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## **JURISDICTIONAL STATEMENT**

Relator Debra Howenstine, M.D., brought this original proceeding in prohibition to obtain interlocutory review of an order entered by Respondent, the Honorable Ellen S. Roper, Circuit Judge of Division III of the Circuit Court of Boone County, on April 6, 2004, which denied Dr. Howenstine's motion for summary judgment asserting her immunity from suit on the basis of official immunity and public duty doctrine. The underlying action, *Paul Muren, et al., v. Debra Howenstine, M.D.*, Circuit Court No. 01CV165662, is a medical malpractice action arising out of anti-tuberculosis treatment Paul Muren received from public health nurses at the Columbia/Boone County Health Department where Dr. Howenstine serves as Medical Director.

This Court issued a Preliminary Writ of Prohibition on June 1, 2004. Under Article V, Section 4 of the Missouri Constitution, this Court has jurisdictional authority to determine and issue remedial writs.

## STATEMENT OF FACTS

The issue raised by Relator's Petition for Writ of Prohibition is whether a physician serving as medical director of a local public health department providing population-based health services on behalf of the State of Missouri is immune from suit under the public duty or official immunity doctrines where the conduct giving rise to the lawsuit does not concern any negligence of the physician in providing direct medical care to plaintiff, but instead her alleged duty to train and supervise the public health nurses who provided these public health services to plaintiff.

### A. The underlying lawsuit

The underlying case, *Paul J. Muren and Pamela Muren v. Debra Howenstine, M.D.*, Case No. 01CV165662, is a case of alleged medical malpractice arising from tuberculosis control treatment Paul Muren received from public health nurses at the Columbia/Boone County Health Department beginning in April 2000. (App. Exh. 2 at A6-A12<sup>1</sup> (*Second Amended Petition for Damages* at ¶¶ 21-52<sup>2</sup>)).

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<sup>1</sup> For those exhibits from the record which are also duplicated and included with this Brief in the Appendix, this Brief will use a citation in the form of "(App. Exh. \_\_\_ at \_\_\_ (*exhibit description*))."

<sup>2</sup> Page 033 was inadvertently omitted from Exhibit 2 to the Writ Petition; consequently, a complete copy of the Second Amended Petition for Damages is attached as App. Exh. 2).

Named as defendants in the original lawsuit were the Medical Director of the Health Department (Dr. Debra Howenstine), the City of Columbia, the four public health nurses who actually provided tuberculosis control services to Paul Muren at the Health Department (Stephanie Potter, Kena McAfee, Carolyn Davidson and Aleta Miller), and the advanced practice nurse who wrote the prescription for Paul Muren's anti-tuberculosis medication and who also serves as the Health Department's Public Health Manager (Mary Martin). (Writ Pet. & Ans. at ¶ 2.)<sup>3</sup> Having reached settlement with the defendant nurses and the City of Columbia, plaintiffs dismissed them from the lawsuit on May 21, 2004. (Writ Pet. & Ans. at ¶ 3.)

The remaining defendant, Dr. Howenstine, asserted as an affirmative defense in her Answer to plaintiffs' petition her immunity from suit by virtue of the official immunity and public duty doctrines. (Exh. 3 to Writ Pet., Vol. I at 063 (*Answer to Second Amended Petition for Damages* at 5).)

#### **B. The allegations of negligence against Dr. Howenstine**

In their lawsuit, the plaintiffs do not allege that Dr. Howenstine was negligent for any medical care she herself provided to Muren; moreover, plaintiffs admit that not one of their medical experts believes that Dr. Howenstine was negligent in the care she provided Muren after she first became aware of Muren's condition on September 19,

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<sup>3</sup> Where undisputed facts are supported by allegations in Relator's Petition for Writ of Prohibition and Plaintiffs' Answer to Petition for Writ of Prohibition admits or fails to deny those allegations, this Brief provides a combined citation in the form of "(Writ Pet. & Ans. at ¶ \_\_\_\_)."

2000. (Writ Pet. & Ans. at ¶ 50.) Instead, plaintiffs seek to hold Dr. Howenstine liable for her alleged failure as Medical Director

- to properly train and supervise the public health nurses who delivered care to Muren,
- to ensure that the delegated responsibilities set forth in a collaborative practice agreement with the nurse practitioner (Martin) were consistent with her level of skill, education, training and competence,
- to ensure that nurses and nurse practitioners followed guidelines for consulting her,
- to properly and regularly review the care provided by the nurses at the public health department, and
- to provide necessary medical direction, services, consultation and supervision of nurses who provided services to Muren.

(Writ Pet. & Ans. at ¶ 4; App. Exh. 2 at A13-A14 (*Second Amended Petition for Damages* at ¶ 56).)

Although plaintiffs allege in their petition that Dr. Howenstine also was negligent for failing to be present and to participate in review of Muren's medical condition and health care, for failing to provide adequate patient education to Muren, and for failing to conduct an adequate history and physical examination of Muren, they admit these allegations are not the principal thrust of their lawsuit. (Writ Pet. & Ans. at ¶ 4.)

**C. Missouri’s delegation of the delivery of public health services to the Columbia/Boone County Health Department**

The Department of Health for the State of Missouri is charged with the duty to “safeguard the health of the people in the state and all its subdivisions,” and this duty includes the duty to prevent the spread of infectious, contagious and communicable diseases. MO. REV. STAT. § 192.020 (attached as App. Exh. 3 at A39). City and county public health units deliver the Department of Health’s services to the public through contractual agreements. 19 C.S.R. § 10-1.010(4); MO. REV. STAT. § 192.900. (See also App. Exh. 4 at A43 (*Missouri Department of Health Public Health Nursing Manual* at § 100.15, which states: “Through contractual agreements the local public health agencies assume the responsibility of the state health department.”).) These local public health agencies are created “to protect the public health of the city, county, or group of counties.” 19 C.S.R. § 20-20.010(25).

The Columbia/Boone County Health Department provides population-based services, which include tuberculosis control services to the general public. (Exh. 7 to Writ Pet., Vol. I at 124 (*Plaintiffs’ Response to Defendant Howenstine’s “Statement of Undisputed Material Facts”* at ¶ 4).<sup>4</sup>) In addition to population-based public health services, the Columbia/Boone County Health Department also maintained at one time a clinic which provided primary medical care services to residents of Boone County who

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<sup>4</sup> With her Petition for Writ of Prohibition, Relator filed numerous exhibits in five separately bound volumes. Citations to exhibits in those volumes will be identified in the form of “(Exh. \_\_ to Writ Pet., Vol. \_\_ at \_\_ (*exhibit description*)).”

were uninsured and had an income no more than 200% of the poverty level; population-based services such as tuberculosis control, however, were not provided through the primary care clinic. (Writ Pet. & Ans. at ¶ 15<sup>5</sup>; Exh. 4 to Writ Pet., Vol. I at 070 (*Defendant Howenstine's Statement of Undisputed Material Facts* at ¶ 6) and Exh. 7 to Writ Pet., Vol. I at 125 (*Plaintiffs' Response to Defendant Howenstine's "Statement of Undisputed Material Facts"* at ¶ 6).) In contrast to the means testing required in order to receive primary care services, there is no means testing for the public health service of tuberculosis control. (Exh. 6 to Writ Pet., Vol. II at 009-010 (*Martin Depo.* at 8:20-9:1).)

The Columbia/Boone County Health Department receives funds from the State of Missouri Department of Health, the City of Columbia, and Boone County to provide public health services, including tuberculosis control services. (Ans. to Writ Pet. at ¶ 13.) The State of Missouri monitors the tuberculosis control services delivered by the Columbia/Boone County Health Department to determine whether the services are being delivered in compliance with State guidelines. (Writ Pet. & Ans. at ¶ 14.)

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<sup>5</sup> Plaintiffs appear to deny the last portion of this statement of fact in their Answer to Dr. Howenstine's Writ Petition. As is evident from the citation to the record, however, plaintiffs admitted this statement of fact on summary judgment; accordingly, they are bound by that admission on appeal. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993) (when considering appeals from summary judgments, facts set forth in support of a party's motion are taken as true unless contradicted by the non-moving party's response to summary judgment).

