No. SC97595

*Court's note: This is an incorrect case number. The correct case number is SC98012.*

# In the Supreme Court of Missouri

**DWIGHT LAUGHLIN,**

**Respondent,**

**v.**

**DEWAYNE PERRY, et al.,**

**Appellants.**

**Appeal from Circuit Court of Newton County, Missouri**
**Fortieth Judicial Circuit, No. 11NW-CV01772**
**The Honorable James V. Nichols, Associate Circuit Judge**

## APPELLANT'S SUBSTITUTE BRIEF

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## INTRODUCTION

In 1993, Plaintiff-Respondent Dwight Laughlin burglarized a federal post office, damaging property therein. After his state court conviction, in 2010 he was discharged when this Court held that the post office is within the exclusive jurisdiction of the United States, precluding state prosecution.

Laughlin then obtained a civil judgment in a malpractice action against his former attorneys, Public Defenders Perry and Flottman. The Court of Appeals affirmed, holding that public defenders are not entitled to official immunity. Official immunity is a judicially created doctrine that protects "government actors who, despite limited resources and imperfect information, must exercise judgment in the performance of their duties." *Davis v. Lambert-St. Louis Int'l Airport*, 193 S.W.3d 760, 765 (Mo. banc 2006). Missouri courts have not directly decided whether official immunity extends to public defenders, but the doctrine applies to public servants who work for the state—including public defenders—by its own terms. Additionally, numerous policy reasons support extending official immunity to public defenders.

Laughlin failed to present sufficient evidence of negligence at trial. This case is the story of a jurisdictional defect repeatedly escaping the skill and learning ordinarily used by legal professionals. Though Laughlin had an expert testify in a conclusory fashion that the elements of legal malpractice

were met, the testimony is merely illusory evidence of an expert opinion that is contradicted by common judicial experience, uncontroverted material facts, and even the expert's own testimony.

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## JURISDICTION STATEMENT

Public Defenders Dewayne Perry and Ellen Flottman appeal from the judgment entered pursuant to the jury verdicts against them in the Newton County Circuit Court, finding them liable for legal malpractice. The jury reached its verdict on May 11, 2018, and the court entered judgment on May 15, 2018. Defendants filed their Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for New Trial on June 14, 2018. The court denied the Motion on June 25, 2018. Defendants timely filed their Notice of Appeal to the Missouri Court of Appeals, Southern District on July 2, 2018, and that court affirmed the decision of the trial court on June 10, 2019. *See Laughlin v. Perry*, 2019 WL 2909058 (Mo. App. S.D. 2019). The Supreme Court of Missouri granted transfer on September 3, 2019. Accordingly, this Court has jurisdiction under Article V, section 10, of the Missouri Constitution.

## STATEMENT OF THE CASE

### I. UNDERLYING CRIMINAL PROCEEDINGS

In 1993, Plaintiff-Respondent Dwight Laughlin burglarized a federal post office in Neosho, Missouri, causing property damage. After his state court conviction, in 2010 Laughlin was discharged when the Supreme Court of Missouri held that "the Neosho post office is within the exclusive jurisdiction of the United States," precluding state court prosecution. *See State ex rel. Laughlin v. Bowersox*, 318 S.W.3d 695, 703 (Mo. banc 2010).

Shortly after Laughlin's arrest, State Prosecutor Scott Watson received a letter from a Federal Postal Inspector, describing Laughlin's conduct and criminal history and asking how Watson wanted to handle the prosecution. App. at 126-28 (Defs. Ex. F).[1] In Watson's experience, this indicated to him that federal authorities expected him to take the lead in any prosecution. (Tr. 257:17-25). Additionally, the Office of the United States Attorney informed Watson that it had decided not to bring federal charges against Laughlin. (Tr. 259:6-17).

Given that there would be no federal prosecution, Watson could either prosecute Laughlin or let him walk free. (Tr. 263:22-264:3). Accordingly,

[1] Defendants' Exhibits referred to in this brief—A, B, D, F, G, L, N, O, P and S—are contained in Appellant's Brief Appendix. Page citations are to the Appendix page number.

Watson filed charges of burglary and property damage in the first degree in the Newton County Circuit Court in 1993, though he "would not have" if he had recognized the exclusive federal jurisdiction. *See* App. at 34-45 (Defs. Ex. A); (Tr. 264:11-12). Defendants Perry and White were the public defenders assigned to represent Laughlin in his criminal trial. App. at 28 (Defs. Ex. A); (Tr. 383:1-10, 424:19-24).

Public Defender Perry never observed anything suggesting that this case deviated from the general rule of concurrent criminal jurisdiction between state and federal courts. (Tr. 405:9-13). In fact, Perry acknowledges that, even now, after 28 years of practice, Laughlin's case presented an unusual issue; he cannot recall hearing of any case—before or since Laughlin's trial—where the jurisdiction was exclusively federal. (Tr. 402:24-403:18, 420:15-22).

Public Defender White also found no basis to question the circuit court's jurisdiction. (Tr. 427:15-22). Further, he does not recall the issue of exclusive federal jurisdiction ever being raised at Laughlin's trial, and he had never heard of any other instances of a Missouri court finding exclusive federal jurisdiction in a criminal case. (Tr. 430:18-24, 428:8-24). White considered Perry an excellent attorney, mentor, and role model; he touted Perry's tendency to "pursue every legal theory and every factual scenario to defend his client as honestly as he could." (Tr. 425:25-426:6).

Before trial, Laughlin began making an unrefined argument to his counsel that the State "did not have the right to prosecute [him] for anything." (Tr. 183:9-186:12). However, Perry declined to pursue the defense because, based on his knowledge and experience, he thought that jurisdiction was resolved as concurrent, which severed any logic in asserting it; from there he exercised discretion in his pursuit of what he considered to be more meritorious arguments. (Tr. 419:7-11, 413:25-414:14); *see* App. at 68-71 (Defs. Ex. A). Despite his zealous defense, Perry's arguments failed, and Laughlin was convicted of burglary and property damage. App. at 72-73 (Defs. Ex. A). He was sentenced as a prior and persistent offender to forty years in prison. *Id*.

Public Defender James Martin assumed Laughlin's representation in the Rule 29.15 post-conviction relief ("PCR") proceedings. App. at 81 (Defs. Ex. B). In alleging that Laughlin's constitutional rights were violated, Martin included a jurisdictional point that "the trial court did not have jurisdiction to try movant's case since it was a federal offense thereby preempting state court jurisdiction." App. at 100 (Defs. Ex. B). In alleging ineffective assistance of counsel, Martin again included a jurisdictional point: "Trial counsel failed to actively argue that Movant's cause should be in Federal Court rather than State Court. Movant was prejudiced because he was subjected to 40 years in State Court instead of a possible three years under Federal law. Had trial

counsel pursued that issue, there is a reasonable probability that the result . . . would have been different." App. at 105 (Defs. Ex. B).

It was Martin's practice in drafting these points to include every argument desired by his clients, simply on the basis that the client requested it; Laughlin signed an affidavit that he was satisfied with the arguments made therein. (Tr. 446:18-447:12); App. at 109-110 (Defs. Ex. B). Though Martin raised these issues, no evidence was adduced in support. App. at 97-110 (Defs. Ex. B). Laughlin declares that, through the PCR proceedings, he still "did not know what [he (Laughlin)] was doing, so [he] did not know how to articulate the point to [anyone] or even exactly what was required to do so." (Tr. 201:11-14). The PCR court denied relief on the ground that "no evidence was adduced showing the offense was not a state offense, or that the federal government had pre-empted jurisdiction." App. at 86 (Defs. Ex. B).

At the final stage in Laughlin's criminal proceedings, Public Defender Ellen Flottman represented him in the consolidated appeal. App. at 26 (Defs. Ex. A). Here, again, Laughlin presented an unrefined jurisdictional argument in a letter to Flottman: "[m]y charges were originally federal because the building was a post office." App. at 144 (Defs. Ex. L). He followed up this correspondence by admitting, "I was not sure if the cases would be helpful or not . . . ." *Id.* at 11. Consistent with the legal professionals that came before

her, Flottman concluded that concurrent state and federal jurisdiction existed to prosecute Laughlin. (Tr. 529:3-14, 530:8-18, 552:9-16). Her experience dictated that the jurisdictional defense did not have merit; looking back, the exclusive-jurisdiction issue in this case was the first of its kind. (Tr. 532:24-533:3). Laughlin lost his appeal, and Flottman communicated the remedies she believed were available, attempting to help one last time. *See* App. at 166-167 (Defs. Ex. 6).

