

**IN THE MISSOURI SUPREME COURT**

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**Case No. SC88271**

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**HORTENSE CAIN**

**Respondent,**

**v.**

**MISSOURI HIGHWAYS AND TRANSPORTATION COMMISSION**

**Appellant.**

APPEAL FROM THE CIRCUIT COURT OF MARION COUNTY, MISSOURI  
Case No. CV303-191CC

THE HONORABLE ROBERT M. CLAYTON, II

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**SUBSTITUTE BRIEF OF APPELLANT**  
**MISSOURI HIGHWAYS AND TRANSPORTATION COMMISSION**

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## **JURISDICTIONAL STATEMENT**

This is an appeal from a final judgment entered in the Circuit Court of Marion County, Missouri. This Court has asserted jurisdiction over the case by order of transfer, pursuant to Article V, Section 10 of the Constitution of Missouri.

## **STATEMENT OF FACTS**

On February 4, 2000, Hortense Cain was struck and injured by a falling tree (Tr. 326-329). At the time of injury, plaintiff was an inmate at the Women's Eastern Reception, Diagnostic and Correctional Center (Correctional Center) in Vandalia, Missouri, and was assigned to an inmate work crew that was maintaining right-of-way under the supervision and control of the Missouri Department of Transportation (Tr. 321, 326-327). It was the highest paying job in the Correctional Center and gave inmates an opportunity to work outside the facility (Tr. 197, 211).

The "work release program" provides inmates with training (Tr. 388), job skills (Tr. 388), and an opportunity to save money (Tr. 320-321). The program is voluntary (Tr. 317), offered only to those inmates who are within three years of their parole date (Tr. 320), have a high school diploma or GED (Tr. 313), and have perfect conduct (Tr. 313). In return for their labor, the inmates receive \$7.50 per 8-hour shift (Tr. 321-322).

February 4, 2000, was a cold and windy day (Tr. 228). That morning, plaintiff and two other inmates, Dana Fitzpatrick and Kristin Korte, were assigned to cut down a particular tree (Tr. 327). The tree was located on a hill approximately 25 to 30 feet from the MoDOT van and trailer (Tr. 229). Ms. Fitzpatrick was to drop and cut the tree into

pieces, which plaintiff and Ms. Korte were to stack (Tr. 187, 407). Until the tree was down, they were instructed to stand at its base with Ms. Fitzpatrick (Tr. 408). Their MoDOT supervisor, John Perkins, was supervising other inmates nearby (Tr. 245-246).

Using a chainsaw, Ms. Fitzpatrick cut pieces out of one side of the tree, with the intent that it fall away from the van and trailer (Tr. 231-232). While making these cuts, the chain slipped off and had to be replaced (Tr. 233). Next, Ms. Fitzpatrick began a straight cut on the opposite side of the tree (Tr. 233). After cutting approximately two inches into the tree, the chain slipped off once again (Tr. 233). While Ms. Fitzpatrick and Ms. Korte worked to replace the chain, plaintiff left the area at the base of the tree, and with her back to the cut tree (Tr. 407), walked toward the porta-potty located on the trailer (Tr. 177, 328). The tree fell unexpectedly and struck plaintiff from behind (Tr. 328-329). Her major injury was to her right knee, which was ultimately replaced with an artificial joint (Tr. 330, 333).

The case was tried on plaintiff's fifth amended petition (L.F. 013). In motions for directed verdict at the close of plaintiff's evidence and at the close of all evidence, MHTC argued that plaintiff's claim was barred by sovereign immunity (Tr. 355, 506; L.F. 42-49). These motions were overruled (Tr. 357, 507). Similarly, MHTC objected to the submission of plaintiff's verdict director (L.F. 50) on the grounds that it did not describe a dangerous condition of MHTC's property, and, therefore, did not instruct the jury on a recognized exception to sovereign immunity (Tr. 508-509). That objection was also overruled (Tr. 511).

The jury assessed plaintiff's damages at \$550,000 and found MHTC seventy-five percent (75%) at fault. Accordingly, judgment was entered against MHTC for \$412,500 (L.F. 112-113; App. 1). MHTC moved to reduce the judgment against it to \$305,021, pursuant to §537.610.2, R.S.Mo (2000) (L.F. 057). That motion was sustained and an amended judgment was entered (L.F. 107-108; App. 2-3). In its post-trial motions (L.F. 53-54), MHTC again raised its sovereign immunity objection to both plaintiff's claim and her verdict director (L.F. 53). These motions were also denied (L.F. 107, App. 2). MHTC filed this appeal and the Eastern District reversed the judgment on the basis of sovereign immunity. Thereafter, this Court granted transfer.