**D. Supervision of and training provided to the public health nurses by the Columbia/Boone County Health Department**

The Columbia/Boone County Health Department is headed by the Director of Public Health who works under the executive direction of the City Manager for the City of Columbia. (Writ Pet. & Ans. at ¶ 16.) Former defendant Martin, the Public Health Manager at the Columbia/Boone County Health Department, exercises supervision over public health nurses at the Department and develops, implements, and coordinates public health nursing for the Department. (Writ Pet. & Ans. at ¶ 17; App. Exh. 5 at A47 (*City of Columbia-Health Department Schematic*); App. Exh. 6 at A49 (*Position Description for Public Health Manager*).)

Public health nurses Potter, McAfee, Miller and Davidson (former defendants in the underlying lawsuit) work under the supervision of the Public Health Manager (Martin) and the Public Health Nursing Supervisor (Lisa Lamm) and under the general medical direction of the Columbia/Boone County Health Department's Medical Director to provide services to clients of the Health Department, including the services in the tuberculosis control program. (Writ Pet. & Ans. at ¶ 21.)

The Public Health Manager and the Public Health Nursing Supervisor are responsible for the hiring, firing, and evaluation of public health nurses at the Department. (Writ Pet. & Ans. at ¶ 19; App. Exh. 6 at A50 (*Position Description for Public Health Manager*); App. Exh. 7 at A52 (*Position Description for Public Health Nursing Supervisor*).) While she provided "general medical direction" to the department, Dr. Howenstine had no direct role with regard to the hiring, firing, or the day-to-day

supervision and training of the public health nurses employed by the Columbia/Boone County Health Department. (Exh. 12 to Writ Pet., Vol. IV at 29-30 (*Howenstine Depo. I* at 111:11-114:5); Exh. 12 to Writ Pet., Vol. IV at 112, 115, 123-124, 125 (*Howenstine Depo. III* at 37:19-38:5; 49:3-20; 50:1-52:9; 83:22-84:16; 84:24-85:13; 89:3-17); App. Exh. 8 at A54 (*Howenstine Aff.* at ¶ 4).)

Lamm, the Public Health Nursing Supervisor at the Columbia/Boone County Health Department, provides direct supervision and training of the professional nursing staff employed by the Health Department. (Writ Pet. & Ans. at ¶ 18; App. Exh. 7 at A52 (*Position Description for Public Health Nursing Supervisor*); Exh. 6 to Writ Pet., Vol. II at 025, 032-033 (*Martin Depo.* at 71:6-22; 100:19-102:7).) Included in the nursing supervisor's responsibilities is the scheduling of nursing staff at the Health Department. (Exh. 6 to Writ Pet., Vol. II at 032 (*Martin Depo.* at 98:15-99:18).)

When new public health nurses are hired at the Health Department, the Public Health Nursing Supervisor schedules the nurses to work with experienced nurses for at least a month so that they can be oriented to the specialty programs such as tuberculosis control; moreover, if it is determined that a nurse needs additional time in a particular area, the time the new nurse is supervised in that program is extended. (Exh. 6 to Writ Pet., Vol. II at 025 (*Martin Depo.* at 70:8-71:10); Exh. 12 to Writ Pet., Vol. IV at 112 (*Howenstine Depo. III* at 37:16-40:19).) Additionally, new public health nurses receive training through the State of Missouri, and are expected to read the Missouri Department of Health Tuberculosis Control Manual and the CDC Core Curriculum on Tuberculosis Control. (Exh. 6 to Writ Pet., Vol. II at 033, 055 (*Martin Depo.* at 103:14-104:11; 189:2-

25); Exh. 12 to Writ Pet., Vol. IV at 113-114 (*Howenstine Depo. III* at 42:6-18; 44:23-45:17; 46:4-47:13).)

In addition, public health nurse training on the delivery of tuberculosis control services was also delegated to certain nurses at the Health Department who were the designated TB control nurses. (Exh. 12 to Writ Pet., Vol. IV at 355 (*Potter Depo.* at 237:1-16); Exh. 6 to Writ Pet., Vol. II at 025, 067 (*Martin Depo.* at 72:1-25; 236:15-237:3).) Training conducted by the TB control nurses included a formal in-service for all of the public health nurses at the Health Department and included training on the paperwork, medication, and the tracking of TB patients. (Exh. 6 to Writ Pet., Vol. II at 024-025 (*Martin Depo.* at 67:2-69:14).) Moreover, all nurses are instructed to review the Health Department's policies and procedures manual annually and sign the manual to indicate that they have read them and understand those policies and procedures. (Exh. 6 to Writ Pet., Vol. II at 033 (*Martin Depo.* at 104:12-25); App. Exh. 8 at A58 (*Howenstine Aff.* at Exh. A – Signature Page for 2000 Manual); Exh. 12 to Writ Pet., Vol. IV at 112-113 (*Howenstine Depo. III* at 40:20-42:1).)

When new information becomes available regarding the delivery of tuberculosis control services, the TB nurses also provide instruction at the weekly nursing staff meetings, and new TB guidelines are distributed to all staff as they become available. (Exh. 6 to Writ Pet., Vol. II at 033 (*Martin Depo.* at 102:19-104:11).) In the year 2000, TB nurse Potter instructed the public health nurses on the newly-revised tuberculosis control guidelines and distributed to these nurses the federal manuals setting out the

newly-revised tuberculosis control guidelines. (Exh. 6 to Writ Pet., Vol. II at 067, 068, 069 (*Martin Depo.* at 238:17-239:4; 240:6-24: 247:5-18).)

According to the Public Health Manager for the Columbia/Boone County Health Department, Dr. Howenstine's responsibility as it related to the training and supervision of the public health nurses providing tuberculosis control services was to "know their capabilities" and, "if she had any insecurity about" the capability of the nurses, to notify the Public Health Manager or Public Health Nursing Supervisor of the need for additional training or supervision. (Exh. 6 to Writ Pet., Vol. II at 025-026 (*Martin Depo.* at 72:1-73:6).)

**E. Dr. Howenstine's Role as Medical Director at the Columbia/Boone County Health Department**

Relator Debra Howenstine, M.D. is the Medical Director of the Columbia/Boone County Health Department, and she serves in that position pursuant to an Agreement for Services entered into between the City of Columbia and the Curators of the University of Missouri. (Writ Pet. & Ans. at ¶ 23.) The Agreement for Services between the University and the City of Columbia provides that the City would reimburse the University for Dr. Howenstine's services in an amount of \$87,459 annually. (Writ Pet. & Ans. at ¶ 25; App. Exh. 9 at A59 (*Agreement for Services*).) In the year 2000, Dr. Howenstine devoted 60 percent of a full-time position to her position as Medical Director of the Health Department and 20 percent of a full-time position to the University of Missouri's medical school and residency program. (Writ Pet. & Ans. at ¶ 24.)

Dr. Howenstine does not have a formal job description for her position as Medical Director of the Columbia/Boone County Health Department. (Writ Pet. & Ans. at ¶ 27<sup>6</sup>; Exh. 4 to Writ Pet., Vol. I at 072 (*Defendant Howenstine's Statement of Undisputed Material Facts* at ¶ 15) and Exh. 7 to Writ Pet., Vol. I at 126 (*Plaintiffs' Response to Defendant Howenstine's "Statement of Undisputed Material Facts"* at ¶ 15).) The Agreement for Services between the City and the University states that Dr. Howenstine would provide primary care services,<sup>7</sup> consultation and oversight of advanced practice nurses, maintain collaborative practice arrangements with advanced practice nurses and registered nurses employed by the Health Department, and oversight of family practice resident physicians during their public health rotation. (App. Exh. 9 at A59 (*Agreement for Services*).)

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<sup>6</sup> Plaintiffs do not fully admit this statement of fact in their Answer to Dr. Howenstine's Writ Petition, but instead offer additional legal arguments as to what Dr. Howenstine's job duties were. As is evident from the citation to the record, however, plaintiffs admitted this statement of fact on summary judgment; accordingly, they are bound by that admission in this appeal. *ITT Commercial Fin. Corp.*, 854 S.W.2d at 376.

<sup>7</sup> As previously stated, the Health Department, and Dr. Howenstine specifically, do not provide primary medical care services for patients receiving population-based tuberculosis control services; rather, Dr. Howenstine manages a patient's initial concerns once she is notified of that concern, and the patient is referred to their own physician if they are experiencing serious complications, such as hepatitis. (Exh. 12 to Writ Pet., Vol. IV at 027-028 (*Howenstine Depo. I* at 102:14-106:17).)

