No. 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

APPELLANTS' SUBSTITUTE REPLY BRIEF

ERIC S. SCHMITT
Attorney General

Zachary M. Bluestone
Deputy Solicitor General
Missouri Bar No. 69004
Christopher R. Wray
Assistant Attorney General
Missouri Bar No. 66341

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-8824
Fax: (573) 751-5391
Chris.Wray@ago.mo.gov

Attorneys for Appellants

INTRODUCTION

Official immunity protects public employees acting within the scope of their authority from liability for injuries arising from discretionary acts or omissions. *Southers v. City of Farmington*, 263 S.W.3d 603, 610 (Mo. banc 2008). By its own terms, this doctrine applies to public defenders because their representation of criminal defendants involves considerable discretion. The public policy considerations Laughlin advances in resisting this conclusion are outweighed by the seven policy benefits Appellants outlined in their opening brief. Likewise, the precedent on which Laughlin relies falters on closer inspection. Therefore, this Court should recognize that official immunity applies to public defenders and reverse the circuit court's denial of judgment notwithstanding the verdict on this basis.

In the event the Court concludes that public defenders are not entitled to official immunity, the judgment against Appellants still must be reversed, as Laughlin failed to make a submissible case of legal malpractice. Specifically, he failed to adduce substantial evidence of negligence, in that his expert could identify no similar Missouri cases and offered no testimony on how another attorney exercising ordinary care would have handled the case differently. Accordingly, the circuit court also erred in denying Appellants' motion for judgment notwithstanding the verdict on this alternative ground.

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I. The circuit court erred in denying Appellants' motion for judgment notwithstanding the verdict because public defenders, like judges and prosecutors, are entitled to immunity for discretionary acts.

Official immunity protects public employees acting within the scope of their authority from liability for injuries arising from discretionary acts or omissions. *Southers v. City of Farmington*, 263 S.W.3d 603, 610 (Mo. banc 2008). Laughlin does not dispute that Perry and Flottman's representation of him fell within the scope of their official duty as public defenders. *See* § 600.042.4(1), RSMo. And this Court has previously indicated that there is "no doubt" an attorney serving as a public defender is a "public officer or employee." *See State v. Lemasters*, 456 S.W.3d 416, 420 (Mo. banc 2015). Legal representation also qualifies as a discretionary act due to the degree of judgment required. *See Southers*, 263 S.W.3d at 610; MO. SUP. CT. R. 4-2.1, 4-1.7 cmt. 1. In addition to satisfying all three *Southers* factors for official immunity, at least seven policy considerations support the application of immunity to public defenders, as detailed in the opening brief. *See* Sub. App. Br. at 35–41. Accordingly, the trial court erred in denying judgment notwithstanding the verdict (JNOV) on this basis.

Laughlin opposes the application of official immunity to public defenders for three main reasons. *First*, Laughlin suggests that public defenders qualify only as "public employees," not "public officers" who exercise sovereign power. *Second*, he claims that legal representation is a ministerial act rather than a discretionary function. And *third*, he advances four policy interests that

purportedly favor withholding immunity from public defenders. As each of these arguments fall short, this Court should recognize that public defenders are entitled to immunity for their discretionary acts.

A. Missouri courts have rejected the notion that official immunity applies only to public officers who exercise sovereign power or conduct policymaking that "goes to the essence of governing."

Laughlin first contends that professional employees of the State, such as doctors and lawyers, are almost never entitled to official immunity because they are not "public officers" who "exercise some portion of the sovereign's power in the performance of their duties." Sub. Resp. Br. at 11–12. Yet the only Missouri authority he cites for this proposition is *State ex rel. Eli Lilly & Co. v. Gaertner*, 619 S.W.2d 761 (Mo. App. 1981), a Court of Appeals opinion from four decades ago. As Laughlin himself concedes, several more recent appellate decisions reject this unduly constrained view of official immunity, recognizing that its protection applies broadly to "public employees." *See, e.g.*, *Woods v. Ware*, 471 S.W.3d 385, 391–92 (Mo. App. 2015); *Richardson v. City of St. Louis*, 293 S.W.3d 133, 140 (Mo. App. 2009); *Boever v. Special Sch. Dist.*, 296 S.W.3d 487, 492 (Mo. App. 2009); *Brummitt v. Springer*, 918 S.W.2d 909, 912 n.2 (Mo. App. 1996). In fact, at least two opinions indicate that *Eli Lilly* is no longer valid after this Court's decision in *Southers v. City of Farmington*, 263 S.W.3d 603 (Mo. banc 2008). *See Woods*, 471 S.W.3d at 392 n.4; *Richardson*, 293 S.W.3d at 141. Accordingly, Laughlin implicitly asks this Court to overturn multiple opinions and to abandon its own interpretation of official-immunity doctrine.