**POINTS RELIED ON**

**POINT I**

**THE TRIAL COURT ERRED IN DENYING DEFENDANT’S MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOT WITHSTANDING THE VERDICT BECAUSE PLAINTIFF FAILED TO PROVE ALL ELEMENTS OF A CAUSE OF ACTION UNDER §537.600, RSMO., IN THAT PLAINTIFF FAILED TO PROVE THAT DEFENDANT’S PROPERTY WAS IN A DANGEROUS CONDITION AND/OR THAT SUCH CONDITION WAS CREATED BY THE NEGLIGENT ACT OR OMISSION OF A PUBLIC EMPLOYEE.**

*Alexander v. State*, 756 S.W. 2d 5392 (Mo. banc 1988)

*State ex rel. Div. of Motor Carrier and Railroad Safety v. Russell*,

91 S.W. 3d 612 (Mo. banc 2002)

*State ex rel. St. Louis State Hospital v. Dowd*, 908 S.W. 2d 738 (Mo. App. 1995)

*Zubcic v. Missouri Portland Cement Company*, 710 S.W. 2d 18 (Mo. App. 1986)

## POINT II

**THE TRIAL COURT ERRED IN SUBMITTING INSTRUCTION NO. 7 BECAUSE THE INSTRUCTION FAILED TO FOLLOW THE SUBSTANTIVE LAW AND CONSTITUTED A ROVING COMMISSION INSTRUCTION IN THAT IT: (1) SUBMITTED FACTS WHICH DO NOT CONSTITUTE A RECOGNIZED EXCEPTION TO SOVEREIGN IMMUNITY UNDER §537.600, RSMO; (2) SUBMITTED INTANGIBLE ACTS AS THE BASIS FOR MHTC'S LIABILITY; AND/OR, (3) SUBMITTED EVIDENTIARY DETAILS OF MHTC'S ALLEGED NEGLIGENCE.**

*State ex rel. Div. of Motor Carrier and Railroad Safety v. Russell,*

91 S.W. 3d 612 (Mo. banc 2002)

*Brown v. St. Louis Public Service Co.,* 421 S.W. 2d 255 (Mo. banc 1967)

*Twin Chimneys Homeowners Ass'n. v. J.E. Jones Construction Co.,* 168 S.W. 3d 488

(Mo. App. 2005)

### **POINT III**

**THE TRIAL COURT ERRED IN PERMITTING RESPONDENT'S COUNSEL, OVER OBJECTION, TO ARGUE IN CLOSING ARGUMENT THAT THE JURY SHOULD "SEND A MESSAGE" BECAUSE SUCH AN ARGUMENT WAS PREJUDICIAL IN THAT IT IMPERMISSIBLY INTERJECTED A PLEA FOR PUNITIVE DAMAGES INTO THE TRIAL.**

*Smith v. Courter*, 531 S.W. 2d 743 (Mo. banc 1976)

*Pierce v. Platte-Clay Electric Cooperative, Inc.*, 769 S.W. 2d 769 (Mo. banc 1989)

*Tune v. Synergy Gas Corp.*, 883 S.W. 2d 10, 22 (Mo. banc 1994)

## POINT I

**THE TRIAL COURT ERRED IN DENYING DEFENDANT’S MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOT WITHSTANDING THE VERDICT BECAUSE PLAINTIFF FAILED TO PROVE ALL ELEMENTS OF A CAUSE OF ACTION UNDER §537.600, RSMO., IN THAT PLAINTIFF FAILED TO PROVE THAT DEFENDANT’S PROPERTY WAS IN A DANGEROUS CONDITION AND/OR THAT SUCH CONDITION WAS CREATED BY THE NEGLIGENT ACT OR OMISSION OF A PUBLIC EMPLOYEE.**

### Standard of Review

Where failure to grant a directed verdict for the defendant is the error asserted, appellate courts review the evidence presented at trial to determine whether or not the plaintiff introduced substantial evidence that tends to prove the facts essential to plaintiff’s recovery. In ruling on a motion for judgment notwithstanding the verdict, all evidence and inferences therefrom are considered in a light most favorable to the verdict.

*Thompson v. City of West Plains*, 935 S.W. 2d 334, 336 (Mo. App. 1996).

### Argument

Throughout this case, MHTC has consistently maintained that the plaintiff’s claim was barred by sovereign immunity. At the pleading stage, the issue was raised by motions to dismiss for failure to state a claim upon which relief could be granted (L.F. 20-22). During trial, defendant reasserted the argument in motions for directed verdict at the close of plaintiff’s evidence, and at the close of all evidence (L.F. 42-49). The issue

was raised again post-trial in MHTC's motion for judgment notwithstanding the verdict (L.F. 53-54). The trial court erred in denying those motions.

For almost three decades now, the appellate courts of this state have endeavored to interpret the meaning of §537.600, RSMo. (1978) and its amendments. In particular, a consistent definition of the term "dangerous condition" found in §537.600.1(2) has remained elusive. The present case provides this Court with an opportunity to clarify the law in this area, or to further add to its confusion.

In considering this case, MHTC urges the Court to keep several maxims of statutory construction in mind. First, it is well settled that statutes waiving sovereign immunity must be strictly construed. *Bartley vs. Special Road District of St. Louis County*, 649 SW 2d 864 (Mo. banc 1983). Further, this Court must ascertain the intent of the legislature from the language used, and give effect to that intent. *Wollard vs. City of Kansas City*, 831 SW 2d 200, 203 (Mo. banc 1992). Legislative intent is determined from the plain and ordinary meaning of the terms in the statute. *Id.* Finally, this Court should presume that the legislature did not intend an absurd or illogical result. *In re Beyersdorfer*, 59 S.W. 3d 523, 526 (Mo. banc 2001).

