

SC91907

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Appellant,

v.

LACONIA Z. CURTIS
as Next Friend for her son
DERRICK L. CARTWRIGHT,

Respondent

Appeal from the City of St. Louis, Circuit Court,
The Honorable John J. Riley, Judge.

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the Circuit Court of the City of St. Louis, against the State of Missouri in the amount of \$315,000.00. After an unpublished opinion by the Missouri Court of Appeals, Eastern District, this Court ordered the case transferred on October 4, 2011. The Court, therefore, has jurisdiction under Mo. Const. Art. V, Section 10 (as amended 1982).

STATEMENT OF THE FACTS

The State of Missouri appeals from a judgment after jury verdict in favor of Derrick Cartwright. Cartwright was injured when he threw a potted plant through a window and jumped out of the building operated by Metropolitan Psychiatric Center, where he was a patient. At the time, Cartwright and another patient were attempting to escape from the Center. Cartwright was given smoking privileges on a third story courtyard balcony. (Tr. 235, 259). While on his second smoke break, Cartwright and the other patient climbed down from the patio area (Supp. Tr. 41) using a series of terraces and ran through an interior courtyard to the administrative area of the Center. (Ex. 14 Cartwright Depo, pgs. 36-37).

The escapees unsuccessfully tried to open two doors into the administrative area of the Center before finding an unlocked door. (Ex. 15, Cartwright Depo, pgs 42-43). The doors were supposed to be self-locking, (Tr. 182-183), and be kept locked at all times. (Tr. 188-189). There was disputed evidence about whether there had been prior problems with the self-locking doors. (Tr. 185, 189). After entering this wing of the Center, the two went down a hallway in the administrative side of the Center (Ex. 15, Cartwright Depo., pg. 45), going through a set of doors and activating an alarm. (Ex. 15, pg. 46). Cartwright saw another hallway, but when they ran to the end that door was locked. (Ex. pg. 46). Cartwright then picked

up a flower pot and broke the window. (Ex. 15, pg. 47). Cartwright knew that they were not at ground level and said he was not going to jump at first until he saw his companion jump. (Ex. pg. 51). Cartwright then jumped through the window sustaining severe injuries from the fall. (Ex. 15 pg. 53, Pltf. Ex. 4-7 and 14).

All of the windows in the patient areas were made of laminated glass (Supp. Tr. 66-67) for safety purposes and also to prevent patients from escaping. (Supp. Tr.67, Tr. 184). The pharmacy and administration wing had tempered, rather than laminated, glass because patients were not supposed to be in that area unsupervised. (Tr. 200-201). Cost considerations versus risk were a factor in using non-laminated glass in non-patient areas. (Tr. 214, Supp. Tr. 72-73). Cartwright's verdict director provides in the first paragraph, "defendant failed to install a laminated safety window in an area to which Derrick Cartwright gained access and as a result the Metropolitan Psychiatric Center was not reasonably safe." The State asserted, prior to and during trial, that the claim was barred by the doctrine of sovereign immunity. After denial of its motion for judgment notwithstanding the verdict, the State appeals.

POINT RELIED ON

**THE TRIAL COURT ERRED IN DENYING THE STATE'S
MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT
BECAUSE PLAINTIFF'S CLAIM WAS BARRED BY THE DOCTRINE
OF SOVEREIGN IMMUNITY IN THAT PLAINTIFF FAILED TO
PROVE A DANGEROUS CONDITION OF PROPERTY THAT WOULD
WAIVE IMMUNITY**

Alexander v. State,

756 S.W.2d 539 (Mo. banc 1988)

Boever v. Special Sch. Dist.,

296 S.W.3d 487 (Mo. App. 2009)

Cain v. Missouri Highways and Transp. Comm'n.,

239 S.W.3d 590 (Mo. banc 2007)

Necker by Necker v. City of Bridgeton,

938 S.W.2d 651 (Mo. App. 1997)

ARGUMENT

A. Standard of Review

Whether a court should have granted a motion for judgment notwithstanding the verdict requires an examination of whether the plaintiff made a submissible case. All facts are reviewed in the most favorable light in considering this question. The question of whether immunity bars a claim against a public entity is an issue of law to be reviewed *de novo* by the appellate court. *Williams v. Kimes*, 996 S.W.2d 43, 44-45 (Mo. banc 1995). In determining whether a submissible case has been made, any dispute as to factual matters is resolved in favor of the plaintiff. *Seward v. Terminal R.R. Ass'n.*, 854 S.W.2d 426, 428 (Mo. banc 1993).

