WD No. 80005

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

RMA (A MINOR CHILD), BY HIS NEXT FRIEND:
RACHELLE APPLEBERRY,
Appellant

v.

BLUE SPRINGS R-IV SCHOOL DISTRICT AND
BLUE SPRINGS SCHOOL DISTRICT BOARD OF EDUCATION,
Respondents.

RESPONDENTS' BRIEF

Appeal from the Circuit Court of Jackson County at Independence
Honorable Marco A. Roland
Circuit Court Case No. 1516-CV20874

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JURISDICTIONAL STATEMENT

This case involves a claim by RMA, a student in the process of transitioning gender from female to male. RMA asserted claims against Blue Springs R-IV School District and Blue Springs School District Board of Education under the Missouri Human Rights Act claiming they engaged in discrimination because they denied RMA, as a transgender, access to the boys' bathroom and locker room facilities located at school. (L.F. 8-20).

Blue Springs R-IV School District and Blue Springs School District Board of Education filed a Motion to Dismiss on grounds the Petition failed to state a claim on which relief could be granted. The District and Board maintain the Act does not extend its protection to claims based on gender identity/transgender status, they are not "persons" subject to liability under the public accommodation provision of the Act and the claims of RMA are barred by collateral estoppel. (L.F. 21-33, 46-57 and 68-74).

On June 28, 2016, the trial court entered its Order of Dismissal and Entry of Judgment in favor of Blue Springs R-IV School District and Blue Springs School District Board of Education. (L.F. 93-94). Thereafter, RMA filed a Motion to Reconsider, which was denied. (L.F. 95-130 and 138-139). RMA has now appealed. (L.F. 140-145). None of the questions presented in this appeal fall within the exclusive jurisdiction of the Missouri Supreme Court under Article V, Section 3 of the Missouri Constitution. Therefore, this appeal falls within the general jurisdiction of the Missouri Court of Appeals. Judgment was entered by the Circuit Court of Jackson County, Missouri and, therefore, it is properly before the Western District. §477.070 RSMo.

STATEMENT OF FACTS

1. THE CURRENT PROCEEDING

On October 24, 2014, RMA filed a Charge of Discrimination against Blue Springs R-IV School District and Blue Springs School District Board of Education, among others, with the Missouri Commission on Human Rights claiming RMA had been denied access to the boys' restrooms and locker rooms at school, based on sex and gender identity. (L.F. 10 and 17-18). RMA is a teenage student under the age of 18 within the Blue Springs School District who was born female and is now transitioning gender from female to male. (L.F. 11 and 12). RMA still has female genitalia as the standard of care for gender confirmation surgery requires an individual reach the age of 18 before surgery will be performed. (L.F. 17 and 30; S.L.F. 171 and 329; Appendix A26 and A184). On July 8, 2015, the Missouri Commission on Human Rights issued a right to sue letter. (L.F. 10 and 19). On October 2, 2015, RMA filed a Petition against Blue Springs R-IV School District and Blue Springs School District Board of Education asserting a claim under the public accommodation provision of the Missouri Human Rights Act, alleging the District and Board engaged in discrimination in violation of the Act because they denied RMA access to the boys' restroom and locker rooms at school because RMA is transgender. (L.F. 8-20).

On November 30, 2015, Blue Springs R-IV School District and Blue Springs School District Board of Education filed their Motion to Dismiss on grounds the Petition failed to state a claim on which relief could be granted because the Act does not extend its protection to claims based on gender identity/transgender status and the District and

Board are not "persons" within the scope of the public accommodation provision of the Act. (L.F. 21-33). On November 30, 2015, RMA filed a Reply to the Motion to Dismiss and Suggestions in Opposition. (L.F. 34-45). On December 23, 2015, Blue Springs R-IV School District and Blue Springs School District Board of Education filed their Reply Suggestions in Support of the Motion to Dismiss addressing the arguments raised in the Reply and Suggestions in Opposition. (L.F. 46-57). On January 4, 2016, RMA filed SurReply Suggestions in Opposition to the Motion to Dismiss essentially making the same arguments previously made in the Reply and Suggestions in Opposition filed November 30, 2015. (L.F. 58-67). On April 12, 2016, Blue Springs R-IV School District and Blue Springs School District Board of Education filed their Supplemental Suggestions in Support of the Motion to Dismiss raising collateral estoppel as an additional ground warranting dismissal based on the prior Petition in Mandamus proceeding filed by RMA. (L.F. 68-74). On May 27, 2016, RMA filed Supplemental Suggestions in Opposition to the Motion to Dismiss. (L.F. 75-85).

On June 28, 2016, the trial court entered its Order of Dismissal and Entry of Judgment in favor of Blue Springs R-IV School District and Blue Springs School District Board of Education. (L.F. 93-94). On July 28, 2016, RMA filed a Motion to Reconsider Order and Amend Judgment and Suggestions in Support. (L.F. 95-130). On August 3, 2016, Blue Springs R-IV School District and Blue Springs School District Board of Education filed their Suggestions in Opposition to the Motion to Reconsider, wherein they again set forth their position the Missouri Human Rights Act does not extend its protections to claims of discrimination based on gender identity/transgender status, they

are not "persons" within the scope of the public accommodation provision of the Act and collateral estoppel applies and, at the same time, the District and Board addressed the new Exhibits attached to the Motion to Reconsider, including the "Dear Colleague" Letter, which were improper under Rule 78.05. (L.F. 131-137). On August 18, 2016, the trial court entered its Order Denying the Motion to Reconsider. (L.F. 138-139). On August 25, 2016, RMA filed a Notice of Appeal. (L.F. 140-145).

2. THE PETITION IN MANDAMUS PROCEEDING

Prior to filing the present Petition, on July 23, 2014, RMA filed a Petition in Mandamus against Blue Springs R-IV School District and Blue Springs School District Board of Education, among others, claiming they engaged in sex discrimination based on gender identity given they denied RMA access to the boys' restroom and locker rooms at school and violated the Missouri Human Rights Act, specifically RSMo. §213.065. (S.L.F. 151-168; Appendix A6-A23). On January 12, 2015, RMA, Blue Springs R-IV School District and Blue Springs School District Board of Education filed their Amended Joint Stipulation of Facts wherein they stipulated RMA was born a female and was a female to male transgender student, RMA still possessed female genitalia and the standard of care for gender confirmation surgery requires an individual reach the age of 18 before such surgery will be performed and RMA's Writ of Mandamus was requesting the Court mandate a student with female genitalia, who identifies as a male, be allowed to use the boys' restrooms and locker rooms. (S.L.F. 169-172; Appendix A24-27).

On January 12, 2015, RMA filed a Brief in Support of Writ of Mandamus arguing discrimination based on transgender status is prohibited by the Missouri Human Rights

Act, including RSMo. §213.065. (S.L.F. 173-211; Appendix A28-A66). That same day, Blue Springs R-IV School District and Blue Springs School District Board of Education filed their Motion to Deny Relators' Requested Writ of Mandamus and Suggestions in Support arguing the Missouri Human Rights Act does not extend its protection to gender identity/transgender status. (S.L.F. 212-243; Appendix A67-A98). On January 22, 2015, RMA filed Suggestions in Opposition to the Blue Springs R-IV School District and Blue Springs School District Board of Education's Motion to Deny Requested Writ of Mandamus arguing again that discrimination based on transgender status is prohibited by the Missouri Human Rights Act, including RSMo. §213.065. (S.L.F. 244-252; Appendix A99-A107). On January 27, 2015, Blue Springs R-IV School District and Blue Springs School District Board of Education filed their Further Suggestions in Support of their Motion to Deny Requested Writ of Mandamus and Response to RMA's Brief in Support of Writ of Mandamus discussing that the plain language of the Missouri Human Rights Act excludes gender identity as a protected class. (S.L.F. 253-261; Appendix A108-A116). On February 11, 2015, the trial court held oral argument during which counsel for the parties argued their respective positions as to whether gender identity/transgender status is a protected class under the Missouri Human Rights Act. (S.L.F. 266-299; Appendix A117-A154). Thereafter, the Court directed counsel to submit proposed judgments (S.L.F. 266-299; Appendix A117-A154). On February 23, 2015, RMA filed a proposed Judgment Upon Petition in Mandamus. (S.L.F. 300-310; Appendix A155-165). At the same time, RMA filed a proposed Writ of Mandamus. (S.L.F. 311-312; Appendix A166-167). On February 23, 2015, Blue Springs R-IV School District and

Blue Springs School District Board of Education filed their proposed Final Judgment and Order. (S.L.F. 313-325; Appendix A168-A180). On March 5, 2015, the trial court entered its Judgment in the Petition in Mandamus proceeding wherein the court denied RMA's Petition. (S.L.F. 326-339; Appendix A181-A194). Therein, the Court included the Findings of Fact stipulated to by the parties and made Additional Factual Findings, which included the following:

> 24. While Relator RMA has not been subject to harassment or bullying, the Court finds that the introduction of a transgender female to male student into the boys' restroom and locker room does present unique challenges in protecting not only RMA, but also in respecting the rights and safety of all students utilizing those facilities.
>
> 25. Respondents have denied Relator RMA's access to the boys' restroom and locker rooms, in part and understandably, due to the possible safety issues that could arise from allowing a student with female genitalia to freely access boys' restroom and locker room facilities.
>
> 37. RMA has not undergone a surgical procedure to modify gender, but has undergone the implantation of a hormone inhibitor.
>
> 38. On October 24, 2014, Relators' filed an additional and separate complaint with the Missouri Commission on Human Rights ("MCHR"), alleging discrimination on the same factual basis presented to this Court as the basis of the Writ of Mandamus.