As Medical Director at the Health Department, Dr. Howenstine is not supervised by the Director of Public Health, nor does she report to the Public Health Manager. (Writ Pet. & Ans. at ¶ 28.) Dr. Howenstine is, however, supervised by the University, but this supervision does not related to her duties as Medical Director; instead, the University supervises Dr. Howenstine with regard to her duties as a faculty member and supervisor of medical resident physicians. (Writ Pet. & Ans. at ¶ 29.)

**F. The role of the public health nurse in the delivery of tuberculosis control services at public health departments**

According to the Missouri Department of Health, public health nurses in local public health agencies have a major responsibility in the control of tuberculosis for instructing the patient in the importance of continuing uninterrupted drug therapy and on the precautions to prevent the transmission of tuberculosis infection; moreover, case management for the individual patient is provided by the public health nurse. (Writ Pet. & Ans. at ¶ 30.) It is the policy of the Missouri Department of Health that all persons on anti-tuberculosis medications will receive at least a monthly review by the public health nurse and that in this review, the public health nurse will (1) assess adherence to the prescribed medical regimen, (2) assess signs and symptoms of adverse reactions to the medication, and (3) conduct an appropriate clinical assessment.<sup>8</sup> (Writ Pet. & Ans. at ¶ 31.)

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<sup>8</sup> While public health departments in designated metropolitan areas provide additional tuberculosis control services, including an initial physician evaluation of the

Under Missouri’s Nurse Practice Act, a professional nurse is authorized to independently perform certain nursing acts which include the “[a]ssessment, nursing diagnosis, nursing care, and counsel of persons who are ill, injured or experiencing alterations in normal health processes.” MO. REV. STAT. § 335.016(10)(b). Similarly, a professional nurse in Missouri does not need to engage in a collaborative practice arrangement<sup>9</sup> with a physician nor does he or she require physician oversight to perform nursing acts the nurse has the specialized education, judgment, and skill to perform. (Writ Pet. & Ans. at ¶ 33.)

**G. Dr. Howenstine’s role as Medical Director in the delivery of tuberculosis control services at the Columbia/Boone County Health Department**

Each local public health department in Missouri is mandated to have a licensed physician “sign off” on standing orders for nurses delivering population-based services; some of the physicians serving this function are not present on-site at the local health department while other local departments (generally, larger health departments) have

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patient, the Columbia/Boone County Health Department is not a designated program. (Writ Pet. & Ans. at ¶ 32.)

<sup>9</sup> “Collaborative practice arrangements” between nurses and their collaborating physicians are “written agreements, jointly agreed-upon protocols, or standing orders for the delivery of health care services” which delegate to the nurse the authority to administer or dispense certain drugs and provide what would otherwise be medical treatment. Mo. Rev. Stat. § 334.104.1.

physicians serving this function as on-site medical directors. (Writ Pet. & Ans. at ¶ 35.<sup>10</sup>) To fulfill this mandate, the City of Columbia contracted with the University to retain the services of Dr. Howenstine as Medical Director, and the Agreement for Services required that Dr. Howenstine maintain collaborative practice arrangements with the advanced practice nurses and the registered nurses employed by the Columbia/Boone County Health Department. (Writ Pet. & Ans. at ¶ 36.)

To comply with this requirement that she, as Medical Director, maintain collaborative practice arrangements with the registered nurses, Dr. Howenstine prepared written policies and protocols which govern the delivery of population-based services, including tuberculosis control services, by the Health Department nurses, who are to review and sign the policies and protocols on an annual basis. (Writ Pet. & Ans. at ¶ 37; App. Exh. 10 at A60-A69 (*Columbia/Boone County Health Department Policies and Protocols*); Exh. 12 to Writ Pet., Vol. IV at 201-202 (*Biery Depo.* at 193:10-196:25.)

The Columbia/Boone County Health Department protocol for tuberculosis control directs the nurses to provide services in accordance with the recommendations of the most current edition of the Missouri Department of Health Tuberculosis Control Manual and the Center for Disease Control Core Curriculum on Tuberculosis, and the services to be provided by the nurses specifically included the placement of tuberculosis skin tests,

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<sup>10</sup> While plaintiffs deny this fact paragraph in their answer to the writ petition, their denial is based on their argument that the allegations are not probative of the issues before this Court and not on any reference to facts in the record disputing the substance of the allegation.

collection of sputum and blood specimens, ordering chest x-rays, and dispensing tuberculosis medications. (Writ Pet. & Ans. at ¶ 39.)

As context for the method for delivery of these services, public health nurses—prior to the adoption of the Collaborative Practice Act in 1996—could provide tuberculosis control services to the public without an on-site physician through a delegation of authority from the State health department directly to the local public health agency and pursuant to protocols developed at the state level. (Writ Pet. & Ans. at ¶ 38;<sup>11</sup> Exh. 12 to Writ Pet., Vol. IV at 179, 181 (*Biery Depo.* at 117:24-118:25; 124:6-125:13).) At that time—and even in some health departments today—a public health nurse could provide anti-tuberculosis medication pursuant to a standing order signed by the state epidemiologist or a prescription signed by a contract physician who was not physically present at the local public health department. (Writ Pet. & Ans. at ¶ 38.)

**H. Collaborative practice arrangements in public health settings  
delivering population-based public health services such as tuberculosis  
control**

The Missouri Department of Health, in its Public Health Nursing Manual, explains the requirements for collaborative practice arrangements in public health clinics providing population-based services:

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<sup>11</sup> While plaintiffs deny this fact paragraph in their Answer to the writ petition, their denial is based on their argument that the allegations are not relevant to the issues before this Court and not on any reference to facts in the record disputing the substance of the allegation.

Collaborating physicians and collaborating registered nurses or advanced practice nurses practicing in association with public health clinics providing specific population-based health services must abide by the statute provisions 334.104 RSMo and sections (1) and (5) only of the collaborative practice rule (4 CSR 200-4.200). The specific services are as follows: immunizations; well child care; HIV and sexually transmitted disease care; family planning; **tuberculosis control**; cancer and other chronic diseases and wellness screenings; services related to epidemiological investigations and related treatment; and prenatal care.

(App. Exh. 4 at A45 (*Missouri Public Health Nursing Manual* at § 200.55) (emphasis added).) In those instances, the geographic areas, methods of treatment, and review of services shall occur as set forth in the collaborative practice arrangement. (App. Exh. 11 at A71 (*Collaborative Practice Regulations* at 4 C.S.R. § 200-4.200(5).))

Conversely, where the provision of health services includes the diagnosis and initiation of treatment of disease or injury not related to population-based health services, then the specific regulatory provisions regarding geographic areas, methods of treatment, and review of services shall apply to collaborative practice arrangements. (App. Exh. 11 at A71 (*Collaborative Practice Regulations* at 4 C.S.R. § 200-4.200(5).)) Accordingly, advanced practiced nurse Mary Martin provided care in the primary care clinic at the Columbia/Boone County Health Department pursuant to a collaborative practice agreement with Dr. Howenstine that was distinct from the collaborative practice agreement between Dr. Howenstine and the nurses (including Martin) who were

providing population-based public health services. (App. Exh. 12 at A73-A74 (*Advanced Practice Nurse Collaborative Practice Agreement*); App. Exh. 8 at A54-A55, A58 (*Howenstine Aff.* at ¶¶ 6-7 and Exh. A - *Columbia/Boone County Health Department Policies and Protocols Signature Page*); App. Exh. 10 at A60-A69 (*Columbia/Boone County Health Department Policies and Protocols*); Exh. 6 to Writ Pet., Vol. II at 034, 036-037, 039 (*Martin Depo.* at 107:18-108:24, 116:4-117:24; 125:24-126:25).)

In the case of collaborating physicians and collaborating registered professional nurses or advanced practice nurses practicing in settings which provide care to those with narrowly circumscribed conditions in public health clinics or community health settings that provide population-based health services including tuberculosis control, review of services shall occur as needed and set forth in the collaborative practice arrangement. (App. Exh. 11 at A71 (*Collaborative Practice Regulations* at 4 C.S.R. § 200-4.200(4)(E)).) Dr. Howenstine's review of the primary care provided by nurse practitioners in the Columbia/Boone County Health Department's primary care clinic occurred every two weeks, and her review of the care provided by population-based public health services at the Health Department was on an as-needed basis. (Writ Pet. & Ans. at ¶ 43.)

