No. SC100809

In the
Supreme Court of Missouri

TRENT BERHOW
Plaintiff/Appellant,

v.

THE STATE OF MISSOURI,
Defendant/Respondent.

Appeal from the Circuit Court of DeKalb County, Missouri
The Honorable Ryan W. Horsman
Case No. 19DK-CC00016

RESPONDENT'S BRIEF

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INTRODUCTION

Plaintiff Trent Berhow, a former inmate at Western Missouri Correctional Center ("WMCC"), was injured in July 2017 after falling from a ladder while he was part of an inmate work crew performing electrical and maintenance work. D8, at 1–5. Berhow brought a personal-injury lawsuit against the Missouri Department of Corrections ("MDOC"), seeking recovery for his injuries. D2. But Berhow had a significant problem: Missouri law requires any claims against MDOC to be brought within one-year of the alleged injury. *See* § 516.145, RSMo. Berhow waited nearly two years. Recognizing that the statute of limitations was fatal to his claim, Berhow amended his petition to substitute the State of Missouri as the sole defendant, alleging that the injuries he previously attributed to MDOC were now attributable to the State of Missouri. D8. The circuit court later granted judgment on the pleadings in favor of the State, correctly rejecting Berhow's attempt bring claims out of time.

This Court should affirm that decision because: 1) the State is entitled to sovereign immunity as it is not a "public entity" for purposes of the express waiver in Section 537.600.1(2); 2) even if the Court decides that the State is a "public entity," the State is entitled to sovereign immunity because WMCC was "property" of MDOC, not the State, for purposes of Section 537.600.1(2); and 3) Berhow's claims are barred by the one-year statute of limitations set forth in

Section 516.145. Any other ruling would enable every individual to evade the one-year statute of limitation for suits against MDOC simply by suing the State instead. Courts do not readily interpret statutes to render text entirely superfluous, so Berhow's attempted end-run should be rejected.

Berhow's assertion that the circuit court abused its discretion in not granting sanctions against the State fares no better. To succeed on a challenge of a circuit court's decision not to grant sanctions, Appellant must establish that the conduct complained of resulted "in fundamental unfairness or substantively altered the outcome of the case." *State v. Thompson*, 985 S.W.2d 779, 785 (Mo. banc 1999) (citing *State v. Kinder*, 942 S.W.2d 313, 338 (Mo. banc 1996)). Berhow cannot establish either. Thus, the circuit court's decision not to grant sanctions against the State was entirely reasonable.

STATEMENT OF FACTS

On June 19, 2019, Berhow, an inmate at Western Missouri Correctional Center who was part of an inmate work program, sued the Missouri Department of Corrections for physical injuries he sustained in July 2017. D2, at 1–4. Specifically, Berhow alleged that he had fallen off a ladder while replacing a light bulb at WMCC. *Id.*, at 4–6. Berhow alleged that his supervisor instructed him to put the ladder in a precarious position, thereby creating a dangerous condition that caused Berhow's injuries. *Id.*

To overcome MDOC's sovereign immunity, Berhow relied on the waiver of sovereign immunity created by Section 537.600.1(2) for "[i]njuries caused by" a "dangerous condition" on "a public entity's property." *See id.*, at 6. But even if the waiver applied, his action was barred by the applicable statute of limitations. Berhow suffered his alleged injury on July 20, 2017, and he sued MDOC almost two years later on June 19, 2019. *See id.*, at 1–4. However, the applicable statutory limitation is "one year" for any action by an MDOC inmate against "the department of corrections." § 516.145, RSMo; *id.* § 217.010(12).

Because of the statute of limitations, Berhow voluntarily dismissed his action against MDOC and instead sued the State of Missouri. *See* D5, D6, D7, D8. The State filed an answer to the First Amended Petition on October 24, 2019. D9.

On February 28, 2022, the State filed its first Motion for Judgment on the Pleadings and Suggestions in Support, arguing that Berhow's action was barred by sovereign immunity and the one-year statute of limitations. D20. That same day, Berhow filed a Motion to Compel Discovery Responses. D22. After a hearing on the parties' motions on May 16, 2022, the circuit court denied the State's first Motion for Judgment on the Pleadings and sustained Berhow's Motion to Compel, ordering discovery by July 1, 2022. D1, at 11. On October 24, 2022, the State responded to Berhow's interrogatories, and offered objections to the same. D29. On February 3, 2023, Berhow filed a Motion to

Strike the State's pleadings. D35. On February 6, 2023, the State made a production of documents. D.34. On March 14, 2023, the circuit court held a hearing on Berhow's Motion to Strike, and took the motion under advisement. D1, at 14; Tr. 15:13–15. Two days later, on March 16, 2023, the State filed a Renewed Motion for Judgment on the Pleadings, again asserting sovereign immunity as to the State, and that the claims were required to be brought against MDOC (which were out of time). D43. On March 20, 2023, the Court held another hearing and ordered the State to "produce all DOC documents" by March 24, 2023. D1, at 14. Though the State raised its Renewed Motion for Judgment on the Pleadings during the hearing, the circuit court indicated it would "look at that motion," but stated "[t]hat's not why we are here today." Tr. 19:2–12. On March 24, 2023, the State complied with the court's order, and produced over 500 pages of material to Berhow. D1, at 15; D47. On April 7, 2023, Berhow filed a Supplemental Memo in Support of Sanctions. D48–54. The circuit court held another hearing on April 11, 2023, where Berhow again argued to strike the State's pleadings and argued for sanctions, and the circuit court again took them under advisement. Tr. 36–53. On May 9, 2023, the circuit court held a final hearing, a pre-trial conference. Tr.53–65. On May 17, 2023, the circuit court granted the State's Renewed Motion for Judgment on the Pleadings, and entered judgment in favor of the State. D59. Berhow appealed. D61.