(S.L.F. 329-331; Appendix A184-A196). Within the Judgment, the Court noted, "Relators are seeking the Court's adjudication on an unsettled area of law. Relator's own counsel admitted as much in oral arguments on February 11, 2015. Relators have admitted that no specific Missouri law or case provides RMA with a specific right, as a transgender student, to utilize the restroom and locker room facilities of RMA's choice." (S.L.F. 332; Appendix A187). The Court also noted, "Relators also lack an existing, clear and unconditional legal right based upon the MHRA and upon which a writ of mandamus could issue. Legislative history and recent legislative actions show that the MHRA specifically does not extend its protection to gender identity in the State of Missouri" and that noticeably missing from RSMo. §213.065 were the terms "transgender" and/or "gender identity." (S.L.F. 336; Appendix A191). The Court went on to find, "While some state legislatures have decided to include gender identity as a protected class, most states, including Missouri, have not. The legal landscape on this issue may certainly change in the future, but at the present time the MHRA does not provide a basis for the issuance of a writ of mandamus in this case because it does not clearly and unequivocally establish a legal right for Relator RMA to have unhindered access to the boys' restrooms, locker room, and any other boys' facilities within the Blue Springs R-IV School District on the basis of Relator RMA's expressed gender identity." (S.L.F. 337; Appendix A181-A182).

Then, on December 8, 2015, while litigation relating to the present Petition was still ongoing, the Missouri Court of Appeals entered its opinion in the Petition in

Mandamus appellate proceeding finding no appeal could lie from the denial of the writ by the lower court. (L.F. 69 and 113).

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN GRANTING A DISMISSAL AS THE PETITION IN THIS MATTER FAILED TO STATE A CLAIM ON WHICH RELIEF COULD BE GRANTED BECAUSE THE MISSOURI HUMAN RIGHTS ACT DOES NOT EXTEND ITS PROTECTION TO CLAIMS BASED ON GENDER IDENTITY/TRANSGENDER STATUS. (RESPONSE TO RMA'S POINT I).

A. STANDARD OF REVIEW

"The standard of review for a trial court's grant of a motion to dismiss is de novo." *Evans v. Empire Dist. Elec. Co.*, 346 S.W.3d 313, 314 (Mo. App. 2011)(citation omitted). "The pleading is granted its broadest intendment, all facts alleged are treated as true, and it is construed favorably to the plaintiff to determine whether the averments invoke substantive principles of law which entitle the plaintiff to relief." *Dean v. Noble*, 477 S.W.3d 197, 203 (Mo. App. 2015)(citation omitted). "When the trial court does not state a basis for dismissal, we presume that it was based on the grounds alleged in the motion to dismiss; we will affirm if the dismissal is proper under any of the grounds stated in the motion." *Id*. (citation omitted).

B. ANALYSIS

1. GENDER IDENTITY/TRANSGENDER STATUS IS NOT A PROTECTED CATEGORY UNDER THE ACT.

Within Sections II.a., b. and c. of Appellant's Brief, RMA alleges dismissal was improper because gender identity/transgender status are gender-related traits which can form the basis of a claim for sex discrimination. RMA cites to various employment discrimination cases brought under other provisions of the Act, some of which were brought by females claiming pregnancy discrimination. RMA then attempts to liken the pregnancy based claims of those females to RMA's own gender identity/transgender status based claims in hopes the Court will find gender identity/transgender status are similar gender-related traits which can also form the basis of a claim for sex discrimination under the Act. What RMA fails to recognize is while pregnancy is a gender-related trait of the female sex which the Missouri legislature has expressed an intent to protect, the same is not true for gender identity/transgender status.

The public accommodations provision of the Missouri Human Rights Act is set forth in RSMo. §213.065.2 and provides in part:

> It is an unlawful discriminatory practice for any person, directly or indirectly, to refuse, withhold from or deny any other person, or to attempt to refuse, withhold from or deny any other person, any of the accommodations, advantages, facilities, services or privileges made available in any place of public accommodation, as defined in section 213.010 and this section, or to segregate or discriminate against any such person in the use thereof on the grounds of race, color, religion, national origin, **sex**, ancestry or disability. (Emphasis added)

Noticeably absent from the statute is the term "transgender" or phrase "gender identity". And, while RSMo. §213.065.2 uses the term "sex", it is undefined. "When no statutory definition is available, the primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute." *Lapponese v. Carts of Colorado, Inc.*, 422 S.W.3d 396, 402 (Mo. App. 2013)(citation omitted). "To determine legislative intent, we must give an undefined word used in a statute its plain and ordinary meaning as found in the dictionary." *Id.* (citation omitted). "We must not read into a statute a legislative intent contrary to the intent made evidence by the plain language." *Id.* (citation omitted).

The plain and ordinary meaning of the term "sex" as set forth in the Merriam-Webster Dictionary is "either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures." Merriam-Webster Dictionary, www.merriam-webster.com/dictionary/sex. The claim in this case is not that RMA has been discriminated against based on sex as defined in Webster's, but rather RMA has been discriminated against based on self-identified/selected gender identity or being transgender—RMA's sex is female but RMA identifies as a male. (L.F. 8-20). The plain and ordinary meaning of the term "sex" does not include gender identity/transgender status. This issue has been addressed by the Missouri legislature, which has considered whether to include such protection in the Act. Specifically, the Missouri legislature has

considered addition of "sexual orientation" and "gender identity" as protected classes under the Act on several occasions, but none of the bills have been enacted into law.[1]

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

House Bill No. 1930 was first read on February 20, 2014 and would have revised the definition of "discrimination" under the Missouri Human Rights Act to include any unfair treatment based on sexual orientation or gender identity. The last action on this bill occurred on March 13, 2014 when a public hearing was completed in the Missouri House of Representatives. The session closed with no future action on the bill and it failed to

While it is true some state legislatures have decided to include gender identity as a protected class, the majority of states have not. Recognizing the term "sex" does not include gender identity/transgender status, currently, only nineteen states and the District of Columbia specifically include gender identity as a protected class in their respective state employment non-discrimination laws.[2] Missouri is not one of them. The legislative

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become a law. *See* Missouri House website at www.house.mo.gov/Bill.aspx?bill=HB1930&year=2014&code=R. (Appendix A227). Other identical and/or similar bills were considered in 2015 (HB407) and 2016 (HB1924, 2279, 2319, 2414 and 2478), but none were enacted into law. *See* Missouri House website at www.house.mo.gov/Bill.aspx?bill=HB407&year=2015&code=R, www.house.mo.gov/Bill.aspx?bill=HB1924&year=2016&code=R, www.house.mo.gov/Bill.aspx?bill=HB2279&year=2016&code=R, www.house.mo.gov/Bill.aspx?bill=HB2319&year=2016&code=R, www.house.mo.gov/Bill.aspx?bill=HB2414&year=2016&code=R and www.house.mo.gov/Bill.aspx?bill=HB2478&year=2016&code=R. (Appendix A229-A233).

[2] According to the ACLU, the nineteen states that currently recognize gender identity as a protected class are Washington, Oregon, California, Nevada, Utah, Colorado, New Mexico, Hawaii, Minnesota, Iowa, Illinois, Vermont, Maine, Massachusetts, Rhode Island, Connecticut, New Jersey, Delaware, Maryland and the District of Columbia. *See*

history makes clear the Act does not presently extend its protection to sexual identity/transgender status. Whether or not to include gender identity/transgender status as a protected class under anti-discrimination statutes is an ongoing debate and the law is evolving. The legal landscape relating to this issue may certainly change in the future. When it does, it is an issue the Missouri legislature will need to again address and the decision will be that of the Missouri legislature to make. However, the fact remains at the present time, the Act does not extend its protection to gender identity/transgender status. The Missouri legislature has considered and rejected such protection. The same holds true with regard to sexual orientation, which RMA would presumably argue is a gender-related trait as well.