**I. Tuberculosis control services provided by the Columbia/Boone County Health Department nurses to Paul Muren**

After Paul Muren came into contact with a co-worker who had been diagnosed with active tuberculosis disease, he came to the Columbia/Boone County Health Department for tuberculosis testing on April 6, 2000. (Exh. 2 to Writ Pet., Vol. I at 026

(*Second Amended Petition for Damages* at ¶ 21.) Muren tested positive for latent tuberculosis infection, and he began receiving Isoniazid (“INH”), an anti-tuberculosis medication, from the Health Department. (Writ Pet. & Ans. at ¶ 45.)

Drug-induced liver injury, or hepatotoxicity, is a known risk of INH treatment. (Exh. 6 to Writ Pet., Vol. II at 186 (*Crippin Depo.* at 131:24-132:1).) However, there is no way to predict which patient will experience INH-induced hepatotoxicity. (Exh. 6 to Writ Pet., Vol. II at 244 (*Salpeter Depo.* at 242:9-243:6).) Information given Muren by the Health Department advised him of this risk. (Exh. 6 to Writ Pet., Vol. II at 186 (*Crippin Depo.* at 132:2-5).) Plaintiffs do not assert that it was negligent for Muren to be prescribed INH by nurse Martin. (Writ Pet. & Ans. at ¶ 51.)

On April 19, 2000, a public health nurse discussed with Muren the “potential adverse reactions” to the INH treatment, advised him to avoid alcohol, and gave him written information about the drug. (App. Exh. 13 at A81 (*Muren Health Department Record* at April 19, 2000 Progress Note).) On April 27, 2000, Muren received his first 30-day supply of INH medication on April 27, 2000, and he returned to the Columbia/Boone County Health Department approximately every 30 days to be assessed by a public health nurse for signs and symptoms of a potential adverse reaction to the INH drug and to pick up another 30-day supply through August 23, 2000. (Writ Pet. & Ans. at ¶¶ 45, 47.)<sup>12</sup>

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<sup>12</sup> While plaintiffs substantially admit Paragraph 45 of the Writ Petition, they supplement their response by asserting conclusory allegations about what Muren reported to the nurses and the significance of these reports, as well as including the legal argument

Muren's health department record for his August 23, 2000 visit noted that Muren complained of tiredness and that in the past week, his urine had been darker yellow on and off, returning to clear yellow. (App. Exh. 13 at A82 (*Muren Health Department Record* at August 23, 2000 Progress Notes).) The public health nurse further recorded that she asked Muren to evaluate whether the darker yellow urine occurred when he was dehydrated ("drinks less fluids, increases outside activity"), and if he found no correlation, to return for liver function tests<sup>13</sup> in one week. (App. Exh. 13 at A82 (*Muren Health Department Record* at August 23, 2000 Progress Notes).) Muren did not return to the Health Department until three weeks later, when he reported with jaundice and was instructed by the public health nurse to stop taking the INH drug and blood was drawn for liver function tests. (App. Exh. 13 at A83 (*Muren Health Department Record* at September 15, 2000 Progress Notes).)

During the time Muren received tuberculosis control services from the Health Department, Dr. Howenstine was not consulted about his treatment by any nurse who

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that Dr. Howenstine was responsible for the nurse's conduct. Because conclusory allegations stated in the return on a writ petition are disregarded by the Court, no response here is provided. *State ex rel. Specialty Foam Prods., Inc. v. Keet*, 579 S.W.2d 650, 653 (Mo. App. S.D. 1979).

<sup>13</sup> Liver function tests analyze the bloodstream for enzymes produced by the liver to determine whether the levels of those enzymes exceed the normal range, thereby indicating that liver injury was occurring. (Exh. 12 to Writ Pet., Vol. IV at 077-078 (*Howenstine Depo. II* at 81:17-82:22; 87:2-20).)

provided care to Muren. (Writ Pet. & Ans. at ¶ 48.)<sup>14</sup> In fact, Dr. Howenstine's first contact with Muren came only after he began suffering an adverse reaction to the INH and had been directed by a public health nurse to stop taking the drug. (Writ Pet. & Ans. at ¶ 49.) Plaintiffs do not allege that Dr. Howenstine was negligent in any way after she became aware of Muren's condition on September 19, 2000. (Writ Pet. & Ans. at ¶ 50.)

**J. Plaintiffs' expert medical testimony on the issue of negligence**

Plaintiffs have asserted in the underlying lawsuit that the public health nurses who provided tuberculosis control services to Muren were negligent for failing to properly monitor and evaluate Muren for signs of adverse reactions to the INH medication and for failing to obtain liver function tests. (App. Exh. 2 at A21, A23-A24, A27, A30 (*Second Amended Petition for Damages* at ¶¶ 85, 97, 111, 125).) Similarly, both of plaintiffs' medical experts have opined that Muren should have been given a liver function test by the public health nurses upon complaint of any sign or symptom of a potential adverse reaction. (Writ Pet. & Ans. at ¶¶ 52, 56.)

Dr. Jeffrey Crippin, one of plaintiffs' medical experts, has testified that because the public health nurses failed to conduct liver function testing on Muren when they saw him at the Health Department, Dr. Howenstine was negligent in failing to train and supervise these nurses. (Writ Pet. & Ans. at ¶ 53.) Dr. Crippin acknowledged in his testimony, however, that his opinion regarding Dr. Howenstine's negligence was based

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<sup>14</sup> Again, the conclusory allegations and argument made by plaintiffs in addition to admitting Paragraph 48 of the Writ Petition are to be disregarded. *Keet*, 579 S.W.2d at 653.

upon his assumption that she was charged with the duty to train and supervise the nurses at the Health Department, and Dr. Crippin admitted that he had not seen the policies and protocols for the Health Department and was unfamiliar with how population-based services were provided at health departments. (Writ Pet. & Ans. at ¶ 54.)

The other medical expert who testified against Dr. Howenstine on behalf of plaintiffs, Dr. Shelley Salpeter, also testified that Dr. Howenstine was negligent for failing to provide proper supervision and training to the health department nurses. (Writ Pet. & Ans. at ¶ 57.<sup>15</sup>) Dr. Salpeter also testified that her opinion that Dr. Howenstine was negligent in failing to properly train and supervise the nurses was based on her

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<sup>15</sup> While plaintiffs admit the statement above, they further state in their Answer that Dr. Salpeter testified that by delegating the authority to provide tuberculosis control services and based upon the Missouri Collaborative Practice Act, Dr. Howenstine had a duty to ensure that the delegated acts were within the skill, training, education and competence of the nurses involved; however, the reference to the record does not support this statement. The testimony referenced by plaintiffs is Dr. Salpeter's explanation why she believes monitoring for adverse reactions to a drug is a delegated medical act instead of a nursing act. (Exh. 6 to Writ Pet., Vol. II at 279-281 (*Salpeter Depo.* at 400:24-406:5).) With regard to that opinion, Dr. Salpeter admits that she had not directed herself to Missouri statute or regulations regarding the distinction between authorized nursing acts and delegated medical acts. (Exh. 6 to Writ Pet., Vol. II at 281 (*Salpeter Depo.* at 407:19-22; 408:23-409:3).)

assumption that Dr. Howenstine had that responsibility at the Health Department. (Exh. 6 to Writ Pet., Vol. II at 224-225 (*Salpeter Depo.* at 152:6-10; 152:21-153:5).)

## POINTS RELIED ON

- I. Relator is entitled to an order making this Court's preliminary writ absolute and prohibiting Respondent from taking any further action other than granting summary judgment to Relator, because Relator is immune from liability in the underlying lawsuit as a matter of law by virtue of the doctrine of official immunity, in that (A) Relator, as Medical Director for the Columbia/Boone County Health Department, is a public official; and (B) Relator's conduct that is alleged to constitute negligence is discretionary conduct performed in her official capacity and did not involve direct patient care.

*State ex rel. Twiehaus v. Adolf*, 706 S.W.2d 443 (Mo. banc 1986).

*Kanagawa v. State*, 685 S.W.2d 831 (Mo. banc 1985).

*Howard v. City of Columbus*, 521 S.E.2d 51 (Ga. Ct. App. 1999) (attached as App. Exh. 14).

*Benjamin v. University Internal Med. Found.*, 492 S.E.2d 651 (Va. 1997) (attached as App. Exh.15).