On September 3, 2024, the Western District issued an opinion reversing the circuit court. The Western District held (at 7–8) that "it would appear that the State is a public entity" based on modern definitions of the words "public" and "entity." The court expressly disregarded (at 8) countervailing statutory language. The Western District further held (at 10–11) that WMCC was the State's "property" for purposes of Section 537.600.1(2) and found that the one-year statute of limitations did not apply to actions against the State. Finally, the Western District held (at 13) that the circuit court did not abuse its discretion in denying Berhow's motion for sanctions because "the circuit court reviewed extensive submissions and held four hearings on the State's discovery responses and concluded that sanctions were not warranted," which was reasonable under the circumstances.

On September 18, 2024, the State timely filed a Motion for Rehearing or, in the Alternative, Application for Transfer to the Missouri Supreme Court. The Western District overruled the Motion for Rehearing and Denied the Application for Transfer on October 1, 2024.

On October 16, 2024, the State filed an Application for Transfer before this Court. The Application for Transfer raised two questions of general interest and importance: 1) Whether the State of Missouri is a "public entity" that has waived its sovereign immunity under Section 537.600.1(2), RSMo, even though waivers of sovereign immunity are strictly construed and even

though other parts of Chapter 537 distinguish "public entities" and the "state," *id.* §§ 537.610.2, 537.615; and 2) Whether an inmate can circumvent the statute of limitations under Section 516.145 by suing the State instead of the Missouri Department of Corrections ("MDOC") for an injury caused by a dangerous condition on MDOC's property. On November 19, 2024, this Court sustained the Application for Transfer and ordered the case transferred from the Western District.

SUMMARY OF ARGUMENT

The circuit court correctly granted the State's Renewed Motion for Judgment on the Pleadings for two independent reasons.

I.A. Sovereign immunity bars Berhow's claims against the State. For starters, sovereign immunity can be waived only through an unequivocal, clear statement passed by the legislature. Absent such language, the Court must find that sovereign immunity has not been waived.

I.B. Berhow cannot establish that the term "public entity," as used in Section 537.600.1, is an unequivocal and clear statement by the General Assembly waiving sovereign immunity for the State itself for several reasons. *First*, Berhow concedes (at 45–46) that the phrase "public entity" is *not* unequivocally clear.

Second, close neighboring provisions explicitly differentiate between "the state" and "the state and public entities." *See* §§ 537.600, 537.610.2. An

interpretation of "public entities" alone that also included the state would impermissibly make the inclusion of the latter in Section 537.600 superfluous. Other statutes bolster this interpretation. *See id.* §§ 537.602.1(2), 107.170.1(2), 610.010.

Third, the history of the abrogation of sovereign immunity in *Jones v. State Highway Commission*, and the General Assembly's enactment of Section 537.600 make clear that both the Court and General Assembly understood a distinction between "the State" and "public entities" For purposes of a sovereign immunity waiver.

Finally, contemporaneous definitions of the relevant terms around the enactment of Section 537.600 support an interpretation that "public entity" relates to "governmental units," not the State itself. Berhow's reliance on contemporary definitions offers little help to determining the general assembly's understanding of those terms in 1978.

I.C. Even if the Court accepts Berhow's argument that the State is a "public entity" for purposes of Section 537.600.1 (it should not), the State is still entitled to sovereign immunity from his claims because the WMCC is not the State's "property" as that term is interpreted under the waiver provision in Section 537.600.1(2). This conclusion is supported by two main points.

First, Section 537.600 uses "public entity" three times in the statute in the singular. This suggest that, contrary to Berhow's position, only one "entity"

can be a defendant for purposes of the waiver. A contrary interpretation runs against general common law principles of premises liability, which strictly place liability with the exclusive possessors of a property, and the elements of Section 537.600.1(2) closely follow. Because MDOC, not the State, exclusively controls and possesses the WMCC, it is the only proper defendant for purposes of the sovereign immunity waiver.

Second, the State (as an entity named by Berhow as the Defendant) does not "own" the WMCC. Under Missouri law, the Governor holds title to all land in Missouri. *See* § 37.005.9, RSMo. Accordingly, it would be the governor—not the State—that holds legal title to WMCC, and thus owned the property at the time of the alleged injury and would be the proper defendant under this theory.

II. Additionally, Berhow's claims are barred by Section 516.145 because they are, in sum and substance, claims against MDOC subject to a one-year statute of limitations. In substituting the State as defendant, in place of MDOC, Berhow seeks to game the statute of limitations in his favor. Berhow asserts (at 57–58) that "[t]he plain, unambiguous language § 516.145 establishes that the one-year statute of limitations contained therein applies only to actions against the Missouri Department of Corrections (and its officers and employees)," and thus *cannot* apply to actions against the State. But he simultaneously argues that there is no difference between the State and MDOC for sovereign immunity purposes.

Berhow's argument leads to absurd results: any inmate would automatically have a five-year statute of limitations for claims brought pursuant to a Section 537.600 waiver, so long as they sued the State in place of MDOC. This would nullify the General Assembly's intent to create of a one-year statute of limitations for claims of injuries suffered by an inmate while incarcerated. Indeed, a ruling consistent with his opinion would effectively invalidate the statute.

III. Separately, Berhow cannot overcome the high bar of establishing that the circuit court abused its discretion in refusing to grant Berhow's motion for sanctions. Specifically, Berhow has not established that the alleged delays resulted in fundamental unfairness or substantively altered the outcome of the case, and careful deliberation of the circuit court over several hearings and briefings is antithetical to any notion of abuse of discretion.

