IN THE SUPREME COURT OF MISSOURI
en banc

DWIGHT LAUGHLIN,	)	
Plaintiff /Respondent,	)	
	)	Case No.: SC98012
vs.	)	
	)	
DEWAYNE PERRY, et al.,	)	
Defendants/Appellants.	)	

APPEAL FROM THE CIRCUIT COURT OF NEWTON COUNTY, MISSOURI
40TH JUDICIAL CIRCUIT - CASE NO. 11NW-CV01772
THE HONORABLE JAMES V. NICHOLS, JUDGE

RESPONDENT'S SUBSTITUTE BRIEF ON APPEAL

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JURISDICTIONAL STATEMENT

Respondent accepts Appellants' Jurisdictional Statement but points out that the case number on the cover of Appellant's Substitute Brief is not the number for this case.

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STATEMENT OF FACTS

Respondent accepts Appellants' Statement of Facts with the following additions:

At page 11 of their Substitute Brief, Appellants summarize the testimony of witness Mark White and call him a public defender. White was an assistant public defender for 28 months and has not practiced law since 1994 (T 424). At page 12 Appellants make argumentative statements regarding the testimony of Dwayne Perry. They state "…from there he exercised discretion in his pursuit of what he considered to be more meritorious arguments. …despite his zealous defense, Perry's arguments failed. …" Nowhere in the testimony does Perry state that he was exercising discretion and appellants characterization of Perry's defense as "zealous" is argumentative and conclusory and this court should disregard those portions of the statement of facts. At page 13, Appellants' statement that James Martin included the claim that the trial court had no jurisdiction in his amended motion for post-conviction relief is misleading because they fail to point out to the court that the federal jurisdictional question was raised by Laughlin in his pro se motion for post-conviction relief and was incorporated by Martin in the amended motion. (T 462)

Additional facts will be called to the court's attention as needed in Respondent's argument.

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POINTS RELIED ON

I.

The Circuit Court did not err in denying Appellants Perry and Flottman's motion for judgment notwithstanding the verdict because Appellants had no official immunity from the legal malpractice claims against them, which were based on their failure to raise the defense of exclusive federal jurisdiction in state criminal proceedings, in that: (1) Missouri Courts have never applied the common law doctrine of Official Immunity to professional employees like doctors and lawyers; (2) The Appellants' duty to assert the defense that the Federal Courts had exclusive jurisdiction for crimes occurring within the federal post office in which Respondent committed his crimes was a ministerial duty in the context of this particular case of providing a defense to the charges against him; (3) Any public policy favoring extending official immunity to public defenders is offset by: (a) the fact that Missouri follows the exoneration rule which reduces the likelihood of frivolous lawsuits; (b) public defenders are shielded from any personal liability by the Missouri State Legal Defense Fund; (c) individuals who are wrongfully incarcerated as a result of a public defender's negligence would be left without a remedy for their injury; and (d) granting immunity would create a system whereby public defenders are protected from their mistakes but private attorneys and contract attorneys engaged by the Public Defender System would not be protected; and (4) Appellants' claim that disallowing them the use of the defense of Official Immunity violates the provisions of Section 105.726.1 RSMo. is wrong because the court is not abolishing

or waiving any defense at law but is simply declining to extend a defense which has never been allowed for public defenders.

State ex rel. Eli Lilly & Co. v. Gaertner, 619 S.W.2d 761 (Mo. App. ED 1981)

Section 105.711 RSMo.

Kuehne v. Hogan, 321 S.W.3d 337 (Mo. App W.D. 2010)

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II.

The Circuit Court did not err in denying Appellants Perry and Flottman's motion for judgment notwithstanding the verdict because: (1) Respondent Laughlin clearly made a submissible case on his legal malpractice claim, in that Respondent's expert outlined the scope of Appellants' legal duty to Respondent which consisted of recognizing that there was a question of whether there was concurrent or exclusive jurisdiction in federal courts of the crime with which Respondent was charged and engaging in research to answer the question; (2) Appellants' contention that the issue was so obscure that no reasonable attorney could be expected to research it is not supported by the fact that other judges failed to recognize the issue because those judges were not rendering expert opinions regarding the duty that Appellants owed to Respondent and they were under no duty to research the jurisdictional issue; and (3) The research to answer the jurisdictional issue was relatively simple to conduct with the resources available to Appellants in 1994.

SKMDV Holdings, Inc. v. Green Jacobson, P.C., 494 S.W.3d 537 (Mo.App. E.D. 2016)

Roberts v. Sokol, 330 S.W.3d 576, (Mo. App. S.D. 2011)

White v. State, 192 S.W.3d 487, (Mo.App. S.D. 2006)

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ARGUMENT

I.

The Circuit Court did not err in denying Appellants Perry and Flottman's motion for judgment notwithstanding the verdict because Appellants had no official immunity from the legal malpractice claims against them, which were based on their failure to raise the defense of exclusive federal jurisdiction in state criminal proceedings, in that: (1) The Common Law defense of Official Immunity is not applicable to professional employees of the state like doctors and lawyers. (2) The Appellants' duty to assert the defense that the Federal Courts had exclusive jurisdiction for crimes occurring within the federal post office in which Respondent committed his crimes was a ministerial duty in the context of this particular case of providing a defense to the charges against him; and (3) Any public policy favoring extending official immunity to public defenders is offset by: (a) the fact that Missouri follows the exoneration rule which reduces the likelihood of frivolous lawsuits; (b) public defenders are shielded from any personal liability by the Missouri State Legal Defense Fund; (c) individuals who are wrongfully incarcerated as a result of a public defender's negligence would be left without a remedy for their injury; and (d) granting immunity would create a system whereby public defenders are protected from their mistakes but private attorneys and contract attorneys engaged by the Public Defender System are not be protected; and (4) Appellants' claim that disallowing them the use of the defense of Official Immunity violates the provisions of Section 105.726.1 RSMo. is wrong because the court is not abolishing

or waiving any defense at law but is simply declining to extend a defense which has never been allowed for public defenders.