Though this Court has not expressly overruled *Eli Lilly*, it abrogated the opinion in *Southers* by 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 610 (emphasis added). As *Woods* and *Richardson* recognized, this formulation cannot be read to limit official immunity to actions that "go to the essence of governing." *Woods,* 471 S.W.3d at 392; *Richardson*, 293 S.W.3d at 140. Indeed, even before *Southers*, this Court rejected the idea that official immunity is limited to public officials who perform sovereign functions. In *Sherrill v. Wilson*, this Court granted transfer after the Court of Appeals concluded that two doctors who released a patient from a state mental hospital were not protected by official immunity under *Eli Lilly*. *See* 653 S.W.2d 661, 662 (Mo. banc 1983). After noting that the Court of Appeals correctly "recognized the rule of non-liability of public officials and employees for discretionary acts," the Court concluded that it "did not go far enough with the principle." *Id*. at 667. The Court then granted immunity to the two doctors, explaining that discretion "relates not so much to the exercise of naked and unrestrained power as to the exercise of judgment." *Id*. Thus, Missouri courts have long rejected Laughlin's proposed framing of official immunity, and he offers no basis for departing from this well-settled interpretation.

In a related argument, Laughlin suggests that "[p]roviding representation to individuals charged with crimes is not a traditional state function." Sub. Resp. Br. at 15. His point appears to be that official immunity applies only to traditional governmental activities, possibly reaching back to those in existence at common law. But, again, official immunity is not so restrictive. *See* Sub. App. Br. at 32–35. Significantly, *Southers* did not limit immunity to traditional state functions. *See* 263 S.W.3d at 610. Moreover, even if there were such a restriction, states have been required to provide legal representation to indigent criminal defendants for more than fifty years. *See Gideon v. Wainwright*, 372 U.S. 335, 342–45 (1963). And contrary to Laughlin's unfounded contention, *see* Sub. Resp. Br. at 15–16, the work of public defenders certainly affects public safety and welfare. As the Minnesota Supreme Court recognized in extending immunity to public defenders, "[T]he criminal justice system . . . 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 v. Mott*, 503 N.W.2d 771, 777 (Minn. 1993) (citation omitted).

Lastly, Laughlin claims that public defenders cannot qualify for immunity because "the nature of their duties belies the fundamental reasoning behind the official immunity rule which is designed to permit public officials to act decisively, even though they might afterwards, by hindsight, be adjudged to have acted negligently." Sub. Resp. Br. at 16. He then suggests that this

principle does not apply to Perry and Flottman, in particular, because they had sufficient time and resources to have discovered the jurisdictional defect. *Id.* But to act decisively does not necessarily mean that protected conduct must occur over a short span of time. For example, in *Brummitt v. Springer*, the Court of Appeals found that a social worker and her supervisor were shielded by official immunity even though they evaluated the progress of a child under state supervision over the course of *several months*. 918 S.W.2d at 910–13. Similarly, the fact that the public defenders represented Laughlin over a similar period of time is no reason to withhold official immunity, particularly in light of other constraints on their time and resources.

B. Legal representation is not a ministerial function, as it requires considerable discretion and strategic decision-making.

Laughlin next argues that Perry and Flottman cannot qualify for official immunity because their representation of him qualifies as a ministerial rather than a discretionary function. Specifically, Laughlin claims that "the decision of Appellants to decline to assert the defense of lack of jurisdiction was not the exercise of 'discretion' in the legal sense of that term," but rather, was a purely ministerial act. Sub. Resp. Br. at 17. For support, Laughlin turns back to *Eli Lilly*, suggesting that discretionary decisions protected by official immunity are limited to those that "go to the essence of governing." Sub. Resp. Br. at 17. But, as discussed above, Missouri courts have declined to follow this holding.

See Sherrill, 653 S.W.2d at 667; *Woods*, 471 S.W.3d at 391-92; *Richardson*, 293 S.W.3d at 140; *see also Haley v. Bennett*, 489 S.W.3d 288, 294–96 (Mo. App. 2016) (applying official immunity to football coaches after noting that *Southers* "did not restrict immunity only to those actions which 'go to the essence of governing'" and, accordingly, rejecting pre-*Southers* precedent in this vein as "dated cases . . . which are neither persuasive nor controlling").