The plain meaning of the language in §537.600.1 is that the state and other public entities are not liable for all negligent acts or omissions of their employees. Sovereign immunity is only waived for injuries directly resulting from the negligent operation of motor vehicles, or from dangerous conditions in public property. In the present case, plaintiff failed to prove a claim under the "dangerous condition" exception set forth in that statute.

The initial inquiry is whether MHTC's property was in a dangerous condition at the time of plaintiff's injury. This Court has held that a dangerous condition may be either a defect in the physical condition of property, or a condition that poses a physical threat by its very existence, without intervention of third parties. *Alexander v. State*, 756 S.W. 2d 539 (Mo. banc 1988). There is no evidence that the tree at issue was defective or dangerous in any manner, prior to cuts being made in it by Dana Fitzpatrick. After those cuts were made, the forces of nature (i.e., gravity and perhaps wind) caused the tree to fall. Plaintiff was injured by that falling tree because she left the place where she had been instructed to stand by her supervisor (Tr. 349, 351).

Respondent may contend that the tree was physically defective at the time it fell, and thereby met the first test for a dangerous condition. A similar argument was rejected by the Eastern District in *Zubic v. Missouri Portland Cement Company*, 710 S.W. 2d 18 (Mo. App. 1986). There, the survivors of a deceased construction worker claimed that a sewer trench without shoring was a "physical defect" on the sewer district's property. The court reasoned, however, that the decedent was engaged in the construction of the sewer trench, and not a stranger to the condition of the property. Hence, it was held that the narrow definition of "dangerous condition" under §537.600 did not encompass injuries to the worker resulting from construction of the sewer trench. *Zubic, Id.* at 19. Likewise, Hortense Cain was a member of the crew that was cutting the tree, and not a stranger to the condition of appellant's property.

Moreover, there are no material distinctions between the present case and *State ex rel. St. Louis State Hospital v. Dowd*, 908 S.W. 2d 738 (Mo. App. 1995). In that case, a

patient and part-time worker at the hospital was injured when his supervisor activated a paper shredder. As in our case, the patient had alleged a violation of several safety policies regarding the use of the shredder. Notwithstanding the negligence of the supervisor, the Eastern District held that the paper shredder was not a dangerous condition in property, and that the claim against the hospital was barred by sovereign immunity. That court recently followed *Dowd* in *Farrell v. St. Louis County*, 190 S.W. 3d 401(Mo. App. 2006).

Respondent relies on *Warren vs. State*, 939 S.W. 2d 950 (Mo. App. 1997), where the Western District found that an unguarded table saw itself was a dangerous condition in property. The plaintiff in that case was injured while he was operating the saw, which was both defective because it lacked a proper guard, and posed a physical threat to him without intervention of a third party. The court held that the state was potentially liable due to the dangerous condition of the saw, and not because of any alleged omissions on the part of Department of Corrections personnel. If the saw had been properly guarded and plaintiff had been injured as a result of the negligent operation of it by another inmate, then the claim against the state would have been barred by sovereign immunity.

In *Bowman v. State*, 763 S.W. 2d 161 (Mo. App. 1988), the court analyzed a similar situation where one juvenile who was collecting trash under the supervision of the Division of Youth Services was injured by the negligent act of another. While acknowledging that the statute must be strictly construed, the court held that the negligent juvenile was a “public employee” within the meaning of §537.600. It reached that

conclusion by applying the “traditional common law doctrine of vicarious liability, and its attendant definitions of master and servant.” *Bowman, Id.* at 164.

With all due respect to the court’s analysis, a juvenile in the charge of the Division of Youth Services simply does not fall within the plain meaning of the term “public employee.” If the court had to resort to the common law definitions of master and servant to reach its conclusion, then it was not strictly construing §537.600. It does not matter that DYS “exercised actual control over the manner in which [the juvenile] performed her tasks.” *Id.* at 164. After all, control of one’s activities is an incident of juvenile detention.

Paradoxically, the court in *Bowman* also found that the injured juvenile was not a state employee and, therefore, was not limited to a remedy under the workers’ compensation act. 763 S.W. 2d at 166. Since *Bowman*, the workers’ compensation law has been amended to specifically exclude inmates from its application, §287.090.1(3), RSMo. In so doing, the general assembly made it clear that inmates would not be entitled to workers’ compensation benefits, whether they were working within a correctional facility or under a work release program like the one here.

In the present case, the Eastern District held that “inmates are barred from pursuing suits against the state for injuries occurred in the line of employment.” Slip Op., p.5. Whether or not this Court agrees with that general proposition, it is certainly consistent with the intent of the legislature. Plaintiff recovered a judgment of \$305,021 for an injury that resulted in a knee replacement. By contrast, the maximum amount that a state employee could have recovered for such an injury under workers’ compensation

would have been \$56,648.<sup>1</sup> Even after payment of attorney fees and expenses, as well as a Medicaid lien, Ms. Cain stands to recover substantially more than a state worker could for the same job-related injury. It cannot be reasonably argued that the legislature intended such an absurd result.

