

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

***SUBSTITUTED BRIEF OF RESPONDENT
HORTENSE CAIN***

Respectfully Submitted,

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RESPONDENT'S STATEMENT OF FACTS

Respondent adopts Appellant's Statement of Facts and supplements the same as follows:

Although the work release program is voluntary from the standpoint that inmates may choose to participate in the same, their actions while participating are under the strict supervision and control of both the Missouri Department of Corrections and the Missouri Department of Transportation. (Tr. 324-325)

Inmates in the program are strip searched daily upon their return to prison. (Tr. 323) They are subject to random urine testing. (Tr. 323) If an inmate fails to comply with the specific directions of the work release supervisor, they risk losing all of their prison privileges, including further participation in the program, and solitary confinement. (Tr. 324)

On the day in question, John Perkins, a MODOT employee, instructed the Respondent and inmates Fitzpatrick, the sawyer and Korte, to stand at the base of a tree while Fitzpatrick cut it down. (Tr. 59, 190, 319) The inmates were also permitted to get water and use a "porta potty" which was attached to a MHTC van by a trailer. (Tr. 319) The van and trailer were parked by Perkins within the falling radius of the tree that the inmates were instructed to cut down. (Tr. 300, 301, 308) The inmates were not allowed to travel outside the area where the van was parked or the area of their assigned duties. (Tr. 319; Respondent. L.F. 007) If they ventured into any other area, they could be charged with escape, subjecting them to severe penalties. (Tr. 320, 353)

The inmates had no prior training to cut trees or to appreciate the dangers associated with that process. (Tr. 64, 177, 180, 181, 185 251, 308, 309, 381, 383) Inmate

Fitzpatrick, the tree cutter, and inmate Korte had experience using a chain saw to cut small bushes and bramble, but never a tree the height and weight assigned to them on the day in question. (Tr. 250) Respondent has never used a chain saw and has no experience cutting trees. (Tr. 326) Respondent is a life long inner city resident of St. Louis, Missouri. (Tr. 312)

Danny Woods, a Missouri Department of Transportation Commission employee testified that he could not think of any reason for cutting and clearing the tree from the area in question; its removal served no useful purpose. (Tr. 393, 394) All MHTC workers who are asked to do the same jobs as inmates are more experienced, proficient and better trained. (Tr. 391, 392) In fact, MHTC's Employee Handbook requires that specific felling techniques be utilized when felling trees. (Res. L.F. 028) The inmates were given no other equipment other than the chain saw and minimal instructions from their supervisor on the day of the incident. (Tr. 251, 382, 383) Their supervisor, John Perkins, told them to cut down a particular tree and then left the area and remained out of sight until after the injury occurred. (Tr. 186, 229-230, 245)

Skip Kincaid, an expert called by the Appellant, testified that tree cutting is an inherently dangerous activity. (Tr. 473) He stated tree felling is an unpredictable process. (Tr. 481) Mr. Kincaid stated that the inmates, because of the work they were doing, needed to be supervised. (Tr. 465, 476) Mr. Nester, Respondent's expert, testified neither the Respondent nor inmates Korte and Fitzpatrick had the necessary training, experience or equipment to cut any tree in a safe manner as required by certain ANSI standards and resultantly the tree in question was in a dangerous condition. (Tr. 273, 308, 309) ANSI Z-133 requires that specific felling techniques be utilized when cutting trees with a diameter of 5" or more. (Tr. 279, et seq.) The tree in question was at least 25-30 feet tall and at

least 6"-8" in diameter and, according to Respondent's evidence, as much as 12"-20" in diameter. (Tr. 249, 250 and Defendant's Exhibits C&D) Dana Fitzpatrick, the sawyer, did not know any of these techniques. (Tr. 251, 252) Mr. Kincaid testified that Ms. Fitzpatrick had insufficient understanding of how to "notch" a tree or training how to cut it. (Tr. 472, 472, 473)

Mr. Nester testified that Dana Fitzpatrick cut the tree too far and lost control of the direction of fall. (Tr. 233, 295) Indeed, MHTC's Employee Handbook states: "Always leave enough wood on your felling cut to hinge tree in direction desired. Do not cut off completely, otherwise control cannot be exercised." (Tr. 119; Res. L.F. 0028) The purpose of the handbook is to provide a safe working place for MHTC's employees. (Tr. 113; Res. L.F. 010) According to MHTC, the handbook also applies to the inmates. (Tr. 114, 120) However, it was never given to the inmates to read! (Tr. 120-121)

Fitzpatrick intended the tree to fall away from the van, but because she cut too deeply, it fell in the wrong direction. (Tr. 231, 252, 294, 295, 300) The inmates were unsure how to fell the tree in question and had no knowledge of the correct techniques to cut it according to acceptable standards. (Tr. 246, 251)

Mr. Nester testified that a trained tree cutter would take approximately 2 minutes to bring it down. (Tr. 295) Fitzpatrick was working on it for at least 45 minutes prior to it falling. (Tr. 234) She stopped cutting it on two separate occasions, both times to fix her chain saw. (Tr. 233, 247-248) When the tree fell, Fitzpatrick was not cutting it, but attempting to fix the saw the second time with the help of inmate Korte. (Tr. 233, 247-248) They were working on it for at least several minutes. (Tr. 233, 247-248)

At that point, Respondent advised Fitzpatrick she was going directly to the van to use the porta-potty and get water. (Tr. 187, 188, 194, 195) During that time, Fitzpatrick

was not aware that her actions had created a physical deficiency in the condition of the tree sufficient enough for it to fall. (Tr. 247, 248, 328, 329, 347, 348). When the tree fell, it landed on both Respondent and the MHTC van parked by John Perkins, the inmates' supervisor. (Tr. 188, 190, 300, 301)

MHTC was on notice that inmates cutting trees and supervised by John Perkins have created dangerous conditions and caused accidents in the past. (Tr. 300, 301) In a prior and strikingly similar incident, a 75 foot tree that was being cut by an inmate, supervised by Perkins, fell on a passing motorist. (Tr. 76, 77, App. L.F. 080-084)

Appellant entered into a contract with the Missouri Department of Corrections on August 26, 1998, wherein it agreed to train and supervise the inmates when using them in work release programs and to provide them with proper equipment to do their jobs. (Tr. 53; Rsp. L.F. 005) In fact, the Work Release Program started in the Hannibal District. (Tr. 40) As consideration under the contract, Appellant obtained a direct benefit in the form of cheap labor by using the inmates in the Work Release Program. (Tr. 52, 367) The program annually provides MHTC with an extra 600,000 man hours of work. (Tr. 367) The work performed by the inmates could not otherwise be done by MHTC, due to the lack of its own resources. (Tr. 368) The inmates, however, provide inexpensive labor for MHTC, since they are paid only \$7.50 per day for an 8 hour shift, or approximately 95¢ per hour, 4 days per week. (Tr. 50, 53, 388, 389)

As a result of Respondent's injuries, she underwent three surgeries, including total knee replacement.(Tr. 83, 84, 165) She incurred medical expenses in excess of \$90,000.00. (Tr. 83, 84, 165)

POINTS RELIED ON

POINT I

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE PLAINTIFF ESTABLISHED AN EXCEPTION TO SOVEREIGN IMMUNITY PURSUANT TO §537.600.1(2) R.S.Mo.

Alexander v. State, 756 S.W.2d, 539 (Mo. Banc 1988)

Jones v. St. Louis Housing Authority, 726 S.W.2d, 766 (Mo. App. ED 1987)

Kilventon v. United Missouri Bank, 865 S.W.2d, 741, 745 (Mo. App. WD 1993)

POINT II

***THE TRIAL COURT DID NOT ERR IN SUBMITTING INSTRUCTION NO. 7
BECAUSE IT WAS A PROPER MODIFICATION OF MAI 31.17 AND 37.01.***

Twin Chimneys v. J.E. Jones Construction, 168 S.W.3d 488, at 499 (Mo. App. ED 205)

Kilventon v. United Missouri Bank, 65 S.W.2d, 741, 745 (Mo. App. WD 1993)

Jones v. St. Louis Housing Authority, 726 S.W.2d, 766 (Mo. App. ED 1987)

POINT III

THE TRIAL COURT DID NOT ERR BY PERMITTING PLAINTIFF'S COUNSEL TO ARGUE THAT THE JURY SHOULD "SEND A MESSAGE," BECAUSE SAID ARGUMENT WAS IN REBUTTAL TO DEFENDANT'S ATTORNEY'S ARGUMENT AND WITHIN THE DISCRETION OF THE TRIAL COURT.

Kelly by Kelly v. Jackson, 798 S.W.2d 699 (Mo. banc 1990)

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

Dickerson v. St. Louis Southwestern Ry Co., 674 S.W.2d 165 (Mo. App. 1984)

Heisler v. Jetco Service, 849 S.W.2d 91 (Mo. App. E.D. 1993)

POINT I

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Argument

Dangerous Condition Exception Pursuant to §537.600.1(2) R.S.Mo, 1978

Respondent disagrees with Appellant's contention that the decisional law interpreting §537.600 is in a state of confusion. (App. Brief. P. 12) The Appellate Courts have clearly analyzed the meaning of the statute on a case by case basis, always keeping in mind the precedents established by this Court.