STANDARD OF REVIEW

"This Court reviews a circuit court's ruling on a motion for judgment on the pleadings de novo." *Woods v. Missouri Dep't of Corr.*, 595 S.W.3d 504, 505 (Mo. banc 2020) (citing *Mo. Mun. League v. State*, 489 S.W.3d 765, 767 (Mo. banc 2016)). "[A] motion for judgment on the pleadings should be sustained if, from the face of the pleadings, the moving party is entitled to judgment as a matter of law." *Id.* (quoting *Madison Block Pharmacy, Inc. v. U.S. Fid. & Guar. Co.*, 620 S.W.2d 343, 345 (Mo. banc 1981)). A "trial court's judgment must be 'affirmed if cognizable under any theory,' regardless of whether the trial court's reasoning is wrong or insufficient." *State ex rel. Greitens v. Am. Tobacco Co.*, 509 S.W.3d 726, 736 (Mo. banc 2017) (quoting *Rouner v. Wise*, 446 S.W.3d 242, 249 (Mo. banc 2014)).

The denial of a motion for discovery sanctions is review for abuse of discretion. *State v. Kinder*, 942 S.W.2d 313, 328 (Mo. banc 1996). "[T]he decision to impose a sanction for a party's noncompliance with the discovery requests lies within the sound discretion of the trial court." *Thompson*, 985 S.W.2d at 785 (citing *Kinder*, 942 S.W.2d at 338). "Failure to impose sanctions for a discovery violation will be considered an abuse of discretion if the violation resulted in fundamental unfairness or substantively altered the outcome of the case." *Id.* (citation and quotations omitted).

ARGUMENT

Berhow argues that the circuit court's judgment in favor of the State should be reversed on two bases: (1) that the circuit court erred in concluding that the State was entitled to judgment as a matter of law on the basis of sovereign immunity; and (2) that the circuit court erred in concluding as a matter of law that Berhow's claim against the State were barred under the applicable one-year statute of limitations, § 516.145, RSMo, because they were filed nearly two years after the alleged accident.

Berhow further argues (at 23) that the circuit court abused its discretion by not granting Berhow's motion for sanctions, and asks this Court to "remand this matter for further proceedings with instructions to enter appropriate sanctions against Defendant State of Missouri." *Id.* at 67.

The State will address these arguments in turn.

I. Berhow's Claims Against the State Are Barred by Sovereign Immunity (Response to Point II).

Sovereign immunity bars Berhow's claims against the State. Sovereign immunity is a common law judicial doctrine barring suit against a government or public entity." *Allen v. 32nd Jud. Cir.*, 638 S.W.3d 880, 886 (Mo. banc 2022). After this Court abrogated sovereign immunity in *Jones v. State Highway Comm'n*, 557 S.W.2d 225 (Mo. banc 1977), the General Assembly firmly overturned that holding in 1978 by restoring sovereign immunity for public

entities through the enactment Section 537.600. In recent years, this Court has been clear: "in the absence of an express statutory exception to sovereign immunity, or a recognized common law exception . . . , sovereign immunity *is the rule* and applies to *all* suits against public entities." *Poke v. Indep. Sch. Dist.*, 647 S.W.3d 18, 21 (Mo. banc 2022) (emphasis added); *see also Ramirez v. Missouri Prosecuting Att'ys' & Circuit Att'ys' Retirement Sys.*, 694 S.W.3d 432, 436 (Mo. banc 2024). Sovereign immunity thus applies by default.

Berhow has not established that this case fits within an exception to the default rule of immunity. Sovereign immunity can be waived only through a clear statement by the General Assembly, and here no language expressly and unambiguously waives the sovereign immunity of the State itself. To the contrary, several textual clues undermine any suggestion of a clear waiver.

A. Sovereign immunity can be waived only through an unequivocal, clear statement passed by the legislature.

"It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (quotation marks omitted). For that reason, "[s]tatutory provisions waiving sovereign immunity are strictly construed." *Allen*, 638 S.W.3d at 891 (citing *Bartley v. Special Sch. Dist.*, 649 S.W.2d 864, 868 (Mo. banc 1983)).

Berhow argues that Section 537.600 creates an express waiver. There, the General Assembly created two express statutory exceptions to sovereign immunity for claims against a "public entity." Relevant here, Section 537.600.1 waives immunity for certain condition's on a "public entity's property":

> "…the immunity of the *public entity* from liability and suit for compensatory damages for negligent acts or omissions is hereby expressly waived in the following instances:
>
> * * *
>
> (2) Injuries caused by the condition of a *public entity's property* if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury directly resulted from the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of harm of the kind of injury which was incurred, and that either a negligent or wrongful act or omission of an employee of the public entity within the course of his employment created the dangerous condition or a public entity had actual or constructive notice of the dangerous condition in sufficient time prior to the injury to have taken measures to protect against the dangerous condition. . . . .

§ 537.600.1(2), RSMo (emphasis added).

"This Court, therefore, interprets the language of section 537.600 by "presum[ing] nothing that is not expressed." *Allen*, 638 S.W.3d at 891 (quoting *Templemire v. W & M Welding, Inc.*, 433 S.W.3d 371, 381 (Mo. banc 2014)); *cf. Church v. Missouri*, 913 F.3d 736, 743 (8th Cir. 2019) (Benton, J.) ("Courts 'give effect' to a state's waiver of sovereign immunity 'only where stated by *the most express language* or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.'" (quoting *Port Auth.*

Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305 (1990) (emphasis added)). "The operation of the statute must be confined to 'matters affirmatively pointed out by its terms, and to cases which fall fairly within its letter.'" *Templemire*, 433 S.W.3d at 381 (quoting R*obinson v. Hooker*, 323 S.W.3d 418, 423 (Mo. App. W.D. 2010)). The Court may not "add or subtract words from a statute" when employing a strict construction. *Cosby v. Treasurer of State*, 579 S.W.3d 202, 207 (Mo. banc 2019).

Simply put, an express waiver of sovereign immunity requires an unequivocally clear statutory statement from the General Assembly. Absent such language, the Court must find that sovereign immunity has not been waived.

Here, because the State itself is not a "public entity" under the statute, and the WMCC is not the State's "property" as that term is interpreted, the State is entitled to sovereign immunity from Berhow's claims and the circuit court properly granted judgment on the pleadings.