(1) The Common Law defense of Official Immunity is not applicable to professional employees of the state like doctors and lawyers;

Respondent does not agree that the applicability of official immunity to public defenders is an open question in the state of Missouri. There is ample authority that professional employees of the state, such as, doctors and lawyers, are not entitled to assert the defense of official immunity when sued for injuries caused by their negligence while acting in the scope of their employment by the state. Respondent claims here, as he did below, that Appellants are not covered by the doctrine of official immunity because they are not public officers. In the case of *State ex rel. Eli Lilly & Co. v. Gaertner*, 619 S.W.2d 761 (Mo. App. ED 1981), the court dealt with a claim of medical malpractice against doctors at a state hospital where negligence in the administration of medication caused the death of the plaintiffs' mother. The court noted that one of the functions of official immunity is to "Halt actions against (defendants) at their inception once it has been proven that the acts complained of were performed by the officer within the course of his official duties" *Id.* at 763. The court first addressed the immunity of the administrative staff of the hospital by stating, "As administrators of a state owned facility the directors and superintendents exercise some portion of the sovereign's power in the performance of their statutorily designated duties. They are, therefore, public officers

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entitled to official immunity." *Id.* at 764.[1] After finding that the administrative staff was entitled to official immunity, the court went on to say, "The same cannot be said for physicians employed in the mental care facilities. In the performance of their duties they are answerable to the facility's superintendent. Their duties and authority are not set out in the statute as are those of the directors and superintendent but are such as the superintendent of the care facility determines. Such duties do not involve any exercise of the sovereign's power, rather the physicians are required, when employed by the state, to render the identical services as required when employed in the private sector, i. e., to provide mental health care. While our legislature has provided for employment of physicians by the superintendents of mental health facilities such statutory provisions did not create immunity for these public employees." *Id.* The court went on to say, "The mere fact that defendants are compensated by public funds is not evidence of legislative intent that they be afforded immunity." *Id.*

In refusing to apply the doctrine of official immunity to legal malpractice claims against public defenders, our sister state of Illinois determined that the application of immunity depended on the source of the duty the employee was charged with breaching. In *Johnson v. Halloran*, 728 N.E.2d 490, (Ill.App. 2000) the court noted that if the act of negligence arose out of the state employee's breach of the duty that was imposed on him

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[1] Their statutorily assigned duties are comparable to those of the State Public Defender as set out in Section 600.042 RSMo.

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solely by virtue of his state employment, sovereign immunity would bar maintenance of the action. However, if the employee was charged with breaching a duty that arose independently of his state employment, he is not shielded from liability by the doctrine of sovereign immunity. The court noted at page 493 "The determination to be made is whether the defendants owed a duty to plaintiff that existed independent of their employment by the state or if the duty allegedly breached by defendants had no existence outside their state employment. The cases involving state-employed doctors provide guidance." The court then noted, "These cases involving state-employed doctors can not be distinguished from the case at bar. Every attorney has the duty to exercise a reasonable degree of skill and care in representing his client." *Id.* In finding that Public Defenders were not entitled to official immunity the court stated, "Plaintiff has alleged that defendants breached their duty to use the skill and care ordinarily used by a reasonably well-qualified attorney under similar circumstances. This is the same duty owed by every attorney to every client regardless of whether the attorney is a state employee. See *Polk County v. Dodson*, 454 U.S. 312, 318, 102 S.Ct. 445, 449–50, 70 L.Ed.2d 509, 516(1981)(" 'Once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defense program' [Citations.]") This duty is derived from the lawyer's status as a licensed attorney and is wholly independent of the lawyer's state employment. 'A State employee who breaches a duty he owes regardless of his State employment is no more entitled to immunity than is a private individual who breaches

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that same duty; the mere fact of his State employment should not endow him with heightened protection.'" *Id.* [2].

The Appellants rely on *Woods v. Ware*, 471 S.W.3d 385, 392 (Mo. App. WD, 2015) to claim that the limitation of official immunity to public employees who engage in purely governmental functions as set forth in *Eli Lilly* is no longer valid. *Woods* however relied on language from *Richardson v. City of St. Louis*, 293 S.W.3d 133, 141 (Mo. App. 2009) where the court stated, "Missouri courts have routinely extended official immunity to discretionary acts even when the public official's actions were not governmental in nature." *Richardson* in turn relied on language from *Southers v. City of Farmington*, 263 S.W.3d 603, (Mo. banc 2008). *Woods* stated at page 392 that the, "*Richardson* court recognized, the Missouri Supreme Court has 'thoroughly discussed the scope of official

[2] See also, *Brandon v. Bonell*, 858 N.E.2d 465 (Ill. App. 2006), stating that when applying the source of duty test the courts have found that an independent duty is a duty imposed by the employee's status as something other than a government employee and stated at page 506, "For example, professionals employed by the State, such as public defenders and doctors at state hospitals, are not protected by sovereign immunity when they breach a professional duty owed by every member of that profession. (citations omitted) Because a professional duty derives from the duty of care imposed by one's status as a professional, this is an independent duty that does not arise solely from one's employment and, thus, a breach is not protected by sovereign immunity."

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immunity and did not restrict immunity only to those actions which 'go to the essence of governing.' Id. (citing *Southers*, 263 S.W.3d at 610–11)." But *Southers* made no reference to the distinction in *Eli Lilly* and nowhere in the opinion did this Court even mention the case. While *Southers* goes to great lengths to explain the differences in the concepts of "sovereign immunity", "official immunity" and "the public interest doctrine", the portion of the opinion dedicated to discussing official immunity is mostly devoted to trying to distinguish between what employee conduct constitutes acting in a discretionary capacity as opposed to conduct that constitutes acting in a ministerial capacity. *Southers* recognized that the doctrine of official immunity has limitations when it stated at page 611, "Official immunity is intended to provide protection for individual government actors who, despite limited resources and imperfect information, must exercise judgment in the performance of their duties. *Davis*, 193 S.W.3d at 765. Its goal is also to permit public employees to make judgments affecting **public safety and welfare** without concerns about possible personal liability. Id." (emphasis added)

Providing representation to individuals charged with crimes is not a traditional state function. In fact, Missouri courts have held that judicial officers retain an inherent power to appoint private attorneys to represent criminal defendants. See Rule 31.02 and *State ex rel. Missouri Pub. Def. Comm'n v. Pratte*, 298 S.W.3d 870, 886 (Mo. 2009). Unlike law enforcement and fire protection, the public defender system is not designed to represent members of the general public. It is designed to represent a specific class of individuals to wit, those charged with criminal offenses. Not only are public defenders'

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duties to their clients well outside the sphere of public safety and welfare, the nature of their duties belies the fundamental reasoning behind the official immunity rule. Immunity is designed to permit public officials to act decisively, even though they might afterwards, by hindsight, be adjudged to have acted negligently. *Rhea v. Sapp*, 463 S.W.3d 370, 377 (Mo. App. WD 2015). Appellant Perry acknowledged that he had sufficient time to devote to Respondent's defense T-409 and both Appellants Perry and Flottman acknowledged that they had sufficient resources in terms of law libraries (T 410 and T 552) and ability to locate the deed necessary to support the jurisdictional challenge which ultimately brought Laughlin his freedom.