In 1985, this Court interpreted the statute in Kanagawa v. State By and Through Freeman, 685 S.W.2d 831, 835 (Mo. Banc, 1985). In Kanagawa, four conditions must be satisfied to claim an exception to sovereign immunity under the statute. They are as follows: (1) a dangerous condition of the property; (2) that plaintiff's injuries directly resulted from the dangerous condition; (3) that the dangerous condition created a reasonably foreseeable risk of harm of the kind plaintiff incurred; and (4) that a public employee negligently created the condition or the public entity had actual or constructive notice of the dangerous condition. Kanagawa, id.

The evolution of the decisional law since Kanagawa has been clear and logical. It does not require clarification, only continued application on a case by case basis. The focus of the analysis by the Appellate Courts when applying the facts of a given case to the four conditions typically involve the first and fourth condition, however, all four must be satisfied to state a cause of action. Kanagawa, id.

Because the statute and Kanagawa state that an employee must create the condition, they necessarily imply that the state's property is in a safe condition before a public employee makes it dangerous. Therefore, the actions of the public employee must, in some manner, create the dangerous condition complained of. In Alexander v. State, 756 S.W.2d, 539, 542 (Mo. Banc 1988), this Court stated as follows:

The language of the statute which refers to conditions created by the negligence of state employees, unquestionably contemplates some negligence by agents of the public entity. (Emphasis added by Respondent).

This logical inference, drawn from the plain meaning of the statute, has created the inescapable analysis developed by the Courts since the statute's inception in 1978. The facts in Alexander gave this Court its first opportunity to explain how a public employee may create a dangerous condition in state property.

In essence, Alexander widened the realm of factual settings which could give rise to an exception to the immunity defense.¹ In Alexander, it was the positioning of certain tables in such a manner which caused injury to a worker. Alexander, relaxed the physical or "intrinsic defect" standard, holding that a physical deficiency in a public entity's property could constitute a dangerous condition if it was created by the positioning of the various objects on the property and not by intrinsic defects in the property. Alexander, id., 756; State ex rel Marston v. Mann, id., 921 S.W.2d 100, 102 (Mo. App. Wd 1996).

When this Court arrived at its decision in Alexander it relied on the reasoning

¹*For a detailed analysis of the history of the theory, after Kanagawa, and before and after Alexander, see State ex rel Marston v. Mann, 921 SW2d 100, 102 (Mo. SD 1996).*

espoused by Judge Karohl in Jones v. St. Louis Housing Authority, 726 SW2d 766, at 774 (Mo. App. ED 1987) in describing how the positioning of the tables against the ladder , “created a physical deficiency in the state’s property which constituted a dangerous condition”. Alexander, 542 In Alexander, this Court gives a hypothetical wherein “this situation is no different in legal effect than had a wrung on the ladder been attached in such a fashion as to have been insufficient to support the plaintiff as he climbed from the upper room”. Alexander, id. Respondent relies on this logic. At the moment her fellow inmate, Dana Fitzpatrick, cut too deeply into the tree, she created a deficiency in it making it unstable and likely to fall.

The concept of a physical deficiency was originally discussed in Jones, id. See, Johnson v. City of Springfield, 817 SW2d 611, 614 (Mo App SD 1991). Jones was the seminal case for this Court’s holding and rationale in Alexander. In Jones, a child was killed because debris was thrown from a mower. In Jones, the accumulation of debris on the state’s property made it physically deficient, thereby creating a dangerous condition.

Judge Karohl’s hypothetical in Jones sheds further light on the correct application of the law. He stated that what the maintenance worker did was no different than if “the Housing Authority had dug a trench and left it unattended ... posing a threat of injury to others”. Jones, at 774. This hypothetical is the reality in Cain’s case. Obviously, before the trench is dug, the ground has no physical deficiencies. The deficiency is created only after a public employee intervenes by altering the condition of the ground by digging the trench; until then it is safe. Therefore, until Cain’s fellow inmates cut the tree, it is safe. When Fitzpatrick cuts it, she creates a deficiency which poses a threat. Her chain saw is no different than the mower in Jones. Moreover, like the hypothetical trench in Jones, MHTC’s employee, John Perkins, left the tree unattended, as did Fitzpatrick, while she

fixed her saw.

In the present case the physical deficiency in the state property goes well beyond the mere positioning of objects, like the debris in Jones or the tables in Alexander. Here the deficiency is created in the property itself and, thus, it becomes a threat.

Appellant states on page 16 of its brief that “the existence of the tree by itself was not a threat to Plaintiff’ until Ms. Fitzpatrick cut it.” This statement is just one example of Appellant’s continuous attempts to argue a convoluted and constrictive interpretation of the §537.600.1(2) by refusing to recognize the state employee’s role in creating the dangerous condition. An interpretation specifically rejected by this Court in Alexander at 542. Again the statute implies that the condition of the property is safe at the outset.

The Appellant would have this Court disregard the analysis spawned by Alexander and the cases that follow it. It can only be avoided if the legislature eliminates the language from the statute which invokes an exception to sovereign immunity based on a public employee’s negligent acts. If the statute stated that the state is only liable for dangerous conditions when it has actual or constructive knowledge of the condition, notwithstanding the actions of its employees, then the line of cases which analyze the public employee’s acts creating the condition would never have developed.

The first line of cases after Kanagawa, id., provided a narrow meaning of “dangerous condition”, by reference to defects in the physical condition of the public entity’s property. In Marston, supra, at 103, the Appellate Court in the Southern District stated as follows:

In Missouri, three major lines of case authority define the term “dangerous condition” as found in §537.600.1(2). See parallel discussions in Johnson, supra. In the first line of case

authority, "dangerous condition" has a narrow meaning and refers to defects in the physical condition of a public entity's property. Kanagawa, 685 S.W.2d at 835; Chase v. City of St. Louis, 782 S.W.2d 571, 572 (Mo. App. 1989) (holding that petition failed to allege fire hydrants were physically defective where fire hydrants did not work and plaintiff's decedent was killed in fire); Zubic v. Mo. Portland Cement Co., 710 S.W.2d 18, 19 (Mo. App. 1986) (holding that a sewer trench on sewer district property was not a physical defect and therefore was not a dangerous condition); Twente v. Ellis Fischel State Cancer Hosp., 665 S.W.2d 2, 11-12 (Mo. App. 1983) (finding no dangerous condition in absence of security guard from his post in hospital parking lot where plaintiff was raped; no allegation of physical defect of property was made).

In the second line of cases, Missouri courts began relaxing the physical defect standard holding that the physical deficiency in a public entity's property could constitute a dangerous condition if the dangerous condition was created by positioning various objects on the property and not by intrinsic defects in the property. See Alexander v. State, 756 S.W.2d 539, 542 (Mo. Banc 1988) (holding that the negligent placement of a folding room partition at the foot of a ladder on which plaintiff was working created a physical deficiency which constituted a dangerous condition); Jones v. St. Louis

Housing Auth., 726 S.W.2d 766, 774 (Mo. App. 1987) (holding that the negligent failure to remove debris on grounds contributed to creating a dangerous condition which resulted in death when debris was flung by lawn mower). In Alexander, at 542, the Missouri Supreme Court declared that the test for a dangerous condition was that the condition was "dangerous" because of its existence, without intervention by third parties, posed a physical threat to plaintiff. (Emphasis added) The concept of dangerous condition "does not include property which is not itself physically defective, but may be the site of injuries as a result of misuse or other intervening act". Stevenson, 820 SW2d at 612 (finding no physical defect, the school had physically sound but open, accessible and unguarded banisters). Additionally, when the injury is the direct result of the intentional conduct of another person and not the direct result of the physical condition of the property, sovereign immunity is not waived. Dale ex rel Dale v. Edmonds, 819 SW2d 388, 390 (Mo. App. 1991) (finding no physical defect when student intentionally hit in the eye by another with debris from school yard).

The third line of case authority shows that a dangerous condition may exist due to negligent, defective or dangerous design of public roads and highways, whose very existence poses a threat to a plaintiff.

Marston's discussion of the definition of dangerous condition is not elusive as suggested by Appellant. It shows us that the definition has evolved on a case by case basis.

Intervention by Third Parties

The concept of "intervention by a third party", as discussed in Alexander at 542, permits the immunity defense where the state's property is not altered in any way and only poses a threat because of the physical actions of a party who intervenes in some manner. However, if the party is a public employee and his actions alter the condition of the state's property by creating a physical deficiency in it, sufficient enough to pose a threat of injury to anyone who comes upon it, then "intervention by a third party" is not applicable and an exception to the immunity defense is invoked. Alexander, id. Alexander refers to the party in the third part simply to describe his relationship to the plaintiff's claim against the state. In cases involving either Missouri roadways or intentional torts, the third party is typically not a public employee. See, e.g., Marston, supra, where the third parties were dragsters; or Twente, supra, where the third party assaulted and raped the plaintiff on the state's parking lot; and State v. Godfrey, 883 SW2d 550, 552 (Mo App ED 1994) where a juvenile escaped from a detention center in a motor vehicle and struck and killed the plaintiff; or Dale, supra, where Plaintiff tripped over asphalt or debris thrown on the property by third parties..