B. The State is not a "public entity" for purposes of the express waiver in Section 537.600.1(2).

At the outset, the Court must determine whether the legislature made unequivocally clear that the State is a "public entity" for purposes of the statute. If not, the Section 537.600.1 waiver does not apply, and the State is entitled to sovereign immunity from Berhow's suit.

Right off the bat, Berhow's suit fails because Berhow concedes that the phrase "public entity" is *not* unequivocally clear. As Berhow puts it (at 45–46), "Since its enactment, Missouri courts have bemoaned the legislature's lack of clarity in the words used in § 537.600." *See, e.g.*, *State ex rel. Trimble v. Ryan*, 745 S.W.2d 672, 674 n.2 (Mo. banc 1988). That concession is significant. If the statute suffers from a "lack of clarity" (at 46) as to the term "public entity," there can be no clear statement that the State itself is an "entity" for purposes of the statute.

Even setting aside Berhow's dispositive concession, several important points undermine Berhow's claim that the State is a "public entity" under Section 537.600.1.

First, in a provision closely neighboring Section 537.600, the legislature expressly differentiated between "the state *and its public entities*." § 537.610.2. The use of the "State" in Section 537.610, but exclusion of the same in the section preceding it, Section 537.600, is significant. "The legislature will not be presumed to have 'inserted idle verbiage or superfluous language in a statute.'" *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582, 586 (Mo. banc 2018) (quoting *Civil Serv. Comm'n of the City of St. Louis v. Members of Bd. of the Aldermen of the City of St. Louis*, 92 S.W.3d 785, 788 (Mo. banc 2003)). If the State fell under the definition of a "public entity" as the term is used in Section 537.600.1(2), then the General Assembly's express

differentiation between "the state and its public entities" in a nearby section within the same chapter would be mere surplusage. Well-settled rules of statutory construction forbid "interpretations that are unjust, absurd, unreasonable, or render statutory language meaningless." *Missouri Bond Co., LLC v. Devore*, 641 S.W.3d 397, 403 (Mo. banc 2022). Moreover, when the General Assembly amended Chapter 537 in 1999, it again used the phrase "the state and its public entities." *See* § 537.615, RSMo. Had "public entities" already included the "State," as Berhow argues, this language would be entirely superfluous. This context strongly suggests that the "State" does not fall within the phrase "public entities." But at the very least, it cannot be said that "public entities" clearly and unequivocally includes the "State" in light of this context. That is fatal to Berhow's case.

Other statutes support this interpretation. In Section 537.602.1(2), the General Assembly defined "entity" in part as "any unit of . . . state, or local government or any of their employees." § 537.602.1(2), RSMo. In Section 107.170.1(2), the General Assembly defined "public entity" as "any official, board, commissioner, or agency of this state." *Id.* § 107.170.1(2). And the Missouri Sunshine Law discusses "governmental entities created by the Constitution or statutes of this state" exemplified as "[a]ny department or division of the state, or any political subdivision of the state." *Id.* § 610.010. In each case, the General Assembly has differentiated between the State and

the entities created or organized thereunder. Berhow's understanding of the term "public entity" is at odds with these express formulations, and if adopted, that understanding would undermine the uniformity of Missouri law.

Separately, Berhow's reliance (at 48–49) on the Legal Expense Fund ("SLEF") framework is misplaced. In his brief excerpt, Berhow misquotes Section 105.711.2, which instead provides that the fund "shall be available for the payment of any claim or any amount required by any final judgment rendered by a court of competent jurisdiction against:"

> (1) The state of Missouri, or any agency of the state, pursuant to ***section 536.050 or 536.087 or*** section 537.600"

§ 105.711.2, RSMo (emphasis on omitted). The sections omitted by Berhow are significant. Specifically, each provides express language for instances when the "the State" would be liable for certain fees and expenses arising out of litigation. *See*, *e.g.*, § 536.087.1 ("A party who prevails in an agency proceeding or civil action arising therefrom, *brought by . . . the state*, shall be awarded those reasonable fees and expenses incurred by that party in the civil action or agency proceeding."). This makes sense. If the state brings a civil action against a private party, and that party prevails, the party can then seek reasonable fees and expenses from the State, to be paid by the SLEF. The SLEF does not, as Berhow claims (at 48), "complemplate[ ] that the State of Missouri's express waiver of sovereign immunity includes a waiver for *itself*."

Second, the legislature enacted Section 537.600 in response to a decision by this Court, *Jones v. State Highway Commission*, which likewise differentiated expressly between the State and public entities. The plaintiff in *Jones* sued the state highway commission—but *not* the State itself—for personal injuries stemming from an automobile accident on one of the State's highways. 557 S.W.2d at 226. This Court held that "sovereign immunity against tort liability is no longer a bar to such actions." *Id.* at 227. The opinion largely based its reasoning on the dissent from *O'Dell v. School District of Independence*, 521 S.W.2d 403 (Mo. banc 1975), which said immunity should be abrogated "as to all governmental *units* in Missouri," *id.* at 422 (J. Finch, dissent) (emphasis added). That statement was in response to the majority opinion's statement that sovereign immunity applies to "governmental entities," which are "the creation" of the State. *Id.* at 407. In *Jones*, this Court abrogated sovereign immunity for "the state *or* an agency of the state, county, municipality, or other governmental body under the doctrine of respondeat superior for injuries negligently caused by its agents, servants and employees in the course of employment." 557 S.W.2d at 230 (emphasis added).

The General Assembly quickly reversed this decision with Section 537.600 by re-establishing sovereign immunity "as existed at common law in this state prior to September 12, 1977 except to the extent waived, abrogated or modified by statutes in effect prior to that date," and "expressly waived" that

immunity for "public entit[ies]" in just two instances. § 537.600.1, RSMo. While the *Jones* Court had abrogated sovereign immunity for tort claims against "the state *or* an[y] agency of the state, county, municipality, or other governmental body," the General Assembly waived sovereign immunity *only* for claims against a "public entity." That term is entirely consistent with the express distinction *O'Dell* and *Jones* drew between the State and those "governmental agencies" created by the State. The State is not a "creation" of itself.