Laughlin's position is also inconsistent with this Court's definition of "discretionary" and "ministerial." In clarifying these terms, *Southers* explained that whether an act qualifies as discretionary "depends on the degree of reason and judgment required." 263 S.W.3d at 610. "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." *Id.* (emphasis added). A ministerial act, by contrast, "is one 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*. (quotation omitted). Thus, courts evaluate whether an act is discretionary on "a case-by-case basis, considering: (1) the nature of the public employee's duties; (2) the extent to which the act involves policymaking or exercise of professional judgment; and (3) the consequences of not applying official immunity." *Id*. A straightforward application of these factors

demonstrates that the representation of criminal defendants is discretionary in nature, and the cases cited by Laughlin do not undermine this conclusion.

i. The Southers factors each indicate that legal representation is a discretionary, not a ministerial, function.

First, "the nature of [Perry and Flottman's] duties" as public defenders required discretion. *See id.* As discussed in the opening brief, the Missouri Rules of Professional Conduct make clear that attorneys must use independent judgment. Sup. App. Br. at 30. "In representing a client, a lawyer shall exercise independent professional judgment." MO. SUP. CT. R. 4-2.1. Similarly, "[l]oyalty and independent judgment are essential elements in the lawyer's relationship to a client." MO. SUP. CT. R. 4-1.7 cmt. 1. If anything, the need for sound judgment applies even more strongly in the high-stakes context of the criminal justice system. Thus, there is no real question that Perry and Flottman's duties in representing Laughlin required "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." *See Southers*, 263 S.W.3d at 610.

Second, the specific duty at issue here—the determination of which defenses to raise on behalf of a criminal defendant—demands significant "professional judgment." *See id.* A public defender must choose between defenses that are strong enough to pursue versus those that will divert attention and resources toward unfruitful areas that will not benefit the client. In making this

choice, the lawyer must rely on experience, training, and a sense of what will convince the court and persuade the jury. *Hawkins v. State*, 512 S.W.3d 112, 116 (Mo. App. 2017) ("The decision of what defenses to present . . . is generally a matter of trial strategy."). Such decision-making is the very embodiment of professional judgment. *See Southers*, 263 S.W.3d at 610.

Third, "the consequences of not applying official immunity" to public defenders would be significant, *see id.*, for the reasons detailed in Appellants' opening brief, *see* Sub. App. Br. at 35–41. Most directly, withholding immunity would undercut the effectiveness of the criminal justice system. If public defenders were potentially liable for strategic choices like selecting defenses, their time and resources would be wasted in the fruitless pursuit of strategies that are almost certain to fail. Advancing meritless defenses would also weaken the credibility of public defenders and slow the criminal justice system, as courts and prosecutors would have to devote their limited time and resources to addressing a litany of additional defenses. Another consequence of denying immunity would be a chilling effect on representation of indigents. Public defenders could not focus fully on the interests of their clients due to worries that they might be sued for unsuccessful results. *See* Sub. App. Br. at 38–39. Similarly, fewer lawyers would choose to work as public defenders if they were subject to malpractice suits. *See id.* Thus, all three *Southers* factors demonstrate that the challenged conduct qualifies as discretionary.

ii. The cases on which Laughlin relies in opposing this conclusion are either inapposite or no longer valid.

Laughlin cites five cases to support his claim that Perry and Flottman's conduct was not discretionary. Sub. Resp. Br. at 17–21. But these decisions are either inconsistent with controlling precedent or are not on point. Thus, Laughlin provides no basis for departing from the clear indication of the *Southers* factors that the public defenders' conduct in representing him was discretionary.

The *first* case, *Thomas v. Brandt*, held that a paramedic and an EMT were not entitled to official immunity for misdiagnosing a patient and not transporting him to the hospital. 325 S.W.3d 481, 484–85 (Mo. App. 2010). After rejecting the validity of *Eli Lilly*, the Court of Appeals declined to extend official immunity to the defendants on the ground that they were not acting in an emergency situation. *Id.* at 484–85. But the first responders in *Brandt* are far different than attorneys defending indigent clients. The duties of first responders treating patients is nearly identical to the conduct of private medical personnel. In contrast, public defenders are a central pillar of the criminal justice system, which is administered by local, state, and federal authorities, thereby implicating immunity concepts. Judges and prosecutors both enjoy immunity for their respective roles in the criminal justice system; public defenders should be shielded by immunity as well.