If this court intended to expand the doctrine of official immunity to public defenders, it had the perfect opportunity to do so in the case of *Costa v. Allen*, 274 S.W.3d 461 (Mo. banc 2009). In *Costa,* this court could have simply affirmed the trial court ruling on Plaintiff's petition because it determined that public defenders were entitled to official immunity. Instead, this court remanded the case to the trial court to give plaintiff an opportunity to amend his petition to properly allege a breach of fiduciary relationship. Had the court believed that official immunity applied to public defenders, there would have been no reason to remand the case because official immunity would have applied to any cause of action set out in an amended petition.

(2) The Appellants' duty to assert the defense that the Federal Courts had exclusive jurisdiction for crimes occurring within the federal post office in which Respondent committed his crimes was a ministerial duty in the

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context of this particular case of providing a defense to the charges against him

Appellants further contend that they are entitled to official immunity because their acts were discretionary as opposed to ministerial.[3] Like the doctors in *Eli Lilly*, the decision of Appellants here to decline to assert the defense of lack of jurisdiction was not the exercise of "discretion" in the legal sense of that term. "Furthermore, even if the doctors are considered to be public officers, the performance of their duties does not require the exercise of 'discretion' in the legal sense of that term. The purpose of official immunity is to protect public officers from the consequence of erroneous or negligent judgments made in the execution of their official duties. The duties of all public officials involve the exercise of functions for the public benefit. 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.'" *Eli Lilly, supra* at 765.

Indeed the struggle to define acts as discretionary or ministerial has led to unusual results. In *Thomas v. Brandt*, 325 S.W. 3d 481 (Mo. App. E.D., 2010), suit was brought

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[3] At page 27 of their brief, appellants allege that legal representation of a client is a discretionary function and cite the court the Missouri Supreme Court rule 4-2.1. That rule says nothing about discretion. The language of the rule states that "a lawyer shall exercise independent professional judgment".

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against medical personnel for negligence in failing to transport plaintiff's decedent for emergency treatment when they thought he was suffering from acid reflux rather than a heart attack. There the court, using the discretionary versus ministerial acts, analysis concluded that because the EMTs were not acting in a true emergency situation, their conduct was more like that of the doctors in the *Eli Lilly* case and they were not covered by official immunity. Clearly, the determination as to whether or not to transport the deceased to the hospital involved the exercise of reason in making the decision.

Likewise, in *Richardson v. Burrow,* 366 S.W. 3d 552 (Mo. App. E.D., 2012), the court was faced with a situation where an emergency medical responder improperly intubated plaintiff's deceased by placing the tube into the decedent's esophagus rather than his trachea. The court found that, because the ambulance district's regulation required that every patient be intubated, doing so was a ministerial act rather than a discretionary act. Certainly, the insertion of a tracheal tube involves training and judgment in knowing how to perform the act; nevertheless, the court found that the conduct was ministerial and the defendant was not covered by official immunity.

In *Rhea v. Sapp,* 325 S.W. 3d 481, (Mo. App. W.D., 2015) the defendant was a fire official heading towards a vehicle fire when he had a head-on collision with another vehicle causing the death of the driver. He had his emergency lights on but not his siren. The court quoted from *Southers*, "regarding the process of determining whether an act is discretionary the court noted that the general rule as to police officers and other emergency responders is that when they are driving in non-emergency situations, they do

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not benefit from official immunity." The court held that the defendant was covered by official immunity because he was acting in an emergency situation, even though he was coming as a backup to other public safety officials and there was no need for him to engage his lights and siren and operate at a high rate of speed.

In *Richardson v. Sherwood*, 337 S.W.3d 58 (Mo.App. W.D. 2011), as modified (Mar. 29, 2011) the court held that a state probation officer was not entitled to Official Immunity when he disclosed to one of his client's employers that the client was using drugs. The Court stated, "The statute does not authorize discretion. Moreover, there is no argument that this case involved an emergency affecting public safety that could not be handled through the channels provided by statute. Defendant may have been in 'good faith' in informing Plaintiff's employer, but if no discretion exists under the statute for such disclosure, it is difficult to find a basis for recognition of official immunity. *Id.* at 65.

Respondent posits, that once he advised Appellants of his desire that they assert a defense challenging the jurisdiction of the state courts, the attorneys had no discretion to refuse to explore that defense. The attorneys assumption that there was concurrent jurisdiction, without further researching the issue was negligence. Laughlin advised Mr. Perry that it was his belief that because the offense took place on federal property all the state could charge him with was misdemeanor trespassing (T 185-186). He had disagreements with Perry from the very beginning because he felt that Mr. Perry was not listening to what he was telling him about the limited jurisdiction of offenses committed

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on post office property (T 189). According to Respondent's expert, once Perry identified that there was an issue of federal versus state jurisdiction, he had an obligation to go to the books and find out whether or not jurisdiction was exclusive or concurrent (T 311). Perry testified that he was aware that there was a jurisdictional issue in the case and had discussed it with the prosecuting attorney during his representation of Laughlin (T 405). Both of them thought there was concurrent state and federal jurisdiction (T 405). At no time did Perry file any kind of a motion challenging the court's jurisdiction (T 405-406). Perry acknowledged that at the time he was representing Laughlin, it would not have been difficult for him to examine the deed from the post office at the county recorder's office, (T 409) that he could have obtained a copy of the federal statutes (T 410) and that he could have obtained all of the documents that Laughlin used in his habeas corpus case at the Supreme Court (T 411). Perry acknowledged that he had the skills to do the research to determine whether or not there was exclusive federal jurisdiction (T 411). Perry admitted that had he properly raised the issue of federal jurisdiction at the time he was representing Laughlin, that would have resulted in success for Laughlin (T 411). Perry failed to properly research the issue, resulting in legal negligence.

