

IN THE SUPREME COURT OF MISSOURI

LACONIA Z. CURTIS,	)	
	)	
Respondent,	)	
	)	
vs.	)	Appeal No. SC 91907
	)	
STATE OF MISSOURI,	)	
	)	
Appellant.	)	

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RESPONDENT'S SUBSTITUTE BRIEF

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## STATEMENT OF FACTS

Laconia Curtis is the mother of Derrick Cartwright. T. 149. Because he suffered from bipolar disorder, Cartwright was at times a resident of the Metropolitan Psychiatric Center, operated by the State of Missouri. T. 151. In August of 2005, Cartwright was involuntarily admitted to the Metropolitan Psychiatric Unit. T. 182.

Elopement – a patient trying to escape – was not uncommon at the Metropolitan Psychiatric Center; in fact, the facility had a common procedure when such an elopement occurred. T. 240-1. Cartwright was classified as an elopement risk, though there is some confusion as to whether that was ever communicated to the staff that watched him. T. 268-70.

Part of the facility has a hallway known as the pharmacy wing. In August of 2005, at the end of that hallway there was a large window that had ordinary glass, as opposed to safety glass. T. 179-80. The State was aware of this. T. 185. Patients were not supposed to be in that hallway. T.201. In order for a patient to get into that hallway, there were several doors side by side in a patio area that were supposed to remain locked, and were supposed to be self-locking. T. 182-3. There was an additional door that could be opened, but had an alarm. T. 185.

The doors that self-locked had experienced problems latching.<sup>1</sup> Supplemental

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<sup>1</sup> “There was disputed evidence about whether there had been prior problems with the self-locking doors. (Tr. 185, 189)” Appellant’s Supplemental Brief at 2. That portion of the testimony says no such thing, and even if it did, the “disputed” evidence was resolved

Transcript (“ST”) 96. The security guards were supposed to check the doors three times a day to ensure they were locked. T. 189-90. In addition, there were signs on the doors reminding the staff to keep them locked. T. 187-9. Finally, the State was aware that there was the potential for staff members to forgot to lock the doors, and this was true at the time the facility was designed. ST 71. As a result, the State was aware when the facility was designed that there was a potential that patients could get into the pharmacy wing. ST 71. The present director of the facility effectively admitted this as well. T. 184, 190, 205-6.

The patient areas had safety glass in all the windows. ST 66-7. This was done for safety purposes, and also to prevent patients from eloping. T. 184, ST 67. If a window has safety glass, the window typically will shatter but stay intact due to film laminated to the glass. T. 213-4. The lack of laminated or safety glass in areas that patients frequent would be a dangerous condition. ST 67. The pharmacy wing did not have safety glass in the window due to cost considerations.<sup>2</sup> ST 72-3.

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in favor of the plaintiff by the jury.

<sup>2</sup> “Cost considerations versus risk were a factor in using non-laminated glass in non patient areas. (Tr. 214, Supp. Tr. 72-73)” Appellant’s Substitute Brief at 3. Again, that is not the testimony favorable to the verdict, and not precisely the testimony. Instead, the witness characterized it as the “design nuances and measures to handle the most probable method of preserving safety or keeping somebody from escaping in the area of highest probability where that would occur.” ST 72.

On the evening of August 21<sup>st</sup>, 2005, Cartwright, along with another patient, climbed down from a patio area where they were on a smoke break. ST 41. They went through an unlocked door into the pharmacy wing, T. 184, ST 44, where they smashed the window and jumped out. ST 47. Cartwright stated he jumped because he was mentally ill. Id. The State's records indicated he jumped because of a psychotic episode. T. 220-1. Cartwright sustained serious injuries to his left leg and right foot. ST 6-7.

Laconia Curtis brought this action as the next friend of Derrick Cartwright. This matter was tried to a jury. A verdict instruction based on MAI 31.16 was submitted to the jury. T.281-2. There is no appeal from the evidence introduced at trial or the jury instructions submitted to the jury.<sup>3</sup> Memorandum Op. at 3n1. The jury returned a verdict in favor of the Plaintiff for \$322,000, assessing 100% of the fault to the State and 0% to the Plaintiff. LF 93. The court set off certain payments, entering a final judgment of \$315,033.94. LF 130. The State filed a Motion for Judgment Notwithstanding the Verdict, and it is the denial of that Motion that the State now appeals.