Emergency doctrine also functions differently than Laughlin suggests. Significantly, while *Southers* recognized that official immunity does not apply to

police officers driving in non-emergency situations, the Court did not incorporate any such requirement into its general criteria for official immunity. 263 S.W.3d at 610–11. The reason why becomes apparent in tracing *Southers*' pronouncement to the cases on which it relies. For example, in *Davis v. Lambert-St. Louis International Airport*, this Court explained that "[p]olice officers, [when] driving in non-emergency situations, do not benefit from official immunity" because driving is ordinarily a ministerial function. 193 S.W.3d 760, 763 (Mo. banc 2006). However, driving in "responding to an emergency" implicates unique considerations, as such circumstances require officers to "exercise[] judgment and discretion." *Id.*; *see also Brown v. Tate*, 888 S.W.2d 413, 415 (Mo. App. 1994) (recognizing the same distinction). In other words, *Davis* applies the normal reason-and-judgment standard in evaluating discretionary functions. While emergency circumstances may *expand* the scope of immunity by converting ministerial functions into discretionary functions due to added complexity, the absence of an emergency does not *limit* liability in contexts that require reason and judgment, like legal representation. Indeed, this explanation is the only way to reconcile cases like *Davis* with a long line of precedent recognizing immunity in non-emergency situations.[1]

[1] *See, e.g., Green v. Lebanon R-III Sch. Dist.*, 13 S.W.3d 278, 285 (Mo. banc 2000) (granting school board members official immunity for setting a tax levy); *Charron v. Thompson*, 939 S.W.2d 885, 886–87 (Mo. banc 1996) (same for prison employee who destroyed contraband); *Collins-Camden P'ship v. Cty. of Jefferson*, 425 S.W.3d 210 (Mo. App. 2014) (same for county council members who rejected a rezoning request); *Shelton v. Farr*, 996 S.W.2d 541, 544 n.5 (Mo. App. 1999) (same for fire marshal who denied fireworks permits).

Second, Laughlin invokes *Rhea v. Sapp*, 463 S.W.3d 370 (Mo. App. 2015), for similar effect. *See* Sub. Resp. Br. at 18–19. Relying on *Southers*, the Court of Appeals in *Rhea* concluded that a fire chief was covered by official immunity because his allegedly negligent conduct in driving without a siren occurred while he was responding to an emergency. 463 S.W.3d at 376–78. As already explained, such emergency-doctrine cases have no negative implication for non-emergency situations that require judgment and discretion.

Third, Laughlin cites *Richardson v. Burrow*, *see* Sub. Resp. Br. at 18, in which the Court of Appeals denied official immunity for a paramedic who allegedly performed a negligent intubation, *see* 366 S.W.3d 552, 556 (Mo. App. 2012). The court deemed this task ministerial because the paramedic was presented with circumstances that "*mandated intubation*" under city policy. *Id.* Therefore, *Burrow* is distinguishable from the present case because it involved the rote application of a procedure rather than the discretionary assessment of trial strategy that would vary based on the circumstances.

Fourth, Laughlin cites *Richardson v. Sherwood*, 377 S.W.3d 58 (Mo. App. 2011). *See* Sub. Resp. Br. at 19. *Sherwood* considered whether a probation officer was entitled to official immunity for informing an employer that a probationer admitted to using drugs. 377 S.W.3d at 60. The Court of Appeals concluded that the probation officer was not subject to protection, as he had no discretion to disclose this information to the employer under section 559.125,

RSMo, which prohibited this disclosure. *Id*. at 64–65. Like *Burrow*, this case is inapposite because the probation officer was required to follow an unambiguous statutory policy, which he had no authority to ignore. Perry and Flottman, on the other hand, were confronted with a question that was far from clear and which required the application of their reasoned judgment as attorneys.

Fifth, Laughlin cites *Canon v. Thumudo* for the proposition that, while it may be appropriate to provide immunity to government doctors for "uniquely governmental" decisions, such as whether to admit or release patients from a state facility, they should not be immune for routine medical decisions. *See* Sub. Resp. Br. at 21 (quoting 422 N.W.2d 688, 705 (Mich. 1988)). Yet Laughlin actually cites to a two-judge concurrence, not the majority opinion, for this proposition. In fact, the Court eschewed the narrow view of immunity advanced by Laughlin: "If every act which deviates from a professional norm were to be categorized as 'ministerial,' immunity would seldom shield professional discretion." *Canon*, 422 N.W.2d at 335. Thus, to the extent this Court considers *Canon*, it actually supports Perry and Flottman, not Laughlin.

In sum, all three of the *Southers* factors confirm that Perry and Flottman's representation of Laughlin involved considerable discretion. The cases Laughlin cites in opposing this straightforward application of official-immunity doctrine do nothing to help his cause, and if anything, support a finding of immunity. Accordingly, this Court should find that Perry and Flottman were engaged in the type of discretionary conduct that is shielded by official immunity.

C. *The policy considerations Laughlin advances are outweighed by the benefits of extending immunity to public defenders and, if adopted, would erode official immunity in other contexts.*

Laughlin does not dispute that extending official immunity to public defenders would advance the seven policy benefits Appellants identified in their opening brief. *See* Sub. App. Br. at 35–41. Instead, he advances four of his own policy considerations that purportedly cut against recognizing immunity. Even a cursory review of these dueling interests demonstrates that recognizing immunity would be far more beneficial to the justice system, public defenders, and the vast majority of criminal defendants themselves, whereas Laughlin's considerations serve only a few individuals. Moreover, if the Court were to adopt Laughlin's reasoning as to the first two policy justifications, it risks undermining official immunity in other contexts, as explained below.

i. Coverage under the State Legal Expense Fund (SLEF) does not strip government employees of official immunity.