Ms. Flottman stated that at the time she was representing Laughlin, the fact that he kept signaling to her that his actions at the Neosho post office constituted a federal crime that had to be prosecuted in a federal jurisdiction, did not mean anything to her (T 531). Flottman recognized that Martin raised the exclusive federal jurisdiction issue in the amended post-conviction motion and that she did not think it was a good issue (T 539).

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She believed that she could have capably answered the question of whether or not jurisdiction was concurrent or exclusive (T 543) and that she was capable of doing the same research that Laughlin put in his *habeas corpus* proceeding (T 544).

Researching the Jurisdictional issue is similar to a doctor's function when he or she diagnoses a medical condition and determines a treatment plan which would be considered a ministerial function. See *Canon v. Thumudo*, 430 Mich. 326, 364, 422 N.W.2d 688, 705 (1988) where the court stated: "A government doctor should not be deemed immune from tort liability merely because he is employed by the government. His actions and decisions should be deemed immune only when he is acting as a uniquely *governmental* doctor, such as when he is determining the scope of the government's involvement with a particular patient. While decisions to admit or release patients from government facilities may thus be deserving of immunity, routine medical decisions—diagnoses, prescriptions, and structuring of treatment plans—should not be so shielded by this Court in the declaration of the common law of this state from accountability for malpractice."

In the context of the doctrine of Official Immunity, having been alerted to the jurisdictional issue, Respondents' duty to research the question and assert the defense of lack of state court jurisdiction became a ministerial function, not protected by the doctrine.

(3) Any public policy favoring extending official immunity to public defenders is offset by:

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(a) the fact that Missouri follows the exoneration rule which reduces the likelihood of frivolous lawsuits;

Appellants' public policy argument is lifted practically verbatim from the concurring opinion in *Kuehne v. Hogan*, 321 S.W.3d 337 (Mo. App W.D. 2010). Virtually every one of Appellants' policy arguments are eliminated because, as the principle opinion in *Kuhne* makes clear, under Missouri law, a plaintiff who is convicted of a crime because of his attorney's negligence, must plead and prove that he has been exonerated of the underlying crime as an element of his cause of action. Failing to do so will result in a dismissal of the petition at the initial stage of the proceeding. This will prevent a rash of frivolous lawsuits that are time consuming and prevent diminution of resources that are better used to provide representation to indigent criminal defendants.

(b) public defenders are shielded from any personal liability by the Missouri State Legal Defense Fund;

All of the other policy arguments are eliminated because public defenders are state employees, covered by the SLDF. The fund is established by Section 105.711 RSMo., which provides in part, "The state legal expense fund shall be the exclusive remedy and shall preclude any other civil actions or proceedings for money damages arising out of or relating to the same subject matter against the state officer or employee, or the officer's or employee's estate. No officer or employee of the state or any agency of the state shall be individually liable in his or her personal capacity for conduct of such officer or employee arising out of and performed in connection with his or her official duties on behalf of the

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state or any agency of the state. The provisions of this subsection shall not apply to any defendant who is not an officer or employee of the state or any agency of the state in any proceeding against an officer or employee of the state or any agency of the state." RSMo § 105.711. Appellants have no personal liability for their negligence and the Public Defender System has no obligation to reimburse the Fund for any claims that have been paid out. It is clear that the Legal Defense Fund covers public defenders because the State Auditor's 2017 report on the State Legal Defense Fund reports that a $300,000.00 claim against the State Public Defender System was paid out by the fund. See page 10 of the report which is included in Respondent's Appendix at A 39. Other than having been required to sit through the trial and appear for depositions, nothing in this case has distracted Appellants from their duties. And if being confronted with their mistake makes them be more aware of their obligations to their clients, that is not a bad result.

In *Kuhne*, Judge Ellis' concurring opinion referred to law in several states that had rejected the doctrine of official immunity for public defenders. However, the majority of those states have created immunity for public defenders through statutory provisions not through the case law pertaining to official immunity.[4] Although Florida recognizes

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[4] Vermont: 13 V.S.A. § 5254 (a), West Virginia: W. Va.Code § 29–21–20 (1989), New Mexico: NMSA 1978, § 31–16–10, Ohio: R.C. 2744.03(A)(6), Connecticut: CV084017246S, Illinois: 745 ILCS 19/1, Nevada: NRS 41.032(2), and Delaware: 10 Del. C. § 4001

official immunity for public defenders, the state of Florida has waived sovereign immunity with respect to claims against the state as the employer of public defenders that are negligent. *Id*. at 350. Furthermore, the majority of those states have created statutory provisions to compensate defendants who have been wrongfully incarcerated because of their actual innocence (see "Compensation Statutes: A National Overview", a nationwide state-by-state study conducted by The Innocence Project.[5] A copy of that study is included in Respondent's appendix at A 47.) In addition, Judge Ellis' concurring opinion fails to take into account that a criminal defendant cannot bring a claim against his or her attorney for legal malpractice unless and until he or she has been exonerated of the underlying crime. Thus, in Missouri, most of the policy arguments in favor of granting official immunity to public defenders are obviated by the fact that most such claims would be subject to dismissal because cases of actual exoneration are exceedingly rare.

(c) individuals who are wrongfully incarcerated as a result of a public defender's negligence would be left without a remedy for their injury;

A countervailing public policy argument is that if public defenders are held to be entitled to official immunity and not covered by the SLDF, a defendant who is

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5 https://www.law.umich.edu/special/exoneration/Documents/CompensationByState_InnocenceProject.pdf

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wrongfully incarcerated due to his public defender's negligence would be left with virtually no remedy. Missouri statutes only allow compensation for wrongfully incarcerated defendants when they can establish their innocence through DNA evidence (see Section 650.058 RSMo.). While a defendant who is wrongfully incarcerated as a result of law enforcement misconduct may have an action pursuant to Section 42 USC Section 1983 against the law enforcement officials; under Respondents' theory, they would have no ability to pursue a legal malpractice case against their public defenders who failed to engage in discovery to establish that the evidence was withheld. As mentioned above and in The Innocence Project study of compensation statutes, the vast majority of states in this country have established a process of compensation for defendants who are wrongfully incarcerated. Missouri, should at least allow compensation when the wrongful incarceration was the result of negligence by his or her public defenders.