## II. LAUGHLIN'S PURSUIT OF RELIEF

Laughlin went to work making the case for his release; he began repeatedly filing his case on his own, though he "still had not learned how to use the law." (Tr. 220:21-221:25). While in prison, he used the law library to learn about jurisdiction. (Tr. 222:3-223:2). Laughlin began raising his case in several forums ("probably 40"), and relief was denied each time. (Tr. 222:12-223:15).

At some point, after receiving a helpful tip and coming to better understand his case, Laughlin identified three principle components that, combined, would establish his entitlement to relief: (1) a constitutional provision defining the court's jurisdiction (Article I, Section 8), (2) a Missouri statute ceding jurisdiction to the federal government (§ 12.010, RSMo.), and (3) the deed to the land of the post office which established its conferment to

the federal government in 1933. App. at 280-290 (Defs. Ex. O);[2] (Tr. 231:13-235:2). From there, he began submitting his case for review with these jurisdiction-defining components in tow. (Tr. 230:13-231:12, 340:18-341).

In 2005, Laughlin submitted a petition for declaratory judgment in the Newton County Circuit Court with this jurisdictional argument fully developed. App. at 294-297 (Defs. Ex. P). In his Petition, Laughlin alerted the court to the existence and contents of the Jurisdictional Exhibits, and he attached the Exhibits to the Petition. *Id.* The court granted summary judgment in favor of the State in 2006 after "having read the brief[s] of both parties" and after "having reviewed relevant case law," finding that there was "no factual or legal issue remaining to be determined in [the] matter." *Id.* at 4.

In 2007, Laughlin filed a petition for a writ of habeas corpus in Texas County. App. at 298-328 (Defs. Ex. S). The petition, accompanied by suggestions in support and several exhibits, included the Jurisdictional Exhibits. *Id.* The Court dismissed the petition in a 2008 docket entry, finding "from the file itself there is no need for an evidentiary hearing." App. at 259 (Defs. Ex. O). Laughlin was denied relief once again. *Id.*

[2] These three items which were essential to Laughlin's entitlement to relief are hereafter collectively identified as the **"Jurisdictional Exhibits."**

In 2009, Laughlin raised the exact same issue on appeal in the Southern District Court of Appeals for the State of Missouri. (Tr. 296:2-15); App. at 260 (Defs. Ex. O). Once more, with the three Jurisdictional Exhibits handed to the court, relief was denied. *Id.*

Not until 2010, after presenting the exact same case, did Laughlin win his discharge. The Supreme Court of Missouri granted habeas relief and ordered Laughlin's release on the ground that the state did not have jurisdiction to prosecute his crimes. *Bowersox*, 318 S.W.3d 695 (Mo. banc 2010); (Tr. 292:16-293:8, 294:17-295:1).

## III. THE MALPRACTICE ACTION

Plaintiff filed this suit against Defendants Perry, White, Martin, Flottman, and Osgood[3] in the Newton County Circuit Court on August 29, 2011, based on their respective roles in representing him over the course of the criminal proceedings delineated above. (L.F. D30 p.1).[4]

Plaintiff sued the defendants for legal malpractice or, in the alternative, for breach of fiduciary obligation. Laughlin voluntarily dismissed Defendant Osgood on December 22, 2011. (L.F. D28 p. 7). He also voluntarily dismissed

[3] Defendant Osgood represented Laughlin in a corresponding appeal before the United States Court of Appeals for the Eighth Circuit in 1997.
[4] Citation to the system-generated Legal File will also reference the PDF page number.

Defendant White on May 7, 2018. (L.F. D28 p. 23). This case was tried before a jury from May 9 to May 11, 2018. (L.F. D28 p. 23-24).

Laughlin alleged multiple times at trial that, during his criminal proceedings, he repeatedly notified his respective attorneys that the State had no jurisdiction to prosecute his crimes. (Tr. 286:8-12, 291:3-8). However, Laughlin concedes that he "didn't know exactly what the issue was" and "didn't have a full understanding of how all that worked." (Tr. 286:16-21, 303:7-15).

At trial, Laughlin enlisted expert Arthur Benson. (Tr. 306-362). In concluding that Perry and Flottman failed the standard of care, Benson maintained that (1) the jurisdictional defect was an "obvious" issue to spot; (2) there was an obligation for the prosecution, the defense, and the court to raise or resolve the issue if they spotted it; and (3) the defect was prominently identified in at least two courts before it reached the Supreme Court of Missouri. (Tr. 337:15-16, 336:18-21, 339:9). He also agrees that the Texas County Circuit Court and the Southern District Court of Appeals "certainly did" have the "picture painted for them as to why [Laughlin] should be released." (Tr. 360:12-24).

Although he describes the issue as obvious, Benson was not familiar with any other Missouri case, before or since Laughlin's trial, where jurisdiction was exclusively federal. (Tr. 310:10-15, 333:4-334:9). Benson testified that "any

lawyer accepting this case under the standard of care . . . would have seen this conflict between State charges on Federal property and would have said, that is something I better answer." (Tr. 315:11-18). At the same time, he acknowledges that Defendants, based on their experience and knowledge, *did* answer it, albeit incorrectly. (Tr. 331:15-332:12). Benson further agreed that "judgment and reasonableness are always factors" in a criminal defense lawyer's representation, and that they aren't required to find "every law that might affect jurisdiction." (Tr. 325:22-326:4).

In response, Defendants presented evidence of the numerous instances in which Laughlin's jurisdictional claim was reviewed and rejected. *See* Defs. Exs. A-B, N-P, S; (Tr. 292:7-295:1). The evidence is summed up by Laughlin's testimony that "probably 40" failures predominated over one victory in the Supreme Court of Missouri. (Tr. 223:3-13, 292:16-293:8, 294:17-295:1).

Laughlin submitted only claims of legal malpractice against Defendants Perry, Martin, and Flottman. L.F. D35 p. 8, 10, 12; (Tr. 577:3-8). As a crucial element thereof, "negligence" was defined as "the failure to use that degree of skill and learning ordinarily used under the same or similar circumstances by members of the legal profession." *Id.* The jury returned a verdict in favor of Defendant Martin and against Defendants Perry and Flottman on May 11,

2018. (L.F. D37). The court entered judgment on the verdicts on May 15, 2018. (L.F. D38 p. 2).

## IV. POST-JUDGMENT

Defendants Perry and Flottman filed their Motion for Judgment Notwithstanding the Verdict or, in the Alternative for New Trial on June 14, 2018. (L.F. 39). Following that motion's denial on June 25, 2018, Defendant-Appellants Perry and Flottman timely filed their notice of appeal on July 2, 2018. (L.F. 40). The Missouri Court of Appeals, Southern District, affirmed the decision of the trial court on June 10, 2019. *See Laughlin v. Perry*, 2019 WL 2909058 (Mo. App. S.D. 2019). The Supreme Court of Missouri granted post-opinion transfer on September 3, 2019.

## POINTS RELIED ON

I.

The Circuit Court erred in denying Defendants Perry and Flottman's motion for judgment notwithstanding the verdict because Defendants had official immunity from the legal malpractice claims against them, which were based on Defendants' not raising the defense of exclusive federal jurisdiction in the state criminal proceedings against him, in that (1) the record and law established (and Plaintiff Laughlin did not dispute) that: (a) as public defenders employed by the State of Missouri, Defendants were public employees; (b) in representing Plaintiff in the criminal proceedings, Defendants were acting within the scope of their authority as public defenders; and (c) a lawyer's choice as to what defenses to pursue and how to pursue them is a matter of discretion, and (2) there is no reason to exclude public defenders from the protection of official immunity where (a) Missouri courts have held that official immunity applies to all public employees (not just "officials") and to discretionary acts of public employees whether those acts are "governmental" in nature and (b) numerous strong public policy reasons support extension of official immunity to public defenders.

