

IN THE MISSOURI SUPREME COURT

Case No. SC88271

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

**SUBSTITUTE REPLY BRIEF OF APPELLANT
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POINT I

REPLY TO POINT I OF RESPONDENT'S ARGUMENT REGARDING PURPORTED EXCEPTIONS TO THE DEFENSE OF SOVEREIGN IMMUNITY.

In reviewing the Substitute(d) Brief of Respondent, one question comes immediately to mind. If MHTC's arguments were so "confusing", "convoluted", "elusive", "preposterous" and "weak", then why did the Eastern District agree with them? That court not only held that respondent's claim was barred by sovereign immunity under the facts of this case, but also went beyond the position argued by MHTC and held generally that "inmates are barred from pursuing suits against the state for injuries occurred in the line of employment." Further, the Eastern District found that its decision in *State ex rel. St. Louis State Hospital vs. Dowd*, 908 S.W.2d 738 (Mo. App. 1995) was a controlling precedent, rather than its decision in *Jones vs. St. Louis Housing Authority*, 726 S.W.2d 766 (Mo. App. 1987), as urged by respondent.

It is respondent who seeks to confuse the issues in this case by arguing common law tort theory. In determining whether Hortense Cain plead or proved a cause of action under § 537.600, RSMo., it does not make a difference whether MHTC had a duty to supervise or train her. The St. Louis State Hospital clearly had a duty to protect and supervise its patients, including the part-time worker who

was injured by a paper shredder. Yet, the Eastern District found that the patient failed to state a claim under the dangerous condition exception to sovereign immunity. *Dowd*, 908 S.W.2d at 740.

So there is no confusion, MHTC is not arguing that the existence of a duty is irrelevant. On the contrary, the existence of a duty is either a condition precedent to liability under § 537.600, or it is inherent in the analysis of any claim under that statute. However, if a duty is found to exist, that does not change the analysis to one of common law negligence. Thus, even if MHTC assumed a duty to supervise and train the inmates by its agreement with the Department of Corrections, the tree was still not a dangerous condition in property, as that term has been interpreted by the courts of this state.

Throughout her argument on Point I, respondent repeatedly states or assumes that Dana Fitzpatrick was a public employee. Notwithstanding the Western District's analysis in *Bowman vs. State*, 763 S.W.2d 161 (Mo. App. 1988), MHTC respectfully submits that a prison inmate on work release simply does not fall within the plain meaning of the term "public employee" under § 537.600, RSMo. Such a construction would not be consistent with reasonable legislative intent.

The inmates did not have a "genuine employment relationship" with MHTC. *Porter vs. Department of Corrections*, 876 S.W. 2d 646, 647 (Mo. App. 1994).

The Working Agreement between appellant and the Department of Corrections referred to MoDOT personnel as “employees” and the inmates as “workers.” (Resp. L.F. 1-5). § 217.437, RSMo. states that the performance of work compensated at less than minimum wage for a public purpose, by any person under the supervision of the Department of Corrections, shall not be deemed employment within the meaning of the provisions of the Employment Security Law, Chapter 288, RSMo. Further, as noted in the Substitute Brief of Appellant, inmates on work release are also not considered “employees” for the purpose of Workers Compensation. § 287.090.1(3), RSMo.

The work release program is rehabilitative in nature, and intended to prepare inmates within three years of their parole date to be productive members of society. It is not, as suggested by respondent, a source of slave labor for the state. The facts that the inmates provide work for the benefit of the state and receive compensation from the state for that work, did not make them state employees. *Porter*, Id. Moreover, all activities of prisoners are subject to the control and direction of the state. Hence, the fact that their work activities were subject to the control and direction of MoDOT personnel under the work release program also did not render them public employees.

In *Warren vs. State*, 939 S.W.2d 950, 956 (Mo. App. 1997), the court observed that, if the state could prove that another inmate had removed the safety

guard from the table saw, then it could provide a defense to the state (i.e., the dangerous condition of the table saw would not have been created by a public employee). The status of inmates working in a prison furniture factory is no different than those in the work release program. They are not public employees in either situation.

Alternatively, respondent suggest that the inmates were “agents of the state.” First, there was clearly no “agency” relationship between MHTC and the inmates. *State ex rel. Ford Motor Co. vs. Bacon*, 63 S.W. 3d 641 (Mo. Banc 2002). Second, § 537.600 makes no reference to agents, and that statute should be strictly construed. While the terms “agents” and “employees” may be used interchangeably in some cases, neither term applies to the inmates here.