A significant distinction between *Bowman* and *St. Louis State Hospital v. Dowd, Id.*, is that the court in *Bowman* was considering the “negligent operation of a motor vehicle” exception to sovereign immunity, rather than the “dangerous condition” exception. The same distinction applies here, and *Dowd* is the controlling precedent. Just as the state hospital was not vicariously liable for the negligent operation of the paper shredder in *Dowd*, MHTC should not be vicariously liable for any negligence in the operation of the chainsaw in this case.

MHTC submits that *Zubcic* and *Dowd* are dispositive. Further analysis reveals that, if Dana Fitzpatrick is considered to be a third party, her conduct intervened to create the condition that resulted in plaintiff’s injury in this case. The existence of the tree “by itself was not a threat to plaintiff” until Ms. Fitzpatrick cut it. *State ex rel. St. Louis State Hospital v. Dowd*, 908 S.W. 2d at 740. See, also, *Alexander v. State*, 756 S.W. 2d at 542.

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<sup>1</sup> §287.190, RSMo., specifies 160 weeks compensation for the loss of a leg at the knee. The maximum average weekly wage in 2005 was \$354.05. Thus, under workers’ compensation, the maximum permanent partial disability recovery for a rating of 100% of the knee would be \$56,648.

This Court did not define what constitutes third-party intervention in *Alexander*. However, in *State ex rel. Nixon v. Westbrooke*, 143 S.W. 3d 737 (Mo. App. 2004), the court held that the dangerous condition exception to sovereign immunity did not apply, because the accident victim had alleged that the intervening acts of highway patrol troopers had caused his injuries. The state itself was immune from liability for a dangerous roadway condition allegedly created by the troopers' removal of traffic cones, and opening the road to traffic while the injured party was still removing debris from it.

Respondent did not contend that she, Dana Fitzpatrick or the other inmates were state employees. Instead, she argued that the inmates were agents under the supervision and control of MHTC. (Tr. 357, 509). The trial judge apparently distinguished them from third parties on that basis. (Tr. 511). Yet, if public employees like the troopers in *Westbrooke* and the supervisor in *Dowd* could be considered third parties, then Ms. Fitzpatrick surely should be in the present case. Her actions in cutting the tree intervened to cause it to be in a weakened or unstable condition, but not a dangerous condition under §537.600.

Whether Dana Fitzpatrick is found to be a public employee, a third party or both, respondent failed to prove that she was negligent in cutting the tree. Respondent's expert, Richard Nester, suggested that "one of the reasons" that the tree "could have" fallen unexpectedly was that "she [Fitzpatrick] cut too far." (Tr. 295). When asked whether the tree was "in a dangerous condition based upon the improper notching" at the time it fell, Mr. Nester could not say (Tr. 309).

There are a number of other reasons why the tree could have fallen, including wind, distribution of weight on the limbs of the tree, whether the tree was rotten, its natural lean, or the incline of the ground. (Tr. 483). There was evidence that it was a windy day (Tr. 184, 228), but no testimony as to whether, what direction, or how hard the wind was blowing at the time the tree fell. We also know that the tree was on a hill (Tr. 229) but the degree of incline was undefined. Absent evidence on those and other factors, as well as the size of the notch that was made by Ms. Fitzpatrick, it is speculative to conclude that the tree fell when or in the direction that it did because she cut it improperly. The doctrine of *res ipsa loquitur* cannot be used to make a submissible case under the dangerous condition exception to sovereign immunity. *Hale ex rel. v. City of Jefferson*, 6 S.W. 3d 187 (Mo. App. 1999).

Actually, respondent attempted to prove that a dangerous condition was created by the negligence of her supervisor, John Perkins. Evidence was adduced that the inmates were not properly trained in safe tree cutting techniques, and were not properly supervised at the time of the subject accident (Tr. 273-274). However, if the hospital in *Dowd* was not liable for the negligent act of its supervisor turning on a paper shredder when somebody's hand was in it, then MHTC cannot logically be liable for the omissions of Perkins here. Furthermore, our appellate courts have repeatedly held that intangible acts, such as inadequate training, inspection or supervision, do not create dangerous conditions in property. *Twente v. Ellis Fischel State Cancer Hospital*, 665 S.W. 2d 2 (Mo. App. 1983), *Thompson v. City of West Plains*, 935 S.W. 2d 334 (Mo. App. 1996),

*Necker v. City of Bridgeton*, 983 S.W. 2d 651 (Mo. App. 1997) and *O'Dell v. Missouri Department of Corrections*, 21 S.W. 3d 54 (Mo. App. 2000).

Respondent also claimed that Mr. Perkins created a dangerous condition by parking the trailer and porta-potty in the “drop zone.” (Tr. 288, 300-301). However, although Ms. Cain was walking in that direction at the time of her injury, the tree struck her before she arrived at her destination. If the potty had been further away, she still would have been walking towards it. The fact that the tree also fell in that direction was a coincidence. Hence, the location of the potty may have met the “but for” causation test, but the injury was not a “natural and probable consequence” of Perkins’ negligence, if any, in parking it there. *State ex rel. MHTC v. Dierker*, 961 S.W. 2d 58, 60 (Mo. banc 1998). Also, if Ms. Cain had stayed in the place where Perkins had instructed her to stand, this accident would not have happened.