*Southers v. City of Farmington*, 263 S.W.3d 603 (Mo. banc 2008)
*Kuehne v. Hogan*, 321 S.W.3d 337 (Mo. App. W.D. 2010)
*Jacobi v. Holbert*, 553 S.W.3d 246 (Ky. 2018)
*Woods v. Ware*, 471 S.W.3d 385 (Mo. App. W.D. 2015)

II.

The Circuit Court erred in denying Defendants Perry and Flottman's motion for judgment notwithstanding the verdict because Plaintiff Laughlin failed to make a submissible case on his legal malpractice claim in that no evidence was adduced in support of the essential element of negligence as it was defined at trial, and therefore, no reasonable jury could have found that Defendants failed to use that degree of skill and learning ordinarily used under the same or similar circumstances by members of the legal profession simply on the basis that Plaintiff's criminal conviction was eventually found defective, considering that the prosecutor, trial judge, post-conviction judge, and several other circuit and appellate courts found no merit in Plaintiff's jurisdictional claim before this Court eventually granted relief on the exact same claim.

*Investors Title Co. v. Hammonds*, 217 S.W.3d 288 (Mo. banc 2007)
*Farm Bureau Town & Country Ins. Co. v. Shipman*, 436 S.W.3d 683 (Mo. App. S.D. 2014)
*Ellison v. Fry*, 437 S.W.3d 762 (Mo. banc 2014)

## SUMMARY OF THE ARGUMENT

Because Laughlin's claims against Perry and Flottman involve their performance of discretionary functions performed in the course of their official duties as public employees, official immunity protects them from these claims. This is true regardless of whether Perry and Flottman are considered policy-making officials, as official immunity in Missouri applies to public employees generally. Contrary to the opinion of the Court of Appeals, this is also true despite the existence of State Legal Expense Fund (SLEF) coverage. The statutes establishing the SLEF expressly disclaim expansion of the State's tort liability where it provides that it does not "abolish or waive any defense at law which might otherwise be available to any agency, officer, or employee of the state of Missouri." § 105.726.1, RSMo. Additionally, as shown below, there are numerous policy reasons that strongly support extending official immunity to public defenders.

Laughlin also failed to present sufficient evidence of negligence at trial. This case is the story of a jurisdictional defect repeatedly escaping the skill and learning ordinarily used by legal professionals. Though Laughlin had an expert testify in a conclusory fashion that the elements of legal malpractice were met, the testimony is merely illusory evidence of an expert opinion that

is contradicted by common judicial experience, uncontroverted material facts, and even the expert's own testimony.

## STANDARD OF REVIEW AND PRESERVATION OF ISSUES

The test for determining whether to grant a motion for judgment notwithstanding the verdict is essentially the same as that for a motion for directed verdict. *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 95 (Mo. banc 2010). The court must decide "whether the plaintiff presented a submissible case by offering evidence to support every element necessary for liability." *Id.* "Evidence is viewed in the light most favorable to the jury's verdict, giving the plaintiff all reasonable inferences and disregarding all conflicting evidence and inferences." *Id.* Whether the plaintiff made a submissible case is a question of law reviewed *de novo* by the appellate court. *Ellison v. Fry*, 437 S.W.3d 762, 768 (Mo. banc 2014).

When the motion is based on an affirmative defense, it should be granted if the defendant has established the affirmative defense as a matter of law. *Fleshner*, 304 S.W.3d at 95. A court may not take the case away from the jury based on an affirmative defense "unless no factual issues with respect to the affirmative defense remain for the jury to decide." *Pitman v. City of Columbia*, 309 S.W.3d 395, 401 (Mo. App. W.D. 2010). "It is not error for a trial court to direct a verdict for a defendant when the plaintiff's evidence establishes recovery is barred by an affirmative defense such as bankruptcy, contributory

negligence, the statute of limitations or the statute of frauds." *Overfield v. Garner*, 595 S.W.2d 446, 446-47 (Mo. App. S.D. 1980).

Defendants Perry and Flottman filed their Motion for Judgment Notwithstanding the Verdict or, in the Alternative for New Trial on June 14, 2018, preserving the issues for appellate review. (L.F. 39).

## ARGUMENT

### I.

**The Circuit Court erred in denying Defendants Perry and Flottman's motion for judgment notwithstanding the verdict because Defendants had official immunity from the legal malpractice claims against them, which were based on Defendants' not raising the defense of exclusive federal jurisdiction in the state criminal proceedings against him, in that (1) the record and law established (and Plaintiff Laughlin did not dispute) that: (a) as public defenders employed by the State of Missouri, Defendants were public employees; (b) in representing Plaintiff in the criminal proceedings, Defendants were acting within the scope of their authority as public defenders; and (c) a lawyer's choice as to what defenses to pursue and how to pursue them is a matter of discretion, and (2) there is no reason to exclude public defenders from the protection of official immunity where (a) Missouri courts have held that official immunity applies to all public employees (not just "officials") and to discretionary acts of public employees whether those acts are "governmental" in nature and (b) numerous strong public policy reasons support extension of official immunity to public defenders.**

Official immunity protects public employees acting within the scope of their authority from liability for injuries arising from their discretionary acts or omissions. *Southers v. City of Farmington*, 263 S.W.3d 603, 610 (Mo. banc 2008). Laughlin's claims against Perry and Flottman are based on their representation of him as public defenders, and public defenders are state

employees. *See* Chap. 600, RSMo. In defending Laughlin, they acted within the scope of their authority as public defenders. Legal representation of a client is a discretionary function. *See* MO. SUP. CT. R. 4-2.1. Because Laughlin's claims against Perry and Flottman involve their performance of discretionary functions performed in the course of their official duties as public employees, they are entitled to official immunity with respect to those claims.

**OFFICIAL IMMUNITY**

As noted above, official immunity protects public employees acting within the scope of their authority from liability for injuries arising from their discretionary acts or omissions, but it does not protect them from liability for torts committed when they are acting in a ministerial capacity. *Southers*, 263 S.W.3d at 610. The difference between discretionary and ministerial acts "depends on the degree of reason and judgment required." *Id.* A discretionary act "requires the exercise of reason in the adaptation of means to an end and discretion in determining how or whether an act should be done or course pursued" whereas a ministerial function involves conduct of "a clerical nature which a public officer is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to his own judgment or opinion concerning the propriety of the act to be performed." *Id.* (internal citations omitted).

## OFFICIAL IMMUNITY APPLIES TO PUBLIC DEFENDERS

Laughlin's claim against Perry and Flottman rests on their decision to not raise or pursue a particular legal defense while defending him in his criminal case. Perry and Flottman are protected by official immunity because, in their determination of legal defenses to raise and pursue on Laughlin's behalf, they were exercising discretion within the scope of their duties as State employees.

*Public Employees.* Perry and Flottman represented Laughlin in their capacity as public defenders. The Missouri Public Defender system is a department within the judicial branch of Missouri's government. § 600.019.1, RSMo. The Public Defender System is headed by the Public Defender Commission, whose members are appointed by the Governor with the advice and consent of the Senate. §§ 600.015.1 and 600.017. The Commission appoints a Director and selects public defenders. §§ 600.017(1) and 600.019.1. Public defenders employ assistant public defenders. § 600.021.1. Assistant public defenders serve at the pleasure of their employing public defender. *Id.* The Commission determines compensation of public defenders and assistant public defenders. § 600.021.3. The Public Defender System's budget is appropriated by the general assembly. § 600.040.2. Public defenders and their employees are entitled to all benefits of the State employees' retirement

system. § 600.040.3. As persons working at the direction of state officials and paid with state funds, public defenders are public employees. *See Kuehne v. Hogan*, 321 S.W.3d 337, 346 (Mo. App. W.D. 2010) (Ellis, J., concurring) (concluding that "Public defenders in the Missouri Public Defender System are undeniably 'public employees'" based on provisions of Chapter 600). The Supreme Court of Missouri has also specifically recognized a public defender as a public officer or employee. *State v. Lemasters*, 456 S.W.3d 416, 419-20 (Mo. banc 2015).