In these types of cases, the concept is simple to understand for two reasons. Firstly, under the fourth condition of Kanagawa, there can only be an exception to sovereign immunity if a public employee creates the condition.... Secondly, the state's property is never the direct or indirect cause of the injury. For example, in Marston or Twente, supra, the party's act causes the injury, but it coincidentally happens on state property. However, when the party is a public employee, within the meaning of §537.600.1(2)

R.S.Mo, the proper application of the concept requires a careful reading of the cases. For purposes of analyzing the concept within the context of the present case, the third party is always presumed to be a public employee within the meaning of the statute.

As previously stated, since the statute requires that a public employee must create the dangerous condition complained of, it implies that the state's property is at the outset, in a safe condition. Therefore, the employee must be intervening in some manner when he creates the condition. The focus must be on the act of the party and its resulting effect. If the public employee's act alters the condition of the property by creating a physical deficiency in it, and that deficiency poses a threat of injury, a dangerous condition has been created. In this instance, intervention by a third party does not bar liability by sovereign immunity. Whereas if the public employee's act does nothing to change the physical condition of the property, and the danger results solely from the act itself, then intervention by a third party is applicable and the immunity defense is available.

Appellant states there are no material distinctions between the present case and State ex rel St. Louis Hospital v. Dowd, 908 SW2d, 738 (Mo. App. 1995). See, Appellant's Brief, pg. 13. Quite the contrary, a careful reading of Dowd, in light of the concept of intervention by a third party, reflects a clear distinction between the present case and Dowd.

In Dowd, the supervisor of a state hospital activated a paper shredder. The Court in Dowd, quoting Godfrey, supra, at 552, concluded that his action of turning on the shredder was an act of intervention by a third party. Dowd, 740. The Court's ruling in Dowd holds that the mere activation of the paper shredder, by a third party does not alter the physical condition of the paper shredder in any way creating a dangerous condition in it. In short, pressing the button to turn on the machine did not create a physical

deficiency in it. Dowd, 740. However, if, for example, the supervisor of the state hospital (obviously a public employee) removed a safety guard from the shredder prior to activating it, then this act creates a physical deficiency in the state's property by altering the condition of the machine to an extent which made it dangerous. Thereafter, when it is turned on, by anyone, it posed a threat because it was no longer in a safe condition. This logic is consistent with Alexander, supra, and reflects a major distinction with the present case in that Fitzpatrick, unlike the supervisor in Dowd, did alter the condition of the state's property by cutting into the tree she was ordered to bring down. Prior to her acts, it was stable and safe. Thereafter, her actions created a deficiency or defect in the state's property, causing the tree to fall on Respondent.

Appellant is correct when it states that "notwithstanding the negligence of the supervisor, the Eastern District in Dowd, held that the paper shredder was not in a dangerous condition and therefore the claim against the state was barred by sovereign immunity". (Appellant's Brief, pg. 14.) However, the rationale for the Court's conclusion is based on intervention by a third party. Dowd, 740. The plaintiff failed to invoke an exception to sovereign immunity, because the supervisor, even as a public employee, did not alter the condition of the shredder in any way and thus did not create a deficiency in the state's property which exposed the Plaintiff to a threat of injury, pursuant to Alexander, supra.

The supervisor may have been negligent for turning on the shredder when a mental health patient was nearby. Obviously it may have been foreseeable on the part of the supervisor that a patient could have reached out and touched the machine unaware of its potential danger. Under those circumstances, the patient may have a common law cause of action against the supervisor in his individual capacity, assuming that official

immunity for discretionary acts did not bar the claim.² However, the state was not liable in Dowd, because the state's property was never altered by the hospital supervisor in any way. It was in the same state before and after his acts. Therefore, it was never in a dangerous condition. He simply turned on the machine. His action constituted intervention by a third party and the claim against the state was barred by sovereign immunity. Dowd, id. The condition of the tree in the present case was completely different before and after Fitzpatrick's acts.

Appellant mistakenly uses the concept of intervention by a third party, to bar Respondent's claim without analyzing the effect that the party's act had on the state's property or if the party was an agent of the state.

The analysis in Dowd is consistent with the holding in Warren v. State of Missouri, 939 SW2d, 950, 956 (Mo App WD 1997), wherein an inmate was injured because a table saw he was using in the prison workshop was missing a safety guard. Under those conditions, it was obvious that the saw was in a dangerous condition because someone had altered its physical condition by removing the guard. Undoubtedly the Court in Warren would have affirmed the trial Court's dismissal if the saw was in a safe condition and it was merely turned on. This would be consistent with the holding in Dowd.

Appellant also misinterprets the holding in Warren, in a vain attempt to distinguish it from the present case. Warren does not state that if the saw was negligently operated by another inmate, there would be no claim. See, Appellant's Brief, pg. 14. Warren states if someone other than an agent for the state, i.e., not a public employee, removed the safety

²*In fact, the Court in Dowd, at pg. 741, stated his actions were discretionary and therefore he was not liable for his actions. In the present case it is not relevant since no claim was ever asserted against Fitzpatrick or Perkins.*

guard, then the state may have a defense to the inmate's claim under sovereign immunity. Warren, pg. 956. Obviously, the Court's reasoning is based on the fourth condition in Kanagawa that a public employee must negligently create the condition. However, if the guard was removed by an agent of the state and the plaintiff was injured as a result of his own use of the saw, or arguably, even if injury occurred to the plaintiff because a third party used the saw, the state could be liable because its agent created a dangerous condition in the state's property and the risk of injury to the plaintiff was foreseeable.

In Cain's case, if her fellow inmate activated the chainsaw, assuming it was not altered in any way, and Cain was injured by it, there would be no claim. However, when the inmate used it to cut the tree, the tree became dangerous and a cause of action accrued. Fitzpatrick created a physical deficiency in the State's property by making cuts which significantly altered its physical condition making it a threat to anyone who came upon it. Alexander, supra. She removed enough wood from the tree to make it unstable and thus a threat to the Respondent. Her actions are no different than the actions of the state's agent in Warren when he removed the saw's safety guard.

Moreover, when it fell uncontrollably and unpredictably Fitzpatrick was not cutting it. Quite the contrary, several minutes had elapsed prior to its falling during which time Fitzpatrick was attempting to fix her saw so she could continue to cut it. While this was occurring, unbeknownst to the inmates, Fitzpatrick's cuts had weakened the tree and made it unstable, and thus in a dangerous condition. The inmates were unaware of the condition because of their lack of experience and training. The situation is compounded by the fact that the MHTC supervisor was never present during the process to supervise their actions or to warn them of the potential dangers on the assumption he had the requisite knowledge to appreciate it himself.

The time elapsed between their acts and the tree falling is not relevant. For example, what if they made their cuts and left the tree in that condition to get a different saw and it fell on a passerby an hour or even a day later? Liability attaches because a dangerous condition was created by a “public employee”.

*Finally, Appellant references *Farrell v. St. Louis County*, 190 SW3d 401 (Mo App ED 2006), but again misinterprets its application to Cain’s case. In *Farrell*, a prisoner pushes a table which strikes another inmate causing him injury. The condition of the table was not altered. No physical deficiencies were created in it. It is, however, a good example of intervention by a third party. *Farrell*, 403.*

*It demonstrates how state property, unaltered in any way by a public employee, becomes dangerous when an outside agency merely pushes it. Like the roadway in *Nixon*, the tables in *Farrell* are in the same condition before and after an act of intervention by a third party. It is the act of the third party which poses a threat to the Plaintiff, not the condition of the property itself, pursuant to *Alexander, supra*. The defense of sovereign immunity shields the state from these actions just as it did when the supervisor in *Dowd* merely turned on the machine. In the present case, it is the condition of the tree, dramatically changed after it was altered, that poses a threat.*

*It is unclear from reading *Farrell* if the inmate who pushed the table was an agent within the meaning of a public employee. Obviously, if he was not, the inquiry ends and the Court does not need to analyze the issue of intervention by a third party.*

*Finally, Appellant relies on *State ex rel. Nixon v. Westbrooke*, 143 S.W.3d 737 (Mo. App. SD 2004), and not surprisingly, again confuses the Court’s clear rationale. In *Nixon*, two Missouri Highway Patrol troopers responded to a scene of an accident. The troopers took steps to barricade a lane and used “cones” to divert traffic. The plaintiff*

filed suit claiming their actions created a dangerous condition on the roadway which caused injury to the plaintiff, a tow truck driver who was removing debris from the roadway. There was no allegation that the troopers altered the condition of the state's property (i.e., roadway) by creating a physical deficiency in it. They merely diverted traffic. Therefore, the roadway was not itself physically defective. Nixon 740. Their actions are similar to the dragsters in Marston, supra, or the inmate in Farrell, supra, because their acts are the direct cause of the plaintiff's injuries, as opposed to a defect in state property created by an employee who altered its condition by making it physically deficient in some manner.

The Court in Nixon concluded the troopers' actions constituted "intervention by a third party". Nixon 741. Therefore, the state was not liable.

Appellant tries to use Nixon as authority to establish that the inmates are not "public employees." Appellant states "that if the troopers, in Nixon, like the supervisor in Dowd, were considered third parties,' then surely Fitzpatrick, in the present case, is a third party'." (App. Brief, pg. 17). Appellant's conclusion is erroneous because it is premised on convoluted logic. It fails to understand the concept of intervention by a third party.