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<sup>3</sup> "Despite the potential issues with the instruction which are not raised here, . . ."

Appellant's Supplemental Brief at 6. Not only is this issue not raised, it was specifically abandoned by the State in the Court of Appeals.

## ARGUMENT

### **Deficiencies in the State's Brief**

Initially, Rule 84.04(c) requires a “fair and concise statement of the facts.” Even after filing an amended Brief, going through oral argument, and now filing a substitute Brief before this Court, Appellant State of Missouri’s Brief fails to follow this Rule. What is disturbing is that though the substitute Brief removed the more egregious misstatements of fact in the amended Brief filed in the Court of Appeals, the facts are not set forth that are favorable to the verdict. Instead, the State here once again tries to argue its case in the Statement of Facts by leaving out facts, and presenting facts clearly not believed by the jury.

Next, Rule 84.04(d) requires a Point Relied On to “explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error.”

The State’s Point Relied On states “Plaintiff failed to prove a dangerous condition of property that would waive immunity.” As the court noted in *Boever v. Special School Dist.*, 296 S.W.3d 487, 491n1 (Mo. App. 2009), this is insufficient. “Points relied on must identify the key facts . . . that would trigger or authorize the relief requested.” In *Boever*, the Point Relied On had a remarkably similar statement concerning official immunity: “they did not have or use any discretion in their treatment of [the child] and failed to carry out their ministerial duties.” *Id.* at 491. Here, there are no facts identified, or theory presented, other than stating there was no dangerous condition.

This is not some idle argument meant to belittle the State’s Brief. This has been the position of Curtis for some time, as explicitly stated at oral argument in the Court of

Appeals. The State's position as to why the condition is not dangerous has, to put it mildly, evolved over the course of the lawsuit, and seems to depend on the whims of the attorney arguing the case or the response of whatever judge happens to be questioning the State's attorney. There is no definitive statement anywhere as to why the condition identified in this lawsuit is not, despite the jury's finding, dangerous. As a result, responding to this unfocused argument is somewhat of a challenge.

### **The State has waived sovereign immunity for this claim**

The trial court presented the jury with a verdict director that required them to find a dangerous condition in order to impose liability on the State. The jury so found, unanimously. As the court noted in *Jones v. St. Charles County*, 181 S.W.3d 197, 203 (Mo. App. 2005), "Whether a defendant created a sufficiently dangerous condition is ordinarily a question of fact." Interestingly, the State took the opposite position at oral argument in the Court of Appeals, asserting that both the testimony of its own employees, and the jury verdict, were irrelevant to the issue of sovereign immunity. Based on the facts and circumstances of this case, that is the position the State must take; but one wonders what is supposed to guide this Court in its decision? Just the facts the State likes? Or thinks are important? The State never poses that question, much less answers it.

Between the trial level and the appeal, six different judges have reviewed the pleadings and the jury's decision, and all agreed there was sufficient evidence to find a

dangerous condition. The State has waived all other issues in this appeal.<sup>4</sup>

The jury's rejection of the State's position is the fundamental problem with the State's argument. As will be seen, the State has created a version of the facts that just does not comport with the allegations made against them, the evidence presented at trial, or the findings by the jury. This is evident in that the Statement of Facts in the State's original Brief almost exclusively cited the State's Opening Statement as its source material. The facts submitted in every subsequent brief, motion and application have only incrementally improved, but still leave out many facts. The reason is that the State's opening statement is the only place where the State's version of the facts existed. "Because the jury found in favor of plaintiff, this Court disregards 'evidence and inferences that conflict with th[e] verdict' in determining whether plaintiff made a submissible case." *Hensley v. Jackson County*, 227 S.W.3d 491, 497 (Mo. 2007).

The argument of the State now is a plethora of sovereign immunity buzzwords, but seems to be threefold: that Cartwright was an intervening actor; that the rules said he was not supposed to be in the pharmacy wing, and therefore it can not be a dangerous condition; and there was no intrinsic defect in the window.