*Acting within Scope of Duties.* Perry and Flottman's conduct in representing Laughlin came within the scope of their official duties because it is the duty of public defenders to provide legal services to eligible persons charged with felonies, including appeals from convictions of felonies. § 600.042.4(1).

*Exercise of Discretion.* "As a practical matter, virtually any decision or action taken by an attorney during trial involves the exercise of professional judgment and is clearly discretionary in nature." *Kuehne*, 321 S.W.3d at 347 n.8 (Ellis, J., concurring). The Kentucky Supreme Court, in its recent decision applying official immunity to public defenders, agreed that the "act of advising

a client is, at its core, a discretionary function." *Jacobi v. Holbert*, 553 S.W.3d 246, 261 (Ky. 2018).[5] As the court explained, providing legal advice

> involves examining the legal landscape, the multi-faceted issues within each separate case, determining what is important and which facts are negligible, taking into consideration the background and history of each individual client, and ultimately deciding the best course of action to take in each case. . . . The law is a field of gray in a world of black and white; as lawyers, we are consistently taught that the answer "depends" upon numerous factors. What is right in each situation may change with the slightest fluctuation in the facts presented to the attorney.

*Id*; *see also* MO. SUP. CT. R. 4-2.1 ("In representing a client, a lawyer shall exercise independent professional judgment."); MO. SUP. CT. R. 4-1.7 cmt. 1 ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client."). With regard to Laughlin's claim, a lawyer's choice as to what defenses to pursue and how to pursue them "requires the exercise of reason in the adaptation of means to an end and discretion in determining how or whether an act should be done or course pursued" and thus falls within the definition of discretionary act set out in *Southers*.

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[5] The *Jacobi* Court refers to the immunity at issue there as "qualified immunity" (553 S.W.3d at 251), "official immunity" (*id*. at 252), and "qualified official immunity" (*id*. at 253). By whatever name, the immunity is defined as immunity from tort liability for public officers and employees for discretionary acts performed within the scope of their public employment. *Id*. at 252, 253, 255. Thus, the immunity discussed by the court in *Jacobi* is the same as official immunity as defined in Missouri.

## OFFICIAL IMMUNITY OF PUBLIC DEFENDERS OPEN QUESTION IN MISSOURI

Although official immunity does apply to public defenders by the terms of the doctrine, the specific question of whether public defenders are protected from malpractice claims by official immunity is an open question in Missouri. *Kuehne*, 321 S.W.3d at 343 (Ellis, J., concurring). This issue was raised in *Johnson v. Schmidt*, 719 S.W.2d 825, 826 (Mo. App. W.D. 1986), but the court decided the case on other grounds and did not reach the issue.

The Western District again confronted this issue in *Costa v. Allen*, 2008 WL 34735, at *5 (Mo. App. W.D. 2008), and determined that public defenders are not protected by official immunity. The court held that official immunity shields only those decisions involving a manifest exercise of sovereign power, and it found that decisions of public defenders in the representation of their clients did not qualify. This Court, however, granted transfer in *Costa*, thereby resulting in the Court of Appeals decision having no precedential value. *Philmon v. Baum*, 865 S.W.2d 771, 774 (Mo. App. W.D. 1993). In its decision after transfer, the Supreme Court did not address the question of immunity for public defenders. *Costa v. Allen*, 274 S.W.3d 461 (Mo. banc 2008).

Not only is the *Costa* decision non-precedential, but the reasoning underpinning that decision has been rejected by the Supreme Court of Missouri in *Southers*, as discussed below.

## PUBLIC EMPLOYEE VERSUS PUBLIC OFFICER

Laughlin did not dispute that Perry and Flottman were public employees exercising discretion while acting within the scope of their duties. Instead, Laughlin argued that the purpose of official immunity is to protect public employees making judgments affecting public safety and welfare and that this purpose does not apply to public defenders because their representation of criminal defendants has nothing to do with public safety and welfare. (T.R. 364). Criminal defendants, however, are members of the public, and public defenders work to improve their rights and welfare by defending them from criminal charges; to hold such an integral part of the criminal justice system outside the sphere of public safety and welfare would be remarkably unfitting. "[I]t does not matter whether the duty relates to the public in general or to an individual member of the public so long as the acts involved are discretionary in nature." *Kuehne*, 321 S.W.3d at 345 (Ellis, J., concurring).

Similarly, Laughlin asserted in his trial brief that, in order to be shielded by official immunity, a defendant must be "invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public." (Tr. 364-365). The quotation appears to be from *State ex rel. Eli Lilly & Co. v. Gaertner*, 619 S.W.2d 761, 764 (Mo. App. E.D. 1981). It was also this reasoning from *Eli Lilly* on which the *Costa* decision relied in denying

public defenders the protection of official immunity. 2008 WL 34735, at *5. In *Eli Lilly*, the court held that only individuals invested with a portion of the sovereign functions of government, and who exercise that power independently and without control of a superior power other than the law, are public officers. 619 S.W.2d at 764. Others employed by public entities who do not exercise such independent authority are public employees, but are not public officers. *Id.* "The discretionary decisions, the protection of which is the purpose of the doctrine of official immunity, are those which are a manifest exercise of the sovereign's power those decisions which 'go to the essence of governing.'" *Id.* at 765 (citation omitted). Thus, even public officers are shielded by official immunity only with regard to decisions that involve "the exercise of the sovereign's power which go to the essence of governing." *Id.*

But the conclusion that only public officers making decisions that go to the essence of governing can receive the benefit of official immunity has since been rejected. In *Woods v. Ware*, 471 S.W.3d 385, 391-92 (Mo. App. W.D. 2015), the court declined to follow the reasoning of *Eli Lilly* based on the Supreme Court of Missouri's subsequent *Southers* decision. The *Woods* court held that the application of official immunity only to public *officials* whose actions are purely governmental in nature, and not to public *employees* in general, was inconsistent with *Southers*' holding that official immunity protects public

*employees* "from liability for alleged acts of negligence committed during the course of their official duties for the performance of discretionary acts." *Id.* at 392 n.4 (quoting *Southers*, 263 S.W.3d at 610) (emphasis added). Based on this interpretation of *Southers*, the *Woods* Court applied the protection of official immunity to a high school wrestling coach—a public employee but not a public official. *Id.* at 395.

Even before *Woods*, the court in *Richardson v. City of St. Louis*, 293 S.W.3d 133, 140 (Mo. App. E.D. 2009), declined to apply *Eli Lilly* to deprive an emergency medical technician of the protection of official immunity. The court there held that "to the extent Plaintiff argues that official immunity applies only to discretionary actions that are purely governmental in nature, this is not the law in Missouri." *Id.* As the court explained:

> Missouri courts have routinely extended official immunity to discretionary acts even when the public official's actions were not governmental in nature. *See, e.g., State ex rel. St. Louis State Hosp. v. Dowd*, 908 S.W.2d 738, 741 (Mo. App. E.D. 1995) (supervisor at public hospital's decision to turn on paper shredder was discretionary), a*brogated on other grounds by Cain v. Mo. Highways and Transp. Comm'n*, 239 S.W.3d 590 (Mo. banc 2007); *Warren v. State*, 939 S.W.2d 950, 954 (Mo. App. W.D.1997) (prison officials' decision regarding the absence of a safety guard on a table saw was discretionary). Recently, our Supreme Court thoroughly discussed the scope of official immunity and did not restrict immunity only to those actions which "go to the essence of governing." *See Southers*, 263 S.W.3d at 610–11.

293 S.W.3d at 140; *see also Haley v. Bennett*, 489 S.W.3d 288, 294-95 (Mo. App. W.D. 2016) (declining to restrict official immunity protection only to public officials engaged in acts governmental in nature and extending it to all public employees, including the high school football coaches at issue in the case, for discretionary acts taken the course of their official duties; relying on *Southers*).

**PUBLIC POLICY FAVORS OFFICIAL IMMUNITY FOR PUBLIC DEFENDERS**

In addition to official immunity applying to public defenders by the doctrine's own terms and under this Court's decision that public employees in general are protected by official immunity, public-policy considerations also support the application of official immunity to public defenders. The Kentucky Supreme Court, in its *Jacobi* decision, recently delineated six public policy reasons favoring official immunity for public defenders. 553 S.W.3d at 258-62. Each of these rationales apply with equal force for Missouri public defenders.