In *Pittman v. Cook Paper Recycling Corp.*, 2015 WL 64668372 (Mo. App. 2015) the Missouri Court of Appeals addressed the issue of whether sexual orientation is a protected status under the Act. On appeal, plaintiff, a homosexual male, alleged the trial court erred in dismissing his petition because it stated a claim for sex discrimination. Plaintiff argued his allegations he was harassed and terminated from his employment due to his sexual orientation were sufficient to state a claim. The Court noted the issue as to whether discrimination based on sexual orientation is prohibited by the Act was one of first impression in Missouri. "The clear meaning prohibiting discrimination based on 'sex' under the Missouri Human Rights Act intended by the Missouri legislature concerns

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ACLU—Non-Discrimination Laws: State by State Information at www.aclu.org/maps/non-discrimination-laws-state-state-information-map.

discrimination based upon a person's gender and has nothing to do with sexual orientation. Indeed, the first definition of 'sex' provided by Webster's Third New International Dictionary is one of the two divisions of human beings respectively designated male or female." *Id*. at *2. "In essence, Pittman's petition is seeking a declaration that sexual orientation discrimination qualifies for protection under the Missouri Human Rights Acts because it is tantamount to discrimination based on sex. We note, however, that to even reach this reading of Pittman's petition, we must liberally construe the petition because, as the circuit court wisely noted, the petition truly does not allege discrimination or harassment on the basis of 'sex'." The circumstances in *Pittman* are akin to the circumstances and claims made in the matter currently before this Court.

The Court in *Pittman* went on to note unlike many other states, Missouri has not enacted legislation prohibiting discrimination against homosexuals by adding sexual orientation as a protected status under the Act. "If the Missouri legislature had desired to include sexual orientation in the Missouri Human Rights Act's protections, it could have done so." *Id*. at *3. "No matter how compelling Pittman's argument may be and no matter how sympathetic this court or the trial court may be to Pittman's situation, we are bound by the state of the law as it currently exists. Without the legislative addition of 'sexual orientation' to the statutory list of protected statuses, the Missouri Human Rights Act does not prohibit discrimination based upon a person's sexual orientation." *Id.* "We cannot usurp the function of the General Assembly, or by construction, rewrite its acts." *Id.* (citation omitted). "Therefore, until the general assembly amends the Missouri Human Rights Act to include sexual orientation, discrimination based upon one's sexual

orientation is not protected by the statute. The circuit court, therefore, astutely dismissed Pittman's petition for failure to state a claim because the Missouri Human Rights Act does not prohibit discrimination on the basis of sexual orientation." *Id.* This same reasoning applies to the matter at bar.

In Appellant's Brief, RMA attempts to distinguish the holding in *Pittman* by citation to *Moore v. Lift for Life Academy, Inc*., 489 S.W.3d 843 (Mo. App. 2016); however, *Moore* does not help RMA. *Moore* was an employment case wherein the plaintiff claimed she was discharged due to her sexual orientation. The issue discussed in the case was whether defendant's participation in MOPERM waived sovereign immunity. Within the conclusion section of the opinion, the Court noted defendant was protected by sovereign immunity so the claim of discrimination on the basis of sexual orientation was barred as a matter of law. Thereafter, in a footnote, the Court noted:

> **It bears mention that sexual orientation is not a protected category under the Missouri Human Rights Act. (RSMo Chapter 213).** *Pittman v. Cook Paper Recycling Corp*., 478 S.W.3d 479 (Mo. App. 2015). Had Moore's claim alleged discrimination on the basis of race, color, religion, national origin, sex, ancestry, age, or disability, her claim would be recognized under the MHRA, which expressly waives sovereign immunity for public employers. See §§213.010 and 213.055. (Bolding added)

Id. at 847 n.1. RMA reads much into this footnote in an attempt to find support for the arguments advanced by RMA in this case. However, *Moore* clearly indicates sexual

orientation is not a protected category under the Act, just like gender identity/transgender status is not a protected category.

In hopes of avoiding this finding, RMA continues to use the magic words "discriminated against based on sex" at every opportunity. This is RMA's conclusion. Repeating the phrase does not make it so. The facts alleged in support of the conclusion are the Blue Springs R-IV School District and Blue Springs School District Board of Education have precluded RMA from using the boys' restroom and locker room facilities at school because RMA is transgender or due to gender identity. (L.F. 8-20). RMA cannot simply use the magic words and convert the unprotected category of gender identity/transgender status into a protected category under the Act. Simply stated, "sex" is not defined to include self-identified/selected gender identity/transgender status. Again, the Missouri legislature has considered and rejected inclusion of gender identity/transgender status as a protected category under the Act. As such, RMA's Petition for Damages fails to state a claim on which relief can be granted and was properly dismissed. The trial court's dismissal should be affirmed on this ground alone.

2. FEDERAL COURT CASES INVOLVING DISCRIMINATION BASED ON GENDER IDENTITY/TRANSGENDER STATUS, AND THE "DEAR COLLEAGUE" LETTER, CITED BY RMA DO NOT ESTABLISH THE TRIAL COURT ERRED IN DISMISSING THE PETITION.

Within Section II.d. of Appellant's Brief, RMA suggests the holdings in federal court cases from other jurisdictions which involved gender identity/transgender based claims somehow establish dismissal was improper in this case. They do not.

RMA suggests the cases cited in Section II.d. establish discrimination based on gender identity/transgender status have been found to be discrimination based on sex by the federal courts and essentially suggests this is a universal finding. Contrary to such suggestion, at present, even the federal courts are struggling with the issue. For example, RMA cites to *G.G. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016); however, what RMA fails to tell the Court is an application to recall and stay the mandate was granted and the case was stayed pending filing and disposition of a writ of certiorari. *See Gloucester County School Board v. G.G.*, 136 S.Ct. 2442 (2016). Similarly, RMA cites to *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); however, RMA fails to advise the Court the case has been distinguished by the recent case of *Johnston v. University of Pittsburg of Com. Systems of Higher Educ.*, 97 F. Supp. 3d 657 (D. Penn. 2015), which also discusses the *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), case cited by RMA as well in Appellant's Brief.

In *Johnston*, plaintiff was born a female, transitioned to living in accordance with her male gender identity, began holding herself out as male and changed her identity documents and records to indicate her male gender identity. According to the complaint, defendants discriminated against plaintiff "because of his sex, including his transgender status and his perceived failure to conform to gender stereotypes." *Id.* at 672. Specifically, the complaint alleged, "While non-transgender male students. . . were

permitted to use the men's locker room and restroom facilities on campus, Plaintiff was singled out and denied access to the men's locker rooms and restrooms." *Id.* at 672. The Court concluded plaintiff was attempting to bring a claim for discrimination based on his transgender status and on his perceived gender nonconformity. The Court held plaintiff had not alleged facts showing unlawful discrimination based on sex in violation of Title IX. "Specifically, the University's policy of requiring students to use sex-segregated bathrooms and locker room facilities based on students' natal or birth sex, rather than their gender identity, does not violate Title IX's prohibition against sex discrimination." *Id.* at 672-73.

The Court began with a general discussion of Title IX, indicating it prohibits sex discrimination in educational programs that receive federal funding. "Title IX prohibits discrimination 'on the basis of sex.' The parties dispute whether discrimination 'on the basis of sex' applies to claims of discrimination by transgender students." *Id.* at 674. The Court noted the issue was a matter of first impression in the Third Circuit and "it did not appear any federal courts had addressed the precise question of whether a student can assert a claim for discrimination on the basis of his transgender status under Title IX." *Id.* at 674. In discussing the claim, the Court noted Title IX does not prohibit discrimination on the basis of transgender itself because transgender is not a protected characteristic under the statute. *Id.* The Court also noted:

> The Court has found no federal court case that has squarely decided this issue in the Title IX context. However, nearly every federal court that has considered the question in the Title VII context has found that transgender

> individuals are not a protected class under Title VII. *See, e.g. Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221-11 (10th Cir. 2007); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Lopex v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F.Supp.2d 653, 658 (S.D. Tex. 2008)(collecting cases); *Sweet v. Mulberry Lutheran Home*, No. IP02-0320-C-H/K, 2003 WL 21525058, at *2 (S.D. Ind. June 17, 2003)("discrimination on the basis of sex means discrimination on the basis of the plaintiff's biological sex, not sexual orientation or sexual identity, including an intention to change sex"); *but see Schroer v. Billington*, 577 F.Supp.2d 293, 305 (D.D.C. 2008)(explaining that "discrimination based on transsexuality ... [is] a characteristic that, in and of itself, nearly all federal courts have said is unprotected by Title VII, " but holding that the revocation of a job offer by an employer because the applicant had transitioned from male to female constituted discrimination "because of sex" in violation of Title VII).