Third, relevant definitions of the terms "public" and "entity" counsel for finding that the State itself is not a "public entity" for purpose of Section 537.600.1. It has been a "cardinal rule" of this Court for nearly two centuries that the terms of a statute must be interpreted as they were understood at the time of its passage. *See State, to Use of Gentry v. Fry*, 4 Mo. 120, 174 (1835) ("Among these rules of construction is the cardinal one, that when a provision, or law heretofore known and understood, is adopted, this provision or law is adopted in the sense in which, at the time of adoption, it was understood."). For this reason, Berhow's reliance on current definitions from Webster's and WEX dictionaries is unavailing. Instead, this Court should look to definitions contemporary to the enactment of Section 537.600.1. The fifth addition of Black's Law Dictionary, published one year after Section 537.600.1, included a new definition of "entity" as a "person . . . governmental unit." *Entity*, Black's

Law Dictionary (5th ed. 1979). This definition has been adopted by Missouri courts. *See MacLachlan v. McNary*, 684 S.W.2d 534, 537 (Mo. App. E.D. 1984). Moreover, the "governmental unit" language is common within this Court's jurisprudence on sovereign immunity, both preceding and following the *Jones* abrogation and enactment of Section 537.600.1. *See, e.g.*, *Payne v. Jackson Cnty.*, 484 S.W.2d 483, 485 (Mo. 1972); *O'Dell*, 521 S.W.2d at 421 (J. Finch, dissenting); *Winston v. Reorganized Sch. Dist. R-2, Lawrence Cnty., Miller*, 636 S.W.2d 324, 329 (Mo. banc 1982); *Cullor v. Jackson Twp., Putnam Cnty.*, 249 S.W.2d 393, 397 (Mo. 1952). And as explained above, the *Jones* Court couched the abrogation of sovereign immunity in those very terms. 557 S.W.2d at 231. Interpreting "public entity" as a governmental unit underneath the State, as opposed the State itself, is consistent with the common understanding of those terms at the time Section 537.600.1 was adopted.

Finally, Berhow asserts (at 53) that the State's argument is "novel" because "countless attorneys, advocates, and judges" have not previously raised it. That is no reason to reject the argument. Indeed, this Court has recently acknowledged that a failure of earlier parties to raise an argument does not abandon a (meritorious) argument in later cases. *See Ramirez*, 694 S.W.3d at 438 n.7. In any event, it is Berhow's argument, not the State's, that lacks legal rigor. Berhow identifies two cases from the last thirty-five years where a tort claim has been brought against the State itself. At the same time,

other litigants as a matter of course sued a specific public entity—state, county, or local governmental unit. Indeed, Berhow identifies no instance when an inmate has sued the State for injury under Section 537.600.1(2).

* * *

In sum, the history of sovereign immunity in this State, principles of statutory interpretation, and relevant definitions of terms at the passage of Section 537.600.1 all counsel in favor of finding that the term "public entity" does not include the State itself, but instead relates to those governmental units created thereunder. But at the very least, this history and related textual provisions mean it is not unequivocally clear that "public entity" includes the State. That is all the State needs to show to prevail. Thus, sovereign immunity bars Berhow's claims against the State and the circuit court was correct to grant judgment on the pleadings. The State respectfully requests that this court affirm that decision.

C. The WMCC was not "property" of the State for purposes of Section 537.600.1(2).

Even if the Court accepts Berhow's argument that the State is a "public entity" for purposes of Section 537.600.1 (it should not), the State is still entitled to sovereign immunity from his claims because the WMCC is not the State's "property" as that term is interpreted under the waiver provision in Section 537.600.1(2). Subsection (2) waives sovereign immunity for "[i]njuries caused by the condition of a *public entity's property*." § 537.600.1(2), RSMo.

(emphasis added). Berhow asserts (at 12) that WMCC is the State's "property" for purpose of the statute.[1] This misinterprets Missouri law for two principal reasons.

First, the statute uses the term "public entity" in the singular three times, indicating legislative intent for *only one* proper defendant for purposes of the waiver. Here, that means that WMCC cannot both be the "property" of MDOC and of the State. This Court has made clear that "[i]n order for property to be considered that of the sovereign for the purpose of waiver immunity under section 537.600.2, the sovereign must have the *exclusive control and possession of that property*." *State ex rel. Div. of Motor Carrier and R.R. Safety v. Russell*, 91 S.W.3d 612, 616 (Mo. banc 2002) (emphasis added). Exclusive control and possession disclaims any notion of joint control or possession. Indeed, Missouri courts have found that such an assertion, for purpose of the sovereign immunity waiver, is "simply not tenable." *Summitt by Boyd v. Roberts*, 903 S.W.2d 631, 635 (Mo. App. W.D. 1995).

The State acknowledges that this Court found in *Allen v. 32nd Judicial Circuit*, that "'public entity's property' as used in section 537.600.1(2) applies

[1] Berhow includes this assertion in his "statement of facts" (at 12). While an appellate court must treat all well-pleaded facts as admitted, no such treatment applies to legal conclusions. *Brickell v. Kansas City, Mo.*, 364 Mo. 679, 681, 265 S.W.2d 342, 343 (1954). As explained herein, this bare assertion finds no support under Missouri law.