*1. Public Defenders Have No Discretion in Choosing Clients or Cases.* Public defenders shall provide legal services to indigent persons charged with felonies (and other defined classes of cases). §§ 600.042.4 and 600.086.1, RSMo. When the statutory prerequisites for representation are met, public defenders must fulfill the statutory mandate to provide presentation. *In re Mennemeyer*, 505 S.W.3d 282, 288-89 (Mo. banc 2017). Given their inability to turn down clients, public defenders have no means "to manage the practice of

law in a proprietary and risk-reducing manner like private practitioners. This difference directly relates to the fact that public defenders are responsible for a governmental task, without distinction of who requests the service if that person is indigent." *Jacobi*, 553 S.W.3d at 258. Therefore, extending official immunity to public defenders is appropriate to mitigate risks they are required to accept as part of their public employment. *Id*. The Minnesota Supreme Court also determined the inability of public defenders to reject a client as a ground supporting its decision to extend immunity to public defenders.[6] *Dziubak v. Mott*, 503 N.W. 771, 775 (Minn. 1993); *see also Kuehne*, 321 S.W.3d at 344 (Ellis, J., concurring) (citing *Tower v. Glover*, 467 U.S. 914, 921 (1984) (comparing public defenders to English barristers who have "broad immunity from liability for negligent misconduct")).

*2. Limited Resources.* As a state agency, the Public Defender's Office must provide its services within the limits of its appropriation. In acknowledging that extraneous circumstances can inhibit optimum practice, the Minnesota Supreme Court factored the limited resources of public

[6] The *Dziubak* Court does not specify what type of immunity it is extending to public defenders. It does, however, note that the absence of immunity will inhibit discretionary action by government officials and distract them from their governmental duties. 503 N.W.2d at 776. Thus, the immunity being applied is comparable to official immunity as defined in Missouri. The court does favorably quote *Brown v. Joseph*, 463 F.2d 1046, 1048-49 (3d Cir. 1972), *cert. denied*, 412 U.S. 950 (1973), which held that judicial immunity applied to state-paid criminal defense lawyers. *Dziubak*, 503 N.W.2d at 777.

defenders into its immunity analysis, concluding that "[i]t would be an unfair burden to subject the public defender to possible malpractice for acts or omissions due to [circumstances] completely out of the defender's control." *Dziubak*, 503 N.W.2d at 776; *see also Jacobi*, 553 S.W.3d at 258-59 (favorably quoting this language); *Mooney v. Frazier*, 693 S.E.2d 333, 369 (W. Va. 2010) (holding, with significant reliance on *Dziubak*, that lawyers appointed to represent criminal defendants in federal court have absolute immunity from state malpractice claims).

*3. Judges and Prosecutors Have Immunity.* Judges, prosecutors, and public defenders all have essential roles in the criminal justice system. Judges are protected by judicial immunity. *State ex rel. Raack v. Kohn*, 720 S.W.2d 941, 944 (Mo. banc 1986). Prosecutors also have absolute immunity from civil claims arising from their initiation and pursuit of criminal cases. *Carden v. George*, 291 S.W.3d 852, 854 (Mo. App. S.D. 2009). Neither the Kentucky nor the Minnesota Supreme Court perceived any reason to exempt public defenders from the immunity from civil claims that judges and prosecutors possess. *Jacobi*, 553 S.W.3d at 259; *Dziubak*, 503 N.W.2d at 777; *see also Scott v. City of Niagara Falls*, 407 N.Y.S.2d 103, 105-06 (N.Y. Sup. Ct. 1978) (finding no reason to extend judicial immunity to judges and prosecutors, but to withhold it from public defenders). "Immunity preserves the criminal justice

system which relies upon the judge, prosecutor and public defender as essential participants. This serves the best interests of indigent defendants and of society as a whole." *Dziubak*, 503 N.W.2d at 777 (citation omitted).

*4. Chilling Effect on Indigents' Representation.* Providing immunity to public defenders ensures that they will devote their efforts solely to their client's case without worrying that they may later be sued by their clients for unsuccessful results. *Jacobi*, 553 S.W.3d at 260.

> Failing to recognize this immunity could potentially stifle the public defender's ability to fully work with her client, finding herself at odds with the indigent defendant; she could be distracted, struggling to keep the client happy to avoid a lawsuit rather than continuing to represent the client's interests and keep the wheel of justice consistently moving.

*Id*; *see also Dziubak*, 503 N.W.2d at 777; *Mooney*, 693 S.E.2d at 368 (a "public defender . . . must be free to exercise independent, discretionary judgment when representing the client without weighing every decision in terms of potential civil liability") (citation omitted); *Bradshaw v. Joseph*, 666 A.2d 1175, 1178 (Vt. 1995) (applying general statutory immunity of state employees to public defenders); *Scott*, 407 N.Y.S.2d at 105 (cautioning that potential liability to clients "will no doubt have a detrimental effect on the Public Defender's ability to effectively allocate his limited time and resources to those matters

which in his judgment have a realistic chance of success"); *Kuehne*, 321 S.W.3d at 348 (Ellis, J., concurring).

*5. Public Defenders' Limited Resources Better Used for Defense of the Indigent than for Defense of Malpractice Claims.* If public defenders are not provided with the protection of official immunity, a portion of the state's limited resources will be diverted to the defense of malpractice suits, leaving less for the defense of criminally charged indigents. Even if the financial cost of defense and of paying any judgments awarded does not come directly from the budget of the Public Defender's Office, the State's overall budget is still reduced, leaving less funding for all programs. Additionally, the resources necessary for malpractice defense include more than just monetary costs. The diversion of the time and energy of public defenders to that purpose is time and energy that they will not have to devote to the defense of their clients.

As the *Jacobi* court succinctly summarized *Dziubak* in adopting its reasoning on this point:

> [W]ithout immunity for the public defender, "the cost and burden of defending civil claims will only exacerbate" the harsh underfunded situation these offices face each day. *Dziubak*, 503 N.W.2d at 776. "In the end, this would hurt indigent defendants, not help them." *Id.* "[R]esources consumed to defend against malpractice suits filed against public defenders would take away from the already limited resources available to serve the indigent constituency." *Id.* "Immunity from suit for public defenders best serves the indigent population in preserving the resources of the

> defender's office for the defense of the criminally accused." *Id.* at 777. Public defenders already work in an economically stunted environment; allowing malpractice suits to deplete those resources further would be averse to the interests of society.

*Jacobi*, 553 S.W.3d at 260; *see also Mooney*, 693 S.E.2d at 369; *Kuehne*, 321 S.W.3d at 347 (Ellis, J., concurring).

*6. Public Defenders Serve a Crucial Role in Criminal Justice System.* It is not indigent defendants alone that benefit from the services of public defenders. In fulfilling their duty to their clients, public defenders are also serving core American values. "[J]ustice demands that a defense be provided to criminal defendants who are not able to afford privately retained counsel … Society as a whole depends upon the role of defense counsel to secure an ordered system of liberty and justice, as ordained by our Constitution." *Dziubak*, 503 N.W.2d at 777. By "striv[ing] to protect this 'ordered system' of justice, we protect the goal of a fair and just system of liberty." *Jacobi*, 553 S.W.3d at 261. As nicely stated by the court in *Scott*:

> Although the orientation of the Public Defender is toward a particular assigned client, by fulfilling that role he permits the judicial system to function in a manner which increases the probability that justice will prevail. To this extent, a public defender serves the public as much as he serves his particular assigned client or clients. The effectiveness and respect generated by a judicial system will be weakened or strengthened in direct proportion to the achievement of justice on a case by case basis.

> Yes, a public defender, like a Judge or District Attorney, is as much a servant of the public as a servant of his individual clients.

407 N.Y.S.2d at 105. Extending the protection of official immunity to public defenders "preserves the criminal justice system which relies upon the judge, prosecutor and public defender as essential participants. This serves the best interests of indigent defendants and of society as a whole." *Dziubak*, 503 N.W.2d at 777; *see also Bradshaw*, 666 A.2d at1178; *Mooney*, 693 S.E.2d at 344; *Kuehne*, 321 S.W.3d at 347 (Ellis, J., concurring).