Laughlin contends that official immunity should not extend to Perry and Flottman because they already enjoy coverage under the SLEF. *See* Sub. Resp. Br. at 22–25, 27–31. But this argument is predicated on a fundamental misunderstanding of the protection the SLEF provides. Laughlin suggests that the SLEF "renders the official immunity defense irrelevant" because it provides "blanket immunity for any acts of such officer or employee arising out of and performed in connection with his or her official duties." *Id.* at 28. This

is simply not true. While SLEF coverage protects certain state employees from paying for legal representation or monetary judgments, this is far different that immunity, which shields government employees from suit entirely.

Moreover, Laughlin's argument ignores the fact that the State still would bear the burden of picking up the tab for both legal representation and any resulting judgments. But the SLEF statute expressly forbids this result, by providing that: "Nothing in sections 105.711 to 105.726 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; s*ee also* *Dixon v. Holden*, 923 S.W.2d 370, 379 (Mo. App. 1996) ("[T]he [SLEF] should not broaden the state's liability for tort."). Under the plain terms of the statute, the SLEF cannot affect any defenses otherwise available to state employees, and thus, the Court must set aside this policy argument against immunity.

ii. The inability of potential claimants to recover is always a consequence of official and other immunities.

Laughlin argues that "a countervailing policy argument is that if public defenders are held to be entitled to official immunity, a defendant who is wrongfully incarcerated due to his public defender's negligence would be left with virtually no remedy." Sub. Resp. Br. at 24–25. As he immediately concedes, however, barring suit against public defenders in no way limits such individuals from securing their release, and there are still a variety of ways in which they

could recover monetary damages. *See id.* at 25. Moreover, the loss of a remedy due to the application of official immunity in this context is no different than any other case in which the State or its employees are shielded by various governmental immunities. For example, judicial and prosecutorial immunity likewise result in a complete bar on recovery in some cases. Thus, this is not a valid reason to withhold official immunity from public defenders, and the General Assembly can provide a specific avenue for relief if it wants to do so.

iii. The exoneration rule does not obviate the need for immunity.

Laughlin asserts that Missouri's adoption of the exoneration rule—that is, the requirement that criminal defendants secure exoneration for a crime before bringing a related malpractice claim—diminishes the need for extending official immunity to public defenders. Sub. Resp. Br. at 22. While this requirement might reduce potential malpractice suits against public defenders, it does not prevent them. The rule does not eliminate the financial resources that must be redirected from criminal defense work to malpractice defense. Nor does it make up for the time and energy public defenders spend defending such claims. Most importantly, this redirection of resources was only one of seven of the public policy reasons that favor official immunity for public defenders. *See* Sub. App. Br. at 35–41.

In particular, public defenders would be chilled in their representation of indigent clients, knowing they could be subject to malpractice liability

despite having no control in selecting their clients. Public defenders also would have an incentive to divert attention away from the strongest defenses to cover all of the bases to limit exposure to liability. As a result of both of these considerations, public-defender recruitment would be negatively impacted.

Additionally, the application of the exoneration rule does not limit malpractice suits to public defenders who actually committed errors. Individuals exonerated of crimes are frequently cleared for reasons unrelated to the quality of their representation. But there still will be a natural desire to attempt to obtain compensation, which will inevitably in claims against public defenders. Thus, while the exoneration rule might minimize one policy concern identified by Appellants, it hardly obviates the need for immunity.

iv. Public defenders and appointed private counsel are not similar situated.

Lastly, Laughlin contends that it would be bad policy to apply official immunity to public defenders when private counsel, either directly employed by a defendant or provided by the public defender system under contract, would not enjoy the same protection. Sub. Resp. Br. at 25–26. However, private counsel already have ways to mitigate the risk of potential malpractice suits that public defenders do not. For example, private counsel may choose their clients and decide what rates to charge the clients they accept. And, while contract lawyers may not get to choose clients, they can account for malpractice risk in assessing the compensation they require before taking on a contract.