Respondent’s reliance on *Kilventon vs. United Missouri Bank*, 865 S.W. 2d 741 (Mo. App. 1993) is misplaced. The language in that opinion regarding an employer’s liability for negligently allowing unsafe work to continue was taken from *Werdehausen vs. Union Electric Co.*, 801 S.W. 2d 358, 364 (Mo. App. 1990), which dealt with the application of § 414 of the Restatement (Second) of Torts. Assuming *arguendo* that *Kilventon* was correctly decided, we have no issue of an employer’s potential liability for the conduct of an independent contractor in the present case. Further, respondent was required to plead and prove a claim under Section 537.600, and not under some section of the Restatement (Second) of Torts.

The inmates were not public employees, agents, independent contractors or slaves. They were offenders in the custody of the state correctional system, and that should distinguish them from the traditional categories of master-servant, principal-agent, or employer-independent contractor. Hence, MHTC questions whether it would ever be appropriate to hold the state vicariously liable for the negligent acts or omissions of inmates. This Court does not have to reach that question, however, because Dana Fitzpatrick was a “third party” under *Alexander vs. State*, 756 S.W. 2d 539 (Mo. 1988).

Although *Zubcic vs. Portland Cement Company*, 710 S.W. 2d 18 (Mo. App. 1986) preceded *Alexander*, the two cases are consistent. In *Zubcic*, the court logically held that a person could not create or participate in the creation of a condition on public property (i.e., a sewer trench without shoring) and then sue a public entity for injuries resulting from that condition.¹ The decedent in *Zubcic* was an employee of the independent contractor that was digging the trench. In *Alexander*, the defendant implicitly conceded that the condition at issue had been created by an “agent of the state.” This Court held that the condition was dangerous because its existence, without intervention by third parties, posed a

¹ Similarly, when one or more drivers cause a road to become dangerous by failing to use it in a proper manner or with due care, the public entity should not be liable for resulting injuries.

physical threat to plaintiff. 756 S.W. 2d at 542. *Zubcic* and *Alexander* are both consistent with the general proposition that, under Section 537.600.1(2), public entities are liable for dangerous conditions created by their employees and not those created by independent contractors or third parties (unless the public entity has notice of the condition in sufficient time to protect against it and fails to do so).

The deceased worker in *Zubcic* presumably had knowledge that the sewer trench was unshored, and had a superior ability to protect himself than would have a stranger to that condition. On page 32 of her brief, respondent attempts to distinguish *Zubcic* by claiming that “she was a stranger to the area and had no experience or training in tree cutting.” However, she knew that the tree had been partially cut and could have protected herself by simply remaining at the location were she had been told to stand by her supervisor. Instead, she chose to ignore those instructions and walked away from the tree with her back turned.

According to respondent, felling a tree is an “unpredictable” activity. Additionally, as more fully discussed in the Substitute Brief of Appellant, there was no direct evidence at trial explaining why the tree fell when and in the direction that it did. Thus, it would be speculation to suggest that direct supervision by John Perkins at the time of the incident would have prevented it from happening. At best, we can assume that Mr. Perkins would have told Ms. Cain to stay at the base of the tree, but he had already told her that. Consequently,

even if this Court were to hold that liability could be imposed for the intangible act of failure to supervise, respondent did not prove that such failure created a dangerous condition.

Finally, respondent relies on several “proprietary function” cases. However, municipal corporations are the only public entities that were subject to the proprietary/governmental distinction. *Wollard vs. City of Kansas City*, 831 S.W. 2d 200, 203 (Mo. banc 1992). Whether the activity is demolition or daycare, the state acts and always has acted in a governmental capacity. When the general assembly eliminated the proprietary/governmental distinction in the 1985 amendments to § 537.600, the purpose was to provide a uniform statutory cause of action for the two categories of torts referenced in the statute. *Wollard, Id.* Those amendments did not expand the waiver of the state’s tort immunity for other proprietary functions. Therefore, the municipal liability cases relied on by respondent are inapplicable and her argument is misplaced.

CONCLUSION

Appellant makes no reply to the arguments set forth in Points II and III of the substitute(d) brief of Respondent, because those issues were fully addressed in MHTC’s initial brief. For the reasons set forth in that brief and here, the judgment of the trial court should be reversed, or this Court should 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 18th day of April 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 2,003 words.

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

Zachary T. Cartwright, Jr.