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<sup>4</sup> "Although the State suggests here the chain of causation is almost *Palsgrafian* . . ." Appellant's Substitute Brief at 6. No, it does not. That argument was waived by filing the Substitute Brief. Rule 83.08(b). Even worse, the testimony was, and the jury believed, that this precise situation was foreseeable.

The intervening cause argument is easily disposed. This argument was actually submitted to the jury via a comparative fault instruction and rejected, as the jury found no fault to Cartwright.

As far as the rules are concerned, one supposes in the next case the State will argue the rules also said he was not supposed to jump through a window. The legislature, courts and juries determine what is a dangerous condition, not “the rules.” The jury here rejected the State’s position. Consistently, the legislature and courts have also rejected the arguments made by the State here. Even the State’s own witnesses rejected this position, as they all conceded that it was inevitable that a patient would end up in this area.

Turning to the intrinsic defect argument, is a spill on the floor, by the State’s definition, an intrinsic defect? Is not a spill only a defect if someone steps in it? However, setting aside that hypothetical, the defect here is no different than the one in *Alexander v. State*, 756 S.W.2d 539 (Mo. 1988). The partition in that case created a dangerous condition due to the circumstances of the plaintiff on the ladder that led to the fall.

### **Previous Law**

Interestingly, the argument the State makes here is the same argument the State made in *Alexander*, an argument this Court described as “convoluted and constrictive.” *Id.* at 542. In *Alexander*, this Court found that a folding partition that was put in place while the plaintiff worked constituted a dangerous condition. The reason for this is that the State fails to understand that there always must be preceding negligence, or a

dangerous condition would not exist. To accept the State's argument that antecedent negligence obviates the waiver of sovereign immunity would essentially eliminate any waiver of sovereign immunity.

*Alexander* led to a series of cases in the lower courts that culminated in *Cain v. Mo. Hwy. & Trans. Comm.*, 239 S.W.3d 590 (Mo. 2007). This Court in *Cain* found a dangerous condition when a state employee cut a tree that stood for several minutes, then fell on the plaintiff. The tree, this Court found, was a dangerous condition as well. The distinction this Court made in *Cain* was that as long as the condition existed for some period of time, it constituted a dangerous condition. That occurred here. The window had existed for some period of time, as had Cartwright's ability to access the area where the window was located. Because the condition had existed for some period of time, it could be considered a dangerous condition. Whether it actually was a dangerous condition was resolved by the jury, though Curtis notes the State's own employee agreed that putting this type of window in an area where mental patients have ready access is a dangerous condition.

The State's argument must therefore fail. State employees created the dangerous condition. The State's premise (at times in its arguments to the courts below) that a dangerous condition did not exist because state employees had to be negligent in order to place Cartwright in the dangerous condition misunderstands the law. A State employee inevitably always has to be negligent to create the dangerous condition. That does not preclude a waiver of sovereign immunity. The distinction is that an employee of the

State did not toss Cartwright out the window; instead, the conditions on the property existed and had existed.

Moreover, the Court must consider what the State really argues here. The State argued in the Court of Appeals (as it musts, or it loses) that plate glass in the patient areas is not a dangerous condition. The State's own designer of the facility concedes that the lack of safety glass in the patient areas would be a dangerous condition – that is why those parts of the facility have safety glass. Significantly, that designer of the facility also conceded that it was inevitable that a patient would end up in the area at issue in this suit.

But if one accepts the State's argument – though contrary to the law and logic – that this employee of the State's testimony should be ignored, the State gets no further. Though in a different context, it has been already recognized that windows that mental patients can get through are a dangerous condition. *Honey v. Barnes Hospital*, 708 S.W.2d 686 (Mo. App. 1986), *cited with approval by Gast v. Shell Oil Co.*, 819 S.W.2d 367, 370 (Mo. 1991). And what alternative rule does the State suggest this Court should adopt? That even though the State knows children will be present, its buildings need only be safe for adults? That if the State knows overweight people will be present, its buildings need only be safe for those people whose weight is "reasonable"? That even though it has a building specifically built to house mental patients who, by the State's own admission will do anything to escape, that its buildings need only be safe for those people in their right mind?