Id. at 674-75. Thereafter, the Court indicated the Third Circuit had not addressed the issue and it would briefly review the relevant Title VII cases. The Court then discussed specific cases from the Seventh, Eighth and Tenth Circuits dealing with the issue. As for the specific Eighth Circuit case, the Court noted:

> Similarly, the Eighth Circuit has concluded that the word 'sex' in Title VII is to be given its traditional definition, rather than an expansive

> interpretation. Because Congress has not shown an intention to protect transsexuals, we hold that discrimination based on one's transsexualism does not fall within the protective purview of the Act. *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750 (8th Cir. 1982)(noting that it was not unmindful of the problem facing the transgender plaintiff, but noting, on the other hand, the equally important problems facing the plaintiff's employer in protecting the privacy interests of its female employees particularly in regard to restroom usage).

Id. at 676. "These cases, along with many others, make clear that Title VII does not provide an avenue for a discrimination claim on the basis of transgender status. Similarly, Title IX's language does not provide a basis for a transgender status claim. On a plain reading of the statute, the term 'on the basis of sex' in Title IX means nothing more than male and female, under the traditional binary conception of sex consistent with one's birth or biological sex." *Id*. (citation omitted).

"The exclusion of gender identity from the language of Title IX is not an issue for this Court to remedy. It is within the province of Congress--and not this Court--to identify those classifications which are statutorily protected." *Id*. at 677. (citation omitted). "Congress purpose in enacting Title IX was to establish equal educational opportunities for women and men in education." *Id*. (citation omitted). "Thus, while Title IX was intended to provide equal educational opportunities for both sexes, the statute does not necessarily prohibit sex-segregated spaces in educational settings." *Id*. (citation omitted). "Finally, the Court finds particularly compelling that the regulations

implementing Title IX explicitly permit educational institutions subject to Title IX to provide separate toilet, locker room and shower facilities on the basis of sex . . . . " *Id.* at 678. (citation omitted). "Thus, Title IX and its implementing regulations clearly permit schools to provide students with certain sex-segregated spaces, including bathroom and locker room facilities, to perform certain private activities and bodily functions consistent with an individual's birth sex." *Id.* As such, the Court concluded, the University's policy of separating bathrooms and locker rooms on the basis of birth sex was permissible under Title IX and the U.S. Constitution. *Id.* at 678.

Thereafter, the Court discussed plaintiff's sex stereotyping claim, including the *Price Waterhouse* case, noting therein the Court said it was "impermissible for the plaintiff's employer to condition her promotion on such stereotypical factors as plaintiff's ability to walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 679 (citation omitted). Thereafter, the Court noted plaintiff had not alleged he was discriminated against because of the way he looked, acted or spoke and indicated:

> Instead, Plaintiff alleges only that the University refused to permit him to use the bathrooms and locker rooms consistent with his gender identity rather than his birth sex. Such an allegation is insufficient to state a claim of discrimination under a sex stereotyping theory. *See, e.g., Eure v. Sage Corp.*, 61 F.Supp.3d 651, 661, No. 5:12-cv-1119-DAE, 2015 WL 6611997, at *6 (W.D. Tex. Nov. 19, 2014)("courts have been reluctant to extend the sex stereotyping theory to cover circumstances where the plaintiff is

> discriminated against because the plaintiff's status as a transgender man or woman, without any additional evidence related to gender stereotype non-conformity"); *Etissy v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007)(*Price Waterhouse* does not require "employers to allow biological males to use women's restrooms. Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes."); *Johnson v. Fresh Mark, Inc.*, 337 F.Supp.2d 996, 1000 (N.D. Ohio 2003) *aff'd*, 98 Fed. Appx. 461 (6th Cir. 2002)(finding no discrimination where employer did not require plaintiff to conform her appearance to a particular gender stereotype, but instead only required plaintiff to conform to the accepted principles established for gender-distinct public restrooms).

Id. at 680-81. The Court noted plaintiff had not alleged discrimination because he did not behave, walk, talk or dress in a manner inconsistent with preconceived notions of gender stereotypes; rather, the University classified him based on his birth sex and prohibited him from entering sex-segregated spaces based on that classification. The Court indicated the contention of discrimination was that he was forbidden from using University bathrooms and locker rooms consistent with his male gender identity rather than his female birth sex and this did not constitute a claim for sex stereotyping. "Furthermore, courts that have considered similar claims have consistently concluded that requiring individuals to use bathrooms consistent with their birth or biological sex rather than their gender identity is not discriminatory conduct in violation of federal and

state constitutions and statutes." *Id*. (citation omitted). As such, the Court determined dismissal was appropriate.

Whether or not gender identity/transgender status is a protected category under federal anti-discrimination law is still an evolving area of law, even in the federal courts. Nevertheless, even if the issue was well established, the outcome in the cases cited by RMA would not change the outcome in this case. The same holds true for the "Dear Colleague" letter referenced by RMA. And, while RMA is correct appellate courts are guided by Missouri and federal employment discrimination case law that is consistent with Missouri law in deciding a case under the Missouri Human Rights Act, the fact is the findings in the federal court cases cited by RMA, and the "Dear Colleague" letter, are not consistent with Missouri law. Most important, as discussed above in Section II.a., the Missouri legislature has affirmatively rejected inclusion of gender identity/transgender status as a protected category under the Act as of this time. As such, this Court would not be remiss in recognizing this issue is one for the legislature to resolve. RMA's Petition fails to state a claim on which relief can be granted. The matter was properly dismissed by the trial court and its dismissal should be affirmed.

3. FEDERAL COURT CASES INVOLVING SEX-STEREOTYPE DISCRIMINATION, AND THE EEOC OPINIONS, CITED BY RMA DO NOT ESTABLISH THE TRIAL COURT ERRED IN DISMISSING THE PETITION.

Within Section II.e. of Appellant's Brief, RMA suggests the holdings in federal court cases from other jurisdictions which involved sex-stereotype discrimination

somehow establish dismissal was improper in this case. They do not. The outcomes in the federal court cases cited by RMA involving sex-stereotype discrimination have nothing to do with the issue presented to this Court. The same holds true for the EEOC opinions referenced by RMA. What RMA fails to recognize is no claim for sex-stereotype discrimination has been asserted in this case. The failure to assert such a claim is key and fatal to RMA's argument.

In *Pittman v. Cook Paper Recycling Corp.*, 2015 WL 64668372 (Mo. App. 2015), in addition to discussing whether discrimination against homosexuals due to sexual orientation was prohibited by the Missouri Human Rights Act, the Court also discussed Pittman and the ACLU's policy arguments advocating broad social change in Missouri regarding the rights of homosexuals and their reliance on *Price Waterhouse* for support, which RMA also relies on in Appellant's Brief. The Court noted it did not need to decide whether the Act prohibited sex discrimination based on gender stereotyping because Pittman did not raise a gender stereotyping claim in his petition. "The petition is devoid of any allegation regarding gender stereotyping. Pittman did not claim he was harassed because he failed to comply with societal stereotypes of how he ought to appear or behave. His claim was a simple and direct claim that he was discriminated against because of his sexual orientation." *Id.* at 484.

Like in *Pittman*, nowhere in RMA's Petition are there allegations of gender stereotyping. (L.F. 8-20). Rather, RMA's claim is a simple and direct claim of discrimination based on gender identity/transgender status. And, as discussed above in Section II.a., the Missouri legislature has rejected inclusion of gender

identity/transgender status as a protected category under the Act. As such, RMA's Petition fails to state a claim on which relief can be granted and was properly dismissed. The trial court's dismissal should be affirmed.