4 C.S.R. § 200-4.200 (attached as Exh. 11).

II. Relator is entitled to an order making this Court's preliminary writ absolute and prohibiting Respondent from taking any further action other than granting summary judgment to Relator, because Relator is immune from liability in the underlying lawsuit as a matter of law by virtue of the public duty doctrine, in that (A) Relator, as Medical Director for the Columbia/Boone County Health Department, is a public employee for purposes of the public duty doctrine; and (B) Relator's conduct that is alleged to constitute negligence concerns duties she owed as Medical Director to the general public in safeguarding public health rather than any special duty she owed to plaintiffs.

*Sherrill v. Wilson*, 653 S.W.2d 661 (Mo. banc 1983).

*Brown v. Tate*, 888 S.W.2d 413 (Mo. App. W.D. 1994).

*Jamierson v. Dale*, 670 S.W.2d 195 (Mo. App. W.D. 1993).

MO. REV. STAT. § 192.020 (attached as App. Exh. 3).

## ARGUMENT

Relator's petition for a permanent writ touches in some way the delivery of public health services to residents in all 114 counties of Missouri. In order to carry out its statutory mandate to safeguard public health in Missouri, the Department of Health delivers public health services in each Missouri county largely through the efforts of public health nurses employed by local public health agencies. In order for these public health nurses to provide the services necessary to safeguard public health, however, the State of Missouri has required since 1996 that a physician enter into a collaborative practice arrangement with the public health nurses, thereby authorizing the nurses to deliver certain specified medical acts pursuant to written protocols.

At issue is whether a physician serving in her administrative role as medical director of a local public health agency engaged in carrying out the State of Missouri's responsibility to safeguard public health through services designed to control the spread of tuberculosis should be directly liable for the alleged negligence of the public health nurses delivering those services to the public because she was required by the State to enter into a collaborative practice arrangement with those nurses. Or, should that physician—who did not herself provide direct medical care to the member of the public—be immune from suit because the negligence alleged against her involves discretionary conduct performed in her official capacity and in fulfillment of her duty to the public?

## I. Standard of Review

Although prohibition is not generally available to review the denial of summary judgment, it is an appropriate remedy to “forestall unwarranted and useless litigation” where plaintiffs’ claim is clearly barred. *State ex rel. O’Blennis v. Adolf*, 691 S.W.2d 498, 500 (Mo. App. E.D. 1985). Where the claim is barred by a defense of immunity, prohibition is particularly appropriate because immunity connotes not only immunity from judgment but also immunity from suit. *State ex rel. Department of Agriculture v. McHenry*, 687 S.W.2d 178, 181 (Mo. banc 1985). A defendant who is clearly entitled to immunity should not be required to proceed through trial and appeal in order to enforce that protection. *State ex rel. Board of Trustees v. Russell*, 843 S.W.2d 353, 355 (Mo. banc 1992).

Where a motion for summary judgment is denied, and on the face of the pleadings the defendant is entitled to immunity as a matter of law, a writ of prohibition is appropriate. *State ex rel. Twiehaus v. Adolf*, 706 S.W.2d 443, 444 (Mo. banc 1986) (citing *McHenry*, 687 S.W.2d at 181); *State ex rel. Missouri Hwy. and Transp. Comm’n v. Dierker*, 961 S.W.2d 58, 60 (Mo. banc 1998) (stating that a writ is appropriate “[w]here the pleadings show that a defendant is immune from suit as a matter of law, and the trial court refuses to grant summary judgment.”).

This Court’s review of Respondent’s denial of summary judgment is *de novo* in that the criteria on appeal for testing the propriety of summary judgment are no different than those which should be employed by the trial court to determine the propriety of the initial motion. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854

S.W.2d 371, 376 (Mo. *banc* 1993), citing *E.O. Dorsch Elec. Co. v. Plaza Constr. Co.*, 413 S.W.2d 167, 169 (Mo. 1967). This Court applies the same standard of review to each point raised in this brief.

Because Relator Dr. Howenstine is entitled as a matter of law to immunity from suit on the ground that her service as Medical Director of the Columbia/Boone County Health Department affords her the protection of official immunity and the public duty doctrine, a permanent writ of prohibition should issue to correct the trial court's exercise of its extrajurisdictional power in denying summary judgment. *State ex rel. Division of Motor Carrier and R.R. Safety v. Russell*, 91 S.W.3d 612, 615 (Mo. *banc* 2002) (prohibition is the extraordinary remedy designed to correct and prevent the trial court's exercise of its "extrajurisdictional power.").

**II. Relator is entitled to an order making this Court’s preliminary writ absolute and prohibiting Respondent from taking any further action other than granting summary judgment to Relator, because Relator is immune from liability in the underlying lawsuit as a matter of law by virtue of the doctrine of official immunity, in that (A) Relator, as Medical Director for the Columbia/Boone County Health Department, is a public official; and (B) Relator’s conduct that is alleged to constitute negligence is discretionary conduct performed in her official capacity and did not involve direct patient care.**

The general rule of official immunity is that a public officer, acting within the scope of her authority, is not liable for injuries arising from her discretionary acts or omissions. *State ex rel. Twiehaus v. Adolf*, 706 S.W.2d 443, 444 (Mo. banc 1986) (citing *Kanagawa v. State*, 685 S.W.2d 831, 835 (Mo. banc 1985)). At issue on Dr. Howenstine’s claim of immunity under the official immunity doctrine was (1) whether Relator Dr. Howenstine was a public official even though she served as Medical Director of the Columbia/Boone County Health Department under a contract entered into between the City of Columbia and her employer, The Curators of the University of Missouri; and (2) whether the fact that Relator Dr. Howenstine was required to be in a collaborative practice arrangement with the public health nurses providing population-based health services to Paul Muren made her liable for the nurse’s conduct in the same way as a physician who provides negligent medical care directly to her patient. The undisputed

material facts clearly supported Dr. Howenstine's claim of official immunity on both of these issues.

- A. Even though Relator Dr. Howenstine serves as Medical Director of the Columbia/Boone County Health Department pursuant to a contract between the City of Columbia and her employer, the undisputed facts demonstrate she was a public official for purposes of the doctrine of official immunity.**

For purposes of official immunity, a public official is one who has been given a right, authority and duty created or conferred by law to independently exercise some portion of the sovereign functions of the government for the benefit of the public. *State ex rel. Eli Lilly & Co. v. Gaertner*, 619 S.W.2d 761, 764 (Mo. App. E.D. 1981). Official immunity is not limited to elected officials. In fact, this Court has expressly rejected the notion that official immunity protects only high-level or elected officials; instead, even a low-level employee may be immune when she exercises judgment in carrying out her official duties. *Green v. Denison*, 738 S.W.2d 861, 865 (Mo. banc 1987).

As a result, Missouri courts have recognized that a variety of employees performing public work are protected by official immunity in the exercise of their discretionary conduct involving governmental decision-making. See, e.g., *Edwards v. McNeill*, 894 S.W.2d 678 (Mo. App. W.D. 1995) (computer programmer and data processing coordinator); *Heins Implement Co. v. Missouri Hwy. & Transp. Comm'n*, 859 S.W.2d 681 (Mo. banc 1993) (highway design engineer); *Bachmann v. Welby*, 860 S.W.2d 31 (Mo. App. E.D. 1993) (police officer); *Clay v. Scott*, 883 S.W.2d 573 (Mo.

App. E.D. 1994) (prison employee); *Gavan v. Madison Mem'l Hosp.*, 700 S.W.2d 124 (Mo. App. E.D. 1985) (hospital trustees and administrator); *Callahan v. Marsh*, 717 S.W.2d 260 (Mo. App. W.D. 1986) (director of nursing); *Webb v. Reisel*, 858 S.W.2d 767 (Mo. App. E.D. 1993) (school district's director of pupil transportation).

As Medical Director for the Columbia/Boone County Department of Health, there is no question that Dr. Howenstine is a public official for purposes of official immunity because the undisputed facts demonstrate that Relator exercises a portion of the sovereign functions of the government for the benefit of the public when she carries out her duties as Medical Director at the Columbia/Boone County Health Department.