### The State's Cases

The State relies on three cases. The first two, *Boever v. Special School Dist.*, 296 S.W.3d 487 (Mo. App. 2009), and *Stevenson v. City of St. Louis*, 820 S.W.2d 609 (Mo. App. 1991), were completely different procedurally and factually from the present case. In those cases, the courts reviewed motions to dismiss based on allegations in the petitions that food was present “without adequate warnings, barriers or preventative measures,” 296 S.W.3d at 493-4, or that there was no “guard or barricade” present on a set of stairs. 820 S.W.2d at 612. The courts, noting an allegation of a simple lack of warnings or barricades can not constitute a dangerous condition, readily dismissed both cases.

The third case, *Necker by Necker v. City of Bridgeton*, 938 S.W.2d 651 (Mo. App. 1997), though decided by summary judgment, posed the same scenario. As the court noted:

In mother's petition, she did not allege specific facts which demonstrated a dangerous condition other than that the "balance beam was unstable, and lacked necessary screws and bolts." However, mother produced no evidence to support her allegations. The remainder of mother's petition made nothing but broad conclusory statements about City's purported negligence. In her narrative response to City's motion for summary judgment, she alleged that the failure to make the beam safe, by warnings and/or signs, barricades, mats, or supervision, and misplacing the beam in the hall, created a dangerous condition.

*Id.* at 654-5.

That was not the allegation here. There was no allegation of a lack of warnings, barricades or supervision. Instead, as the Court of Appeals noted, the State's own witness testified that these windows could be a dangerous condition. The State's argument throughout this case is that these windows were not dangerous because Cartwright was not supposed to be near these windows. The problem the State ran into was that all the State's witnesses conceded it was inevitable that a patient in the hospital would find himself or herself at this location. Interestingly, the *Necker* court cited with approval *Kilventon v. MHTC*, 865 S.W.2d 741 (Mo. App. 1993), which found explosives in an unmarked trailer were dangerous to the firemen who responded to the scene, a fact scenario much closer to the instant suit than *Necker*.

Moreover, the State's argument is alternatively predicated on Cartwright being the cause of the problem. What the State has refused to acknowledge throughout this case is that Cartwright's potential fault was presented to the jury, and rejected. While the State has never believed Cartwright was blameless – the State has sounded the drumbeat of Cartwright's fault since the case was filed – it keeps bumping up against the cold reality of the jury's finding that Cartwright had no fault here.

The State's substitute Brief argues this case does not fall into what the State describes as the "*Alexander-Cain* mold" for two reasons: there was no last moment change to the window, and in normal use, the window was not dangerous. Unfortunately, the State's characterization of the "*Alexander-Cain* mold" has it exactly backwards. In those two cases, and particularly *Cain*, the whole point of the condition being dangerous was that the condition had existed for a period of time. *See* 239 S.W.3d at 594n6.

Moreover, if nobody was standing on the partition in *Alexander*, 756 S.W.2d at 540, or under the tree in *Cain*, 239 S.W.3d at 592-3, no injury would have occurred. A partition is not dangerous, and neither is a tree. A non-laminated window placed around mental patients, though, is dangerous. The State’s characterization of *Alexander* and *Cain* is simply incorrect.

The State also describes the “*Alexander-Cain* mold” incorrectly when it argues a “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. Actually it was this rule that *Cain* specifically overturned by holding that the action or inaction of a third party who is not a state employee can take a case out of the statute; but actions by state employees are not part of the “dangerous condition” analysis. 239 S.W.3d at 595-6.

Moreover, even third party intervention generally does not exclude a dangerous condition. In *Huifang v. City of Kansas City*, 229 S.W.3d 68 (Mo. App. 2007), the plaintiff sued when another car hit him while he was a pedestrian. He sued the city based on the fact that the intersection was dangerous.

The City raised the exact same argument made by the State here: that there was an intervening cause – namely, the negligent driver – and the City should, therefore, not be liable. However, as the *Huifang* court pointed out, that was not what the cases said, and was not the law. Instead, the court made clear that “the concurring negligence of a third party does not preclude the liability of the public entity unless the third party negligence is such as to constitute an efficient and independent intervening cause of the injury.” *Id.* at 77.

The State submitted Cartwright's comparative fault to the jury, and the jury found he had none. There was no appeal of this submission, or the jury's finding. In the face of a jury finding that Cartwright was not negligent, it is difficult to envision how this non-existent negligence could be an efficient and independent intervening cause.