Firstly, "intervention by a third party" has nothing to do with the definition of a "public employee", as that term is used in the statute or in Kanagawa. Secondly, the supervisor in Dowd was obviously a public employee or the Court in Dowd would never have addressed the issue of public official immunity. Dowd, 741. It is equally obvious that the Missouri state troopers in Nixon are "public employees."³ How could they be

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Nixon involved a Writ of Prohibition. The Court granted the Writ and stated on pgs. 737 and 741 that the trial

anything else? Appellant attaches too much significance to the words "third party." The words merely refer to that party's acts in relation to the plaintiff's claim against the state.

In fact, if the supervisor of the state hospital in Dowd, or troopers in Nixon, were not agents of the state, it would be unnecessary for the Court to even discuss the application of "intervention by a third party," because the fourth requirement established by Kanagawa demands that a public employee creates the dangerous condition. If the condition is created by someone other than a state agent, there is no liability. See, Warren, supra.

Appellant goes on to state, on page 17 of its brief, that "her actions in cutting the tree intervened to cause it to be weakened or unstable, but not a dangerous condition under §537.600". This statement makes no sense - - how can a 30 foot tree be unstable or weakened but not in a dangerous condition? This is another example of Appellant's refusal to acknowledge the state employee's role in creating the dangerous condition, contrary to Alexander, at 542.

It also reflects Appellant's lack of understanding why her acts are not considered "intervention by a third party". Obviously Fitzpatrick "intervened". She was ordered to cut down a tree by her MHTC supervisor. Prior to her actions, the property is safe at the outset. Her actions, as an "agent of the state" create a physical deficiency in the state's property by altering its condition. Consequently, the tree now poses a threat to anyone who comes upon it. Therefore, it is in a dangerous condition.

court should take no further action against the "state" in the pending case; other than dismissing it (the state) as a party defendant. Apparently the case proceeded against Troopers Trader and Warren. Whether their actions were protected by public official immunity is not established in the opinion.

Respondent was not injured by Fitzpatrick, or even her saw. Her injuries were a direct and proximate result of the defective condition of the tree that fell on her, only after it was created by the negligence of an agent of the state.

Appellant's disturbing lack of ability or intentional refusal to differentiate between these legal issues in its brief is the only thing that remains confusing or elusive in this case. Nevertheless, Nixon is another good example of intervention by a third party where a third party's act does nothing to alter the condition of state property. It also serves as yet another reminder of the law's continuing logical evolution since Alexander.

In an effort to apply a narrow definition of a dangerous condition, as espoused by a pre-Alexander case, to the instant case, Appellant relies on Zubcic v. Missouri Portland Cement Company, 710 SW2d, 18 (Mo. App. ED 1986). Zubcic analyzed the entire issue in three paragraphs on one page of its opinion. Zubcic, 19. It did not attempt to analyze the compound effect of all the conditions under Kanagawa, id.

Moreover, the holding by the Appellate Court in Zubcic, supra, was decided before Alexander, otherwise it may have reached a different conclusion. Further, Zubcic, does not conclude one way or another if a public employee within the meaning of the statute created the condition. It focuses solely on the alleged "physical defect" on the Sewer District's property. Assuming that a "public employee" did create the condition, one could argue after Alexander, that failing to properly shore up the trench, may very well have created a physical deficiency in the trench of a magnitude sufficient to create a dangerous condition in it thereby invoking an exception to sovereign immunity pursuant to Alexander. After all in Zubcic, like Alexander, it was the negligent positioning of certain objects, that is, lumber, to shore up the trench which allegedly created the dangerous condition.

Although Appellant fails to recognize that Alexander significantly expands the narrow definition of “dangerous condition” offered in Zubcic, it also fails to recognize that unlike Zubcic, where the injured employee was familiar with the area, and as a construction worker had experience in the construction of it, the evidence in the case at bar indicates that Respondent was a stranger to the area and had no experience or training in tree cutting. (Tr. 312, 326) Zubcic, 19. She was not familiar with any part of the process and had never been to the location of the incident before it occurred. (Tr. 312).

Therefore, since Zubcic was decided prior to Alexander and it is factually dissimilar to the present case it provides little or no authority to support Appellant’s position.⁴

Respondent submits that the line of cases which have developed since Jones, supra, that are factually similar to the present case, have all focused on whether or not the state’s property was altered in some manner, by a public employee, creating a deficiency in it thereby exposing threat of injury to anyone who comes upon it. This focus has been a logical evolution of the law after carefully considering the term “dangerous condition,” and the actions of the “public employee,” not the elusive and confused analysis suggested by Appellant.

Appellant on page 13 of its brief states that “the initial inquiry is whether MHTC’s property was in a dangerous condition at the time of plaintiff’s injury”. While it is true

⁴An arguable conflict exists when comparing the facts in Jones and Alexander, supra, with Zubcic. Therefore, to the extent Zubcic is inconsistent with Alexander, it should be reversed. This is especially persuasive since this Court relied on Jones, not Zubcic, when it arrived at its conclusion.

that Kanagawa, id., establishes this as the first condition, the inquiry cannot stop there, but must continue so as to examine the remaining three conditions established by Kanagawa in conjunction with one another. And Appellant states “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”. (App. Br. 13.) This is true, but again it must be considered with the fourth condition established by Kanagawa, id., in mind, to wit: that a public employee must “create the dangerous condition complained of”. Prior to this occurring, the state’s property is safe at the outset. Respondent agrees that prior to Fitzpatrick’s acts the tree in question was not a danger to anyone. It was only after she altered its condition by cutting it, did she create the dangerous condition complained of.

Appellant’s statement on page 13 of its brief that “after those cuts were made, the forces of nature, for example, gravity and perhaps wind, caused the tree to fall”, is ludicrous. For example, if MHTC used inmates to raze a perfectly safe and stable highway overpass with jack hammers and other power equipment and allowed it to remain exposed in a partially demolished condition and inclement weather ensued, MHTC would argue any injury to a passerby or motorist, caused by the condition of the overpass, would be caused by the forces of nature, not its employee’s negligence in creating the condition in the first place. Obviously, under the law, it is foreseeable that injury may occur once MHTC’s agents commit a negligent act, notwithstanding the effects of weather or physics. This premise is so fundamental, it needs no citation to support it. However, see, e.g., Warren, supra, at 956.

In fact, the second and third conditions established in Kanagawa, and under the statute, contemplate this basic premise - - (2) that plaintiff’s injuries directly resulted from the dangerous condition; (3) that the dangerous condition created a reasonably

foreseeable risk of harm of the kind Plaintiff incurred.... Kanagawa, id. Even in Jones, supra, the Court held the Housing Authority responsible despite the fact that it subcontracted the mowing, because it was foreseeable that the debris could be thrown from the mower.

One must analyze all the facts in light of all four conditions required by Kanagawa. This means the courts will always determine, on a case by case basis, to what extent a physical deficiency in the state's property constitutes a dangerous condition and determine if the plaintiff's injuries were directly caused by the condition and if the condition created a reasonably foreseeable risk of harm. Kanagawa, id. It seems painfully obvious that injuries sustained by someone during the felling of a tree is foreseeable and a direct result of the dangerous condition of the tree after it is cut.

The tree in question would never have fallen but for the cuts made by Dana Fitzpatrick, an agent of the state, being paid by MHTC and under its control and supervision. She was told to cut the tree by her supervisor, John Perkins, and as Defendant's expert, Skip Kincaid, stated at trial, the process of cutting a tree is inherently dangerous and unpredictable. (Tr. 473, 481). Any time a large tree is being cut, it is a condition which is obviously dangerous and, pursuant to Alexander, one which poses a threat of physical injury to anyone located within its falling radius.

The Inmates are "Public Employees" within the Meaning of §537.600.1(2)

Appellant states on pg. 17 of its brief that Judge Clayton in the trial determined that Fitzpatrick was an agent of the State. (Tr. 511). Quite frankly, that issue was never debated in this case. Appellant's trial counsel confused the concept of intervention by a third party, when he attempted to argue that it applied even when the party's act altered the condition of the property (Tr. 510, 511), but never did he argue that the inmates were

not agents of the state.

The facts in this case lead to only one conclusion, that the inmates are “public employees” as that term is used in §537.600.1(2) R.S.Mo. Cain’s fellow inmates were not third parties who intervened, but agents of the state who created a physical deficiency in MHTC’s property. See, Bowman v. State, 763 S.W.2d 161 at 166 (Mo App 1988) wherein a juvenile, “who was essentially a prisoner under the supervision of the Division of Youth Services,” was still a “public employee” within the meaning of §537.600 R.S.Mo. In Bowman, two youths (Brenda Savu and Brenda Bowman) were responsible for riding on the back of a trash truck. Brenda Bowman was injured when Brenda Savu activated the trash compactor. Danny Sides, was a state employee who drove the truck. The Court in Bowman states:

[2] Here, Brenda Savu performed a service for the state by collecting trash.

Danny Sides, an employee of the state, exercised actual control over the manner in which she performed her tasks. A jury could properly find that those facts brought her within the common law definition of a servant and subjected her master, the state, to liability for her acts. Therefore, the court improperly granted summary judgment for the state....

Although the injured party in this case is not a stranger to the employer, neither should she be considered an employee. Because she was, in essence, a prisoner, we can hardly say that she voluntarily entered into a contractual arrangement with the state in which she gave up her rights to recover for her injuries. Brenda Savu, on the other hand, served the

state, and it accepted her service and exercised control over her performance....