*7. Impact on Recruiting*. In addition to the above six public policy reasons set out by the Kentucky Supreme Court in *Jacobi*, several courts have also noted that extending official immunity to public defenders will aid in the recruitment of qualified lawyers by public defender offices. *Dziubak*, 503 N.W.2d at 776; *Bradshaw*, 666 A.2d at1178; *Mooney*, 693 S.E.2d at 344; *Kuehne*, 321 S.W.3d at 348 (Ellis, J., concurring). Candidates will be more likely to accept employment with public defender offices if they know they will not be subject to civil claims of clients who have not gotten the desired results.

## OTHER JURISDICTIONS

In *Kuehne*, Judge Ellis conducted a substantial review of the law of other jurisdictions regarding public defenders and immunity. He concluded that "the majority of jurisdictions addressing the issue, either judicially or legislatively,

have extended immunity of some type to public defenders." 321 S.W.3d at 348-49 (Ellis, J., concurring) (citing cases). The few jurisdictions Judge Ellis found that denied immunity to public defenders involved the application of judicial immunity or immunities specifically limited to policy-making officials. *Id*. at 349-50 (Ellis, J., concurring) (citing cases). Judicial immunity is a different concept than official immunity. And, as discussed above, official immunity in Missouri applies to public employees generally and not just to policy-making officials. *Southers*, 263 S.W.3d at 610.

Since Judge Ellis's review of other jurisdictions in 2010, at least three additional states have extended official immunity to public defenders. The first is Kentucky's *Jacobi* decision, which is discussed above. The other two cases are from a Colorado appellate court and a federal district court applying Virginia common law. *Harbeck v. Smith*, 814 F. Supp. 2d 608, 624-25 (E.D. Va. 2011) (interpreting state common law to extend sovereign immunity to state-employed public defender for alleged simple negligence); *Wallin v. McCabe*, 293 P.3d 81, 83 (Colo. App. 2011) (public defenders are public employees entitled to immunity to the extent set out in the Colorado Governmental Immunity Act, Colo. Rev. Stat. § 24–10–106 (2010)). These cases further support the *Kuehne* concurrence's conclusion that most jurisdictions extend some form of immunity

to public defenders regarding malpractice claims and that there is a trend in that direction.

### OFFICIAL IMMUNITY AND STATE LEGAL EXPENSE FUND COVERAGE

The Southern District affirmed the trial court's denial of official immunity because the State Legal Expense Fund (SLEF) "protections render it unnecessary, and perhaps unwise, for us to add a duplicative judge-made immunity." *Laughlin*, 2019 WL 2909058, at *3. The Southern District added that the state "voluntarily assumes the financial risk of employee negligence without destroying the rightful claims of injured victims via flat immunity," saying that this "reflect[s] a considered legislative balancing" and that the court was "reluctant to overlay a second immunity that would hurt innocent victims." *Id.* at *4. But as discussed above, official immunity applies to public defenders by the plain terms of the doctrine. Applying it here would not "add a duplicative judge-made immunity," *id.* at *3, but rather correctly apply an immunity that already exists. But more problematically, the Southern District blurs the distinction between two distinct inquiries—the existence of liability and the source of payment—and overlooks language in the SLEF statute prohibiting this precise result.

The SLEF's purpose is clearly rooted in the protection against financial loss on behalf of state employees and entities. The SLEF "exists to protect the

covered employees from the burden and expense of civil litigation relating to the performance of their duties" and its "purposes are apparent." *Kershaw v. City of Kan. City*, 440 S.W.3d 448, 458 (Mo. App. W.D. 2014) (quotation omitted). While the SLEF protects State employees against the financial burden of a judgment, it forbids the notion that, in the assessment of their liability, those employees (or the State) lose the right to otherwise applicable defenses as a result. § 105.711.5, RSMo.

In interpreting the SLEF statute, the Court of Appeals considered only section 105.711.5, RSMo, which shields state employees from civil liability in their individual capacities for conduct arising from official duties. Unfortunately, the court overlooked the intent of the General Assembly to preserve any defenses available to these employees. This intent is made plain through a related provision of the SLEF statute: "Nothing in [the SLEF statute] shall be construed to abolish or waive any defense at law which might otherwise be available to any agency, officer, or employee of the state of Missouri." § 105.726.1, RSMo.; *see also* 20A MOPRAC § 13.7 n.107 ("The Fund did not abrogate the doctrine of official immunity."). Put simply, the SLEF "does not expand the state's tort liability." *Dixon v. Holden*, 923 S.W.2d 370, 379 (Mo. App. W.D. 1996). But the Southern District's holding does just that. Additionally, the Southern District's reasoning overlooks the fact that the

SLEF statutes has been amended a number of times in the past and might not always cover public defenders.

While the plain language of this provision leaves no room for interpretation, it is important to recognize that the General Assembly had a compelling interest in preserving defenses even where the SLEF shields officials. Without these defenses, the Fund is left to pick up the tab for liabilities that were never anticipated. Missouri courts have emphasized that the SLEF represents a "partial waiver" of sovereign immunity. *P.L.S. ex rel. Shelton v. Koster*, 360 S.W.3d 805, 810 (Mo. App. W.D. 2011) (citation omitted). As such, the waiver must be "strictly construed" in favor of immunity. *Ford Motor Co. v. Dir. of Revenue*, 97 S.W.3d 458, 461 (Mo. banc 2003); *P.L.S. ex rel. Shelton v. Koster*, 360 S.W.3d 805, 810 (Mo. App. W.D. 2011); *see also F.A.A. v. Cooper*, 566 U.S. 284, 290 (2012) ("Any ambiguities in the statutory language [or in the scope of a waiver] are to be construed in favor of immunity."). By denying official immunity to public defenders on the basis of SLEF coverage, the Court of Appeals not only undermined the intent to preserve all available defenses, but it also interpreted a limited waiver of sovereign immunity as broadly as possible, exposing the State to liability far beyond what the General Assembly prescribed.

The Southern District also errantly relied on language in the SLEF statute that identifies the fund as the "exclusive remedy." *Laughlin*, 2019 WL 2909058, at *3. But this provision of the SLEF statute only reinforces that the SLEF is a protective instrument and that State employees cannot be subject to suit for additional damages. The statute provides that "[t]he state legal expense fund shall be the exclusive remedy and shall preclude any other civil actions or proceedings for money damages," and "[n]o … employee of the state … shall be individually liable in his or her personal capacity" for conduct "arising out of and performed in connection with his or her official duties on behalf of the state or any agency of the state." § 105.711.5, RSMo. Thus, the SLEF's clear purpose is to concurrently protect the State's business interests and employees' pecuniary interests. This exclusive remedy clause does not—contrary to the holding of the Court of Appeals—alter the scope of the statute.

Perhaps of even greater concern, the rationale advanced by the Court of Appeals risks undermining official immunity and related defenses in other contexts. If the mere existence of SLEF coverage is enough to preclude the application of official immunity to public defenders, there is no reason why this same logic would not extend to other classes of public employees. Thus, in addition to the important question of whether official immunity applies to public defenders, this Court should clarify that the existence of SLEF coverage

can never serve as a basis for denying defenses that are otherwise available to state employees.

## SUMMARY

Because Laughlin's claims against Perry and Flottman involve their performance of discretionary functions performed in the course of their official duties as public employees, official immunity protects them from these claims. *See Southers*, 263 S.W.3d at 610. Even if Perry and Flottman are not considered to be policy-making officials who exercise authority that goes to the essence of governing, that is not required, as official immunity in Missouri applies to public employees generally. *Id.* Moreover, as shown above, there are numerous policy reasons that strongly support extending official immunity to public defenders. The existence of the SLEF does not change the application of official immunity to public defenders.

Because Perry and Flottman were entitled to official immunity from Laughlin's claims as a matter of law, they were also entitled to the entry of judgment notwithstanding the verdict at the trial of this case. *See Fleshner*, 304 S.W.3d at 95 (motion for JNOV based on affirmative defense should be granted if the affirmative defense is established as a matter of law). As such, the district court should be reversed on this basis.