C. CONCLUSION

Within the Amicus Brief filed by Promo and the Amicus Brief filed by the American Civil Liberties Union of Missouri Foundation, the ACLU Lesbian, Gay, Bisexual & Transgender Project, the National Center for Lesbian Rights and the Transgender Law Center (hereinafter the ACLU entities), both make arguments similar to those made by RMA in relation to whether the Missouri Human Rights Act extends its protection to gender identity/transgender status. Both provide background information on issues faced by gender identity/transgender individuals and argue policy reasons as to why the Missouri Human Rights Act should be interpreted and extended to include gender identity/transgender status as a protected category. Both also rely on federal cases from other jurisdictions in support for their arguments, some of which are the same cases cited by RMA. As discussed above, contrary to the suggestion the issue is well settled at the federal level, federal courts are also struggling with the issue of discrimination based on gender identity/transgender status in relation to federal anti-discrimination laws. However, the federal cases from other jurisdictions do not help in resolving the issue in this case relating to the Missouri Human Rights Act and the protection it provides. The arguments of PROMO and the ACLU entities provide this Court with nothing new or different to consider.

Nowhere do either of these organizations address the unique challenges in what they demand from the Blue Springs R-IV School District and Blue Springs School District Board of Education. The District and Board owe a responsibility to protect the privacy interests of all students and an obligation to address concerns for the safety of all students. Allowing a transitioning female to male student into the boy's restroom and locker room (or the other way around) creates a situation of concern not just for RMA but for all students. Counsel for RMA has recognized no specific Missouri law or case provides RMA with a specific right as a transitioning female to male student to have unfettered access to the restroom and locker room of RMA's choice. To the extent the legislature has addressed the issue, gender identity/transgender status is unequivocally not included as a protected class within the Act. Without further direction from the legislature, the actions of the District and Board are consistent with the law and their obligations to look after the safety and privacy of all students.

RMA claims Blue Springs R-IV School District and Blue Springs School District Board of Education have violated the public accommodation provision of the Missouri Human Rights Act as they have denied access to the boys' restroom and locker rooms at school because RMA is transgender. Gender identity/transgender status is not a protected category under the Act. This is clear from the plain language of the statute. This is also clear from a review of the legislative history of the statute as the Missouri legislature considered and affirmatively rejected inclusion of gender identity/transgender status as a protected category under the Act numerous times. As such, RMA's Petition fails to state

a claim on which relief can be granted and was properly dismissed. The trial court's dismissal should be affirmed.

II. THE TRIAL COURT DID NOT ERR IN GRANTING A DISMISSAL AS THE PETITION IN THIS MATTER FAILED TO STATE A CLAIM ON WHICH RELIEF COULD BE GRANTED BECAUSE THE BLUE SPRINGS R-IV SCHOOL DISTRICT AND BLUE SPRINGS SCHOOL DISTRICT BOARD OF EDUCATION ARE NOT "PERSONS" UNDER RSMO. §§213.010(14) AND 213.065.2. (RESPONSE TO RMA'S POINT II).

A. STANDARD OF REVIEW

The standard of review for a trial court's grant of a motion to dismiss is de novo." *Evans v. Empire Dist. Elec. Co.*, 346 S.W.3d 313, 314 (Mo. App. 2011)(citation omitted). "The pleading is granted its broadest intendment, all facts alleged are treated as true, and it is construed favorably to the plaintiff to determine whether the averments invoke substantive principles of law which entitle the plaintiff to relief." *Dean v. Noble*, 477 S.W.3d 197, 203 (Mo. App. 2015)(citation omitted). "When the trial court does not state a basis for dismissal, we presume that it was based on the grounds alleged in the motion to dismiss; we will affirm if the dismissal is proper under any of the grounds stated in the motion." *Id*. (citation omitted).

B. ANALYSIS

1. THE STATE (OR ANY POLITICAL OR CIVIL SUBDIVISION THEREOF) IS NOT A "PERSON' AS DEFINED IN RSMO. §213.010(14).

Within Section III.a. of Appellant's Brief, RMA alleges dismissal was improper because a School District and/or Board of Education are included in the definition of a "person" as defined in RSMo. §213.010(14), even though they are a subdivision of the state. RMA suggests it is clear "from looking at the entirety of the statute that the legislature intended the state and its subdivisions to be subject to the MHRA and considered 'persons' for the purpose of the statute." What RMA fails to appreciate is the Missouri legislature has clearly indicated who comes within the definition of a "person" and it does not include a School District and/or Board of Education.

RSMo. §213.065.2 entitled, "Discrimination in public accommodations prohibited, exceptions," provides:

> It is an unlawful discriminatory practice for any **person**, directly or indirectly, to refuse, withhold from or deny any other person, or to attempt to refuse, withhold from or deny any other person, any of the accommodations, advantages, facilities, services or privileges made available in any place of public accommodation, as defined in section 213.010 and this section, or to segregate or discriminate against any such person in the use thereof on the grounds of race, color, religion, national origin, sex, ancestry or disability. (Emphasis added).

RSMo. §213.010(14) defines "person" as "one or more individuals, corporations, partnerships, associations, organizations, labor organizations, legal representatives, mutual companies, joint stock companies, trust, trustees, trustees in bankruptcy, receivers, fiduciaries, or other organized groups of persons."

The Blue Springs R-IV School District and Blue Springs School District Board of Education's position that neither of them is a "person" subject to liability under Chapter 213, specifically RSMo. §213.065.2, is supported by the principles of statutory construction and definitions contained within Chapter 213, primarily the definition of "employer" found in RSMo. §213.010(7). RSMo. §213.055 provides it is an unlawful employment practice:

> (1) For an **employer**, because of race, color, religion, national origin, sex, ancestry, age or disability of an individual:
>
> (a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, national origin, sex, ancestry, age or disability;
>
> (b) To limit, segregate, or classify his employees or his employment applicants in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, national origin, sex, ancestry, age or disability; . . . . (Emphasis added).

RSMo. §213.010(7) defines "employer" as "the state, or any political or civil subdivision thereof, or any person employing six or more persons within the state, or any person directly acting in the interest of an employer, but does not include corporations and associations owned and operated by religious or sectarian groups." In defining who is an

"employer" for purposes of Chapter 213 liability, specifically RSMo. §213.055, "the state, or any political or civil subdivision thereof" are specifically included in the definition. However, for purposes of liability under RSMo. §213.065.2, the definition of "person" set forth in RSMo. §213.010(14) does not include "the state, or any political or civil subdivision thereof" in the definition. The failure to include "the state, or any political or civil subdivision thereof" in RSMo. §213.010(14) is telling because, "School Districts are political subdivisions of the state, . . . and a school board is an instrument or arm, of the state government . . . . " *Hughes v. Civil Service Commission of City of St. Louis*, 537 S.W.2d 814, 815 (Mo. App. 1976)(citation omitted). The Missouri legislature's failure to include political or civil subdivisions of the state, such as School Districts and Boards of Education, is a clear sign such entities are not a "person" within the definition of RSMo. §213.010(14).

In *St. Joseph Light & Power Company v. Nodaway Worth Electric Cooperative*, 822 S.W.2d 574 (Mo. App. 1992), the Missouri Court of Appeals addressed the issue of statutory definitions where the case turned on whether or not school districts met the definition of "person". The case arose because St. Joseph was supplying electrical service to school districts, but the districts requested Nodaway Worth do so. RSMo. §394.315 provided "no rural electric cooperative shall be permitted or required to supply retail electric energy to any *person* at any structure where said person is receiving, or has within the last sixty days received, retail electric energy from another supplier or electric energy. . . ." (emphasis added) Further, RSMo. §394.315 defined "person" or "persons" to be "a natural person, cooperative or private corporation, association, firm, partnership,

receiver, trustee, agency, or business trust." The Court noted under RSMo. §394.315, if school districts were "persons" then Nodaway Worth would be precluded from supplying them with electric service. St. Joseph argued school districts were "persons" within the meaning of RSMo. §394.315 as each was an agency.

"The primary rule of statutory construction is to ascertain the intent of the lawmakers from the language used, to give effect to that intent if possible, and to consider the words used in a statute in their plain and ordinary meaning." *Id*. (citation omitted). "Furthermore, when the legislature enacts a statute referring to terms which have had other legislative or judicial meaning attached to them, the legislature is presumed to have acted with knowledge of the legislative or judicial action. " *Id*. (citation omitted). After discussing the common definition of agency, the court determined school districts were not within the common definition of agency. Further, the Court noted, "It is also significant here to note that in construing a statute, it is appropriate to take into consideration statutes involving similar or related subject matter when such statutes shed light upon the meaning of the statute being construed." *Id*. (citation omitted). The Court then noted RSMo. §394.080(4) gave rural electric cooperatives the power to sell electric energy "to governmental agencies and political subdivisions and to other persons. . . . ." RSMo. §394.020(2) defined "person" as "any natural person, firm, association, corporation, business trust, partnership, federal agency, state or political subdivision or agency thereof, or any body politic. . . ." The Court indicated while the definition of "person" in Section §394.020(2) included the "state or any political subdivision or agency thereof, or any body politic", the definition of "person" in RSMo. §394.315.1 did

not. Further, the Court noted had the Missouri legislature intended to include "political subdivision or agency thereof, or any body politic" in the definition in RSMo. §394.315.1 it could have done so. "The variations in the language employed within these statutes are indicative that the legislature did not intend to include state or political subdivisions or agencies thereof, or bodies politic within the definition of person under §394.315, RSMo 1986 (now repealed)." *Id.* at 577. As such, the Court concluded school districts were not "persons" within the scope of RSMo. §394.315.