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." 638 S.W.3d at 894 (emphasis in original). The State respectfully submits that this holding is at odds with traditional common law principles of premises liability in Missouri, which strictly place liability with the exclusive possessors of a property. The elements of premises liability, which can be found at Restatement (Second) of Tort, § 343 (1965), are very similar to those elements enacted in Section 537.600.1(2). The Restatement (Second) of Torts, § 343, which was adopted by this Court in *Gilpin v. Gerbes Supermarket, Inc.*, 446 S.W.2d 615, 618 (Mo. banc 1969), sets forth the elements of a cause of action against a possessor of land as follows:

> A *possessor of land* is subject to liability for physical harm caused to his invitees by a condition on the land if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they would not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

(Emphasis added). Simply put, it is the possessor of land that is subject to liability for physical harm caused to an invitee by condition of the land. This Court has held that when a "landowner relinquishes possession and control of the premises to [another entity], the duty of care shifts to [that entity]. The landowner, no longer considered the possessor of the land, is *thus relieved of*

potential liability." *Matteuzzi v. The Columbus Partnership, L.P.*, 866 S.W.2d 128, 132 (Mo. banc 1993) (emphasis added).

When the General Assembly adopted Section 537.600.1(2) it is presumed to have been aware of the existing common law of premises liability as expressed in the Restatement. *State ex rel. T.J. v. Cundiff*, 632 S.W.3d 353, 357 (Mo. banc 2021) ("In construing a statute, the Court must presume the legislature was aware of the state of the law at the time of its enactment."). And statutes should be "construed in a way that synchronizes their meaning with the existing common law." *State v. Duggar*, 806 S.W.2d 407, 408 (Mo. banc 1991) (quoting *Lawson Rural Fire Association v. Avery*, 764 S.W.2d 113, 116 (Mo. App. W.D. 1988)). Here, the Court should construe § 537.600.1(2) in harmony with the Restatement so that only the possessor of land is subject to liability, and thus it is "untenable" that two entities are jointly liable for an alleged injury at WMCC.

The operative question, then, is who exclusively controlled and possessed WMCC? There is only one answer: MDOC. MDOC's enabling statutes vest the entity with statutory authority to "*supervise and manage* all correction centers," § 217.015.1, RSMo. (emphasis added). That includes WMCC. Moreover, the statutes provide that MDOC's "director shall have control over all real estate . . . correctional centers . . . properly belonging to, or used by, or in connection with any facility within the department," *id.* § 217.025.5, and

"shall establish and maintain correctional centers," *id.* § 217.025.7. MDOC had exclusive control and possession of WMCC, and thus WMCC was MDOC's "property" for the purposes of Section 537.600.1(2).

Second, the State (as an entity named by Berhow as the Defendant) does not "own" the WMCC. Under Section 37.005.9, "the fee title to all real property now owned or hereafter acquired by the state of Missouri, or any department, division, commission, board or agency of state government . . . shall on May 2, 1974, vest in the *governor*." § 37.005.9, RSMo. Accordingly, it would be the governor—not the State—that holds legal title to WMCC, and thus owned the property at the time of the alleged injury. If Berhow's theory was correct, every plaintiff suing under Section 537.600.1(2) could maintain a case against the State itself, so long as the Governor held the title of the property.

Indeed, this would allow for a waiver of sovereign immunity, and suit against the State, even in instances where the State leased property to an individual or private corporation and an injury then occurred as to a dangerous condition on that property. Such a scenario runs counter to this Court's decision in *State ex rel. Division of Motor Carrier & Railroad Safety v. Russell*, where the Court found that "[i]n order for property to be considered that of the sovereign for the purpose of waiver immunity under section 537.900.2, the sovereign must have the exclusive control and possession of that property." 91 S.W.3d 612, 616 (Mo. banc 2002).

* * *

In sum, the proper interpretation of a "public entity's property" waives sovereign immunity for a single entity and requires that an entity have exclusive possession and control as a basis for that waiver. Here, exclusive possession and control of WMCC was vested in MDOC by the General Assembly, and thus WMCC was the "property" of MDOC, not the State writ large. And even if joint liability was acceptable between an entity that exclusively controls and possesses a property and the owner of that property, the sovereign immunity waiver would still not apply here, as the holder of the title, and thus owner, of the WMCC is the Missouri Governor. As such, the circuit court was correct to grant judgment on the pleadings, and the State respectfully requests that this court affirm that decision.

II. Berhow's Claims Are Barred by the One-Year Statute of Limitations in § 516.145, RSMo (Response to Point III).

Berhow's claims are barred by Section 516.145 because they are, in sum and substance, claims against MDOC subject to a one year statute of limitations. Missouri law provides, in part:

> Within one year: all actions brought by an offender, as defined in section 217.010, against the department of corrections or any entity or division thereof, or any employee or former employee for an act in an official capacity, or by the omission of an official duty.

§ 516.145, RSMo. There is no dispute that Berhow's claims against MDOC are barred under this statute. He was allegedly injured on July 20, 2017, (D8:P1–

5) and filed suit on June 19, 2019 (D8:P6–7). Berhow attempted to get around this bar to his claims by simply naming the "State of Missouri" as a defendant and dismissing MDOC.

While "[t]he primary rule of statutory interpretation is to effectuate legislative intent through reference to the plain and ordinary meaning of the statutory language," *State ex rel. Valentine v. Orr*, 366 S.W.3d 534, 540 (Mo. banc 2012) (citation omitted), the Court may look beyond plain and ordinary meaning of a statute "when the language . . . would lead to an absurd or illogical result." *Akins v. Dir. of Revenue*, 303 S.W.3d 563, 565 (Mo. banc 2010). This Court has held that interpretation of statutes "is not hyper-technical, but instead, is reasonable and logical and gives meaning to the statute." *Ben Hur Steel Worx, LLC v. Dir. of Revenue*, 452 S.W.3d 624, 626 (Mo. banc 2015) (citing *Ivie v. Smith*, 439 S.W.3d 189, 203 (Mo. banc 2014)).

Berhow asserts (at 57–58) that "[t]he plain, unambiguous language § 516.145 establishes that the one-year statute of limitations contained therein applies only to actions against the Missouri Department of Corrections (and its officers and employees)," and thus *cannot* apply to actions against the State.