Therefore, inmate Fitzpatrick, the sawyer, who is being paid by MODOT and under the control of a MODOT employee, is well within that definition - - "a public employee", pursuant to §537.600.1(2) R.S.Mo.

Appellant attempts to distinguish Bowman from Dowd because the exception to sovereign immunity used in Bowman was based upon the "negligent operation of a motor vehicle", as opposed to the "dangerous condition exception" used in Dowd. (App. Br. pg. 16) There is no need to distinguish them. They stand for two complete different issues unrelated to either exception to sovereign immunity. The major issue before the Court in Bowman was whether Brenda Savu was a "public employee" within the meaning of §537.600.1(2); it did not discuss which exception to immunity was used to establish the underlying liability of the state. Dowd, as previously stated, has nothing to do with the issue of vicarious liability. Dowd analyzed the issue of "intervention by a third party", regardless of the underlying exception to immunity. Respondent relies on Bowman as authority that Fitzpatrick was also a public employee within the meaning of the statute. She is well within that definition.

Her negligence causes injury to a fellow inmate. She is a servant of the state, subjecting her master (MHTC) to liability for her acts while her supervisor, John Perkins, exercised control over the manner in which she performed her task. See, Bowman, at 164. In Bowman, supra, and the instant case, Plaintiffs brought claims under the sovereign immunity statute since they are not covered by Missouri Workers Compensation

law.⁵ See, §287.090.1(4); see also, Porter v. Mo. Department of Corrections, 876 S.W.2d 646. Coincidentally, in Bowman, the change in the Workers Compensation law excluding inmates from compensation benefits under §287.090.1(4) had not yet been promulgated. The Court, on its own rationale, excluded her from the exclusive remedy of Workers' Compensation, since she did not meet the classic definition of an employee under that Act. Bowman, 165. Therefore, the inmates' remedy for injuries incurred in the line of "employment" must be based on a claim against the state under an exception to sovereign immunity.

Appellants would argue that because the Legislature has excluded inmates from receiving Workers' Compensation benefits, it is ipso facto, also the intent of the Legislature to prohibit them from filing suit against the state for injuries incurred in the

⁵Appellant argues on page 15 of its brief that Respondent could recover more than a state employee for a job related injury under the Missouri Workers Compensation Statute. This is not only irrelevant since the inmates are not "employees" within the Missouri Workers Compensation Act, and Respondent is not suggesting that the statute should be changed to include them, but it is also a complete misstatement of the facts and the law under the Act. Although the maximum average weekly wage in 2005 was \$354.05, the Missouri Workers Compensation Act provides for either the state maximum or two-thirds (2/3) of the employee's weekly wage, *whichever is less*, to be used as the compensation rate for an injured employee. See, R.S. Mo §287.170. In the instant case, Ms. Cain's weekly wages are less than the state average weekly wage and, therefore, her compensation rate would be approximately \$20.00 per week (95¢ per hour x 2/3 or approximately 63¢ per hour x 8 hour day = \$5.05 x 4 days) which equates to approximately \$2,120.00 based upon the unlikely assumption that she would have a 100% disability of the knee, (106 weeks x \$20.00) not the extravagant and absurd figure of \$56,648.00 erroneously postulated by Appellant.

line of employment. (App. Br. pg. 15) Presumably this logic would extend to the law's proscription against civil rights violations, breaches of contracts, or if a prisoner was injured in an auto accident involving the motor vehicle exception to sovereign immunity; all of these causes of action could occur in the line of employment. This is yet another attempt by Appellant to support its position by adopting a strained interpretation of the cases and law that developed after the inception of §537.600.1(2). The Court in Warren, supra, stated on page 958 "...where a prisoner is injured...such a reading of the statute would not only defeat its purpose, it would be contrary to common sense..."

As the Court in Bowman states on pg. 164, one must keep in mind the compensatory purpose of §537.600.1 R.S.Mo, since it establishes an exception to sovereign immunity. Indeed, this Court in Alexander, at pg. 542, states that the statute... unquestionably contemplates some negligence by agents of the public entity. (Emphasis added by Respondent)

Therefore, it is impossible to exclude an examination of the traditional common law doctrine of vicarious liability and its attendant definitions of master and servant when determining the meaning of "public employee" under the statute. Bowman, 164.

In Bowman, the Court stated as follows:

A master is a principal who employs another to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.

A servant is a person employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right of control by the

master.

Appellant states that control of one's activity in prison is an incident of detention. (App. Brf. pg. 15) This is true if we were analyzing the issue of detention as opposed to agency. Here, control is being exercised pursuant to a contract in consideration of payment to the inmates, albeit a slave's wage, in return for a direct benefit to MHTC. Appellant suggests that inmates can never be agents for the state. This is preposterous and ignores fundamental case law, not to mention the lack of any citations to support the point.

Therefore, under Bowman's classic and fundamental interpretation of master/servant law, Fitzpatrick's actions establish the vicarious liability of MHTC because she is within the definition of a public employee. She is not a third party unrelated to this case.

MHTC's has Assumed a Duty Under its Contract with MHTC

A glaring deficiency in Appellant's brief is the conspicuous absence of any meaningful discussion of the issues precipitated by the August 26, 1998 working agreement between MHTC and the Missouri Department of Corrections. Appellant devotes less than two paragraphs to discuss the ramifications of this contract in the present case. (App. Brf. pg. 20)

*Section 227.210.1 R.S.Mo provides that "the state highways...shall be under the jurisdiction of the Commission (MHTC)... and shall be maintained by the Commission and kept in a good state of repair at whatever cost may be required." Section 227.220 R.S.Mo authorizes the MHTC, "to remove any... obstruction to the lawful use of the state highway, including the right to remove or trim trees located within or overhanging the right of way of the state highway." See, *Mispagel v. Missouri Highway & Transportation**

Commission, 785 S.W.2d 279.

Section 227.220 R.S.Mo, supra, establishes MHTC's duty to maintain the roadside, including its duty to cut trees. However, the Appellant in the instant case goes one step further; it enters into a contract with the Missouri Department of Corrections (MDC) and takes on a new role by assuming the duty of paying, supervising, equipping, and training the inmates in order to assist it in fulfilling its legislative mission under the statute. In doing so it is saving over 600,000 man hours per year. ⁶ (Tr. 367-368)

In 1953, this Court recognized "that a Defendant, by entering into a contract, may place itself in such a relation toward third persons as to impose upon it an obligation to act in such a way that they will not be injured." Wolfmeier v. Otis Elevator Co., 62 S.W.2d 18 at 22 (Mo S.Ct. 1953).

More recently, the Missouri Court of Appeals in the Western District in Kilventon v. United Missouri Bank, 865 S.W.2d 741 (Mo App WD 1993), has extended this same principle to MHTC.

In Kilventon, the Court reviewed the trial Court's order granting summary judgment in favor of MHTC. Under Kilventon, MHTC allowed explosives to remain in an unmarked trailer with no warning signs. The trailer caught fire and caused injuries to

⁶*Although it is reasonable to assume MHTC workers cost more, nevertheless, even at the approximate minimum wage rate of \$6.00 per hour, this would cost MHTC \$3,600,000.00 ($\$6.00 \times 600,000$). By Mr. Woods' own admission, using the inmates at approximately 95¢ per hour ($660,000 \times .95 = \$570,000.00$), MHTC was saving at least \$3,030,000.00 per year. This figure does not include taxes, social security, or other costs such as medical insurance, retirement, unemployment, workers compensation, etc., which MHTC is not required to withhold or pay for the inmates, since they are not employees. The net savings to MHTC are huge.*

several firemen who responded to the scene. The court held that if MHTC assumed an affirmative duty, by contract or conduct, to implement safety precautions at the job site, it was liable for injuries to the third party fireman caused by the unsafe performance of MHTC work. See, Kilventon, supra, at 745. In Kilventon, there was even an allegation of an arsonist causing the fires in question. Without regard to the possible acts of "intervening third parties" the court still suggested that liability could be extended to MHTC, for failure to warn of the potentially dangerous condition.

Appellant narrowly construes the facts under Kilventon, by arguing that the issues under the contract arose solely to determine if MHTC had fully relinquished possession and control of the accident site to a contractor. Appellant's interpretation is weak. In Kilventon, there was a genuine issue of material fact as to whether or not MHTC assumed an affirmative duty under a contract to implement safety precautions at the job site. Kilventon, 745 The Court in Kilventon, recognized this as an issue, and reversed the order granting summary judgment in favor of the Defendant and remanded the case for trial. In the instant case, there is no genuine issue of material fact as to whether or not Appellant entered into a contract to train, supervise and provide the necessary equipment for the inmates to perform their work. It exists and it is undisputed. (App. L.F. 001)

Incidentally, the dangerous condition in Kilventon was the presence of explosives in a trailer. Kilventon, 746. Explosives are inherently dangerous and their mere presence, regardless of any other facts, makes the area around them in a dangerous condition. Kilventon, 746. (Emphasis added by Respondent)

In the present case, Appellant's own expert, Skip Kincaid, stated as follows:

Q.(BY MR. FIORE) ... that you agree, do you not, that cutting a tree is an inherently dangerous process, correct?

A. Yes.

Q. (BY MR. FIORE) *There is absolutely no question in your mind about that?*

A. No.

(Tr. 473)

Q.(BY MR. FIORE) *Now Skip, it's very clear to you, is it not, that this tree felling process is very unpredictable, do you agree?*

A.Yes.