Within Section III.d. of Appellant's Brief, RMA suggests *Nodaway Worth* has no application to this case. RMA misses, or hopes to ignore, the importance of the case and its application to this matter. *Nodaway Worth* provides an analysis of statutory construction and application to two statutes, Section §394.020(2) which defined "person" to include the "state or any political subdivision or agency thereof, or any body politic" and RSMo. §394.315.1 which defined "person" but did not include similar language. The Court concluded had the legislature intended to include the "state or any political subdivision or agency thereof, or any body politic" in §394.315.1, it would have done so through similar language. Given it did not, the Court concluded school districts were not "persons" within the scope of RSMo. §394.315. In this case, the legislature defined "employer" in RSMo. §213.010(7) to include "the state, or any political or civil subdivision thereof" but did not include similar language in the definition of "person" in RSMo. §213.010(14), just seven short sections above. The only conclusion which can be drawn from this omission is the legislature did not intend the definition of "person" to include "the state, or any political or civil subdivision thereof."

Further, in RMA's attempt to distinguish *Nodaway Worth*, RMA says the definition of "person" in the Missouri Human Rights Act includes several categories of entities not covered by the statute at issue in *Nodaway Worth* and while the definition in section §394.315 was limited to a "cooperative or private corporation", the definition in RSMo. §213.010(14) "includes corporations generally. *Id*. Thus, even if a school district was not a 'person' under §394.315, it would be under the MHRA, since 'school districts have long been considered . . . public corporations. *Doe*, 372 S.W.3d at 48." This cited statement in *Doe* related to discussion of whether the school at issue fit under the type of establishment described in RSMo. §213.010(15)(e), which, as noted above, defined a "place of public accommodation" as "any public facility owned, operated, managed by or on behalf of this state or any agency or subdivision thereof, or any public corporation . . . . " The Court noted public school districts had been considered both subdivisions of the state and public corporations and found Plaintiff had sufficiently pled the school was a place of public accommodation as defined by Section 213.010(15)(e).

What RMA fails to recognize is the definition of "person" in RSMo. §213.010(14) uses the term "corporations" not "public corporations". The term "corporations" in RSMo. §213.010(14) cannot be interpreted to include school districts. *See Haggard v. Division of Employment Security*, 2007 WL 1186613, *4 (Mo. App. 2007)(wherein the court noted the Missouri Supreme Court had found that "unless otherwise specified, where the term 'corporation' is used in our statutes and Constitution it uniformly refers to private or business organizations, not to public corporations.")(citation omitted). Further, to interpret it as such would violate the rules of statutory construction. *See Carpenter v.*

King, 679 S.W.2d 866, 868 (Mo. 1984)(en banc)(noting "It is well-established in this state that the state and its agencies are not to be considered as within the purview of a statute, however general and comprehensive the language of such act may be, unless an intention to include them is clearly manifest, as whereby they are expressly named therein, or included by necessary implication")(citation omitted).

The same holds true for RMA's suggestion that while a Board of Education was not addressed in *Nodaway Worth*, it fits at least one category listed in the definition of "person" in §213.010(14). RMA suggests members of a Board of Education are "fiduciaries" and therefore a "person" under the statute and a Board of Education is an "organized group of persons" and, therefore, a "person" also. As with the argument about "corporations", this argument ignores the Missouri legislature's clear intent that the state and its political and civil subdivisions are not included in the definition of "person" and the rules of statutory construction that the state and its agencies are not to be considered within the scope of a statute unless an intention to include them is clear.

If a School District, or Board of Education, were intended to be "persons" for purposes of liability under RSMo. §213.065.2, the Missouri legislature could have included language in the definition of "person" just like it did when defining "employer" for purposes of liability under RSMo. §213.055. Given the legislature did not include the state or any political or civil subdivision thereof within the definition of "person", the intent is clear. The Blue Springs R-IV School District and Blue Springs School District Board of Education are not "persons" within the scope of RSMo. §213.010(14) such that they can have potential liability under RSMo. §213.065.2. As such, RMA's Petition fails

to state a claim on which relief can be granted and was properly dismissed. The trial court's dismissal should be affirmed.

2. THE DEFINITION OF "PLACES OF PUBLIC ACCOMMODATION" IN RSMO. §213.010(15)(E) AND THE DEFINITION OF "EMPLOYER" IN RSMO. §213.010(7) DO NOT ESTABLISH THE SCHOOL DISTRICT OR BOARD OF EDUCATION ARE "PERSONS" SUBJECT TO LIABILITY UNDER THE ACT.

Within Section III.b. of Appellant's Brief, RMA acknowledges the Missouri legislature did not include the state or its agencies within the definition of "person" in RSMo. §213.010(14); however, R.M.A suggests the definition of "places of public accommodation" in RSMo. §213.010(15)(e) establishes the legislature intended to hold the state accountable under RSMo. §213.065. Further, within Section III.c. of Appellant's Brief, RMA suggests because RSMo. §213.010(7) includes "the state, or any political or civil subdivision thereof" in the definition of "employer", the Missouri legislature intended to include the state and its agencies and subdivisions in the definition of "person" in RSMo. §213.010(14), otherwise unlawful discrimination in employment could not be pursued. Both of RMA's arguments are without merit.

With regard to RMA's first argument, RMA says, "To include public facilities as places of public accommodation, but not permit an action to be brought against the entities providing such accommodation renders subsection (15)(e) meaningless." Such is not true. Under RSMo. §213.010(15)(e), a "place of public accommodation" includes

"any public facility owned, operated, or managed by or on behalf of this state or any agency or subdivision thereof, or any public corporation. . . ." RSMo. §213.065 addresses discrimination in public accommodations and when a "person" engages in an unlawful discriminatory practice as it relates to a "place of public accommodation". Simply because public facilities may be included as a "place of public accommodation" does not mean the Missouri legislature intended suit could be brought against the state and its agencies. Again, such a finding would be directly contrary to the legislature intent as demonstrated by the definition of "person" and "employer". Further, simply because public facilities may be included as a "place of public accommodation" does not render RSMo. 213.010(15)(e) meaningless. A claim can still be pursued against a "person," as that term is defined by the Act.

With regard to RMA's second argument, RMA essentially suggests there is no way to address employment discrimination if public entities are not a "person" within the scope of RSMo. §213.010(14) because under RSMo. §213.075, an administrative complaint can only be filed against a "person". RSMo. §213.055 addresses unlawful employment practices and when an "employer", "labor organization", "joint labor-management committee" and "employment agency" engage in such practices. As noted above, RSMo. §213.010(7) defines an "employer" to include "the state, or any political or civil subdivision thereof" or "any 'person' employing six or more 'persons' within the state and any 'person' directly acting in the interest of an 'employer,' but does not include corporations owned and operated by religious or sectarian groups." RSMo. §213.075 addresses the filing of an administrative charge against the person alleged to

have committed the unlawful discriminatory practice. These provisions clearly set forth who can be pursued for alleged unlawful employment practices under the Act. So, contrary to RMA's suggestion, employment discrimination can be addressed even if public entities are not "persons". Regardless, this case does not involve a claim under RSMo. §213.055 for unlawful employment practices, but rather a claim under RSMo. §213.065.

Through the arguments in Sections III.b. and c. of Appellant's Brief, what RMA is suggesting is this Court should conclude the Missouri legislature meant to but forgot to include "the state, or any political or civil subdivision thereof" in the definition of "person" set forth in RSMo. §213.010(14), although it remembered to include it in the definition of "employer" set forth in RSMo. §213.010(7), seven short sections above. This suggestion is contrary to the plain language of the statute and would be improper. As discussed above, the Missouri legislature specifically included "the state, or any political or civil subdivision thereof" in the definition of "employer" in RSMo. §213.010(7) but not in the definition of "person" in RSMo. §213.010(14). As such, it can only be concluded The Blue Springs R-IV School District and Blue Springs School District Board of Education were not intended to be and are not "persons" within the scope of RSMo. §213.010(14) such that they can have potential liability under RSMo. §213.065.2. As such, RMA's Petition fails to state a claim on which relief can be granted and was properly dismissed. The trial court's dismissal should be affirmed.