(d) granting immunity would create a system where public defenders were protected from their mistakes but private attorneys and contract attorneys engaged by the Public Defender System would not be protected

Allowing public defenders to escape liability for their negligence is bad policy because it would create a two tier system where a defendant who relies on a public defender to represent him would be left without compensation but a defendant who engaged with private counsel would be entitled to compensation if wrongfully convicted

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as a result of the attorney's negligence. Furthermore, in Missouri, the public defender system contracts a significant portion of its cases to private counsel.[6] who are independent contractors.[7] Those individuals would not fall within the scope of official immunity. Thus, an indigent defendant who is assigned a contract attorney would have a legal cause of action for compensation as a result of the contract attorney's negligence whereas one who is represented by a public defender would not. An outcome dependent upon whether an indigent defendant has been assigned a public defender employed by MSPD or a contract attorney would be neither logical nor just.

(4) Appellants' claim that disallowing them the use of the defense of Official Immunity violates the provisions of Section 105.726.1 RSMo. is wrong because the court is not abolishing or waiving any defense at law but is

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[6] In 2018, 13.6% of MSPD's caseload was contracted. State of Missouri Public Defender Commission, Fiscal Year 2018, Annual Report, (https://publicdefender.mo.gov/wp-content/uploads/2018/10/MSPD-2018-Annual-Report-Print-Copy-Color-10172018.pdf) at page 62. Appendix A 63.

[7] MISSOURI STATE PUBLIC DEFENDER SYSTEM PANEL ATTORNEY CONTRACT, (https://publicdefender.mo.gov/wp-content/uploads/2018/07/Panel-Attorney-Contract-2018-07-01.pdf) at page 4. A copy of the contract appears in the appendix at A 64

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simply declining to extend a defense which has never been allowed for public defenders.

At pages 45 and 46 of their brief Appellants misconstrue the opinion of the Southern District in this case. They claim that by denying official immunity the Southern District is undermining the legislature's intent and on page 46 Appellants claim that the Southern District's opinion alters the scope of the statute, presumably, by adding protections that the legislature did not intend. What the Southern District did was not to deny official immunity to Appellants, but rather the opinion declined to extend the defense of official immunity to public defenders since the right to that defense had never been applicable to public defenders.

"As in many other states, the General Assembly of the state of Missouri has chosen to defend and pay claims against state employees arising out of the performance of their official duties for the state. Id.; § 105.711.2(2). The State Legal Expense Fund is merely a voluntary assumption by the state of defense and payment of judgments or claims against state employees sued for their conduct arising out of and performed in connection with official duties on behalf of the state." *Cottey v. Schmitter*, 24 S.W. 3d 126, 129 (Mo. App. WD 2000) The case dealt with the liability of a state employee who was operating a snowplow in the course of his duties as a state employee and negligently caused injury to the plaintiff. The court held that because the claim was against the employee rather than the state, the state sovereign immunity cap did not apply and the SLDF was obligated to pay the judgment against the operator. The case was decided on a

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stipulated set of facts and neither party raised the issue of official immunity although one could have surely argued that the employee was engaged in a discretionary function when he caused the accident.

It could reasonably be argued that the SLDF establishes a statutory scheme that renders the official immunity defense irrelevant. Section 105.711.5 provides, "No officer or employee of the state or any agency of the state shall be individually liable in his or her personal capacity for conduct of such officer or employee arising out of and performed in connection with his or her official duties on behalf of the state or any agency of the state." The statute eliminates the ministerial vs. discretionary distinction and replaces it with a blanket immunity for any acts of such officer or employee arising out of and performed in connection with his or her official duties. By covering employees acting in a ministerial capacity, the SLDF actually expands the defenses available to state employees. But what the Legislature took away by establishing absolute immunity for state employees who cause injury to third persons, it replaced with the Legal Expense Fund stating, "The state legal expense fund shall be the exclusive remedy and shall preclude any other civil actions or proceedings for money damages arising out of or relating to the same subject matter against the state officer or employee, or the officer's or employee's estate." *Id.* The Legislature has eliminated the common law cause of action against state employees for injuries caused by them while engaged in their official duties and replaced it with the statutory scheme creating the SLDF.

Appellants argue that eliminating the official immunity defense violates the admonition of Section 105.726.1 which states, "Nothing in sections 105.711 to 105.726

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shall be construed to broaden the liability of the State of Missouri beyond the provisions of sections 537.600 to 537.610, nor to abolish or waive any defense at law which might otherwise be available to any agency, officer, or employee of the State of Missouri." Disallowing the official immunity defense to public defenders does not abolish or waive a defense at law which might otherwise be available to any agency, officer, or employee. In 1983, when Section 105.711 was enacted, the state of the law was embodied in *Eli Lilly & Co.*, *supra,* which held that the official immunity defense didn't apply to professional employees of the state. "The legislature is presumed to be aware of the state of the law at the time it enacts a statute. (citations omitted) In cases of ambiguity, statutes are to be construed with reference to the principles of common law in force at the time of their passage, and statutes are not to be interpreted as effecting any change in the common law unless clearly so indicated in the statute." *Martinez v. State*, 24 S.W.3d 10, 17 (Mo. App. E. D. 2000) Accordingly, if there is any ambiguity as to what defenses the legislature was referring to in Section 105.726.1, it should be interpreted to mean that since the common law defense of official immunity was not available to public defenders in 1983, is not available now.

Nor does elimination of the official immunity broaden the liability of the State of Missouri. That argument was rejected by the court in *Dixon v. Holden*, 923 S.W.2d 370, 379 (Mo. App. WD 1996) where the court stated, "However, the law under scrutiny here does not expand the state's tort liability. The Fund is merely a voluntary assumption of defense and payment of judgments or claims against state employee sued for their conduct arising out of and performed in connection with official duties on behalf of the

state. The doctrine of sovereign immunity is not an issue in this case."[8] Just as in *Dixon*, Respondent's suit here was not against the State of Missouri, but against its employees. In *Dixon*, the court noted, "The underlying suit was not versus the state, but two of its employees. Missouri, like many other states, has chosen by statute to defend and pay judgments. The doctrine of sovereign immunity is not altered nor implicated by this case or this opinion." *Id.*

It is illogical to assume that the legislature, in enacting a partial waiver of sovereign immunity through the SLDF intended to limit that waiver to employees acting in a ministerial capacity. After this court abolished common law sovereign immunity in Missouri, the Legislature implemented a statutory form of sovereign immunity by enacting sections 537.600 to 537.650 RSMo. See *Southers, supra* at page 609. That legislation also created statutory waivers of sovereign immunity for negligence of public employees arising out of the operation of motor vehicles or for injuries caused by the dangerous condition of a public entities' property. *Southers* thereby reaffirmed the holding of *Davis v. Lambert-St. Louis International Airport*, 193 S.W.3d 760 (Mo. banc 2006) that due to the waiver of immunity in Section 537.600 RSMo. the public entity could be held liable on a *respondeat superior* basis for the conduct of its employee even though the employee was covered by common law official immunity. In *Davis* the court noted that official immunity does not mean the conduct which would amount to a tort was not still tortuous in character but merely that the defendant is given absolution from

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[8] State employees are not protected by sovereign immunity. *Southers*, *supra* at 609-610.