Additionally, respondent presented evidence that a rope could have or should have been used to control the direction that the tree fell (Tr. 286). The inmates were not provided with ropes, or instructed on when or how to use them. Yet, if digging a 20’ deep sewer trench without shoring did not constitute a dangerous condition in *Zubcic, Id.*, then felling a tree without a rope would not be one here. Furthermore, no appellate decision has held that the manner in which an activity is conducted is the same thing as a “condition” in property, within the meaning of that term under §537.600.

Throughout this case, plaintiff has relied on the following language from *Kilventon v. United Missouri Bank*, 865 S.W. 2d 741, 745 (Mo. App. 1993):

If MHTC assumed an affirmative duty to implement safety precautions, by contract or conduct, it was liable for injuries caused by unsafe performance of the work if it negligently allowed the unsafe work continue. *Werdehausen v. Union Electric Co.*, 801 S.W. 2d 358, 364 (Mo. App. 1990).

Appellant respectfully points out that such language was dicta in *Werdehausen*, which dealt with the relationship between an owner and an independent contractor. It was cited in *Kilventon* in response to MHTC's argument that it had fully relinquished possession and control of the accident site to a contractor. Again, the Western District resorted to common law tort theory, rather than strictly construing §537.600. Further, unlike the worker in *Zubcic* and the plaintiff in this case, the firefighters in *Kilventon* were strangers to the condition of the property. Moreover, if *Kilventon* were decided today, the intervening criminal conduct of the arsonists would mandate summary judgment under *State ex rel. MHTC v. Dierker, Id.*

The issue here is not whether MHTC had a duty to supervise the inmates, or "allowed the unsafe work to continue." Rather, the issue is whether liability can be imposed for failure to supervise. For example, the Division of Motor Carrier and Railroad Safety had the duty to supervise the maintenance and signing of railroad crossings. Nevertheless, it could not be held liable for the condition of a particular crossing, because it did not own or have exclusive control of the property. *State ex rel. Div. MCRS v. Russell*, 91 S.W. 3d 612 (Mo. banc 2002). Again, failure to perform an intangible act,

including failure to supervise, cannot constitute a dangerous condition in property for the purposes of waiving sovereign immunity. *Russell, Id.* at 616.

At common law, plaintiff may have had a cause of action against a non-sovereign employer arising from the master-servant relationship.<sup>2</sup> However, any such action would have been a round peg that would not fit within the square holes of §537.600. Strictly construing that statute, plaintiff failed to prove that she was injured as a result of a dangerous condition in property that was caused by the negligent act or omission of a public employee. Consequently, she failed to make a submissible case under §537.600, her putative claim was barred by sovereign immunity, and the judgment of the trial court should be reversed.

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<sup>2</sup> See, e.g. § 510 of the Restatement (Second) of Agency.

## **POINT II**

**THE TRIAL COURT ERRED IN SUBMITTING INSTRUCTION NO. 7 BECAUSE THE INSTRUCTION FAILED TO FOLLOW THE SUBSTANTIVE LAW AND CONSTITUTED A ROVING COMMISSION INSTRUCTION IN THAT IT: (1) SUBMITTED FACTS WHICH DO NOT CONSTITUTE A RECOGNIZED EXCEPTION TO SOVEREIGN IMMUNITY UNDER §537.600, RSMO; (2) SUBMITTED INTANGIBLE ACTS AS THE BASIS FOR MHTC'S LIABILITY; AND/OR, (3) SUBMITTED EVIDENTIARY DETAILS OF MHTC'S ALLEGED NEGLIGENCE.**

### **Standard of Review**

When reviewing claimed instructional error, the court views the evidence most favorably to the instruction, disregards contrary evidence, and reverses where the party challenging the instruction shows that the instruction misdirected, misled or confused the jury, and there is a substantial indication of prejudice. The test is whether the instruction follows the substantive law and can be readily understood by the jury. *Twin Chimneys Homeowners Ass'n. v. J.E. Jones Construction Co.*, 168 S.W. 3d 488 (Mo. App. 2005).

### **Argument**

When an MAI instruction is applicable, its use is mandatory, and any deviations not required by the particular facts of the case are presumed prejudicially erroneous, unless and until the proponent of the instruction proves that no prejudice could have resulted from such deviation. See *Brown v. St. Louis Public Service Co.*, 421 S.W. 2d

255 (Mo. banc 1967). See, also, How to Use This Book, Missouri Approved Jury Instructions, Sixth Edition (2002) (“The use of a provided MAI is mandatory. If you think the change of a word or phrase will make it a better instruction, do not do it. You are falling into error if you do.”).