(Tr. 481)

"An inherently dangerous activity is one for which the 'employer should recognize as necessarily requiring the creation ... of a condition involving a peculiar risk of bodily harm to others unless special precautions are taken '... " Mays v. Penzel Construction Co., 801 S.W.2d 350, 352 (Mo App. ED 1990).

Under Mays, "inherently dangerous tasks create a danger requiring active care to counteract; these tasks must be distinguished from situations in which the danger is created by the negligent manner of performing the task." Mays, at 352 quoting Smith v. Inter-County Tel. Company, 559 S.W.2d 518 (Mo banc 1977)⁷ Therefore, in the present case, MHTC was under a duty to take affirmative action to make the work area safe which includes the area within the tree's falling radius. Its contract only compounds its obligation.

⁷See also, Black's Law Dictionary, 7th Ed defining inherently dangerous as *"danger inhering in the instrumentality or condition itself at all times so as to require special precautions to prevent injury, not danger arising from mere casual or collateral negligence of others with respect thereto under particular circumstances."*

The courts have also recognized that a duty may be assumed and undertaken by conduct and once so assumed, the Defendant must exercise reasonable care in carrying out the duty. Bowman v. McDonald's Corp., 916 S.W.2d 270, 287 (Mo WD 1995). In the present case, Chris Shulse testified that MHTC has shown certain training tapes to inmates but hadn't done it yet with the crew Respondent was a part of. (Tr. 131) In fact, MHTC did it after the accident. (Tr. 132) Yet, despite knowing that past crews under Perkins' negligent supervision have caused injury, it allows Perkins to order an untrained crew to take down a tree with a height and diameter larger than anything they have encountered before. Therefore, based upon either Kilventon or Bowman, supra, MHTC's contract or conduct indicate it has assumed a duty to train, supervise and properly equip the inmates. Once MHTC assumes these duties by conduct or contract, it is liable for unsafe performance of the inmates' work if it negligently causes injury. Kilventon, 745.

Appellant would dismiss Kilventon's discussion of this legal premise as "dicta" (App. Brf. pg. 20). However, as indicated, the holding in Kilventon developed in response to a motion for summary judgment. The Court stated on page 746, that "genuine issues of material fact exist concerning whether MHTC assumed responsibility for ascertaining that the appropriate signs and warnings were placed on the trailers and whether MHTC had actual or constructive knowledge of the dangerous condition". Obviously, the Court mentioned these issues because they could establish MHTC's liability. Cain also relies on this logic as a basis for her cause of action.

In Oldecker v. Peters, 862 S.W.2d 94, 106 (Mo App WD 1993), the Court held that MHTC could be negligent under the dangerous condition exception to sovereign immunity for violating its design manual by not providing the lighting prescribed in the manual on a specific stretch of roadway. Therefore, MHTC should be liable for violating

its employee manual if it prescribes certain tree felling techniques.

In the present case, MHTC's own manual provides instruction on tree removal. It requires, inter alia, posting an employee to warn and utilizing proper notching techniques when felling a tree. (See, Res. L.F. 028) Albeit it is insufficient compared to the ANSI standards (Z133 - 9.5 et seq) or The Arborist's Safe Tree Felling Guide also introduced during the trial of this case. See, Res. L.F. 057, et seq. Although the manual applies to the inmates, it was never given to them. In fact, they never received any training. MHTC violated its own standards by never instructing them pursuant to its own safety manual and for not fulfilling its obligations to train them under the working agreement with MDC.

If the contract is not examined, and made an issue in this case, it will encourage MHTC to continue ordering prisoners in the work release program to perform tasks for which they are inadequately trained, under equipped and unsupervised, thereby exposing them to an unnecessary and unreasonable risk of injury.

Respondent agrees with Appellant that historically a governmental entity's failure to perform an intangible act, including failure to supervise, cannot constitute a dangerous condition in the property for the purpose of waiving sovereign immunity. See, e.g., State ex rel Div. MCRS v. Russell, 91 S.W.3d 612 (Mo banc 2002). However, once a dangerous condition is established, these intangibles may be considered to determine the extent of the employee's negligence. E.g., Kilventon, supra. The cases cited by Appellant analyzing intangible acts do not involve the public entity's contractual obligation to perform them. Respondent submits Kilventon is controlling since it, like the present case, involves a contract.

Appellant would prefer to perform its contract when and where it chooses. On one

hand MHTC would argue that it has no duty to supervise or train, yet on the other it agrees to assume these duties in its contract. In light of Wolfmeier, supra, its contract is a two edged sword. MHTC cannot have its cake and eat it too.

It is fundamental that any administrative agency may enter into a contract. If that is true, why should MHTC be excluded from the law this Court established in Wolfmeier, supra, and all the cases that adhere to this principal? In Kilventon, the Court indicated that MHTC may have had a duty to warn of the presence of explosives. Kilventon, 746. This is an intangible act based upon MHTC's alleged contract. Even in Jones, supra, the Appellate Court stated that the Housing Authority had a "duty to clear the area". Jones, 774. When analyzing the instruction the court in Jones, at 778, stated the Housing Authority "failed to adequately police the grounds before the grass was mowed." These are intangible acts.⁸ Jones treats them as additional conditions in the state's property after the initial dangerous condition was established by proving an accumulation of debris existed on the Housing Authority's property. Jones at 778.⁹

Appellant also admits that a dangerous condition must exist before a duty to warn arises. (See, App. Brf. pg. 23) Further, Appellant admits that MHTC and other public entities, under certain circumstances, have a duty to warn of conditions in order to make their roads and highways reasonably safe for travel. (App. Brf. pg. 23) Here MHTC

⁸*Jones also involved a contract. Jones, 778. This will be discussed more fully, infra.*

⁹*Black's Law Dictionary states that a "condition", is either a mode or state of being. See, Black's Law Dictionary, 7th Ed. Black's states that a condition may be a mode or manner in which something is done. Black's defines "mode" as follows: the manner in which a thing is done; ... See, Black's, 7th Edition.*

assumes a new duty by contract with the Missouri Department of Corrections which essentially requires it to make the work area safe. If the condition of this tree, which is the property of MHTC, becomes dangerous because of MHTC's actions and it poses a threat of injury to the inmates in the area in which they are assigned to work, MHTC should be liable for its failures to make the area safe.

Appellant suggests that Respondent is responsible for her own injuries in this case. It stated that Respondent would never have been injured "had she stayed in the place where Perkins has instructed her to stand"... (App. Brf. pg. 19) This statement implies that the area beyond the base of the tree posed some threat to the Respondent. Obviously the threat exists because a tree was being taken down and both it and the area within its falling radius is in a dangerous condition. This is the basis of Respondent's argument.

As a practical matter, Appellant received an instruction on comparative fault and the jury took it into consideration when it attributed 25% fault to Respondent in reaching its verdict. Appellant also suggests that the supervisor's decision to park the van and trailer in the "drop zone", and Respondent's injury while in transit to it is merely coincidental, since the tree could have dropped anywhere. (App. Br. pg. 19)

This argument fails to take into consideration the proper methods for safe tree removal as set forth in ANSI Standard 9.5, et seq., and the other two exhibits on tree felling introduced as evidence in this case. (App. L.F. 057)¹⁰

ANSI 9.5.5 states workers shall be positioned and their duties organized so the action of one will not injury another. ANSI 9.5.6 states that only the sawyer should be

¹⁰See also, App. L.F. 088, et seq.; Res. L.F. 090, the 1997 Standard; Res. L.F. 096- 106, for other examples of safe tree felling techniques and concerns.

instructed to remain at the base of the tree and all others should clear the work area beyond the length of the tree's falling radius. ANSI 9.5.7 also indicates all other workers should not return to the work area until the chain saw operator has acknowledged that it is safe to do so. ANSI 9.5.8 requires the crew leaders, in this case, Perkins as supervisor, to determine how many employees are necessary for the tree removal operation. Mr. Nester testified only one person - - the sawyer - - needed to be at the base of this tree. (Tr. 293) ANSI 9.5.12 indicates that workers not directly involved in the operation shall be at least two tree lengths away from the tree being dropped. Obviously this indicates that the truck and van should be parked beyond the falling radius of this tree. ANSI 9.5.13 indicates a planned escape route should be in place that allows the workers to leave the tree at a 45 ° angle on either side of the intended direction of fall. (See also generally, Res. Tr. pgs. 290-294) Finally, even MHTC's manual states "when felling a tree in a critical location, always post an employee to observe and warn the saw operator if the tree begins to rock or fall." (Res. L.F. 028). In this case, Perkins not only failed to implement MHTC's own rule, but was no where in sight until after Respondent was injured.

Quite frankly, if any one of the foregoing instructions were utilized this injury would never have occurred. If John Perkins had correctly supervised these inmates as he was obligated to do under Appellant's contract, this injury would not have occurred. In a proper operation, Respondent would never have been assigned to the base of this tree while it was being cut down. (Tr. 293)

Historically, prior to the 1985 amendments to §537.600 R.S.Mo, the courts determined whether the activity performed by the governmental entity was proprietary or governmental in nature. Under Missouri law, demolition is considered a proprietary function, and, therefore, an exception to sovereign immunity. See, Hayes v. City of

Pagedale, 8 S.W.3d 216 (Mo App ED 1999) where the Court found that under Missouri law sovereign immunity does not shield a municipality from liability for negligent demolition of property, in that such activity is deemed to be a proprietary rather than a governmental function. Obviously, in the present case, this tree was being demolished. It was not being trimmed by MHTC, it was being taken down.