As an historical principle of law, the State has enjoyed complete immunity for torts. Sovereign immunity was the rule in Missouri until this court abolished the doctrine in the decision of *Jones v. Mo. Highway and Transp. Dept.*, 557 S.W.2d 225 (Mo. banc 1997). The same year, the legislature reinstated sovereign immunity as it existed before *Jones*, but created two exceptions by waiving the state's immunity when injuries resulted from the operation of a motor vehicle or where injury was caused by the condition of the sovereign's property. RSMo. 2000, Section 537.600. (see Appendix) The circumstances included within the property condition waiver are at issue here.

Because the burden of proof rests upon the plaintiff to show a waiver of immunity, *Kanagawa v. State of Missouri by and through Freeman*, 685 S.W.2d 831 (Mo. banc 1985), he must prove four elements: (1) that the property was in a dangerous condition at the time of the injury; (2) that the injury directly resulted from the dangerous condition; (3) that the condition created a foreseeable risk of injury of the type that occurred; and (4) that either a *negligent or wrongful act or omission created the dangerous condition* or that public entity had actual or constructive notice of the dangerous condition in sufficient time to have protected the Plaintiff from injury by the condition. *Id.* at 835 (emphasis added).

Although the State suggests that the chain of causation here is almost *Palsgrafian*, the dispositive issue here involves the first element. Plaintiff submitted his case on the theory that because the tempered glass window that Cartwright jumped through was not made of laminated safety glass the Metropolitan Psychiatric Center was dangerous (“not reasonably safe”). Despite the potential issues with the instruction which are not raised here, it is apparent that the true gist of Cartwright’s theory is that the window was unsafe because it did not have laminated glass. The question is, therefore, whether the window through which Cartwright jumped was in a dangerous condition before Cartwright broke it.

Much of the litigation since the enactment of Section 537.600.1(2) has

concerned what type of defect is necessary to create a dangerous condition of state property for which sovereign immunity is waived. This case falls either between two lines of cases or within a line of cases that are contrary to the trial court's failure to enter judgment notwithstanding the verdict

B. Failure to Prove a Dangerous Condition in the Property Itself.

This Court has most notably taken up such questions regarding “dangerous conditions” in two cases since *Kanagawa, Alexander v. State*, 756 S.W.2d 539 (Mo. banc 1988) and *Cain v. Missouri Highways and Transp. Comm'n.*, 239 S.W.3d 590 (Mo. banc 2007). In each, the Court affirmed that the “dangerous condition” must be present in the physical property itself, not in the action or inaction of a person – state employee or third party – on that property.

In *Alexander*, the Court found that there was a dangerous condition created by the presence of a partition at the bottom of a ladder, even though the partition may have been placed there after the injured person climbed the ladder before descending. 756 S.W.3d at 541-43. The Court held that “the danger [need] not [be] created by any intrinsic defect in the property involved, but by the dangerous condition created by the positioning of various items of property.” *Id.* at 542. The Court saw a parallel to *Jones v. St. Louis Housing Auth.*, 726 S.W.2d 766 (Mo. App. 1987), where the injury was caused by “debris on the public entity's yard,” *i.e.*, from “items of property” that were

“positioned in such a way as to be dangerous when a mower was used – as would be expected – on the property.

More recently, the Court addressed a falling tree in *Cain*. There, the Court recognized that until a crew arrived to remove the tree, “there was no physical defect in the tree” (239 S.W.3d at 594) – just as there may have been no physical defect in the ladder until the partition was placed at the bottom. A state employee partially cut the tree and left it standing 45 minutes before it fell, thus “creat[ing] a dangerous condition within the meaning of the statute.” *Id.* By comparison, here there was no physical defect in the window until Cartwright, a third party, not a state employee, threw a potted plant through the window, breaking the glass, and then jumped.