MAI 31.17 is the appropriate instruction when submitting a case against the state for a dangerous condition on the state’s property created by a state employee (App. 4). In paragraph First, it requires plaintiff to describe the “condition” that made the public entity’s property dangerous, like “there was oil on the gymnasium floor” or “the table saw was unguarded.” As these examples from the instruction indicate, a “condition” must be physical in nature, and can be either an intrinsic defect, e.g., an unguarded table saw; or a defect created by the positioning of objects, e.g., oil on the gymnasium floor. See *Alexander v. State of Missouri*, 756 S.W.2d 539 (Mo. banc 1988). In contrast, *intangible acts*, such as failure to warn<sup>3</sup> or to supervise the actions of others, do not constitute “dangerous conditions” for purposes of establishing a waiver of sovereign

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<sup>3</sup> Failure to warn or “adequately” warn does not constitute a dangerous condition in property. Rather, a hazard or dangerous condition must exist before a duty to warn arises. MHTC and other public entities have a duty to warn of conditions that make their highways or roads not reasonably safe for travel. However, the possibility that one or more drivers will fail to exercise due care or obey the rules of the road is not a “condition” in property. See Brief of Amicus Curiae in *Hensley v. Jackson County, Missouri*, SC88176.

immunity under §537.600, RSMo. See *Thompson v. City of West Plains*, 935 S.W.2d 334 (Mo. App. 1996) (alleged failure to inspect or supervise renovation project); *Necker v. City of Bridgeton*, 938 S.W.2d 651 (Mo. App. 1997) (alleged failure to supervise, warn or secure a balance beam); and, *O'Dell v. Missouri Department of Corrections*, 21 S.W.3d 54 (Mo. App. 2000) (failure to inspect, warn or secure ceiling tiles). See also, *Twente v. Ellis Fischel State Cancer Hospital*, 665 S.W.2d 2 (Mo. App. 1983) (alleged failure to provide security guards); *Stevenson v. City of St. Louis School District*, 820 S.W.2d 609 (Mo. App. 1991) (alleged failure to guard or barricade a banister and stairwell); and, *State ex rel. Div. of Motor Carrier and Railroad Safety v. Russell*, 91 S.W.3d 612 (Mo. banc 2002) (alleged failure to warn of railroad crossing's physical condition).

A proper MAI 31.17 submits only four ultimate facts to the jury: first, there existed a physical condition that made the public entity's property not reasonably safe; second, the unsafe condition was created by an employee of the public entity within the course and scope of his or her employment; third, said employee was thereby negligent; and, fourth, plaintiff sustained injury as a result of that negligence.

In comparison, Instruction No. 7 (App. 5), below, was plaintiff's verdict director, patterned on MAI 31.17. At trial and in its post-trial motions, MHTC objected to this instruction on the grounds: (1) that it did not follow the substantive law because it submitted facts which do not constitute a recognized exception to sovereign immunity (Tr. 508-509; LF. 55), and because (2) it constituted a *roving commission* to the jury (LF. 55).

INSTRUCTION NO. 7

In your verdict you must assess a percentage of fault to Defendant if you believe:

First, the tree was being cut down without training the tree cutters or supervising them or using ropes to control the direction of fall or clearing the drop zone, and, as a result, the Defendant's cutting down of the tree was not reasonable safe, and

Second, such condition was created by an employee of Missouri Highway and Transportation Commission, and

Third, the employee was thereby negligent, and

Fourth, as a direct result of such negligence, plaintiff sustained damage.

M.A.I. 31.17 & 37.01 Modified

Submitted by Plaintiff

According to plaintiff's verdict director, the dangerous condition was the cutting of the tree by inmates who were not trained or supervised, and without the use of ropes or clearing the drop zone. Alone or in the aggregate, these facts do not describe a "condition" of property, but the *manner* in which a "condition" is created. Moreover, facts relating to the alleged failure by MHTC to *train* or *supervise* the inmates, to *use* ropes, and/or to *clear* the drop zone constitute only *intangible acts*, which, as a matter of law, likewise do not constitute a recognized exception to sovereign immunity under

§537.600. Consequently, plaintiff's modification of paragraph First in MAI 31.17 was improper.

To improperly instruct the jury on the law is to mislead and confuse them. Accordingly, to the extent that Instruction No. 7 failed to follow the substantive law, it also constituted a *roving commission* to the jury, and its submission was reversible error. See *Twin Chimneys Homeowners Ass'n., Id.* at 499 (an instruction that fails to notify the jury of what acts or omissions of the party, if any, found by them from the evidence, would constitute liability, constitutes a *roving commission*). Instruction No. 7 also constituted a *roving commission* to the extent it submitted evidentiary details of MHTC's alleged negligence.

A proper instruction submits only the ultimate facts so as to avoid undue emphasis on certain evidence, confusion, and the danger of favoring one party over another. *Twin Chimneys Homeowners Ass'n., Id.* at 498. Plaintiff's Instruction No. 7 submitted facts concerning MHTC's alleged failure to train or supervise the inmates, its failure in using ropes and its failure in clearing the drop zone. These are not ultimate facts but evidentiary details, and they serve no legitimate function for the proper submission of a MAI 31.17 Instruction.