There can be no dispute that the protection of public health is a function of the sovereign. It is the statutory charge of the Missouri Department of Health to safeguard the public in Missouri against infectious disease, and that duty is delegated to local public health agencies through contractual agreements between the state health department and the local agencies. MO. REV. STAT. § 192.020; 19 C.S.R. § 10-1.010(4). Indeed, it is through this contractual relationship that the Columbia/Boone County Health Department assumes the “sovereign functions” of the Missouri Department of Health when it delivers population-based health services—including tuberculosis control services—to the public.

The Missouri Department of Health mandates that each local health department have an arrangement with a physician for the purposes of “signing off” on standing orders guiding the delivery of population-based services by the public health nurses. Relator Dr. Howenstine is that physician at the Columbia/Boone County Health

Department. It follows, then, that by filling this role, Dr. Howenstine assumes certain sovereign functions of the State.

The official nature of Dr. Howenstine's duties is most readily demonstrated in the fact that the State of Missouri directly provided the services Dr. Howenstine now provides as Medical Director. Prior to the adoption of the Collaborative Practice Act in 1996, Missouri's Department of Health promulgated state-wide protocols and standing orders under which local public health nurses were authorized by the State's epidemiologist to treat tuberculosis patients and provide them with INH medication without a physician on-site at the local health department. With the adoption of the Collaborative Practice Act, this sovereign function was shifted to Dr. Howenstine.

That it remains a sovereign function, however, is evidenced by the fact that the population-based public health services (including those directed at the control of tuberculosis) provided by the Columbia/Boone County Health Department continue to be monitored by the Missouri Department of Health to insure that the tuberculosis control services being delivered are appropriate and comply with state guidelines.

In carrying out the sovereign functions with which she is charged, Dr. Howenstine exercises independent decision-making. Dr. Howenstine is not supervised by the Director of Public Health, nor does she report to the Public Health Manager for the Health Department. Moreover, she is not supervised by the University with regard to her role at the Health Department. Accordingly, there can be no question that Dr. Howenstine is vested with the authority and given the duty to independently exercise some portion of the

sovereign functions of the government for the benefit of the public. Therefore, she is a public official for purposes of official immunity.

In opposing summary judgment, plaintiffs denied that Relator Dr. Howenstine was a public official because she was an employee of the University of Missouri and not of the Missouri Department of Health or the City of Columbia. Whether Dr. Howenstine's salary is from a public source, however, is not the determining factor in deciding whether she is a public official. *Eli Lilly*, 619 S.W.2d at 764.

Even so, her salary is from a public source. It is undisputed that Dr. Howenstine serves as Medical Director of the Columbia/Boone County Health Department pursuant to an agreement for her services entered into between the City of Columbia and The Curators of the University of Missouri, for which the City annually reimburses the University \$87,459 for Dr. Howenstine's services. Consequently, Dr. Howenstine's position as Medical Director is funded by a public source, and the fact that this funding is not directly paid by the City or the State to her is irrelevant.

This point is best demonstrated by *Benjamin v. University Internal Med. Found.*, 492 S.E.2d 651 (Va. 1997) (attached as App. Exh. 15). In *Benjamin*, a physician serving as medical director of a state-operated clinic was immune from liability in medical malpractice action because she was not an attending physician who provided medical care to the plaintiff or who was consulted about plaintiff's condition; instead, the physician performed merely administrative functions in reviewing patient charts, responding to complaints, and arranging for physician coverage. *Id.* at 653. The fact that the physician's salary was paid to her by her university employer even though the actual

source of these funds was the state did not remove her from the shield of immunity. *Id.* at 652-53.

Therefore, Relator Dr. Howenstine is a public official for purposes of official immunity.

**B. The fact that Relator Dr. Howenstine is a physician in a collaborative practice arrangement with the public health nurses who provided tuberculosis control services to plaintiff Paul Muren does not remove her from the protection of official immunity.**

The underlying lawsuit does not involve claims of negligence arising from any medical care Relator Dr. Howenstine directly provided Muren; indeed, it is undisputed that Dr. Howenstine was not consulted by the public health nurses regarding their care of Paul Muren and had absolutely no knowledge of Paul Muren until after the alleged negligence occurred. Neither of plaintiffs' experts criticize any care Relator Dr. Howenstine provided Muren once she learned of his condition in September 2000.

Had her provision of medical care been the conduct at issue in the underlying suit, however, summary judgment in her favor would have been inappropriate. See *Cooper v. Bowers*, 706 S.W.2d 542, 543 (Mo. App. W.D. 1986) ("A physician, even though an employee of the state, does not perform a governing function involving the exercise of sovereign power when he treats patients."); *Eli Lilly*, 619 S.W.2d at 765 ("The defendant doctors are being sued as treating physicians, not as titular heads of any department nor are they being sued for allegedly negligent administrative policy decision . . . . They are not being sued for an erroneous decision requiring the exercise of governmental judgment

and discretion but for an allegedly erroneous medical decision for which they should answer without a shield of immunity.”). But this is not the case asserted against Dr. Howenstine.

The primary theory of liability adopted by plaintiffs against Dr. Howenstine has been her alleged failure to train and supervise the public health nurses who provided the direct care to Paul Muren. Indeed, plaintiffs’ petition alleges this failure on the part of Dr. Howenstine, and plaintiffs’ experts testified that Dr. Howenstine was negligent for failing to train and supervise the public health nurses—based upon their assumption that this was her duty.

If, in fact, it was Dr. Howenstine’s duty to train and supervise the health department nurses, allegations such as the failure to train or supervise are precisely the type of conduct which is protected by the scope of official immunity. See *Kanagawa v. State*, 685 S.W.2d 831 (Mo. banc 1985) (claim that prison officials failed to adequately supervise their employees and insure that the prisoners were supervised was discretionary function protected by official immunity); *State ex rel. Southers v. Stuckey*, 867 S.W.2d 579 (Mo. App. W.D. 1993) (juvenile home administrator’s failure to make adequate provision to ensure that the staff were trained in security measures was discretionary function protected by official immunity); *Bates v. State*, 664 S.W.2d 563 (Mo. App. E.D. 1983) (developmental disability treatment center superintendent’s failure to properly screen employees hired and failure to supervise the center’s employees were discretionary functions protected by official immunity).

The case of *Howard v. City of Columbus*, 521 S.E.2d 51 (Ga. App. 1999) (attached as App. Exh. 14), illustrates the application of this rule of law in the context of a physician serving in the capacity of a medical director of a jail. The *Howard* court held that the defendant physician was immune from suit in his role as medical director for the jail and could not be liable for negligent supervision or training of the medical staff at the jail or its policies because he was performing those duties in the course of his public employment. 521 S.E.2d at 415. Unlike Dr. Howenstine, however, the physician in *Howard* also had a distinct duty to his patient for which was not immunized from liability—he also served as the on-call physician for the jail, and he failed to come to the jail to examine a seriously ill diabetic prisoner or order that he be sent to a hospital after a nurse called and spoke with him about the prisoner’s condition. *Id.* Consequently, even if Dr. Howenstine was charged with the duty to train and supervise the public health nurses, she would be immune from liability.

This, however, was not her duty. The extensive discovery conducted by plaintiffs in this case unequivocally shows that the duty to provide training and supervision of the public health nurses was that of the Columbia/Boone County Health Department and not Dr. Howenstine. The Public Health Manager testified that while it was her overall responsibility for the training and supervision of the public health nurses, she delegated that responsibility to the Public Health Nursing Supervisor. Certain nurses designated as TB Control Nurses provided the public health nurses with specialized training in tuberculosis control to supplement the other training provided by the Health Department.

Because plaintiffs were unable to point to any contract provision, job description, or testimony by any health department employee to support their assertion that Dr. Howenstine had a duty to train and supervise the nurses, plaintiffs instead pointed to the collaborative practice arrangement Dr. Howenstine was required to enter into with the public health nurses as the source of the alleged duty of Dr. Howenstine to supervise and train the nurses so as to ~~A~~guarantee they will not be negligent in performing their duties. Those regulations, however, create no such duty.

Particularly, subsection 3 of the collaborative practice regulations, upon which plaintiffs relied for this argument, does not require that Dr. Howenstine act in such a way so as to “guarantee” non-negligent treatment by the nurses:

The collaborating physician shall consider the level of skill, education, training and competence of the collaborating registered professional nurse or advance practice nurse and ensure that the delegated responsibilities contained in the collaborative practice arrangement are consistent with that level of skill, education, training, and competence.