### **The State's Argument Must Inevitably Fail**

What the State apparently intends here, without saying so, is to adopt the dissent's position in *Cain*. As this Court noted recently, "This Court is mindful of stare decisis." *Manzara v. State*, 343 S.W.3d 656, 662 (Mo. 2011). See also *State v. Deck*, 303 S.W.3d 527, 554 (Mo. 2010) (Breckinridge, concurring) ("I am committed firmly to the principle of stare decisis"). But even if this Court were inclined to overrule *Cain*, this is not the case to do so.

First, consider the facts here: the State's project manager for the facility has already conceded that non-safety glass in a patient area would be a dangerous condition, and the State's project manager for the facility has already conceded it would be inevitable that patients would be in this area where Cartwright jumped. This is not *Cain*, where the prisoners were in the process of cutting down a tree and on a break. The window had been at the facility for years, there was testimony of prior problems with the only locked door between Cartwright and the window, and there was evidence that the facility itself was concerned about these doors. To say there was an "intervening actor," whether a state employee or not, is no different than saying an "intervening actor" spilled something on the floor. The circumstances at the State's facility were an injury waiting to happen.

Second, even under pre-*Cain* law, the courts would have considered this a dangerous condition. Consider the two cases cited by the dissent in *Cain*, which the dissent felt exemplified conditions that were not dangerous. Both, *State ex rel. St. Louis State Hospital v. Dowd*, 908 S.W.2d 738 (Mo. App. 1995) and *Farrell v. St. Louis County*, 190 S.W.3d 401 (Mo. App. 2006), involved situations where an employee was doing something to the plaintiff: In *St. Louis State Hospital*, the state employee pushed a button on a paper shredder, while in *Farrell*, he slid a table across another table. There is no similar actor here. No employee threw Cartwright out the window. No employee waved him through the door.

The bottom line is that throughout this case, the State has presented arguments that are never fully explained, either in the context of the law or on their own merits. If an “intervening actor” spills something on the floor, is the “dangerous condition” exception inapplicable because the “intervening actor” was negligent in creating the spill, or the State’s employee in not cleaning it up, in not barricading it? Of course not, because the spill is still there. The cases focus on the length of time of the condition in determining if it’s a dangerous condition; as recently as 2007, this Court in *Cain* confirmed time is the proper focus. Instead, what we have here is nothing more than the State attempting to gut the sovereign immunity doctrine.

What principle of law does the State wish this Court to adopt?

1. That if the State makes a rule saying that a plaintiff can not do something dangerous, the condition is removed from the statute? That is ridiculous.

2. If a State employee or anybody else was negligent at some time in the past which led to the dangerous condition, that the condition is removed from the statute? Again, then nothing would be dangerous. One could argue (which the State did here, unsuccessfully) that a plaintiff is always comparatively at fault.

3. That the property has to have an “intrinsic defect,” a term never defined? Then a water spill on the floor would not be a dangerous condition, nor would the partition in *Alexander*.

The State at various levels has tried various arguments; none have succeeded. For that reason, both the judges and the jury below should be affirmed.

### **CONCLUSION**

As should be clear, the State has never set forth what principle this Court has set forth, or what principle this Court should adopt, that precludes liability for the State in this case. The six judges and twelve jurors that have already examined the sovereign immunity issue all held correctly that the State has waived sovereign immunity for this claim. Every decision made by every single judge so far in this case should be affirmed.

**CERTIFICATE OF COMPLIANCE**

David Knieriem, the undersigned attorney for Plaintiff/Respondent, hereby certifies, pursuant to Missouri Supreme Court Rule 84.06(c), that this Respondent's Brief:

1. Complies with Missouri Supreme Court Rule 55.03,
2. Complies with the limitations contained in Missouri Supreme Court Rule 84.06(b),
3. Contains 4,431 words, and 384 lines, excluding the cover page, according to the word count toll contained in Microsoft Word software with which it was prepared,
4. Contains zero lines of monospaced type in the brief (including Points Relied On, footnotes, signature blocks and cover page),

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on November 15, 2011, the foregoing was filed via electronic filing to be served electronically on:

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