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liability, stating, "Even when official immunity protects a government employee from liability there remains 'tortious conduct' for which the governmental employer can be derivatively liable." *Id.* at 766. The court went on to state, "The balance struck by the statutes' interplay with the common law places accountability on the government employer for the actions of its subordinates. Section 537.600.1(1) waives sovereign immunity for the negligent operation of a motor vehicle; all such governmental liability is necessarily premised upon *respondeat superior* relationships. … . It would be inconsistent with that statutory waiver of sovereign immunity to recognize a judicially-created doctrine of official immunity to shield the government employer from liability where employees are acting in a discretionary capacity. *Id*. Similarly, the SLDF legislation creates a blanket immunity for all state employees regardless of whether they are acting in a discretionary or ministerial capacity but waives sovereign immunity of the state for those actions by creating a legal defense fund which compensates individuals injured by state employees subject to certain statutory caps. As in *Davis*, it would be inconsistent with the statutory waiver of sovereign immunity established by the SLDF to recognize a judicially created doctrine of official immunity to shield the fund from liability when employees are acting in a discretionary capacity.

II.

The Circuit Court did not err in denying Appellants Perry and Flottman's motion for judgment notwithstanding the verdict because: (1) Respondent Laughlin clearly made a submissible case on his legal malpractice claim, in that Respondent's expert outlined the scope of Appellants' legal duty to Respondent which consisted of

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recognizing that there was a question of whether there was concurrent or exclusive jurisdiction in federal courts of the crime with which Respondent was charged and engaging in research to answer the question; (2) Appellants' contention that the issue was so obscure that no reasonable attorney could be expected to research it is not supported by the fact that other judges failed to recognize the issue because those judges were not rendering expert opinions regarding the duty that Appellants owed to Respondent and they were under no duty to research the jurisdictional issue; and (3) The research to answer the jurisdictional issue was relatively simple to conduct with the resources available to Appellants in 1994.

Appellants' second argument appears to be nothing more than an attempt to make another closing argument from the trial. Appellants cite absolutely no case addressing the sufficiency of the evidence to support a finding of negligence by an attorney. None of the cases cited by Appellants in support of their argument involve a claim of legal malpractice.

(1) Respondent Laughlin clearly made a submissible case on his legal malpractice claim, in that Respondent's expert outlined the scope of Appellants' legal duty to Respondent which consisted of recognizing that there was a question of whether there was concurrent or exclusive jurisdiction in federal courts of the crime with which Respondent was charged and engaging in research to answer the question;

Appellants' theory that Respondent failed to submit any evidence to support his claim that the attorneys were negligent is contrary to the record before this court. Appellants' argument boils down to an assertion that because prior to Respondent's presentation of his writ application to the Missouri Supreme Court with supporting documents, Respondent presented the same documentation to several other courts that denied relief, as a matter of law, no attorney should have been reasonably expected to determine that the federal courts had exclusive jurisdiction over a burglary in the Neosho, Missouri post office. Appellants' argument amounts to nothing more than a request that this Court reweigh the evidence and void the jury's findings. "The standard for reviewing the denial of Appellant's motions for a directed verdict and for judgment notwithstanding the verdict based on determining whether (Plaintiff) presented a submissible case depends on whether legal and substantial evidence supports each fact essential to liability. *Dhyne v. State Farm Fire & Cas. Co*., 188 S.W.3d 454, 456 (Mo. banc 2006). Substantial evidence is evidence that has probative force upon the issues, and from which the trier of fact can reasonably decide a case. *Meyer v. Purcell*, 405 S.W.3d 572, 578 (Mo.App.E.D. 2013). The evidence is viewed in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences and **disregarding** evidence and inferences that conflict with that verdict. *Id*. The questions of whether evidence is substantial and whether the inferences drawn therefrom are reasonable are questions of law. *Id*. This Court will reverse the jury's verdict for insufficient evidence only where there is a complete absence of probative fact to support the jury's conclusion. *Id*. citing *Giddens v. Kansas City S. Ry. Co*., 29 S.W.3d 813, 818

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(Mo. banc 2000). Thus, to make a submissible case, (Plaintiff) was required to present substantial evidence for every fact essential to liability in a legal malpractice case." *SKMDV Holdings, Inc. v. Green Jacobson, P.C.*, 494 S.W.3d 537, 544–45 (Mo.App. E.D. 2016)(emphasis added).

At page 49 of their brief Appellants claim that they are not asking the court to reweigh the trial evidence but rather, they are asking this court to recognize a lack of substantial evidence presented by Respondent at trial. They then proceed to challenge Respondent's expert's opinion that Appellants were negligent by citing evidence that multiple courts had rejected Laughlin's claim that the Circuit Court of Newton County Missouri had no jurisdiction over the crime with which he was charged. Appellants are trying to repackage their argument that this court should give weight to the evidence that other courts had overlooked Laughlin's claim. Appellants are ignoring the standard of review which requires that all such evidence be disregarded as conflicting with the verdict. Appellants spend roughly four pages of their brief, from page 55 through page 58, outlining what they refer to as "Defendants' Evidence," for this court to consider in determining that Respondents failed to make a submissable case. Again, the standard of review requires this court to **disregard** all of "Defendants' Evidence," in reviewing the claim that Respondent failed to make a submissable case.