Moreover, there are many contexts in which immunity shields public employees doing similar work as private employees. For example, public-school principals, teachers, and coaches are protected by official immunity for their discretionary conduct while their private counterparts are not. *See, e.g., A.F. v. Hazelwood Sch. Dist.*, 491 S.W.3d 628, 631–33 (Mo. App. 2016) (holding that official immunity applied to public school teacher and principal); *Haley v. Bennett*, 489 S.W.3d 288, 295 n.8 (Mo. App. 2016) (same for public school teachers and coaches). This difference in treatment is not unfair. Although public entities and their employees may provide similar services as private entities, they do so for different reasons. Public entities provide services because they are required to do so or because the public deems them sufficiently important to justify the use of tax revenue, while private employers generally do so for profit. Thus, just because private counsel will not benefit from immunity is no reason for withholding it from public defenders.

v. Conclusion.

By its own terms, official-immunity doctrine applies to public defenders because their representation of criminal defendants involves considerable discretion. The availability of SLEF coverage has no bearing on this question, and the other policy concerns Laughlin identifies are outweighed by the undisputed benefits of extending official immunity to public defenders. Therefore, this Court should recognize that official immunity extends to public defenders and reverse the circuit court's denial of JNOV on this basis.

II. Alternatively, the circuit court erred in denying Appellants' motion for judgment notwithstanding the verdict because Laughlin failed to present substantial evidence that an ordinary attorney in Perry or Flottman's position would have handled the case differently.

In the event the Court concludes that public defenders are not entitled to official immunity, the judgment against Perry and Flottman still must be reversed, as Laughlin failed to make a submissible case of legal malpractice. Despite his suggestion to the contrary, *see* Sub. Resp. Br. at 33, the second point relied on does not ask this Court to reweigh the evidence presented at trial. Rather, Appellants assert error in the denial of JNOV due to the absence of evidence Laughlin presented showing negligence—an essential element of a malpractice claim. *See Klemme v. Best*, 941 S.W.2d 493, 495 (Mo. banc 1997).

"To make a submissible case, substantial evidence is required for every fact essential to liability." *Steward v. Goetz*, 945 S.W.2d 520, 528 (Mo. App. 1997). "Substantial evidence is that which, if true, has probative force upon the issues, and from which the trier of facts can reasonably decide a case." *Id.* (quotation omitted). Because Laughlin's own expert did not testify that other attorneys would have handled the case differently and because he could not identify a single Missouri case involving exclusive federal jurisdiction, the only evidence concerning the standard of care is the track record of numerous judges and attorneys who thought the State had jurisdiction to prosecute Laughlin. Thus, there is no basis on which a reasonable jury could find negligence.

A. The relevant question is whether an attorney of ordinary skill would have investigated the obscure jurisdictional defense, not whether Perry and Flottman failed to spot the issue.

Before addressing Laughlin's contentions about substantial evidence, it is important to clarify what he was required to establish for a viable malpractice claim. Laughlin suggests that the public defenders failed to "recognize the issue" of jurisdiction and that they did not assert it as a defense due to this oversight. Sub. Resp. Br. at 32, 35–37. In doing so, Laughlin bypasses the very heart of the question the jury had to answer: whether Perry and Flottman's decision to not investigate the obscure jurisdictional defect rose to the level of negligence. This deficiency comes to light in considering the jury instructions for malpractice, which required Laughlin to prove three related elements:

> First, during [his/her] representation of Plaintiff, Defendant . . . ***failed to investigate*** and [assert/present] the [defense/argument] that the Federal Courts had exclusive jurisdiction for crimes occurring within the federal post office in which Plaintiff committed his crimes.
>
> Second, Defendant . . . ***was thereby negligent***. . . . The term "negligent" or "negligence" . . . means the failure to use that degree of skill and learning ordinarily used under the same or similar circumstances by members of the legal profession. . . .
>
> Third, such negligence directly caused or directly contributed to cause damage to Plaintiff.

L.F. D35 at 8, 10, 12; App. 8, 10, 12 (emphasis added); *see also Steward*, 945 S.W.2d at 531 (providing a similar description of the elements of a malpractice claim). In other words, Laughlin had to establish that an ordinary attorney in

Perry and Flottman's shoes—using the skill and learning ordinarily used by attorneys under such circumstances—would have come to a different conclusion about concurrent jurisdiction. Yet Laughlin's own description of the evidence he presented at trial does not address, much less establish, this central issue.

B. Laughlin failed to adduce substantial evidence that Perry and Flottman violated the standard of care by failing to investigate the obscure jurisdictional defect.

Laughlin acknowledges that the only evidence he presented concerning negligence was the testimony of his expert, Arthur Benson.[2] In an effort to show that he "clearly presented ample evidence of all the [malpractice] elements," Laughlin provides a detailed summary of the opinions Benson offered at trial. *See* Sub. Resp. Br. at 35–38. The bulk of this recital rehashes Benson's commentary on questions of law and other irrelevant testimony, such as observations about Public Defender James Martin. *Id.* Tellingly, only three sentences of the summary even mention Perry and Flottman. Moreover, there is no appraisal of the reasonableness of their conclusions about concurrent jurisdiction, no suggestion that an ordinary attorney would have handled the case differently,[3] and no mention of a single other Missouri case involving

[2] Indeed, Laughlin had to offer expert testimony "to prove that the defendant[s'] conduct fell below the standard of care of the profession under the circumstances." *See Duncan v. Dempsey*, 547 S.W.3d 815, 820 (Mo. App. 2018) (citation omitted).