4 C.S.R. § 200-4.200(3)(B) (App. Exh. 11 at A70). Instead, the physician “considers” the levels of skill, education, training and competence of the nurse and “ensures” that the delegated responsibilities are consistent with that level of skill, education, training, and competence—there is no requirement that the collaborating physician conduct training or exercise supervision.

Regardless of the duty imposed by subsection 3, the collaborative practice regulations specifically exclude subsection (3) of 4 C.S.R. § 200-4.200 (entitled “Methods of Treatment”) from application to population-based health services:

(5) Population-Based Public Health Services.

(A) In the case of the collaborating physicians and collaborating registered professional nurses or advanced practice nurses practicing in association with public health clinics that provide population-based health services limited to . . . tuberculosis control . . . , the geographic areas, methods of treatment and review of services shall occur as set forth in the collaborative practice arrangement. If the services provided in such settings include the diagnosis and initiation of treatment of disease or injury not related to population-based health services, then the provisions of sections (2), (3), and (4) above shall apply.

4 C.S.R. § 200-4.200(5) (App. Exh. 11 at A71). This exclusion represents the reality that delivery of population-based health services by public health nurses had been occurring for years before the adoption of the collaborative practice law. Accordingly, the regulations adopted to implement the collaborative practice law distinguished between those arrangements necessary to provide population-based services and those related to the provision of primary care services.<sup>16</sup>

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<sup>16</sup> The distinction is evidenced by comparison of the collaborative practice agreement between Dr. Howenstine and the public health nurses providing tuberculosis

Underlying plaintiffs' argument that Dr. Howenstine should be liable for the public nurses' alleged negligent treatment because of her collaborative practice agreement is the assumption that the nurses' conduct constituted a medical act she delegated to them by virtue of the collaborative practice agreement. This, too, is a false assumption.

The public health nurses assessed Paul Muren for potential signs and symptoms of an adverse reaction to INH when he returned to the Health Department every 30 days for additional medication. Plaintiffs alleged in the underlying suit that this conduct was negligent—that the nurses failed to recognize the signs and symptoms Muren was allegedly reporting. Clinical monitoring for adverse reactions to the drug is not a medical act dependent upon any authorization by Dr. Howenstine. A registered professional nurse in Missouri is authorized by statute to independently perform nursing acts which include the “[a]ssessment, nursing diagnosis, nursing care, and counsel of persons who are ill, injured or experiencing alterations in normal health processes.” MO. REV. STAT. § 335.016(10)(b). Recognizing that a professional nurse in Missouri need not engage in a collaborative practice arrangement to perform nursing acts, it is the policy of the Missouri Department of Health that persons on anti-tuberculosis medications will receive at least monthly review by the public health nurse, and the review will assess for adherence to the

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control (App. Exh. 10) with the collaborative practice agreement between Dr.

Howenstine and Martin, an advanced nurse practitioner (App. Exh. 12).

prescribed medical regimen, signs and symptoms of adverse reactions to the medication, and provide an appropriate clinical assessment. (Writ. Pet. & Ans. at ¶ 31.)

This Court's opinion in the 1983 case *Sermcheif v. Gonzales* refutes plaintiffs' argument. In *Sermcheif*, 660 S.W.2d 683 (Mo. banc 1983), nurses providing women's health services pursuant to standing orders and the physicians who had signed these standing orders brought a declaratory judgment action seeking a ruling that the nurses' conduct did not constitute the unauthorized practice of medicine. The services routinely provided to patients by these nurses pursuant to standing orders and without the supervision of physicians included, among others, the taking of history, breast and pelvic examinations, the dispensing of certain designated medications, and the diagnosis of the existence or nonexistence of contraindications to the use of contraceptives. *Id.* at 684-86.

In determining whether these acts constituted permissible nursing acts, this Court reviewed Missouri's Nurse Practice Act of 1975 and its definition of "professional nursing" which included the "assessment, nursing diagnosis, nursing care, and counsel of persons who are ill, injured or experiencing alterations in normal health processes" and "the administration of medications and treatments." *Id.* at 688-89. Noting that the Act provided a broader definition of nurse and that the most apparent change was the elimination of the requirement that a physician directly supervise nursing functions, this Court held that the acts of the nurses were clearly authorized under the Act. *Id.* at 688-89.

Most relevant to this case is this Court's affirmation of a nurse's authority under the Act to make a nursing diagnosis:

There can be no question that a nurse undertakes only a nursing diagnosis, as opposed to a medical diagnosis, when she or he finds or fails to find symptoms described by physicians in standing orders and protocols for the purpose of administering courses of treatment prescribed by the physician in such orders and protocols.

*Sermcheif*, 660 S.W.2d at 689-90. Similarly, the clinical monitoring of Muren by public health nurses, in which they monitored for signs and symptoms of an adverse reaction to INH, did not constitute a medical act, but a nursing act which did not require any delegation of authority by Dr. Howenstine.

**C. Dr. Howenstine's conduct is fulfilling her duties as Medical Director is discretionary in nature and, therefore, protected by the official immunity doctrine.**

Even if the regulation relied upon by plaintiffs was applicable to public health departments providing population-based services, there is no evidence in this lawsuit that Dr. Howenstine failed to consider the fact that the defendant nurses in this case were trained, properly-licensed and experienced such that they were competent to perform the duties she delegated to them when she entered into the collaborative practice arrangements with them. Moreover, any negligence by Dr. Howenstine in following the mandate of the regulation would not remove the protection the doctrine of official immunity affords her because such conduct is discretionary in nature.

It is well established that public officials acting with the scope of their authority are not liable for injuries arising from their discretionary acts or omissions. *Kanagawa*,

685 S.W.2d at 835. Whether an act can be characterized as discretionary depends upon the degree of reason and judgment required. *Id.* at 836. Discretion relates not so much to the exercise of naked and unrestrained power as to the exercise of judgment. *Id.* The official immunity doctrine serves society's compelling interest in the vigorous and effective administration of public affairs by protecting public officers from fear of personal liability as they make judgments concerning the public safety and welfare. *Id.*

Even though Dr. Howenstine, by virtue of her role as Medical Director, is required to enter into collaborative practice arrangements with the public health nurses who deliver population-based public health services, the substance of that arrangement (or protocol) and—more particularly—the exercise of her independent judgment in determining how to best to consider the competency of those with which she enters such an arrangement is discretionary conduct. Even where a statute provides directs a public official to take a certain course of action, the official's conduct is deemed to be discretionary in nature where the evaluation and review of a particular course of action requires the exercise of that official's reason and judgment. See, e.g., *Brummitt v. Springer*, 918 S.W.2d 909 (Mo. App. S.D. 1996) (holding that both the mental health case worker and her supervisor were entitled to official immunity for their alleged failure to supervise and evaluate the foster home placement of a child who died from malnutrition because “the very nature of evaluating and reviewing Abigail's progress required the exercise of reason in determining what course of action should be pursued regarding her stay in the foster home.”). Similarly, the negligent conduct alleged against

Relator involves her official duties and require the exercise of her own independent discretion and judgment.

Removing the protection of official immunity from Dr. Howenstine for failing to do what plaintiffs say she should have done has far-reaching implications. Assuming for sake of argument that it is the duty of a physician providing oversight to a local health department to train and supervise public health nurses, most of the local public health agencies in Missouri do not have physicians on-site. Instead, these departments rely on physicians in their surrounding communities to enter collaborative practice agreements so that public health services may be delivered.

If all of the physicians in Missouri who are in collaborative practice agreements with public health nurses providing these population-based health services are subject to liability for any negligent act by a public health nurse even though the protocols these physicians authored are not attacked, one can only expect the imminent return to the prior system wherein a physician employed by the State of Missouri and sitting in Jefferson City, Missouri, issued standing orders which authorized public health nurses to provide tuberculosis control services in the furthest corners of the State.

Because Relator Dr. Howenstine is a public official and the charged negligence relates to the discretionary performance of her official duties as Medical Director of the Columbia/Boone County Health Department, she is entitled to official immunity in the underlying lawsuit.

