Summary of SC98929, *Pamela S. Allen and Kelly D. Allen v. State of Missouri, 32nd Judicial Circuit, and Cape Girardeau County and City of Cape Girardeau, Missouri*

Appeal from the Stoddard County circuit court, Judge Stephen R. Mitchell

Argued and submitted September 14, 2021; opinion issued January 11, 2022, and modified on the Court's own motion March 1, 2022

Attorneys: The Allens were represented by D. Matthew Edwards and Michael Moroni of Burns, Taylor, Heckemeyer, Green & Edwards LLC in Cape Girardeau, (573) 388-2224. The state was represented by Katherine S. Walsh of the attorney general's office in St. Louis, (573) 751-3321. The county was represented by Mary Eftink Boner of Mary Eftink Boner LC in Jackson, (573) 243-9896. The city was represented by A.M. Spradling III of Spradling & Spradling in Cape Girardeau, (573) 335-8296.

This summary is not part of the opinion of the Court. It is provided by communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: The state appeals from a judgment entered in favor of a woman who fell down the basement stairwell of a courthouse from which a state circuit court operates but which is jointly owned by the city and the county. The woman and her husband also appeal. In a unanimous decision written by Judge W. Brent Powell, the Supreme Court of Missouri affirms the judgment in part, reverses the judgment in part and remands (sends back) the case. Although there was sufficient evidence the stairwell constituted a dangerous condition of which the state had notice, the jury was erroneously instructed it could find the state liable for mere control – not exclusive possession and control – over the stairwell. Additionally, the city was not entitled to a directed verdict because there was evidence showing the city was a legal owner of the courthouse.

Facts: Pamela Allen worked for a title company in Cape Girardeau. When necessary, she would go to the courthouse out of which the 32nd Judicial Circuit (the state) operates to obtain records, some of which were maintained in the courthouse's basement. In 2013, Allen lost her footing while descending the stairs to the basement and broke her left leg. She subsequently developed blood clots that made it difficult for her to breathe and for which she was later hospitalized. Allen and her husband sued the state, Cape Girardeau County, and the city of Cape Girardeau. The state moved to dismiss on the basis of sovereign immunity. The circuit court overruled the state's motion, and the case proceeded to trial. Evidence was introduced that the city and county jointly owned the courthouse but had entered into a lease allowing the county to control the building while giving the city approval over any alterations or changes to the building. The circuit clerk's office kept the keys to the basement. Upon request, clerk's office personnel gave the keys to title company employees, who entered the basement unescorted. The basement stairs are original to the 1854 building. They are painted concrete, not uniform in size, and have varying heights and tread spaces. The stairwell is narrow and contains a single-bulb light fixture. No prior complaints or incidents involving the stairs had been reported. Before the case was submitted to the jury, the circuit court granted a directed verdict in the city's favor. At the instruction conference, the state objected to the Allens' proffered instruction stating the jury could assign a percentage of fault to the state if the state "owned or controlled" the basement stairwell. The circuit court overruled the state's objections. The jury returned its verdict finding

Allen 10 percent at fault and the state 90 percent at fault, awarding Allen $427,500 in damages. The jury found Allen's husband sustained no damages. The state and the Allens appeal.

AFFRIMED IN PART; REVERSED IN PART; REMANDED.

Court en banc holds: (1) The Allens presented sufficient evidence demonstrating a dangerous condition and notice for purposes of establishing the state's liability under section 537.600, RSMo. The statute provides a sovereign may be subject to liability if the plaintiff was harmed by a physical deficiency in the state's property that constituted a dangerous condition. The Allens introduced evidence of multiple physical defects and deficiencies, including the staircase having a single light bulb, limited headroom because of pipes and wires running overhead, painted concrete stairs, and chipped steps. The stairs are not level, sloped downward, are narrower than modern stairs and vary in length. Such evidence was sufficient for the jury to find the existence of physical defects and deficiencies tantamount to a dangerous condition. And, although a possessor of land does not breach the standard of care owed to invitees when the dangerous condition is so open and obvious that the invitee reasonably should be expected to discover it and realize the danger, the possessor remains liable if it should anticipate the harm despite such knowledge and obviousness. The state had sufficient time and opportunity to become aware of the stairs' condition. Their own records were located there, and the state directed some of its visitors to use the stairs. There was also evidence the state refused to permit a group to tour the basement because it was unsafe and the employees called it "the dungeon."

(2) The circuit court erred in refusing the state's instruction. The plain meaning of the phrase "public entity's property" in section 537.600.1(2) encompasses both actual legal ownership and a functionally equivalent degree of possession and control. Therefore, when the public entity does not own the property at issue, the inquiry must focus on whether the public entity had possession and control over the property equal to that of a property owner. Not every level of control over a property renders it the public entity's property for purposes of waiving sovereign immunity. Instead, when the public entity does not own the property, it must have exclusive possession and control over it. Accordingly, it was erroneous for the instruction to refer to "ownership and control" rather than "ownership and exclusive possession and control." Because the evidence established the state does not legally own the courthouse, the instruction, as worded, prejudiced the state by permitting the jury to find the state liable if the state had mere control over the stairs.

(3) The circuit court erred in sustaining the city's motion for directed verdict. The phrase "public entity's property" as used in section 537.600.1(2) applies to public entities that legally own the property where the accident occurred or that lack legal ownership but have exclusive possession and control over the property. A plaintiff seeking to establish injury on a public entity's property under section 537.600 need introduce evidence the public entity had exclusive possession and control of the property only when the public entity does not have actual or legal ownership of the property. Because the Allens produced evidence showing the city was a legal owner of the courthouse, the circuit court erroneously entered directed verdict in the city's favor.

(4) The Allens failed to preserve for appeal any claims regarding the husband's cause of action for loss of consortium because they failed to include such claims in their motion for new trial.