To determine whether or not Respondent presented a submissible case to the jury, it is important to examine what the jury was instructed to find in order to find in favor of Respondent. With respect to Appellant Perry, the jury had to find that his failure to investigate and assert the defense that the Federal Courts had exclusive jurisdiction for

crimes occurring within the federal post office in which Respondent committed his crimes constituted a failure to use that degree of skill and learning ordinarily used under the same or similar circumstances by the members of the legal profession. See Instruction Number 6 at D 35, P8 and Appendix A 70. With respect to Appellant Flottman, the jury had to find that her failure to investigate and present the argument that the Federal Courts had exclusive jurisdiction for crimes occurring within the federal post office in which Respondent committed his crimes constituted a failure to use that degree of skill and learning ordinarily used under the same or similar circumstances by the members of the legal profession. See Instruction Number 12 at D 35, P 12 and Appendix A 71.

Respondent clearly presented ample evidence of all the above elements through the testimony of his expert, Arthur Benson. Benson is an attorney who primarily represents plaintiffs who have claims that their rights have been impaired by local governments or "who believe that they were injured or harmed by their prior representation by lawyers, legal malpractice and civil rights." (T 307). Benson testified that with respect to the standard of care in Missouri, there are no specializations. Every lawyer is licensed and deemed capable of handling any case. When a lawyer takes a case, the standard of care imposes upon the lawyer an obligation to conduct a thorough investigation and to become competent and knowledgeable as to the applicable laws based on the facts revealed in that investigation (T-310).

In Laughlin's case, there was one issue that stood out prominently and that was whether or not there was exclusive federal jurisdiction or concurrent state and federal jurisdiction (T 310). With respect to Laughlin's case, his defense attorney first had to

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recognized that there was an issue pertaining to jurisdiction and then he was obligated to answer the question (T 310). In law school, attorneys are taught to identify questions and then answer the question so in this case once Perry identified that there was an issue of federal versus state jurisdiction, he had an obligation to go to the books and find out whether or not jurisdiction was exclusive or concurrent (T 311). The research to answer that question could have been done in two or three hours or perhaps somewhat longer by an attorney who was not accustomed to doing that type of research (T 313). Jurisdiction is an issue that can be raised at any time in the proceedings (T 314-315). Any lawyer accepting the case under the standard of care would have exercised a degree of skill of other lawyers under the same or similar circumstances and would have seen the conflict between state charges on federal property and would have said, "this is something I'd better answer". It was negligent for Perry not to answer the question and raise it properly to the court (T 315). The lawyer is an agent of the client and when clients raise issues, it is the lawyer's job to sort out whether or not those are frivolous or serious issues (T 316). In this particular issue, Laughlin raised the issue to his attorney that there was a conflict between the state's charge and federal property and what was involved (T 316).

In his motion for post-conviction relief, Laughlin wrote that there was no jurisdiction because the case was a federal matter. This alerted Martin to the issue but then Martin did not do anything with it (T 317). At that point, Martin could have obtained a copy of the deed to the post office, cited the Missouri statute and alerted the court to the fact that there was no jurisdiction but Martin failed to do that (T 318). In its judgment against Laughlin on the motion for post-conviction relief, the court noted that there was

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no evidence presented to support the allegation that the trial court did not have jurisdiction (T 318).

With respect to Laughlin's appeal, he notified Flottman that he wanted her to raise the jurisdictional issue and she ignored it (T 318-319). The standard of care for a public defender is the same as that of that of a private attorney who is retained and paid a fee (T 319). All lawyers, whether retained or public defenders, are expected to meet the standard of care which involves recognizing issues, being diligent, conducting thorough investigations, being competent, knowing the applicable law of those facts, and addressing any issues they raise (T 319). Attorneys are not necessarily expected to know the answer to the questions like jurisdictional issues but they are expected to do an investigation and become competent as to the applicable law on the jurisdiction issue (T 321). It is not a defense attorney's job to recognize every issue that might benefit their client but they do have an obligation to recognize every important issue, issues which are determinant as to whether or not the client is innocent or guilty (T 325). At the time of Laughlin's conviction, there had been cases in other states answering the question about whether or not there was exclusive federal jurisdiction (T 333). It was not the court's obligation to do the research to go to the recorder of deeds to find out whether or not the post office was purchased before or after 1940 (T 335). It was not the prosecuting attorney's job to research that issue either (T 335). Had the prosecutor known that there was no state jurisdiction, he would have had an obligation not to have brought the charge but prosecutors make mistakes all the time and it is the defense counsel's job to check on the mistakes made by prosecutors (T 336). It is within the power of the court to recognize

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that there was a jurisdictional issue and ask the lawyer to research it, but that rarely occurs (T 338). It is primarily the obligation of the defense attorney to raise the jurisdictional issues. Although the prosecutor and the courts could have raised the issue, they were not obligated to do that (T 340). Theoretically, the court of appeals could have asked the attorneys to go back to Newton County and look at the date of the deed for the post office but in Benson's experience, he had never actually seen a court do something like that (T 341). Although Laughlin recognized the jurisdictional issue when he was first charged, that is something that is difficult for a layman who is not trained in the law to get across to the court (T 355). The question of whether or not a court has jurisdiction is not unique to the criminal law (T 355). By pointing out the jurisdictional question and asking his attorneys to answer the question, Laughlin was not demanding perfection from his attorneys, he was simply demanding competence (T 357-358).

(2) Appellants' contention that the issue was so obscure that no reasonable attorney could be expected to research it is not supported by the fact that other judges failed to recognize the issue because those judges were not rendering expert opinions regarding the duty that Appellants owed to Respondent and they were under no duty to research the jurisdictional issue.

Appellants take Respondent's somewhat hyperbolic testimony that he probably presented his case to forty different courts as a statement of fact. Yet they only cite four

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instances when other courts reviewed his claim of lack of state court jurisdiction prior to the final submission to the Missouri Supreme Court.[9]

In a legal malpractice case, *Roberts v. Sokol*, 330 S.W.3d 576, 581 (Mo. App. S.D. 2011), the Court stated, "It is important to emphasize that '[a] lawyer's negligence is a question of fact, not a question of law'. … The rule prevails in Missouri that expert testimony is required to show legal malpractice, except in 'clear and palpable cases.'… Thus, as when the 'inquiry is about medical malpractice (again, except in 'clear and palpable cases,' ...), the judge is as dependent upon expert testimony as is the jury.'" (internal citations omitted) *Id.* at 581. The Court went on to say, "The same rule applies in cases of legal malpractice. Thus the lawyer charged with legal malpractice is in no better position nor in any worse position than the physician charged with medical