In the instant case, MHTC worker Danny Wood states that “he saw no real purpose or reason to cut the tree down”. (Tr. 393, 394) See, for example, Larabee v. Kansas City, 697 S.W.2d 177, 179-180 (Mo App 1985), where the Court stated that the Missouri Supreme Court held that the destruction of property without necessity and where the property is not, in fact, dangerous to the public, may be at the peril of the municipality.

It has also been held that where the municipality receives a special benefit or profit, the function is considered proprietary and again considered an exception to sovereign immunity. See, Schultz v. City of Brentwood, 725 S.W.2d 157 (Mo App ED 1987). In Schultz, supra, at pg. 160, the Court reasoned that a “fee paid” giving its broadest meaning carries with it the implication of a pecuniary benefit. Obviously, MHTC has received such a benefit when using the inmates at 95¢ per hour.

In Schultz, it was the city’s operation of a day care center and failure to supervise one of the children in it, which gave rise to its liability. It was not necessary to determine that the area where the child was injured was in a dangerous condition, since the proprietary function was an exception to sovereign immunity at common law.

This Court in Wollard v. City of Kansas City, 831 S.W.2d 200, 203 (Mo banc 1992), stated that common law proprietary exceptions to sovereign immunity only apply to municipal corporations. However, there are no prior Missouri cases where a public entity assumed a duty under a contract with another state agency involving some proprietary

functions which, thereafter, precipitated a cause of action. There are no Missouri cases which analyze this situation. These facts are unique to the work release program.

It would be unjust to allow MHTC to undertake the duties in its contract and then raise the shield of sovereign immunity when injury occurs for its failure to properly carry them out. This is especially true when MHTC continues to benefit from the very contract it chooses to ignore. The holding in Wollard, id., suggests it is not possible to extend a common law proprietary exception to immunity to a non-municipal entity which engages in proprietary functions such as the one in the present case. Respondent submits it may be necessary to revisit this issue under the unique facts of this case.

Regardless, Respondent has established that the felling of a tree is a dangerous activity which renders both the tree and the area surrounding it in a dangerous condition. If it is inherently dangerous, by MHTC's expert's own admission, and if MHTC has assumed a duty by contract or conduct to do it safely with proper training, equipment and supervision, then it should be liable to the inmates for injuries they sustain because of inadequate supervision, training and equipment. For all of the above reasons Respondent has established a valid exception to sovereign immunity.

POINT II

**THE TRIAL COURT DID NOT ERR IN SUBMITTING INSTRUCTION NO. 7
BECAUSE IT WAS A PROPER MODIFICATION OF MAI 31.17 AND 37.01.**

Argument

MHTC argues that the instruction submitted was improper because it failed to follow the substantive law regarding dangerous conditions and constituted a roving commission to the extent it submitted evidentiary details of Appellant's alleged negligence.

Respondent has established an exception to sovereign immunity in this case. However, as it effects the issues regarding this instruction, Respondent submits that MHTC's obligations as set forth in its contract with the Missouri Department of Corrections and its conduct establishes its liability for not only defects in the property, but intangible acts, like failure to supervise, train, and provide necessary equipment. Each act establishes a specific duty of care. Once the Plaintiff proves a dangerous condition exists, MHTC is responsible for using due care when discharging its duties under its contract.

In, Kilventon, supra, the Court stated that if MHTC assumed an affirmative duty by contract or conduct, to implement safety precautions at the job site, it was liable for the injuries to the workers caused by the unsafe performance of the work. See, Kilventon, supra, at 745.

Pursuant to paragraph 6 of the working agreement between MHTC and Missouri Department of Corrections, MHTC acknowledges its role as supervisor of the inmates while in their custody and agrees ... "to provide a continuous level of supervision and accountability for the inmates in work related duties and non-work related activities." (Tr. 47; Respondent. LF pg. 002)

Paragraph 18 of the agreement states MHTC will provide all the necessary tools

and equipment, including specialized clothing.¹¹ Paragraph 18 also states that “MHTC will train the inmates in the proper and safe use of tools and equipment ... and that all inmate training will occur during the regular working hours.”

Pursuant to the aforesaid contract, MHTC has assumed an affirmative duty to train, equip and supervise the inmates for the task they are performing at the instance and request of MHTC. As stated, supra, MHTC also assumed this duty by its conduct - - it trained inmate crews with videos and other instruction but failed to train Respondent's crew.

MHTC's manual states “when felling a tree ... post an employee to warn the saw operator if the tree begins to rock or fall.” It also requires its employees to utilize special notching techniques. (Emphasis added by Respondent) (See, Res. L.F. 028)

Just as the court reasoned in Kilventon, supra, that MHTC can be responsible for a number of intangible acts including the erection of appropriate signs and warnings, it was also liable for injuries caused by unsafe performance if it negligently allowed the unsafe work to continue. See, Kilventon, supra, 745, 746; Jones, 774, 778.

As previously stated, the process of cutting a tree is inherently dangerous and automatically creates a dangerous condition in the tree and the area within its falling radius. MHTC's supervisor, John Perkins, failed to supervise the inmates during this process. He had an affirmative duty to supervise the inmates while they cut the tree. He has an affirmative duty to train the inmates in the proper techniques on how to use a

¹¹*Although the contract calls for specialized clothing and the MHTC manual states employee shall use hard hats, the inmates never received them. Only the MHTC supervisor had one. (Res. L.F. 019; Tr. 225) This is another example of MHTC's lackadaisical effort to satisfy its own requirements.*

chain saw when notching a tree in order to control the direction of fall. He had an affirmative duty to make sure the area wherein he parked the van and trailer was safe, since it was foreseeable that the inmates might use the same. He had an affirmative duty to use the proper equipment and tools, including braces and ropes, in order to control the direction of fall. Finally, he had a duty to safely clear the drop zone within the falling radius of this tree.

All of this information was brought out during the trial through exhibits and testimony from the inmates, MHTC workers, and the parties' respective experts. (See, e.g., Respondent. L.F. 028, 057, et seq.) The jury could easily conclude from this evidence that MHTC failed to provide the necessary training, supervision or equipment to guard against Respondent's injury. These failures do not create the dangerous condition that established Respondent's exception to sovereign immunity. It must exist before the duties arise. However, once an exception is established, MHTC's failure to carefully discharge its duties under the contract can form the basis of Respondent's verdict director. Though some of these acts are intangible, MHTC assumed a duty to implement them and its failure to perform any one of them establishes its negligence. Had any of these acts been performed by Mr. Perkins, the area would have been safe. This is why the jury was able to choose anyone of them to attach liability to MHTC.

Pursuant to Kilventon or Jones, supra, this is the substantive law. These acts were proved during the course of trial with specific evidence. The instruction did not constitute a roving commission, but rather precise failures by the supervisor which proved he was negligent in creating the dangerous condition of the tree and its surrounding area.

Even under Kilventon, supra, sovereigns can be held liable for their failure to supervise and warn. Under Jones, supra, at 774 & 778, the Housing Authority was liable

for failing to “adequately police” or “failing to clear” the area of debris. This places an affirmative duty on the sovereign entity to perform an intangible act.

The instruction used in Jones at 777, states that the act of mowing was an element of the claim. Obviously “mowing” allowed the dangerous condition in Jones (accumulation of debris) to injure the Plaintiff. Jones, 774.

In the present case, it was Appellant’s failure to train, supervise and equip the inmates properly pursuant to its contract and its employee manual that allowed the dangerous condition of the falling tree to injure the plaintiff. Pursuant to Wolfmeier, supra, if MHTC assumed certain duties, it must use reasonable care when carrying them out.

Even in Jones, supra, a contract between the Housing Authority and the mowing contractor was admitted into evidence. Jones, 778. Ironically, it was the Housing Authority who tried to use the contract to prove that the mowing company had an affirmative duty to “police the grounds.” The Court reviewed the contract and concluded that the mowing company never agreed to undertake that duty. Therefore, it was the responsibility of the Housing Authority, hence, it had assumed an intangible obligation under its contract. Here it is uncontroverted that MHTC has assumed an affirmative duty to make its work area safe. This includes, e.g., its affirmative duty to “clear the drop zone”, etc.¹²

In Jones, 778, the Court stated the instruction submitted ultimate factual issues to the jury for their determination. The factual issues were condition, notice of condition

¹²The “drop zone” was discussed at length by Mr. Nester and set forth in Respondent’s exhibits. (Res. L.F. 96-97, Tr. 287-290)

and failure to remedy the condition. Jones, 778. Respondent submits that her verdict director charges the jury to the same.

Respondent agrees with Appellant that MAI 31.17 and 37.01 were modified in order to tailor the instruction to the facts in the instant case. However, Appellant states that any modification of the MAI instruction is reversible error. It states on page 23 of its brief, citing MAI 6th Edition, 2002, even if ... a word or phrase is changed it will be error (Appellant's Brief pg. 23)

Appellant fails to provide the Court with the full text of the cited source. In the Missouri Approved Jury Instructions, 6th Edition, on page XLIX, the committee comments "a modification which is necessary to make a provided MAI fit the facts of your case, however, is not only permissible but is required."