[3] Critically, while Benson opined that an attorney *should have* handled the case differently, he offered no basis for concluding that a practicing lawyer using ordinary case *would have* done so.

exclusive federal jurisdiction. *Id.* Nor is any of this critical information found in the few pages of the trial transcript in which Benson addresses the public defenders' purported negligence. (Tr. 315:7–316:5, 318:19–319:25). Thus, even indulging the inaccuracies in his summary,[4] Laughlin fails to identify substantial evidence of negligence because Benson never engaged with the real question of whether Perry and Flottman violated the standard of care.

Perhaps because Benson recognized that the answer to the jurisdictional question was not obvious, (Tr. 336:21-22), the only substantive testimony he offered regarding negligence dealt with issue spotting. Benson opined that the jurisdictional issue was "glaring" and that the standard of care required Perry and Flottman to answer this question. (Tr. 315:11-18, 321:18-23, 336:18-22). But they *did* "answer the question." (Tr. 310:20, 404:24–405:20; 539:6-21). Because they had no reason to know that Missouri ceded exclusive jurisdiction over certain property in the 1880s or that the Federal Government acquired the Neosho post office before the jurisdictional presumption flipped in 1940, the public defenders believed that the standard rule of concurrent jurisdiction applied to Laughlin's crimes. (Tr. 330:18–332:19). On this basis, they reasonably

[4] For example, Benson testified that an attorney that had decided to research the jurisdictional defect would "go to the books to find out whether or not jurisdiction was exclusive or concurrent," (Tr. 310:16–311:16), not that "Perry had an obligation to [do so.]" *See* Sub. Resp. Br. at 36. Even if Benson had made this broader pronouncement, however, this says nothing about what an ordinary attorney would have done in the same circumstances.

concluded that it would not be a productive use of their limited time to pursue the issue further. *See Strong v. State*,[5] 263 S.W.3d 636, 652 (Mo. banc 2008) ("[T]he duty to investigate does not force defense lawyers to scour the globe on the off-chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste."). As such, Benson's commentary about issue-spotting misses the point.

Looking beyond this irrelevant evidence, Laughlin is left to contend that negligence was established because his conviction was ultimately overturned or simply because his expert said so. *See* Sub. Resp. Br. at 16, 42. But an adverse outcome is never sufficient to demonstrate malpractice. *See Stalcup v. Orthotic & Prosthetic Lab*, 989 S.W.2d 654, 657 (Mo. App. 1999) ("In a professional negligence action, a presumption of negligence based solely on an adverse result is not permitted."). The remainder of Benson's testimony consists of conclusory assertions that Perry and Flottman violated the standard of care. (Tr. 309:21-22, 318:13-17). But "[t]he submissibility of an

[5] Although *Strong* involved a post-conviction challenge asserting ineffective assistance of counsel rather than a claim for legal malpractice, the standard for malpractice negligence is—if anything—more demanding than the objective-reasonableness prong of a *Strickland* claim. *See Roberts v. Sokol*, 330 S.W.3d 576, 581 (Mo. App. 2011) (noting that "proceedings . . . involving claims of ineffective assistance of counsel . . . are distinguishable from cases involving legal malpractice claims" due to constitutional implications). Indeed, setting a higher bar for malpractice liability makes good sense, as a criminal defendant's liberty is at stake in an ineffective-assistance case, whereas prevailing in a malpractice cases results only in monetary damages.

issue depends upon proof of facts," and "[n]either mere conclusions nor expressions of 'feeling' satisfy that standard." *See Thienes v. Harlin Fruit Co.*, 499 S.W.2d 223, 227 (Mo. App. 1973) (citing *Zeigenbein v. Thornsberry*, 401 S.W.2d 389, 393 (Mo. 1966) and other cases). Because Benson failed to explain how Appellants' conduct departed from what any other attorney would have done under the circumstances, he provided no foundation for his opinions as to this ultimate fact, and his bald testimony must be discarded. *See Mueller v. Bauer*, 54 S.W.3d 652, 657 (Mo. App. 2001) ("Where an expert's testimony is mere conjecture and speculation, it does not constitute substantive, probative evidence on which a jury could find ultimate facts and liability.").