But Berhow cannot have his cake and eat it too. He simultaneously argues that there is no difference between the State and MDOC for sovereign immunity purposes, but then turns around and argues (at 58) that "[a] person of ordinary intelligence knows that MDOC is a specific department within the

executive branch of government," so that the statute of limitations for MDOC does not apply to the State. At the same time as he asserts (at 12) that the MDOC is an "agent" of the State.

The inescapable conclusion of Berhow's inconsistent positions is that his naming of the State as Defendant is *only* an effort to game the statute of limitations to bring claims that are otherwise out of time. Indeed, the Amended Petition asserts claims for alleged negligence by an MDOC employee at an MDOC facility while Berhow was an inmate at the MDOC. If Berhow's position was correct, every inmate who sought to bring claims "against the department of corrections or any entity or division thereof, or any employee or former employee for an act in an official capacity, or by the omission of an official duty," would gain a four-year extension of the limitation by simply naming the State as a defendant. Accepting this argument would not just render Section 516.145 superfluous, but would amount to a judicial repeal of that statute. *See Missouri Bond Co., LLC*, 641 S.W.3d at 403 ("Well-settled rules of statutory construction forbid "interpretations that are unjust, absurd, unreasonable, or render statutory language meaningless."). If the Court is to hold that the State and MDOC are one "public entity" for purposes of the sovereign immunity waiver, it should also hold that the State stands in the shoes of MDOC for purposes of the statute of limitations. To conclude otherwise would impermissibly nullify the General Assembly's intent of a one-

year statute of limitations for claims for injuries suffered by an inmate while incarcerated.

None of the hypotheticals or examples offered by Berhow change this conclusion. The two hypotheticals (at 60–61) concern potential suits against private actors, and thus have no application the issues here. A 42 U.S.C. § 1983 claim is equally inapposite here where such a claim for monetary damages (as opposed to injunctive relief) must be brought against a state official in their individual capacity. *Hafer v. Melo*, 502 U.S. 21, 26 (1991). Section 516.145, only concerns claims stemming from "an act in an official capacity, or by the omission of an official duty." § 516.145, RSMo. Here, Berhow brings claims arising from an alleged injury due to a WMCC employee's actions during employment at WMCC. Finally, Berhow's reliance on *Cain v. Missouri Highways & Transp. Commission*, 239 S.W.3d 590 (Mo. banc 2007) is puzzling. There, inmates engaged in work for MoDOT later sued MoDOT for injuries that arose during that work. *Id.* at 595. The inmates did not sue the State, but instead a specific government unit that had a casual relation to the injuries. Section 516.145 did not apply because the claims were wholly unrelated to MDOC.

For these reasons, Berhow's claims are barred by the one-year statute of limitations set forth in Section 516.145. As such, the circuit court was correct

to grant judgment on the pleadings, and the State respectfully requests that this court affirm that decision.

III. The Trial Court Did Not Abuse Its Discretion by Not Granting Berhow's Motion for Sanctions (Response to Point I).

Berhow cannot overcome the high bar of establishing that the circuit court abused its discretion in refusing to grant Berhow's motion for sanctions. A motion for sanctions should only be granted in "extraordinary circumstances where recourse to applicable court rules or statutes is necessary in order to protect litigants from the abuse of legal process." *Ingram v. Horne*, 785 S.W.2d 735, 737 (Mo. App. S.D. 1990); *see also id.* (finding sanctions "should be applied sparingly and with great caution."). This Court has routinely explained that "the decision to impose a sanction for a party's noncompliance with the discovery requests lies within the sound discretion of the trial court." *Thompson*, 985 S.W.2d at 785 (citing *Kinder*, 942 S.W.2d at 338). A circuit court's decision not to impose sanctions can *only* be an abuse of discretion "if the violation *resulted in fundamental unfairness* or *substantively altered the outcome of the case*." *Id.* (citation and quotations omitted) (emphasis added). Because Berhow can show neither, this Court should reject Point I.

A. The State's discovery conduct did not result in fundamental unfairness to Berhow or substantively alter the outcome of the case.

Berhow has not alleged, let alone established, that either of the bases required for a showing of an abuse of discretion are met here. First, Berhow has not demonstrated fundamental unfairness. "Fundamental unfairness occurs when the state's failure to disclose results in defendant's 'genuine surprise' and the surprise prevents meaningful efforts to consider and prepare a strategy for addressing the evidence." *Thompson*, 985 S.W.2d at 785 (quoting *State v. Johnston*, 957 S.W.2d 734, 750 (Mo. banc 1997)). "[B]are assertions of prejudice are not sufficient to establish fundamental unfairness." *Id.* For the first time in this appeal, Berhow claims (at 36) "prejudice here is clear" because "[t]he State's refusal to engage in discovery prevented Plaintiff for several years from exploring multiple sources of information." But Berhow was never so prevented. After dismissing MDOC and naming the State as the defendant, Berhow served a barrage of discovery seeking information and documents within the possession, custody, or control of MDOC, *not the State*.[2] At all relevant times, Berhow was free to issue a subpoena for records from the MDOC seeking the very information that he complains was withheld. He did

[2] Indeed, that Berhow sought discovery solely within the possession, custody, or control of MDOC, rather than the State, further demonstrates that it was MDOC—rather than the State—that was the proper defendant in this action.

not do so. In any event, MDOC cooperated with the parties and provided interrogatory responses on October 24, 2022, and responses to the requests for production on October 24, 2022. *See* D 38, at 2. And additional documents were produced on March 24, 2023. D47. As such, there was no failure to disclose. Moreover, any delay certainly did not "prevent[Plaintiff's] meaningful efforts to consider and prepare a strategy for addressing the evidence," *Thompson*, 985 S.W.2d at 785, because the case did not progress to factual issues.