**III. Relator is entitled to an order making this Court’s preliminary writ absolute and prohibiting Respondent from taking any further action other than granting summary judgment to Relator, because Relator is immune from liability in the underlying lawsuit as a matter of law by virtue of the public duty doctrine, in that (A) Relator, as Medical Director for the Columbia/Boone County Health Department, is a public employee for purposes of the public duty doctrine; and (B) Relator’s conduct that is alleged to constitute negligence concerns duties she owed as Medical Director to the general public in safeguarding public health rather than any special duty she owed to plaintiffs.**

The “public duty” rule denies a civil action against public employees for damages for negligence arising out of duties owed to the public-at-large. *Sherrill v. Wilson*, 653 S.W.2d 661, 668 (Mo. banc 1983). A finding that a defendant is immune under the public duty doctrine results in the plaintiff’s failure to state a claim for negligence because plaintiff has failed to show that defendant breached a particular duty to plaintiff. *Spotts v. City of Kansas City*, 728 S.W.2d 242, 248 (Mo. App. W.D. 1987). Further, the public duty protects not only protects upper-level officials, it also provides protection for lower-level employees charged with carrying out a duty to the public. See, e.g., *Spotts*, 728 S.W.2d 242 (public duty doctrine applicable to a police officer).

Given her role as Medical Director of a public health department and the fact that the negligence alleged against in no way relates to any medical care she herself provided Muren, Dr. Howenstine is immune under the public duty doctrine.

**A. The public duty doctrine applies to Dr. Howenstine as Medical Director of the Columbia/Boone County Health Department.**

As they did in their response to Dr. Howenstine's claim of official immunity on summary judgment, plaintiffs also made much of the fact that Dr. Howenstine was an employee of the University contracted out to the City of Columbia to serve in her role as Medical Director of the Columbia/Boone County Health Department. Despite the fact that public funds are paid to the University (itself, a public institution) for Dr. Howenstine's services as Medical Director, this argument carries even less weight on the question of whether the public duty doctrine applies because the focus here is on the particular nature of the duties performed by Dr. Howenstine and not on who signs her paycheck.

Although the public duty doctrine is closely related to official immunity, the public duty doctrine is broader in application than official immunity:

The public duty doctrine is defined differently than the official immunity doctrine. The public duty doctrine holds that a public official, or a public employee, may not be held liable to a person injured by his negligence in the performance of his public duty, because his duty is owed only to the general public, and not to the person injured. In the case of a public official, rarely if ever will the public duty doctrine provide a shield from liability where the official immunity doctrine would not. The two doctrines merge; they produce the same result. It may be that the public duty

doctrine will furnish protection to a public employee who is not a public official in a case where the official immunity doctrine would not.

*Brown v. Tate*, 888 S.W.2d 413, 416 (Mo. App. W.D. 1994) (emphasis added). Though the two doctrines “merge” when a public official is the actor, they remain distinct doctrines otherwise with a focus on whether the actor is carrying out a duty to the public at-large.

**B. The nature of Dr. Howenstine’s alleged negligence concerns the duty she owed to the general public in safeguarding public health as Medical Director.**

Dr. Howenstine had no physician-patient relationship with Muren; in fact, she did not become aware that Muren was receiving tuberculosis control services from Columbia/Boone County Health Department until after he suffered an adverse reaction to the INH and had been instructed to stop taking the drug. Instead, Dr. Howenstine’s indirect “involvement” with Muren’s anti-tubercular treatment was only as a consequence of the exercise of her discretion and judgment as Medical Director at Columbia/Boone County Health Department as the drafter of the department’s protocols for population-based public health services forming the collaborative practice agreement she had with the public health nurses who provided public health services to Muren.

As such, Muren cannot claim Dr. Howenstine had a special duty to him arising from the physician-patient relationship; instead, Dr. Howenstine’s duty at the Health Department was directed to the public-at-large. Local public health departments, according to Department of Health regulations, are “provided by a city, county or group

of counties to protect the public health of the city, county, or group of counties.” 19 C.S.R. § 20-20.010(25). The Columbia/Boone County Health Department, like all local public health agencies or departments in Missouri, delivers services designed to safeguard the public health under the authority of the Missouri Department of Health. See MO. REV. STAT. § 192.020; 19 C.S.R. § 10-1.010(4). These Department of Health services include population-based public health services and include the tuberculosis control services provided Muren by the Columbia/Boone County Health Department between April and September 2000. Because her efforts were directed at carrying out the duty of the Missouri Department of Health and the Columbia/Boone County Health Department to safeguard public health, Dr. Howenstine’s conduct in her role as Medical Director and author of the protocols for population-based services was performed on behalf of the State and as a duty to the public.

To counter the protection afforded Dr. Howenstine in carrying out her duty to the public, plaintiffs argued on summary judgment that because Muren was receiving tuberculosis control services from public health nurses pursuant to the collaborative practice arrangement they had with Dr. Howenstine, it was foreseeable that the nurses’ failure to follow the protocols in delivering that care would result in harm to Muren and others in receipt of those services.

Noncompliance with a regulatory or statutory directive does not create a duty to a particular class of persons—even where harm to a particular class may be foreseeable. See, e.g., *Jamierson v. Dale*, 670 S.W.2d 195, 196-97 (Mo. App. W.D. 1984) (affirming summary judgment in favor of Division of Family Services employee responsible for

inspection of licensed day care center for compliance with licensing regulations because regulations created duty to public and not to discrete class of children attending day cares); *State ex rel. Southers v. Stuckey*, 867 S.W.2d 579 (Mo. App. W.D. 1993) (affirming residential youth facility administrator's dismissal from suit under public duty doctrine even though state regulation directed administrator to "immediately" notify local police of runaway youth because duty ran in favor of state and did not create a private right of action for specific member of public); see also *Cooper v. Planthold*, 857 S.W.2d 477 (Mo. App. E.D. 1993) (recognition that Missouri has not implemented a "special duty" exception to public duty doctrine which would remove immunity where particular individuals are intended to be protected by exercise of a particular duty).

The facts in *Green v. Denison*, 738 S.W.2d 861 (Mo. banc 1987), further demonstrate that even where a particular harm may be foreseeable, the public duty doctrine will immunize a public official carrying out a duty to the public. In that case, innocent bystanders were injured by police fire in an apartment building. 738 S.W.2d at 862. The plaintiffs argued that the police could and should have foreseen the violent encounter and, because they had violated a statute and failed to take additional safety precautions, were liable under a simple theory of negligence. *Id.* at 865-66. However, this Court held that the officers' discretionary conduct was protected by the public duty doctrine, as well as their official immunity. *Id.* at 866-67. If the foreseeability of injury in *Green* did not destroy the officers' immunity, then the attenuated argument advanced by plaintiffs that Muren's injury was foreseeable can not destroy the immunity afforded the Medical Director of Columbia/Boone County Health Department.

That Dr. Howenstine is immune under the public duty doctrine is obvious. During the time Muren received tuberculosis control services from the Public Health Nurses at the Health Department, Dr. Howenstine's duty to oversee the medical direction of the Health Department, her duty to adopt appropriate protocols for the population-based service of tuberculosis control, and her duty to enter collaborative practice arrangements with the public health nurses were duties she owed to the public—not to Paul Muren. Even if it were Dr. Howenstine's responsibility to train and supervise the Public Health Nurses (which it was not), this responsibility constituted a duty to the general public and to the State of Missouri—not to Paul Muren or even to a discrete class of Missouri citizens with latent tuberculosis infections. Consequently, Dr. Howenstine is immune from suit under the public duty doctrine.

## **CONCLUSION**

Because Relator, as Medical Director for the Columbia/Boone County Health Department, is entitled as a matter of law to immunity from the underlying lawsuit due to the protection afforded her by the official immunity and public duty doctrines, this Court should make its preliminary writ absolute and prohibit Respondent from taking any further action other than granting summary judgment to Relator Debra Howenstine, M.D.

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that I caused a copy of the foregoing and a copy of the disk required by Rule 84.06(g) to be served upon each of the parties by first-class U.S. mail, postage prepaid, this 2<sup>nd</sup> day of August, 2004, as indicated below:

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**CERTIFICATE OF COMPLIANCE WITH RULE 84.06**

I hereby certify that the foregoing Relator's Brief complies with all requirements of Supreme Court Rule 84.06 in that:

1. Relator's Brief, formatted in Microsoft Word, complies with the limitations contained in Rule 84.06(b), in that the number of words in this Relator's Brief that are counted against the 31,000 word limit is 12,239, according to the word count of the word-processing system used to prepare this brief; and
2. that, as required by Rule 84.06(g), the IBM-PC-compatible 1.44 MB, 3 2-inch floppy disk containing this brief and filed herewith has been scanned for viruses and is virus-free.

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