Quoting and adding its own emphasis to *Kanagawa*, the Court in *Cain* observed that “‘Dangerous condition’ ... ‘refers to *defects in the physical condition* of the public entity’s property.’” 239 S.W.3d at 594 (emphasis added). The “defects in physical condition” of the ladder in *Alexander* and the tree in *Cain* were created by the affirmative steps of placing a ladder and cutting a trunk.

This case does not, of course, fit into the *Alexander-Cain* mold. There was no last-moment change to the window. Cartwright would argue that it was foreseeable that a patient could, through a series of machinations, reach the non-patient area window in question, and that therefore the Center

should have designed the window with laminated glass. But that argument demonstrates the essential failing of Cartwright's theory – that the Center failed to adequately protect Cartwright from eloping. Even if the theory was that the window was defective because of a failure of a third party to properly design the building, that theory was not submitted to the jury. Such ordinary negligence is barred by sovereign immunity.

This case is within – or at least much closer to – a second line of cases, a line that has not been addressed, to date, by this Court. In those cases, the court of appeals has repeatedly found (consistent with *Alexander* and *Cain*) that the condition must be at least a physical deficiency, and then expressly excluded claims that are dependent on mere human action or inaction that create some kind of danger in a facility that is otherwise, by design and policy, not dangerous. In those cases, the court of appeals has held that failure to supervise or warn does not constitute a dangerous condition. *Boever v. Special Sch. Dist.*, 296 S.W.3d 487, 493 (Mo. App. 2009). “Failure to perform an intangible act, whether it be by failure to supervise or warn, cannot constitute a dangerous ‘condition’ of the ‘property for purposes of waiving sovereign immunity.’” *Necker by Necker v. City of Bridgeton*, 938 S.W.2d 651, 655 (Mo. App. 1997).

In *Bridgeton* a nine year old girl left the gym where her mother was playing volleyball and proceeded to play on a balance beam being stored in a

hallway. She fell from the beam and her mother sued claiming a dangerous condition of property because the city could foresee that a child would play on the beam. In rejecting her claim the court said: “Intangible acts such as inadequate supervision, lack of warnings or signs, the inability to secure an area and the lack of barricades do not create a dangerous condition.” *Id* at 655.

That rule was again applied by the court of appeals in *Boever*. There, a severely handicapped child choked to death on food left in the classroom (a known risk for that particular child). 296 S.W.3d at 490. The court upheld dismissal on the basis of sovereign immunity because essentially the claim was for a failure to warn, protect, or guard against injury. *Id.* at 494. The classroom itself was not dangerous; it was the act of leaving food within reach of the child that created the danger. Similarly, here the window itself was not dangerous; it was either the acts of Cartwright (jumping from balcony to balcony; entering alarmed doors; etc.) or perhaps someone leaving unlocked a door that should have been locked (albeit a door that Cartwright could only reach by the circuitous means he took), or throwing a pot through a window that created the danger. The verdict in this case cannot be reconciled with *Boever*.

Nor can it be reconciled with *Stevenson v. City of St. Louis Sch. Dist.*, 820 S.W.2d 609 (Mo. App. 1991). That case arose when a student fell in the

open stairwell while sliding down a banister. *Id.* at 611-12. The court of appeals found sovereign immunity not waived because a stairwell in a school was not in a dangerous condition. *Id.* at 613. There was nothing unsound, broken, loose, missing, or otherwise in a defective condition, and the danger was created solely by the activity of students sliding down banisters – something clearly against the rules, though reasonably foreseeable. Here, the injury occurred because the injured party took extraordinary steps to reach a location where the rules and policy – and, apparently but for someone neglecting to lock a door or discover an unlocked door– barred him from being.

The trial court should have granted judgment for the State on sovereign immunity grounds because of the *Boever* and *Stevenson* precedents. There was no evidence of a defect in the tempered glass window or any physical deficiency until the third party act of breaking the window.

CONCLUSION

This Court should reverse the decision of the trial court and direct the entry of judgment notwithstanding the verdict.

Respectfully submitted,
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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that:

1. The attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) in that it contains 2,454 words exclusive of the cover, this Certificate of Compliance and of Service and the signature block, as determined by the Word Count feature of the software in which it was prepared, WordPerfect 2007;

2. I hereby certify that a true and correct copy of the foregoing was filed electronically via CaseNet on November 3, 2011, to:

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