In sum, even if the Court considers only Laughlin's slanted description of the evidence he presented at trial, there is no basis from which a reasonable jury could have found the Perry and Flottman were negligent.

C. Laughlin's expert testimony loses any probative force in light of undisputed evidence that no other legal professionals in similar circumstances pursued the jurisdictional defect.

Given that Laughlin could not identify substantial evidence of negligence, the Court need proceed no further to find that he failed to present a submissible case. But even if his expert testimony had some limited force when considered in isolation, it cannot withstand the weight of undisputed contrary evidence concerning the standard of care. Specifically, Benson's conclusory opinion that Perry and Flottman were negligent is undercut by the only direct evidence of

whether an ordinary attorney would have pursued the jurisdictional defect: the conduct of numerous legal professionals who assumed concurrent jurisdiction in the very same case. *See* Sub. App. Br. at 51–52, 55–58.

Laughlin attempts to escape the implication of this highly probative evidence in two ways. *First*, he argues that the Court must disregard all evidence that conflicts with that verdict. Sub. Resp. Br. at 33. But "[a] party is bound by the uncontradicted testimony of his own witnesses, including that elicited on cross-examination." *Hurlock v. Park Land Med. Ctr.*, 709 S.W.2d 872, 880 (Mo. App. 1985). Moreover, "even the positive assertion of a witness can be so diluted and qualified by other testimony of the same witness as to render such assertion of no probative value." *Thienes*, 499 S.W.2d at 227.

At trial, Benson was forced to acknowledge that the jurisdictional defect repeatedly escaped the skill and learning demonstrated by numerous legal professionals involved with Laughlin's various cases. (Tr. 334:20–352:20). Indeed, even after Laughlin had assembled all of the pieces needed for someone to puzzle together a viable claim, several courts still denied him relief. (Tr. 360:12–362:6). When presented with this contrary evidence on cross, Benson could offer no explanation for why so many legal professionals failed to recognize the "obvious" jurisdictional defect beyond his grudging admission that "they should have." (Tr. 359:12–360:24). But, without better justification, or at least examples of other similar Missouri cases, there is no way to reconcile

the empirical evidence of how lawyers actually handled Laughlin's case with Benson's contradictory assertion of what Perry and Flottman should have done. In failing to provide any reason why the public defenders should be held to a higher standard, Benson fatally undercut his own testimony.

Second, Laughlin attempts to escape the significance of the many courts who rejected his jurisdictional claim because "those judges were not rendering expert opinions" and "owned no duty to [him]."[6] Sub. Resp. Br. at 38–40. The implication about the expertise of these judges is puzzling. Appellants did not offer these court rulings as expert evidence, nor did they need to do so in order to use this track record to cross-examine Benson. And Laughlin is simply incorrect that courts do not have an independent duty to verify jurisdiction, *see id.* at 38, even where neither party raises the issue, *see Fannie Mae v. Truong*, 33 S.W.3d 541, 542 (Mo. banc 2000) (recognizing this Court's duty to examine jurisdiction *sua sponte* and collecting cases).

Negligence is a legal principle rooted in the reasonableness of particular conduct in a given set of circumstances. Because Benson could identify no similar Missouri cases and offered no testimony on how an ordinary attorney

[6] Laughlin attempts to escape his testimony at trial that he sought review in "probably 40 cases" by minimizing his estimate as "somewhat hyperbolic." *See* Sub. Resp. Br. at 38; (Tr. 223:3-13). But his trial testimony refers to "numerous motions to recall the mandates," (Tr. 223:3-13), which indicates that there were many more cases than the six Appellants outlined in the opening brief.

would have handled the case differently than Perry and Flottman, the conduct of other the legal professionals that reviewed Laughlin's case is the only evidence probative of whether the public defenders acted reasonably under the circumstances. Given that both of Laughlin's arguments for exclusion fall short, the Court should consider this undisputed evidence as the only indication of the standard of care and find Laughlin failed to show negligence, thereby precluding the submission of his malpractice claim to the jury.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the circuit court's denial of JNOV and enter judgment in their favor.

Respectfully submitted,

ERIC S. SCHMITT
Attorney General

/s/ Zachary M. Bluestone
ZACHARY M. BLUESTONE
Deputy Solicitor General
Missouri Bar No. 69004
CHRISTOPHER R. WRAY
Assistant Attorney General
Missouri Bar No. 66341

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 821-3159
Fax: (573) 751-5391
Zack.Bluestone@ago.mo.gov

ATTORNEYS FOR APPELLANTS

CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the limitations contained in Supreme Court Rule 84.06 and contains 7,404 words as calculated pursuant to the requirements of Supreme Court Rule 84.06 as determined by Microsoft Word 2016 software.

/s/ Zachary M. Bluestone
ZACHARY M. BLUESTONE