and the seized ammunition at trial because those actions denied Mr. Higgs his right to be free from unreasonable searches and seizures and violated due process and equal protection, U.S. Const. Amends. IV and XIV and Mo. Const. Art. I, §2, §10, and §15, in that Mr. Higgs' encounter with Popielarz was not consensual because at its outset it involved coercive accusatory questioning such that Mr. Higgs' paraphernalia statements, the gun, and the ammunition all were the fruit of the illegal Fourth Amendment violation and done in violation of his right to Equal Protection.
4. The trial court clearly erred in overruling the motion to suppress statements and trial objections made renewing the motion to suppress statements and thereby erred in admitting into evidence at trial Mr. Higgs' statements about having paraphernalia, the seized gun, and the seized ammunition because these actions violated Mr. Higgs' right to due process of law and privilege against self-incrimination, U.S. Const. Amends. V and XIV and Mo. Const. Art. I §10 and §19, in that when Mr. Higgs made the statements he was subjected to custodial interrogation without having been given *Miranda* warnings such that his paraphernalia statements and the search and seizure uncovering the gun and the ammunition resulted from the *Miranda* violation and all were the fruit of the illegal Fifth Amendment violation.

WD84424

Garrett Loomis, Appellant,

v.

Scott Bowers and Lea Booker, Respondents.

Garret Loomis appeals from the circuit court's judgment dismissing his petition asserting one count of negligence and one count of negligent infliction of emotional distress against Scott Bowers and Lea Booker. As alleged in the petition, on December 25, 2017, Loomis went to Ameristar Casino. Loomis was present for approximately 30 minutes to an hour when he was approached by Bowers and Booker who were employed as security guards by Ameristar Casino.

Bowers and Booker accused Loomis of being intoxicated and instructed him to leave the premises. Loomis explained to them that he had not been drinking but rather had a brain injury that partially impairs the use of one side of his body. Despite this explanation, Bowers and Booker again asserted that Loomis had too much to drink and forced him to leave the premises. Loomis initially brought suit in the Circuit Court of Clay County against Ameristar Casino asserting one count of denial of public accommodation on the basis of disability in violation of the Missouri Human Rights Act (“MHRA”). The petition was amended to add the security guards John Doe 1 and John Doe 2, whose identities were unknown at the time. The case was removed to the U.S. District Court for the Western District of Missouri. Ameristar Casino filed a motion to dismiss, and Loomis filed a motion to remand. The federal court dismissed the case without prejudice because Ameristar Casino was not properly served pursuant to Missouri Supreme Court Rule 54.21. The federal court denied Loomis’ motion to remand and subsequent motion for reconsideration. On July 23, 2020, Loomis filed the present case in the Circuit Court of Clay County against Bowers and Booker. Bowers and Booker filed a motion to dismiss asserting that the claims were barred by *res judicata*, meaning that the claims had already been adjudicated, or otherwise preempted by MHRA. The circuit court dismissed the petition, finding that the common law negligence claims were fully encompassed by MHRA and that Loomis was not entitled to any other remedies. This appeal followed.

Appellant’s points on appeal:

1. The trial court erred in granting Respondents’ motion to dismiss Appellant’s common law negligence claims because the trial court misinterpreted MHRA, RSMo §213.010 *et seq.*, to preempt appellant’s claims, in that the version of MHRA, as amended by Senate Bill 43, effective August 28, 2017, does not preempt Appellant’s claims.
2. The trial court erred in granting Respondents’ motion to dismiss Appellant’s common law negligence claims because the additional ground in Respondents’ motion, asserting that Appellant’s claims are barred by the Statute of Limitations, does not warrant dismissal, in that MHRA’s Statute of Limitations set forth in §213.111 of MHRA does not apply to Appellant’s common law claims against Respondents, and his claims are subject to the statute of limitations established by RSMo §516.120.
3. The trial court erred in granting Respondents’ motion to dismiss because the additional ground in Respondents’ motion to dismiss Appellant’s common law negligence claims, asserting that Appellant’s claims are barred by the doctrine of *res judicata*, does not warrant dismissal, in that the prior decision of the federal court was not an adjudication on the merits for purposes of *res judicata*.
4. The trial court erred in granting Respondents’ motion to dismiss Appellant’s common law negligence claims because the additional ground in Respondents’ reply suggestions in support of their motion to dismiss, asserting that Appellant’s claims are precluded by the doctrine of judicial estoppel, does not warrant dismissal, in that Appellant did not make any factual assertions in pleadings or under oath or under penalty of perjury in prior proceedings that were inconsistent with his current factual assertions, Appellant did not convince the federal court in prior proceedings to take his position, Appellant

abandoned his prior position by voluntarily dismissing his appeal from the federal court's order, and did not derive any unfair advantage from his prior position.

5. The trial court erred in granting Respondents' motion to dismiss because to the extent Respondents' motion to dismiss can be interpreted as arguing that the Appellant's petition failed to state a claim upon which relief can be granted as it failed to adequately allege the duty element of these claims, this ground does not warrant dismissal, in that Appellant's Petition II sufficiently stated the duty element of his common law claims.
6. The trial court erred in granting Respondents' motion to dismiss Appellant's negligent infliction of emotional distress claim because, to the extent Respondents' motion to dismiss can be interpreted as arguing that the Appellant's petition failed to state a claim upon which relief can be granted as it failed to adequately allege the duty element of this claim, this ground does not warrant dismissal, in that Appellant's Petition II sufficiently stated the duty element.