Appellant argues that Instruction No. 7 was a "roving commission". Pursuant to Twin Chimneys v. J.E. Jones Construction, 168 S.W.3d 488, at 499 (Mo. App. ED 205), the instruction becomes a "roving commission" when it assumes a disputed fact or proffers an abstract legal question allowing the jury to "roam freely through the evidence and choose any facts which suited its fancy or its perception of logic" and impose liability. Appellant does not argue that Instruction No. 7 "proffers an abstract legal question" as prohibited by Twin Chimneys, supra. It argues that it allowed the jury to assume disputed facts as opposed to ultimate facts which created liability.

The instruction must notify the jury of "what acts or omissions of the party, if any, found from the evidence would constitute liability ...", Twin Chimneys, at 499.

Respondent's evidence as adduced by its expert witness, lay witnesses, and exhibits informed the jury that the inmates had no prior training in felling trees. Mr. Nester testified that certain ANSI standards must be adhered to if a tree is to be cut in a safe

manner. These techniques include proper notching technique, clearing the drop zone, and using ropes and pulleys to control the direction of fall.

All parties in the case, including Appellant's witnesses, testified that it was necessary to train the inmates prior to performing such a dangerous activity. Appellant has already established that these intangible acts, like failure to train, can give rise to liability based upon its interpretation of Kilventon, supra. The remaining facts pled in the instruction were undisputed. There is no evidence that the Appellant used ropes or pulleys to control the direction of fall. There was no evidence that Appellant's agents and servants cleared the drop zone. In fact, it was quite the contrary that the inmates' supervisor, John Perkins, parked the van and trailer within the drop zone of the tree. There was no evidence that he was at or near the scene of occurrence when the tree fell on the Respondent and therefore failed to supervise the inmates.

These were all undisputed ultimate facts which created a dangerous condition within the falling radius of the tree the inmates were cutting down. Any one of them creates an unsafe area. Any one of them was a direct and proximate cause of Respondent's injuries. The jury could have found from any one of these ultimate facts that MHTC was liable. Therefore, the instruction does not create a roving commission. Twin Chimneys, supra.

The standard for review to reverse on improper instruction places the burden on the Appellant that it misdirected, misled or confused the jury and that there is a substantial indication of prejudice. Twin Chimneys, 498. All of the ultimate facts set forth in Instruction No. 7 were proved with evidence not only proffered by the Respondent but corroborated by the Appellant's own witnesses. It is unreasonable to infer that the jury would be confused about how and why a dangerous condition is created the instant

someone begins to cut a tree for the purpose of taking it down. The jurors could reasonably infer from the evidence that training, supervision, warning, proper felling techniques and the use of appropriate equipment would all be necessary to make the area surrounding the tree safe. Appellant fails to meet its burden under Twin Chimneys, supra because the jurors were not misdirected or substantially prejudiced and because they relied on ultimate facts in reaching their verdict to attach liability to MHTC.

For the foregoing reasons, Respondent submits that Instruction No. 7 is not a roving commission and is based upon substantive law.

POINT III

THE TRIAL COURT DID NOT ERR BY PERMITTING PLAINTIFF'S COUNSEL TO ARGUE THAT THE JURY SHOULD "SEND A MESSAGE," BECAUSE SAID ARGUMENT WAS IN REBUTTAL TO DEFENDANT'S ATTORNEY'S ARGUMENT AND WITHIN THE DISCRETION OF THE TRIAL COURT.

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. Bank 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); Dickerson v. St. Louis Southwestern Ry Co., 674 S.W.2d 165 (Mo. App. 1984).

Argument

Appellant's brief on page 29 states as follows:

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 §37.610.3, R.S.Mo.

This statement is misplaced and mischaracterized. Nowhere in Plaintiff's closing argument does her attorney tell the jury to send a message to MHTC by the amount of its verdict. Pursuant to Kelly, supra, the entire argument must be analyzed.

Respondent's attorney in his closing argument, tells the jury about the verdict director. (Tr. 521-523) He goes on to discuss the Respondent's injuries and medical costs of over ninety thousand dollars. (Tr. 523) He discusses Appellant's negligence and the witnesses' testimony.

Finally, he asks the jury for \$750,000.00, for \$90,000.00 in medical bills, three operations, permanent disfigurement, and continuing medical care. He states in summation, "I do not think that \$750,000.00 is unreasonable." (Tr. 543) Nowhere in his argument does he discuss or mention the phrase "send a message".

However, Appellant's attorney, in his closing argument does argue that the jury should "send a message"! First he refers to the plaintiff and her witnesses as convicted felons (Tr. 546), (Tr. 547), (Tr. 551). Obviously they are convicted felons. The jury knew that by the witnesses' own testimony. Appellant's attorney vehemently uses the words convicted felons, as if these people were of a lower species.

Then, during Appellant's closing argument, he is the first to use the phrase "send a message" when he says, "A verdict in favor of the plaintiff, what message will you be sending to organizations and companies and individuals about whether or not they should try to improve their conduct." (Tr. 550) Appellant goes on to state, "Your decision today could affect the future of the work release program. Give that some thought." (Tr. 554) Then the Appellant argues, "This entire case comes down to common sense. Common sense and taking responsibility for the consequences of your own actions, which are virtues, ladies and gentlemen, that have made Hannibal, Missouri, and Marion county, Missouri a solid, decent place to live, and work, and raise a family for many generations. You have the opportunity today to continue that tradition... (Tr. 556-557)

Finally, the Appellant states, "You have a unique chance today, ladies and

gentleman, to determine the type of justice that you want to rule in Marion county, and your verdict will send a message out as to what type of justice you want to rule in this area." (emphasis added by Respondent) (Tr. 558)

At this point Defendant's attorney "opened the door" regarding the use of the phrase "sending a message" and the Plaintiff's attorney was entitled to argue in rebuttal that MHTC should treat the people on work release fairly and humanely and ask the jury to send this message to MHTC. See, Heisler v. Jetco Service, 849 S.W.2d 91, 94 (Mo App 1993) where the Court stated during closing argument, "...when a door is opened...opposing counsel may elect to walk through it"...

Respondent's attorney, comments solely on the Appellant's closing argument in Respondent's rebuttal. Respondent's counsel did not address the issue in the context of damages or a demand for money. It was a reasonable rejoinder considering Appellant's argument. Which argument tries to (1) scare the people that they will lose the work release program, if they find for the plaintiff, (2) that we want to keep Hannibal, Missouri and all of Marion County pure from the likes of the convicted felons, who are the plaintiff and her witnesses and (3) Appellant's attorney wants to send a message as to what justice the jury wants to rule in Marion County. (Tr. 558)

In rebuttal, Respondent's attorney stated very clearly, "I'm not trying to punish the defendant in this case. I am trying to send them a message up there and I am trying to change the work release program. And, I do want people like Hortense to be treated fairly. I didn't say release her. I didn't say set her free. I just said treat her fairly. (Tr. 560) Note: Appellant's attorney did not object.

Respondent's attorney goes on to discuss the use of training tapes and the standards that the inmates should be taught, then states, "You have an opportunity not to

punish, but as a conscience of a good community, you have an opportunity to send a message. (Emphasis added by Respondent) And with all of the resources of MODOT and all of the things they can do, tell them to spend just a little, make a little effort and change this. - That's what you have the opportunity to do." (Tr. 560)

Whenever Respondent's attorney used the phrase "send a message," - he was intimating fair treatment for those in the work release program, not punitive damages. It was only argued in response to Appellant's "send a message" arguments.

In, Dickerson v. St. Louis South Western Ry Co., 674 S.W.2d 165 (Mo. App. 1984) at 173, the Court stated, "The trial court is vested with a broad discretion in ruling on the propriety of jury arguments and determining whether prejudice has resulted."

In, Pierce v. Platt-Clay Electric Cooperative, Inc., 769 S.W.2d 769, (Mo. Appointment. 1984) at 1973, the Court stated, "The decision to grant a mistrial lies in the sound discretion of the trial court. Absent a manifest abuse of discretion, an Appellate Court will not interfere with the trial court's decision."

In the present case, Respondent incurred over \$90,000.00 in medical costs, three operations over a period of five (5) years and permanent disfigurement of her leg. Her doctor testified that she will need continuing care for the rest of her life. The above adequately supports the jury verdict of \$412,500.00, which sum was reduced by remitter to the statutory cap of \$305,021.00.

Judge Clayton overruled Defendant's objection during Plaintiff's closing rebuttal argument and denied the Defendant's motion for a new trial based on Respondent's "send a message" argument. This Court should defer to the trial court's discretion on the propriety of this issue. See, Dickerson, supra, at 173 and Pierce, supra, at 779.

CONCLUSION

For the foregoing reasons: MHTC is responsible for its negligent acts when the

Respondent or others suffer injury from a dangerous condition created by MHTC. Any other result would give MHTC carte blanche authority to use the inmates in any fashion it chooses knowing it will be shielded from liability by virtue of the sovereign immunity defense. This could lead to intolerable results inconsistent with any reasonable interpretation of our laws or public policy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing and a 3-1/2" labeled diskette containing this brief were served, first class postage pre-paid this 5th 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 14,729 words.

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

PETER P. FIORE, JR.