First and foremost, as a matter of law, these facts do not describe a dangerous physical condition in, upon and/or attending to MHTC's property. Indeed, these facts constitute *intangible acts*, which are insufficient to establish the waiver of sovereign immunity, and, thus, cannot form the basis of liability against MHTC. See *Twente, Stevenson, Thompson, Necker, O'Dell, and Russell*, *supra*. Secondly, their use belittles

the need and importance of a finding of a dangerous condition. Whether intended or not, the stacking of facts describing MHTC's alleged negligence in paragraph First diverted the jury's attention from finding a physical defect of property, and, instead, focused their attention solely on the existence of negligence. This unfairly favored plaintiff, as she no longer had to prove the existence of a dangerous condition—she needed only prove the existence of negligence, and MHTC is not liable for all negligent acts or omissions of its employees. Unfortunately, because these facts were submitted in the disjunctive, it is impossible to know which, if any, the jury found to assess liability against MHTC.

The instruction was improper and prejudicial. This is evident not only by the instruction's text, but also by the closing argument of plaintiff's counsel. In determining prejudicial error, it is proper to consider the argument of counsel. *Goff v. St. Luke's Hospital of Kansas City*, 753 S.W.2d 557, 565 (Mo. banc 1988).

During closing argument, plaintiff's counsel did not argue that a dangerous condition in property existed, but rather that the tree cutting process was not reasonably safe. Counsel specifically told the jury that fault could be assessed to MHTC, if it found *any one* of the acts or omissions stated in paragraph First of Instruction No. 7. "*That's the law,*" he declared (Tr. 521-522; 538-539). But, as previously discussed, that's not the law.

*Intangible acts*, like those in paragraph First, do not describe a dangerous condition in property, but the "process" by which a dangerous condition could result. Even if we assume for argument's sake that one of the four alternative submissions constituted a dangerous condition, the instruction's prejudicial taint remains, since one of

those submissions was a failure to supervise, which cannot constitute a dangerous condition in property for the purposes of waiving sovereign immunity. *Russell*, 91 S.W. 3d at 616.

Taken separately or together, Instruction No. 7 and the argument of plaintiff's counsel were improper and prejudicial, in that each misled the jury on the issue of MHTC's liability. Consequently, in the event the Court chooses not to award the relief sought in Point I, then, based upon the foregoing, MHTC respectfully requests the Court to reverse and remand this case for a new trial on all issues.

### **POINT III**

**THE TRIAL COURT ERRED IN PERMITTING PLAINTIFF’S COUNSEL, OVER OBJECTION, TO ARGUE IN CLOSING ARGUMENT THAT THE JURY SHOULD “SEND A MESSAGE” BECAUSE SUCH AN ARGUMENT WAS IMPROPER AND PREJUDICIAL, IN THAT IT IMPERMISSIBLY INTERJECTED A PLEA FOR PUNITIVE DAMAGES INTO THE TRIAL.**

#### **Standard of Review**

In ruling on the propriety of final argument, the challenged comment must be interpreted in light of the entire record rather than in isolation. *Kelly by Kelly v. Jackson*, 798 S.W.2d 699 (Mo. banc 1990). And, absent a manifest abuse of discretion, an appellate court will not interfere with the trial court’s decision. *Pierce v. Platte-Clay Electric Cooperative, Inc.*, 769 S.W.2d 769 (Mo. banc 1989).

#### **Argument**

At issue here are statements made by plaintiff’s counsel during closing argument. These statements clearly communicated to the jury that it should “send a message” to MHTC by the amount of its verdict. In effect, this constituted a plea for punitive damages, which was improper given MHTC’s immunity from such damages under §537.610.3, RSMo.

Missouri courts have long shown displeasure with “send a message” arguments in cases where punitive damages are not sought. *Pierce*, 769 S.W.2d at 779. In *Smith v. Courter*, 531 S.W. 2d 743 (Mo. banc 1976), plaintiff’s counsel, in closing argument,

argued that the jury should use the verdict to speak out about its [the jury's] feelings regarding an issue in the case. In support of its order for a new trial, the trial court ruled that such argument constituted a plea for punitive damages, in that it invited the jury to use its verdict to deter defendants from like conduct in the future. This was both improper and prejudicial because it allowed the jury to consider an element of damage that was outside the issues pleaded or submitted. On review, this Court agreed. It explained that in order to maintain the distinction between punitive and compensatory damages, the jury “should not be motivated by argument to hold as one of their objectives, in arriving at the amount of their verdict, the punishment of the defendant or the deterrence of others.” *Smith, Id.* at 748.

In *Fisher v. McIlroy*, 739 S.W.2d 577 (Mo. App. 1987), the jury was also invited to “send a message” by its verdict. Specifically, defendant’s counsel argued for the jury to “send a message to the young people in this city.” In affirming the trial court’s order granting a new trial, the Eastern District, citing *Smith*, held that because such argument injected a plea for punitive damages, the opposing party was entitled to a new trial.

Likewise, in *Pierce*, supra, plaintiff’s counsel remarked near the end of his closing, “when you’re done you can send a message to the utility world.” In that case, this Court found no abuse of discretion in the trial court’s refusal to grant a mistrial. The court credited the quick objection of counsel and the trial court’s admonition to the jury to disregard the comment with averting prejudice, and, thus, reversible error.