## II.

**The Circuit Court erred in denying Defendants Perry and Flottman's motion for judgment notwithstanding the verdict because Plaintiff Laughlin failed to make a submissible case on his legal malpractice claim in that no evidence was adduced in support of the essential element of negligence as it was defined at trial, and therefore, no reasonable jury could have found that Defendants failed to use that degree of skill and learning ordinarily used under the same or similar circumstances by members of the legal profession simply on the basis that Plaintiff's criminal conviction was eventually found defective, considering that the prosecutor, trial judge, post-conviction judge, and several other circuit and appellate courts found no merit in Plaintiff's jurisdictional claim before this Court eventually granted relief on the exact same claim.**

Laughlin failed to present sufficient evidence of negligence at trial. A case is submissible only where "each and every fact essential to liability is predicated on legal and substantial evidence." *Investors Title Co. v. Hammonds*, 217 S.W.3d 288, 299 (Mo. banc 2007). In reviewing for a submissible case, "[a]n appellate court will not . . . supply missing evidence or give the plaintiff the benefit of unreasonable, speculative or forced inferences." *Farm Bureau Town & Country Ins. Co. v. Shipman*, 436 S.W.3d 683, 687 (Mo. App. S.D. 2014) (citation omitted). Laughlin alleges that, simply because his public defenders allowed the defect to survive his underlying criminal

proceedings, they were negligent in representing him. But that unsupported allegation is not enough to create a submissible case.

Defendants are not asking this Court to reweigh the trial evidence. Rather, they are asking this Court to recognize a lack of substantial evidence presented by Laughlin during trial. This case is the story of a jurisdictional defect repeatedly escaping the skill and learning ordinarily used by legal professionals even in far more favorable circumstances. Laughlin relies only on the illusory evidence of an expert opinion that is contradicted by common sense, uncontroverted material facts, and even the expert's own testimony. *See Francisco v. Kan. City Star Co.*, 629 S.W.2d 524, 530 (Mo. App. W.D. 1981) ("While indulging an evidentiary presumption in favor of the plaintiff, this court cannot disregard the dictates of common reason, and accept as true that which, under all the facts or circumstances, cannot be true or give a plaintiff the benefit of other than reasonable inferences."); *Morgan v. Toomey*, 719 S.W.2d 129, 137 (Mo. App. E.D. 1986) ("[T]he present record and common sense preclude us from indulging in the speculation urged by plaintiff. Plaintiff had his day in court and simply failed to make a submissible case.").

One of the four essential elements of the present malpractice claims, "negligence" was defined in the instruction to the jury as "the failure to use that degree of skill and learning ordinarily used under the same or similar

circumstances by members of the legal profession." (L.F. D35 p. 8, 10, 12; Tr. 577:3-8). In other words, negligence can be addressed by asking, "What would other legal professionals have done in the same or similar circumstances?" Because the facts of this case arose over two decades ago, it is difficult to speculate about the conduct of legal professionals in such a different legal climate; some might agree that it would be impracticable to do so. Luckily, there is no need for postulation here, as the holes in Laughlin's case, common sense, and the uncontroverted facts show that his case was not submissible.

## PLAINTIFF'S EVIDENCE

The thrust of Laughlin's case at trial focused on fostering the sentiment that he suffered a great harm. While this is certainly true, it has little to do with whether the conduct of Defendants constituted negligence. The rest of his case similarly fails to establish proof of that essential element.

The core of Laughlin's negligence evidence is the testimony of his expert, Arthur Benson. Benson concluded that Defendants Perry and Flottman were negligent in their failure to resolve what he labeled a "prominent" and "obvious" jurisdictional issue. (Tr. 309:21-22, 317:12-14, 310:1-15, 318:13-17). Though the facts of the case continually contradict him, as does his own testimony, Benson testified at trial that resolving the jurisdictional issue was

"not very difficult." (Tr. 312:8). He bases these conclusions on nothing more than hindsight.

Benson acknowledged an ethical duty, if nothing else, on behalf of legal professionals—including prosecutors—to address the jurisdictional issue if they spotted it. (Tr. 337:3-23). Benson also recognized an appellate opinion wherein the court acknowledged its "duty to address appellate jurisdiction *sua sponte*." (Tr. 343:7-22); *see also Transit Cas. Co. In Receivership v. Certain Underwriters At Lloyd's Of London*, 995 S.W.2d 32, 34 (Mo. App. W.D. 1999) (affirming that the appellate court had a responsibility to address jurisdiction as a prerequisite to entertaining an appeal). Benson agreed that the submission of the three Jurisdictional Exhibits was the key to resolving the issue, and thereafter, "the Court would have been alerted to the lack of jurisdiction." (Tr. 317:24-318:4). However, when presented with the fact that several courts had been indulged with the Jurisdictional Exhibits provided to them and *still* did not grant relief, Benson had no explanation; he admitted and conceded that "they should have" after having the "picture painted for them." (Tr. 359:12-362:6).

When asked about the prevalence of any other exclusive federal jurisdiction rulings out of Missouri, either before or since Laughlin's case, Benson's response mirrored that of Defendants: he could not recall any from Missouri. (Tr. 333:4-12). He did acknowledge that "there are cases from

around the country," although those decisions are immaterial given that a dormant Missouri statute is driving these proceedings. *Id.*; § 12.010, RSMo.

According to Benson, any lawyer practicing consistent with the standard of care would have "seen this conflict between State charges on Federal property and would have said, that is something I better answer." (Tr. 315:11-18). At the same time, Benson acknowledged that Defendants' deduction of concurrent jurisdiction, while incorrect, *was* an answer. (Tr. 331:15-332:12). Most importantly, though, is Benson's concession that "judgment and reasonableness are always factors" in a criminal defense lawyer's representation and that they aren't required to find "every law that might affect jurisdiction." (Tr. 325:22-326:4).

Benson's testimony is manifestly at odds with the facts of this case. He maintains that the jurisdictional issue was obvious, he recognizes a duty to raise and resolve the issue, and he recognizes that this duty is so important as to transcend the relegation of it to any one party. Yet, it was never addressed in roughly **forty** instances of legal review. The only logical conclusion one can draw from his testimony is that Benson believes everyone who reviewed Laughlin's case—all the way through the Southern District—violated their professional responsibilities. This is an unlikely and largely inappropriate deduction. To agree with Benson's assessment that Defendants should have

succeeded, where numerous lawyers and judges did not, is to hold Defendants to an unreasonably high standard.

Moreover, Benson confirmed just how obscure this issue is, given that he—as the expert dedicated to the issues in this case—is not familiar with any other instance of exclusive federal jurisdiction out of Missouri. This, from the one individual designated as the expert with the benefit of reviewing the case decades later with the assistance of modern technology and the key issues already identified. Benson's speculation that the jurisdictional defect was a prominent and obvious issue under comparatively primitive circumstances is entirely unconvincing. Regardless, it is not as though Defendants let the issue go unchecked; the record is clear that all legal professionals involved concluded that jurisdiction was concurrent, as determined in light of both the circumstances and their considerable experience.

Laughlin alleges that he notified his public defenders several times that the State had no jurisdiction to prosecute his crimes. (Tr. 183:9-186:12, 446:18-447:12). He now attempts to bolster his claim of negligence with such a fact. However, Laughlin admits that he "didn't know how all that worked" at the time and he was therefore not capable of expressing a satisfactory argument to this end; nowhere in the record is there any evidence that Laughlin had conceived of such an argument at the time of Defendants' involvement. (Tr. 286:13-21, 290:20-291:24, 303:7-19). Ultimately, his contention was

disregarded by his public defenders, and everyone else, because jurisdiction was found to be concurrent by everyone associated with the case. (Tr. 264:11-12, 419:7-11, 427:15-22, 529:3-14).

Laughlin's avowal that he put Defendants on notice of the jurisdictional defect in his proceedings is misleading. There is a *massive* disparity between his argument to Defendants ("there is federal jurisdiction because this was a federal crime") and his still widely-rejected argument in the habeas filings ("here is the deed, the state statute, and the Article I provision that, combined, establish exclusive federal jurisdiction"). It was actually adduced at trial that Laughlin received a helpful tip, during his incarceration and after Defendants represented him, which helped him craft his argument. The record is clear, though, that Laughlin's winning argument developed well after Defendants' involvement. Regardless, all legal professionals involved at the time of the initial proceedings perceived a lack of merit in the argument given that it was only half-right under the apparently concurrent conditions, and they each forwent the jurisdictional defense. While Laughlin framed his deficient "notice" as evidence of negligence, the instruction accounts for neither a client's perceptions of the issues, nor their conduct regarding the same. Therefore, it is not probative.