Second, Berhow offers no compelling theory of how the delayed receipt of discovery materials altered the outcome of this case. Indeed, he cannot because the disposition of the case occurred as a result of a judgment on the pleadings after the State argued that sovereign immunity and the statute of limitations barred Berhow's claims. *See* D59. Berhow only asserts as prejudice (at 36) a delay in his ability to inquire into "the determinations about the events of the fall, the nature and fitness of the ladder, and the forthrightness of the State and MDOC in responding to discovery." None of these issues were pertinent to the purely legal questions of sovereign immunity and the statute of limitations. Whether or not the physical ladder was produced, for example, has *zero* bearing on whether Berhow can bring his cause of action against the

State itself or the one-year statute of limitations bars his claims.[3] The same is true for Berhow's arguments about additional witnesses, the incident report, and the cause of Berhow's fall. Regardless of their potential relevance to the factual issues underlying Berhow's claims, they simply have no impact on the purely legal questions as to application of sovereign immunity and the statute of limitations. As such, there was no substantive alteration to the outcome of the case, and thus the circuit court did not abuse its discretion in not issuing sanctions against the State.

[3] Berhow asserts (at 35) that he "was foreclosed from developing a spoliation record" against the State with respect to retention and production of the ladder. Several points undermine this argument. First, Missouri's evidentiary spoliation doctrine requires "proof of . . . intentional destruction, fraud, or suppression. *See Brown v. Hamid*, 856 S.W.2d 51, 57 (Mo. banc 1993). Berhow does not allege anything of the sort. Second, at most, even when proven, spoliation "gives rise to an inference unfavorable to the spoliator." *Id.* (citing *Garrett v. Terminal R. Ass'n of St. Louis*, 259 S.W.2d 807, 812 (Mo.1953). Such an inference is presented to the fact finder, but here the case was adjudicated on law alone. Finally, Berhow's claims of spoliation run headlong into his own actions and the procedural posture of the case. Berhow filed his original complaint in June 2019, nearly two years after his accident. D1–2. Berhow then substituted the State for MDOC as defendant in August 2019. Most notably, Berhow only served his first discovery on the State in February 2020, D10, two-and-a-half years after the accident and months after the WMCC had closed, as Berhow acknowledges, Br. at 14. Even if the ladder had any relevance to the motion for judgment on the pleadings (it does not), it was Berhow's delays in bringing this case and serving discovery that prevented acquisition of the ladder.

B. Berhow's arguments were fully before, and considered by, the circuit court.

Aside from his failure to establish the necessary showing for an abuse of discretion, Berhow cannot overcome what is plainly evident: each argument raised about the discovery process here was before the circuit court, which had intimate knowledge of the entire process, and was deemed insufficient to grant a motion for sanctions. Indeed, Berhow admits (at 36), as he must, that "the trial court considered the sanctions issue at separate appearances." In other words, the circuit court reviewed Berhow's arguments on several occasions and elected to not sanction the State. By Berhow's own count (at 25–29), the circuit court heard Berhow's arguments on discovery no fewer than five times. During the penultimate hearing on the issue, the Court ordered the State to "produce all DOC documents" by March 24, 2023. D1, at 14. The State complied with that order, and produced over 500 pages of material to Berhow. D1, at 15; D47. Following that production, Berhow filed two supplemental memoranda seeking sanctions against the State. *See* D1, at 15–16; D48; D56. The circuit then heard argument on sanctions on May 5, 2023, and ultimately sided with the State and did not enter sanctions.

Such thoughtful deliberation is the very antithesis of an abuse of discretion. *See Noble v. L.D. Enters., Inc.*, 687 S.W.3d 11, 17 (Mo. App. W.D. 2024) (finding court abuses its discretion only where decision is "so

unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful, deliberate consideration"). Berhow's argument amounts to little more than a disagreement with the result, not a fundamental flaw necessitating this Court's intervention. Because sanctions "should be applied sparingly and with great caution," *Ingram*, 785 S.W.2d at 737, and the State complied with the circuit court's March 20, 2023 order to produce DOC materials, the circuit court's decision to not grant sanctions against the State was wholly appropriate.

C. Because the State is entitled to sovereign immunity, the circuit court had no opportunity to grant sanctions.

Moreover, if the Court agrees that the State is entitled to sovereign immunity from Berhow's claims, there was not even occasion for the circuit court to address the sanctions issue and thus it did not abuse its discretion in not granting the same. "Immunity connotes not only immunity from judgment but also immunity from suit." *Ramirez*, 694 S.W.3d at 436 (citing *State ex rel. Alsup v. Kanatzar*, 588 S.W.3d 187, 190 (Mo. banc 2019)). Where sovereign immunity applied, the circuit court lacks jurisdiction to hear the suit and any proceedings therein. *Cf. Berger Levee Dist., Franklin Cnty. v. United States*, 7 S.W.3d 15, 17 (Mo. Ct. App. 1999) (citing *United States v. Mitchell*, 463 U.S. 206, 212 (1983)). Where the State is immune from suit *in toto*, it stands to reason that the State should not be sanctioned for any alleged discovery delays.

Thus, the circuit court's decision to not grant sanctions against the State was not an abuse of discretion.

CONCLUSION

For the reasons stated above, the State respectfully requests that this Court affirm the circuit court's judgment in favor of the State, finding Berhow's claims against the State as barred by sovereign immunity and the applicable statute of limitations.

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[4] The first signature on this brief is pro hac counsel, so additional counsel also signs this brief in accordance with Rule 9.03(b).

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 8,473 words, is in compliance with Missouri Supreme Court Rule 84.06(b), includes the information required by Rule 55.03, and includes information on how the brief was served on the opposing party.

/s/ Reed C. Dempsey

CERTIFICATE OF SERVICE

I hereby certify that, on December 30, 2024, a true and correct copy of the foregoing was filed with the Court's electronic filing system to be served by electronic methods on counsel for all parties entered in the case.

/s/ Reed C. Dempsey