Here, the theme of respondent’s case was that she was treated as a slave: forced to perform a dangerous task without adequate tools, training or supervision (Tr. 172-174);

subject to punishment for even slight deviation from her overseer's instructions (Tr. 194, 319-320); and strip-searched in any event (Tr. 322-323). This theme continued into closing argument, where Mr. Fiore argued: that MHTC should treat the inmates fairly and not only as some accessible source of cheap labor (Tr. 538); that the jury should tell MHTC to treat the inmates the way we would treat each other; that for the jury to treat "people" fairly, it must first affect the work release program (Tr. 559); and, that the jury, "as [the] conscience of a good community" has an opportunity to "send a message" (Tr. 565). Send the message that "with all of the resources of MoDOT and all of the things that they can do, tell them to spend just a little, make a little effort and change this." *Id.* At this point, MHTC's counsel objected on grounds that this argument was improper as being punitive in nature, and that there was no prayer for punitive damages. (Tr. 565). The trial court overruled the objection and Mr. Fiore concluded with: "[s]end a message to them under the law of the State of Missouri that we will not allow this to take place. To treat everyone fairly here. That's what I expect in this community and in this state. That's what I know you expect" (Tr. 565-566).

From a review of *Smith*, *Fisher* and *Pierce*, the argument of Mr. Fiore was prejudicial error. The theme of respondent's case and closing was clear: *punish* MHTC for treating respondent unfairly. *Punish* MHTC so that the work release program will be changed. In fact, a change to the work release program was Mr. Fiore's stated goal (Tr. 560). The "send a message" statements were prejudicial, not only because they interjected the issue of punitive damages, which are expressly disallowed under §537.610, but also because they invited the jury to use punishment and/or deterrence as

one of its objectives in arriving at a verdict. *Smith*, 531 S.W.2d at 748. Further, such an argument can also influence a jury's determination of fault, or its assessment of the percentages thereof. Under a system of comparative fault, the issues of fault and damages are undeniably "blended and interwoven." *Tauchert v. Ritz*, 909 S.W.2d 687, 691 (Mo. App. 1995), citing *Phillips v. Lively*, 708 S.W.2d 369, 373 (Mo. App. 1986).

In *Pierce*, 769 S.W.2d at 779, the Supreme Court stated, "[w]hen the message argument becomes the theme of the entire closing, it constitutes reversible error." The Eastern District relied on *Pierce* in *Derossett v. Alton and Southern Railway Company*, 850 S.W.2d 109 (Mo. App. 1993), in finding that there was no "send a message" theme pervading the closing argument at issue in that case. As previously discussed, the theme was far more pervasive in plaintiff's argument here. Further, the court in *Pierce* was not creating a quantitative litmus test. A review of *Smith*, *Fisher* and *Pierce* reveals that the prejudicial error resulting from "send a message" arguments is not necessarily determined by the number of times the argument is made. Rather, reversible error occurs when the jury is encouraged to base the amount of its verdict on considerations other than fair compensatory damages. It is especially egregious in this case, where the argument was allowed over objection and without an admonition to disregard from the trial court.

Respondent may argue that, although it was error to interject the issue of punitive damages in this case, the error was harmless because there was no excessive verdict. Again, prejudicial error is not simply a function of the amount of the verdict. Instead, prejudice results from the fact that the jury was invited to award punitive damages. *Smith* at 748. Since there is no method by which this Court can know how much, if any, of the

verdict represented the jury's response to respondent's plea to "send a message," this Court should assume that the jury did what it was invited to do by respondent's improper argument. *Id.* Moreover, this Court should presume that the trial court's error was prejudicial, unless and until respondent can show otherwise. *Tune v. Synergy Gas Corp.*, 883 S.W.2d 10, 22 (Mo. banc 1994).

In sum, an attorney is a trained professional, and, as such, should be held ultimately accountable for the words and phrases that he chooses to best articulate and advocate his client's legal position. Accordingly, any counsel that chooses to interject error by the use of a "send a message" argument during closing, should be held to account for that argument's presumed prejudicial effect. In this case, the extent to which Mr. Fiore's statements poisoned the jury will always be a matter of speculation. Yet, as Judge Thomas reasoned in *Tune*, 883 S.W.2d at 22, "If we do not enforce the rules [of argument], then we cannot rely on the jury's damage assessment." Additionally, since the issues of fault and damages are undeniably "blended and interwoven," MHTC should be granted a new trial on all issues. Therefore, MHTC respectfully requests that this Court reverse and remand for a new trial.

### **CONCLUSION**

MHTC regrets that Hortense Cain was injured while working on its right of way. However, her injury did not directly result from a dangerous condition in public property, as that term has been construed by the courts of this state. Plaintiff failed to plead or prove a claim that fell within one of the limited exceptions to defendant's sovereign immunity under §537.600. Her claim was submitted on an improper instruction, which

was exacerbated by an improper argument of counsel. The jury sent its message, but this Court should send a different one. MHTC respectfully requests that the judgment of the trial court be reversed, or that this Court reverse and remand the case for a new trial on all issues.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that two copies of the foregoing and a 3 ½” labeled diskette containing this brief were served, first class postage pre-paid, this 19th day of March 2007, to:

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing brief complies with the limitations contained in Missouri Rule 84.06, and that the brief contains 7,745 words.

The undersigned further certifies that the diskette simultaneously filed with the hard copies of the brief has been scanned and is virus free.

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Zachary T. Cartwright, Jr.