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[9] "In 1993 and through the initial three stages of his criminal proceedings (trial, PCR, and appeal), the jurisdictional defect went undetected. …

In 2005, Mr. Laughlin filed a Petition in the Newton County Circuit Court, complete with all three Jurisdictional Exhibits in support. …

In 2008, Mr. Laughlin submitted his case in the Circuit Court of Texas County on a Petition for a Writ of Habeas Corpus. (App. A67). …

In 2009, Mr. Laughlin's case was raised in the Southern District. …

Finally, in 2010, the Missouri Supreme Court would grant relief, and with the exact same instruments that were before the courts below. …"

Brief of Appellant at pages 56 - 57

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malpractice. In the one case as in the other, the case for the professional's negligence is made out by expert testimony. If the lawyer charged with malpractice could call upon the trial judge's expertise to declare whether the lawyer's act or omission was negligent, the physician or other professional should also be able to refer the issue of his alleged negligence to a professional peer interposed between himself and the jury. All professionals, for better or for worse, are under the same rule." *Id.* at 581. The opinion of the judges who reviewed Laughlin's prior attempts to win his freedom is irrelevant. Unlike Appellants, those judges owned no duty to Laughlin. "It is not the appellate court's duty to become an advocate [for Movant] and search the record for error." *White v. State*, 192 S.W.3d 487, 490 (Mo.App. S.D. 2006). It is only the opinion of Respondent's expert, the only opinion the jury heard, that matters in determining if he made a submissible case.

(3) The research to answer the jurisdictional issue was relatively simple to conduct with the resources available to Appellants in 1994.

Respondent would posit that the research to determine whether there was concurrent or exclusive jurisdiction in Federal Court for the crime with which Laughlin was charged at that time was quite simple and case law establishing the exclusive federal jurisdiction would have been easy to find even without computer assisted legal research. At appendix A – 72 - 77, Respondent has attached the documents showing how simple the research would have been. If one simply went to the USCA general index in 1994 and researched under the topic of "postal service" and explored the authorities under the index term "larceny", one would easily see the citation to 18 USC Section 2115. Going to

the actual code in USCA at title 18, section 2115 and in the annotations at note 15, one would see the reference to the case of *Com. v. Magnum*, 332 A.2d 467 (Pa. Super. 1974) where the head note reads, “Judgment of state court convicting defendant upon his plea of guilty of burglary of post office could not stand if the post office was exclusively owned by federal government and used for its purposes.” A quick reading of that case would advise any attorney of the documents he or she would need to obtain and the Missouri statutes which would need to be reviewed in order to determine whether or not the federal court had exclusive jurisdiction. Reference to 18 USCA, Section 2115 is also made in the letter from the postal inspector to Prosecuting Attorney Scott Watson dated February 16th, 1993 which was introduced as Appellant’s Exhibit F at trial (T 256) and appears in Respondent’s Appendix at A – 78 - 80.

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CONCLUSION

Considering that Respondent's claim in this action is clearly covered by the State Legal Defense Fund and that he clearly made a submissible case through expert testimony this appeal borders on frivolous. A jury heard three days of testimony and delivered a verdict they felt reasonable based on the evidence they heard. The reasonableness of the verdict and the fact that the jury listened to the evidence and instructions is confirmed by the fact that they found in favor of James Martin, the one defendant who actually listened to Respondent and asserted the jurisdictional defense. Perhaps they found that his failure to offer evidence in support of the issue was not negligent or simply was not the cause of Respondent's damage. The importance of having an attorney to formulate the jurisdictional defense in legalese is attested by the fact that once the Missouri Supreme Court recognized the significance of his claim and appointed counsel to assist him, Laughlin prevailed, and his conviction was vacated.

The attorney-client relationship is special. It includes not only a duty to use a high degree skill but is also a fiduciary duty. Clients represented by public defenders are entitled to have their attorneys use the same degree of skill and learning as clients who are paying six figures for criminal defense. Allowing public defenders to assert the defense of official immunity holds them to a different standard of care, even though the damages caused by their failure to meet that standard is not coming out of their own pockets. Applying a different standard of care to public defenders enhances the

perception of many criminal defendants that they are not being provided a constitutionally adequate defense.

The injustice of applying a different standard of care to public defenders was well stated by Justice Nix of the Pennsylvania Supreme Court when he wrote: “We are called upon here by the appellees to read into a statute implementing a constitutionally prescribed duty to furnish indigents with court-appointed counsel, an unexpressed public interest in limiting liability for professional malpractice visited upon indigents thus represented. We are asked to rule that this potential liability outweighs the interest of the indigent client in the provision of legal services under the same standards as those applicable in other attorney-client situations. Appellee’s contention is tantamount to a suggestion that we distinguish between groups of plaintiffs based on economic status, thus, denying an indigent the tort relief which would be available to the paying client in a similar fact situation. Such a distinction would raise troublesome equal protection questions were we to adopt it. … It is inconsistent with our belief that the quality and extent of the services or ethical responsibilities of public defenders and court-appointed counsel should turn on or be affected by the source of their compensation, or the economic status of their clientele.” *Reese v. Danforth*, 406 A.2d 735, 740 (Pa., 1979).

Perhaps the most profound expression of Appellants' failure to exercise that degree of skill and learning ordinarily used under the same or similar circumstances by the members of the legal profession was characterized by Judge Wolff at footnote 7 of the Missouri Supreme Court’s order discharging Respondent where he referred to

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Appellants' representation as a "feeble attempt" at full and fair litigation of an issue.

Dwight Laughlin prays this court to affirm the judgment in his favor.

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IN THE SUPREME COURT OF MISSOURI
en banc

DWIGHT LAUGHLIN,	)	
Plaintiff /Respondent,	)	
	)	Case No.: SC98012
vs.	)	
	)	
DEWAYNE PERRY, et al.,	)	
Defendants/Appellants.	)	

CERTIFICATE PURSUANT TO RULE 84.06(c)

I, William J. Fleischaker, Attorney for Respondent, hereby certify:

1. That on November 18th, 2019, a copy of the foregoing was sent through the Missouri eFiling system to the registered attorneys of record and to all others by facsimile, hand delivery, electronic mail or U.S. mail postage prepaid to their last known address.
2. That the Brief complies with the limitations contained in Rule 84.06(b);
3. That there are 10,181 words in the Brief;

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