C. CONCLUSION

Within the Amicus Brief filed by the Kansas City Chapter of the National Employment Lawyers Association (KC-NELA), it makes similar arguments to those made by RMA in relation to the definition of "person" in §213.010(14). KC-NELA says public school administrators are "persons" because they are "individuals". This has nothing to do with the issue in this case as no individuals have been sued. KC-NELA also suggests public schools are "persons" because they are public corporations and the definition includes "corporation". This is the same argument raised by RMA, which as noted above is incorrect. KC-NELA also suggests public schools are "persons" because the definition includes "organizations" and "organized group of persons." Again, for the same reasons, this argument fails as well as it ignores the Missouri legislature's plain intent and the rules of statutory construction. The arguments of KC-NELA provide this Court with nothing new or different to consider.

When the Court considers the language of the statutes at issue, the Missouri legislature's intent is clear. If the Missouri legislature intended to include "the state, or any political or civil subdivision thereof" in the definition of "person" set forth in RSMo. §213.010(14), it could have done so, just like it did with the definition of "employer" set forth in RSMo. §213.010(7). However, it did not. The Blue Springs R-IV School District and Blue Springs School District Board of Education were not intended to be and are not "persons" within the scope of RSMo. §213.010(14) such that they can have potential liability under RSMo. §213.065.2. As such, RMA's Petition fails to state a claim on which relief can be granted and was properly dismissed. The trial court's dismissal should be affirmed.

III. THE TRIAL COURT DID NOT ERR IN GRANTING A DISMISSAL AS THE PETITION IN THIS MATTER FAILED TO STATE A CLAIM ON WHICH RELIEF COULD BE GRANTED BECAUSE THE CLAIMS ALLEGED ARE BARRED BY COLLATERAL ESTOPPEL. (RESPONSE TO RMA'S POINT III).

A. STANDARD OF REVIEW

"The standard of review for a trial court's grant of a motion to dismiss is de novo." *Evans v. Empire Dist. Elec. Co.*, 346 S.W.3d 313, 314 (Mo. App. 2011)(citation omitted). "The pleading is granted its broadest intendment, all facts alleged are treated as true, and it is construed favorably to the plaintiff to determine whether the averments invoke substantive principles of law which entitle the plaintiff to relief." *Dean v. Noble*, 477 S.W.3d 197, 203 (Mo. App. 2015)(citation omitted). "When the trial court does not state a basis for dismissal, we presume that it was based on the grounds alleged in the motion to dismiss; we will affirm if the dismissal is proper under any of the grounds stated in the motion." *Id*. (citation omitted).

B. ANALYSIS

Within Sections IV.a., b., c., d. and e. of Appellant's Brief, RMA alleges dismissal was improper because collateral estoppel cannot be applied to the claims in the current case and even if it could, the elements for application of the doctrine have not been established. RMA's argument on this point is incorrect.

"Collateral estoppel, a.k.a. issue preclusion, precludes relitigation of an issue previously decided and incorporated into an earlier judgment." *Johnson v. Missouri*

Department of Health and Senior Services, 174 S.W.3d 568, 580 (Mo. App. 2005)(citation omitted). "The doctrine of collateral estoppel applies when once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action including a party to the first cause." *Bi-State Development Agency v. Whelan Security Company*, 679 S.W.2d 332, 335 (Mo. App. 1984)(citation omitted). "For an issue in the present action to be precluded by the doctrine of collateral estoppel: (1) it must be identical to an issue decided in a prior adjudication; (2) the prior adjudication must have resulted in a judgment on the merits; (3) the party against whom the doctrine is being asserted must have been a party or was in privity with a party to the prior adjudication; and, (4) the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the prior adjudication." *Johnson*, 174 S.W.3d at 580. (citation omitted). "A judgment on the merits is one rendered after argument and investigation and when it is determined which party is in the right, as distinguished from a judgment rendered upon some preliminary or merely technical point, or by default, or without trial." *Bi-State*, 679 S.W.2d at 336.

1. ALL REQUIREMENTS FOR APPLICATION OF COLLATERAL ESTOPPEL HAVE BEEN MET.

As for the first requirement that the issue in the present action be identical to the issue decided in the prior adjudication, the requirement has been met. The heart of this case and the prior Petition in Mandamus proceeding is RMA's claim the Act provides protection to RMA's transgender status and, as such, entitlement to access to the boys' restroom and locker room at school. (L.F. 8-20 and S.L.F. 151-168; Appendix A6-A23).

In the present case, RMA alleged the Blue Springs R-IV School District and Blue Springs School District Board of Education engaged in discrimination in violation of the public accommodation provision of the Act because they have denied access to the boys' restroom and locker rooms at school because RMA is transgender. (L.F. 8-20). In the Petition in Mandamus proceeding, RMA alleged the Blue Springs R-IV School District and Blue Springs School District Board of Education engaged in discrimination based on gender identity in violation of the public accommodation provision of the Act given they denied RMA access to the boys' restroom and locker rooms at school. (S.L.F. 151-168; Appendix A6-A23). The issue presented, whether the Act provides protection to gender identity/transgender status, and which was decided in both cases is identical.

As for the second requirement that the prior adjudication must have resulted in a judgment on the merits, this requirement has also been met. The judgment in the prior Petition in Mandamus proceeding was clearly a judgment on the merits.

In the Petition in Mandamus proceeding, after the Petition was filed, the Court held a Case Management Conference on November 5, 2014, at which time a briefing schedule was set. (S.L.F. 146-150; Appendix A1-A5). On January 12, 2015, the parties filed their Amended Joint Stipulation of Facts wherein they stipulated RMA was born a female and was a female to male transgender student, RMA still possessed female genitalia and the standard of care for gender confirmation surgery requires an individual reach the age of 18 before such surgery would be performed and RMA's Writ of Mandamus was requesting the Court mandate a student with female genitalia who identifies as a male, be allowed to use the boys' restroom and locker rooms. (S.L.F. 169-

172; Appendix A24-A27). That same day, RMA filed a Brief in Support of Writ of Mandamus arguing discrimination based on transgender status is prohibited by the Missouri Human Rights Act, including RSMo. §213.065. (S.L.F. 173-211; Appendix A28-A66). That same day as well, Blue Springs R-IV School District and Blue Springs School District Board of Education filed their Motion to Deny the Writ of Mandamus and Suggestions in Support addressing that the Missouri Human Rights Act does not extend its protection to gender identity/transgender status. (S.L.F. 212-243; Appendix A67-A98). On January 22, 2015, RMA filed Suggestions in Opposition to their Motion to Deny Requested Writ of Mandamus arguing again that discrimination based on transgender status is prohibited by the Act. (S.L.F. 244-252; Appendix A99-A107). On January 27, 2015, Blue Springs R-IV School District and Blue Springs School District Board of Education filed their Further Suggestions in Support of their Motion to Deny the Writ of Mandamus discussing the plain language of the Missouri Human Rights Act does not include gender identity as a protected class. (S.L.F. 253-261; Appendix A108-A116). Thereafter, on February 11, 2015, the Court held oral argument during which counsel for the parties argued their respective positions as to whether gender identity/transgender is a protected class under the Missouri Human Rights Act. (S.L.F. 262-299; Appendix A117-A154). At the conclusion of the hearing, the Court directed counsel to submit proposed judgments. (S.L.F. 262-299; Appendix A117-A154). On February 23, 2015, RMA filed a proposed Judgment Upon Petition in Mandamus and proposed Writ of Mandamus. (S.L.F. 300-312; Appendix A155-A167). That same day, Blue Springs R-IV School

District and Blue Springs School District Board of Education filed their proposed Final Judgment and Order. (S.L.F. 313-325; Appendix A168-A180).

Thereafter, on March 5, 2015, the trial court entered its Judgment in the Petition in Mandamus proceeding wherein it denied RMA's Petition. (S.L.F. 326-339; Appendix A181-A194). Therein the Court included the Findings of Fact stipulated to by the parties and also made Additional Factual Findings, with some of the additional findings as follows:

> 24. While Relator RMA has not been subject to harassment or bullying, the Court finds that the introduction of a transgender female to male student into the boys' restroom and locker room does present unique challenges in protecting not only RMA, but also in respecting the rights and safety of all students utilizing those facilities.
>
> 25. Respondents have denied Relator RMA's access to the boys' restroom and locker rooms, in part and understandably, due to the possible safety issues that could arise from allowing a student with female genitalia to freely access boys' restroom and locker room facilities.
>
> 37. RMA has not undergone a surgical procedure to modify gender, but has undergone the implantation of a hormone inhibitor.
>
> 38. On October 24, 2014, Relators' filed an additional and separate complaint with the Missouri Commission on Human Rights ("MCHR"), alleging discrimination on the same factual basis presented to this Court as the basis of the Writ of Mandamus.