The jurisdictional defect that existed in Laughlin's proceedings was an obscure issue that repeatedly escaped the grasp of legal professionals in

numerous forums. Laughlin claims to have alerted Defendants of the defect, but he admits he was not effectively capable of legitimately doing so; the record supports the latter. Furthermore, it is easy to see through the holes in Arthur Benson's testimony. While his reasoning at times even favors Defendants, his assessment of what constitutes negligence is at odds with the definition of the element itself: Benson did not acknowledge the sheer volume of evidence that supports the Defendants' handling of the case, or the circumstances under which it came. He merely based his determination of negligence on how he perceives this issue with the benefit of hindsight and the guiding hand of the Supreme Court of Missouri, and such accommodations are not probative of negligence at the time of Defendants' representation of Laughlin.

**DEFENDANTS' EVIDENCE**

The failure that defined the conduct of Defendants was mirrored by other legal professionals, even in more favorable circumstances, time and time again; this is readily observable in the evidence presented by Defendants at trial.

First, in 1993 and through the initial three stages of his criminal proceedings (trial, PCR, and appeal), the jurisdictional defect went undetected. *See* App. at 25-115 (Defs. Ex. A, B). Each legal professional privy to the State's prosecution concluded that jurisdiction was concurrent. (Tr. 264:11-12, 419:7-11, 427:15-22, 529:3-14).

In 2005, Laughlin filed a Petition in the Newton County Circuit Court, complete with all three Jurisdictional Exhibits in support. App. at 294-296 (Defs. Ex. P); (Tr. 299:20-302:6). In granting summary judgment in favor of the State, the court declared there was "no factual or legal issue remaining to be determined." *Id*. at 4. Though the issue was fully articulated to the court in accordance with Benson's expert opinion, Laughlin was denied relief. *Id*.

In 2008, Laughlin submitted his case in the Circuit Court of Texas County on a Petition for a Writ of Habeas Corpus. App. at 298-328 (Defs. Ex. S). Once again, he had the three key Jurisdictional Exhibits backing him up. *Id*. at 16-30. Again, the court's attention was explicitly directed to the existence of exclusive federal jurisdiction in Laughlin's criminal proceedings—all that was needed, according to Benson. *Id*. The denial is indisputable: "Court examines entire file and finds from the file itself there is no need for an evidentiary hearing, denies plaintiff's relief, and dismisses petition." App. at 259 (Defs. Ex. O).

In 2009, Laughlin's case was raised in the Southern District. App. at 260 (Defs. Ex. O). The appellate court was the next to review the now fully briefed jurisdictional deficiency. Once again, the three keys to Laughlin's freedom were laid plainly before the court. (Tr. 294:17-295:1). Nevertheless, the denial was explicit: "Having fully considered the [Petition], the Court denies [it.]" App. at 260 (Defs. Ex. O).

Finally, in 2010, the Supreme Court of Missouri granted relief, and with the exact same instruments that were before the courts below. (Tr. 294:17-295:1, 292:13-293:8); *see Bowersox*, 318 S.W.3d 695. Given that negligence requires the same or similar circumstances of the conduct at issue, it is worth reiterating that the circumstances here, and the times below, were exceptionally more accommodating than those surrounding Defendants—the necessary pieces were provided. Between the first and final stages, Laughlin estimates that he submitted his case for legal review **forty** times, with legal professionals consistently denying his theory until this Court granted relief. (Tr. 223:3-13).

The Defendants were the only party to address the necessary element of negligence. Simply stated, the facts show that the same outcome was reached by the overwhelming majority of legal professionals who reviewed Laughlin's case; many of them had the pieces of the puzzle laid out before them—pieces not provided to Defendants—and still did not put it together. One court was the exception here—not the norm. By definition, this defeats an essential element of Laughlin's case. Negligence, as defined in the jury instruction, cannot be determined solely by one instance of a desirable result in this sea of opposition, no matter the extent of that desirability.

Defendants Perry and Flottman were exposed to this jurisdictional outlier at the earliest stages of the seventeen-year span that saw it become clearer as time passed. To the knowledge of the legal professionals involved, including Benson, no other instance of exclusive federal jurisdiction before or since Laughlin's case, has arisen in Missouri. The evidence leaves no room to doubt that the issue was beyond the experience and practice of everyone involved at the time. At the very least, the proper outcome repeatedly escaped the skill and learning ordinarily used by the members of the legal profession, thus placing their conduct beyond the reach of a negligence finding under the relevant instruction.

## NEGLIGENCE INSTRUCTION

To revisit, "negligence" was defined at trial as "the failure to use that degree of skill and learning ordinarily used under the same or similar circumstances by members of the legal profession." (L.F. D35 p. 8, 10, 12; Tr. 577:3-8). Each element is addressed below.

### A. Members of the Legal Profession

Laughlin's criminal trial was the inception of the jurisdictional defect. Through (1) the trial, (2) the subsequent post-conviction relief proceedings, and (3) the consolidated appeal of both, the issue remained present. Defs. Trial Exs. A-B, M-N. The record depicts each of Laughlin's attempts for relief in

Newton County, Texas County, the Southern District Court of Appeals, and finally the Supreme Court of Missouri.

Laughlin raised his case numerous times—**forty** by his own estimation. Throughout these iterations, legal professionals on all sides and numerous judges were exposed to the same factual underpinnings that led to this Court's finding of exclusive federal jurisdiction.

B. Skill and Learning Ordinarily Used

What was ordinary at the time of these proceedings is readily observable from the evidence of the numerous occasions that Laughlin sought relief. As discussed above, Laughlin's case went through some level of legal review an estimated forty times, six of which are well documented in the record. Every court that reviewed Laughlin's case would deny him relief, save one. This denial rate sits above ninety-seven percent.

Notably, when Laughlin finally *was* granted relief, it came from the Supreme Court of Missouri—this is beyond ordinary. This Court comprises the highest echelon in the state's justice system, and the cases heard there typically hail from a distinctive pedigree. Regardless of how clear the issue is now, there is a reason it survived repeatedly and was decided by the highest State court.

The record shows that the standard of care consistently resulted in the denial of Laughlin's requested relief. This repeated failure is fatal to Laughlin's case when one observes the circumstances of each denial: the tools to get the job done were handed to them. To that end, the skill and learning used by the other members of the legal profession appears to have been well below that employed by Defendants.

C. Same or Similar Circumstances

The circumstances of Defendants' representation were comparatively crude. While the vast majority of later courts reached the same conclusion as Defendants, there is a clear disparity in the resources available to them. This alone precludes any notion of a level—or "similar"—playing field. It is clear from the record that, certainly in the late stages, the courts were working with all of the pieces handed to them. Nothing more than reading was required to resolve this "obvious" issue in those cases, and even then, multiple courts reasonably concluded that the jurisdictional defect did not defeat Laughlin's conviction. Indeed, all of the pieces endorsed by Benson as the keys to Laughlin's freedom were provided to at least four different courts—only one of them made the right call.

## SUMMARY

The "substantial evidence" required for a submissible case under the *Investors Title Co.* standard, in conjunction with the ordinary care demanded by the negligence instruction, cannot be satisfied by one outlier, especially when it is up against **forty** instances of evidence to the contrary. Thus, while the elements of the negligence instruction are fully addressed by Defendants' evidence, Plaintiff's evidence has no probative value without the speculative inferences forbidden by *Farm Bureau*. As Laughlin failed to adduce evidence of the essential element of negligence, he failed to make a submissible case for the jury, and Defendants Perry and Flottman are therefore entitled to the entry of judgment notwithstanding the verdict**.**

## CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the decision of the Circuit Court.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the limitations contained in Supreme Court Rule 84.06 and contains 11,318 words as calculated pursuant to the requirements of Supreme Court Rule 84.06 as determined by Microsoft Word 2016 software.

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