(S.L.F. 329-331; Appendix A184-A196). Within the Judgment, the Court noted, "Relators are seeking the Court's adjudication on an unsettled area of law. Relator's own counsel admitted as much in oral arguments on February 11, 2015. Relators have admitted that no specific Missouri law or case provides RMA with a specific right, as a transgender student, to utilize the restroom and locker room facilities of RMA's choice." (S.L.F. 332; Appendix A187). The Court also noted, "Relators also lack an existing, clear and unconditional legal right based upon the MHRA and upon which a writ of mandamus could issue. Legislative history and recent legislative actions show that the MHRA specifically does not extend its protection to gender identity in the State of Missouri" and that noticeably missing from RSMo. 213.065 were the terms "transgender" and/or "gender identity." (S.L.F. 336; Appendix A191). The Court went on to find, "While some state legislatures have decided to include gender identity as a protected class, the majority of states, including Missouri, have not. The legal landscape on this issue may certainly change in the future, but at the present time the MHRA does not provide a basis for the issuance of a writ of mandamus in this case because it does not clearly and unequivocally establish a legal right for Relator RMA to have unhindered access to the boys' restrooms, locker room, and any other boys' facilities within the Blue Springs R-IV School District on the basis of Relator RMA's expressed gender identity." (S.L.F. 337; Appendix A181-A182).

The trial court's judgment on March 5, 2015 in the Petition in Mandamus proceeding was clearly on the merits. The judgment was rendered after investigation and extensive briefing and argument by counsel for the parties. Further, the trial court in the

Petition in Mandamus proceeding determined the Blue Springs R-IV School District and Blue Springs School District Board of Education were in the right and RMA had no valid claim under the Missouri Human Rights Act. Again, as stated above, "A judgment on the merits is one rendered after argument and investigation and when it is determined which party is in the right, as distinguished from a judgment rendered upon some preliminary or merely technical point, or by default, or without trial." *Bi-State*, 679 S.W.2d at 336.

As for the third requirement that the party against whom the doctrine is asserted must have been a party or in privity with a party in the prior adjudication, there can be no genuine argument the requirement has not been satisfied. Both the prior Petition in Mandamus proceeding and the present case are brought by RMA through Next Friend Rachelle Appleberry. (L.F. 8-20 and S.L.F. 151-168; Appendix A6-A23). Clearly, RMA was a party to the prior adjudication and is a party to the present action.

As for the fourth requirement that the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the prior adjudication, this requirement has also been met. As noted above in discussing the second requirement, RMA actively participated in the Petition in Mandamus proceeding and had a full and fair opportunity to litigate the issue as to whether the Act provides protection to gender identity/transgender status and, as such, entitlement to access to the boys' restrooms and locker rooms at school.

Through the present case, RMA is now attempting to relitigate the issue of whether the Act provides protection to gender identity/transgender status and, as such,

entitlement to access to the boys' restrooms and locker rooms at school because the Court in the Petition in Mandamus proceeding did not agree with RMA's position. Rather, the Court held the Act does not provide protection to RMA's transgender status and, as such, entitlement to access to the boys' restrooms and locker rooms at school. RMA is not entitled to relitigate the issue and should be collaterally estopped from doing so.

2. RMA CANNOT AVOID APPLICATION OF COLLATERAL ESTOPPEL.

In an effort to avoid this finding, within Section IV.a. of Appellant's Brief, RMA suggests dismissal was improper because collateral estoppel was not properly raised, given it is an affirmative defense. RMA misses the mark. This is not a situation where an answer was filed by the Blue Springs R-IV School District and Blue Springs School District Board of Education and they failed to raise collateral estoppel as an affirmative defense. Rather, at the very outset of this case, Blue Springs R-IV School District and Blue Springs School District Board of Education filed a Motion to Dismiss and, as such, were not required to file an Answer until such time the trial court ruled on the Motion. And, while RMA suggests an affirmative defense is not one that can be raised in a Motion to Dismiss, such is not true. In *Johnson v. Raban*, 702 S.W.2d 134, 136 (Mo. App. 1985), the Missouri Court of Appeals held an affirmative defense, such as issue preclusion, can be raised in a Motion to Dismiss. (citation omitted). Collateral estoppel was properly raised and before the trial court.

Thereafter, within Sections IV.b., c., d. and e. of Appellant's Brief, RMA argues the elements necessary for application of the doctrine of collateral estoppel were not met. Such is not true.

Within Section IV.b. of Appellant's Brief, RMA suggests collateral estoppel cannot be applied based on the decision in the Petition in Mandamus proceeding because the issue is one of law in this case. "The doctrine of collateral estoppel applies when once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action including a party to the first cause." *Bi-State Development Agency v. Whelan Security Company*, 679 S.W.2d 332, 335 (Mo. App. 1984)(citation omitted). *See also United States v. Stauffer Chemical Company*, 464 US 165 (1984)(wherein plaintiff argued the legal question of whether private contractors were "authorized representatives," as the term was defined in the Clean Air Act, had already been decided in prior litigation between the parties such that the government was estopped from relitigating the issue and the Court agreed collateral estoppel applied). So, contrary to RMA's suggestion, collateral estoppel can and does apply in this case.

Next, within Section IV.c. of Appellant's Brief, RMA suggests the Court in the Petition in Mandamus proceeding did not make a ruling as to whether the Act extended its protection to gender identity. As discussed above, this is clearly an incorrect statement.

Within Section IV.d. of Appellant's Brief, RMA suggests collateral estoppel cannot be applied because there has been no adjudication on the merits denying RMA's

claim under the Act and RMA had no full and fair opportunity to litigate the issue. This statement is likewise not correct. As discussed above, the court in the Petition in Mandamus proceeding made a decision on the merits, after RMA had a full and fair opportunity to brief and litigate the issue as to whether the Act provides protection to RMA's transgender status and, as such, entitlement to access to the boys' restrooms and locker rooms at school.

Finally, within Section IV.e. of Appellant's Brief, RMA suggests it would be unfair to use the Judgment in the Petition in Mandamus proceeding to deny the ability to bring the present action. Contrary to RMA's suggestion, RMA is not in a legal "catch-22". RMA's claims were not dismissed because the Petition in Mandamus was denied. Rather, the claims were dismissed because RMA has no valid claim under the Act as it does not provide protection for claims based on gender identity/transgender status. Given this, what is unfair is to subject the Blue Springs R-IV School District and Blue Springs School District Board of Education to yet another lawsuit where the issue of whether RMA has a valid claim under the Act has already been decided.

C. CONCLUSION

All elements necessary for application of the doctrine of collateral estoppel were established. The parties already litigated the issue of whether the Missouri Human Rights Act extends its protection to gender identity/transgender status. RMA now wants to re-litigate the same issue in this case because the issue was previously ruled in favor of Blue Springs R-IV School District and Blue Springs School District Board of Education. Such is fundamentally unfair. As such, RMA's Petition fails to state a claim on which relief

can be granted and was properly dismissed. The trial court's dismissal should be affirmed.

CONCLUSION

Respondents Blue Springs R-IV School District and Blue Springs School District Board of Education's Motion to Dismiss was properly granted as the Missouri Human Rights Act does not extend its protection to gender identity/transgender status, the District and Board are not "persons' under RSMo. §213.010(14) such that they can have liability under RSMo. §213.065 and RMA's claims are barred by collateral estoppel.

For these reasons, all as specifically set forth above, Judge Roldan's dismissal should be affirmed. Blue Springs R-IV School District and Blue Springs School District Board of Education were entitled to dismissal of RMA's Petition for Damages and entry of Judgment in their favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND

CERTIFICATE OF COMPLIANCE WITH SUPREME COURT RULES

I certify that:

1. I, Merry M. Tucker, signed the original of the above and foregoing Respondents' Brief, which is maintained in my office;

2. Respondent's Brief complies with the limitations contained in Rule 84.06(b);

3. There are 12,995 words in the foregoing Brief, not including the Table of Contents and Table of Authorities; and

4. A copy of the foregoing Respondents' Brief was served via email, along with a copy of the Supplemental Legal File and Appendix, to:

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