

In the
SUPREME COURT OF MISSOURI

No. SC97983

MICHAEL HOLMES,
Respondent,

v.

SARAH STEELMAN, etc., et al.,
Appellants,

v.

MAYOR LYDA KREWSON, et al.,
Respondents.

Appeal from the Circuit Court, 22nd Circuit
Hon. Joan L. Moriarty, Circuit Judge

SUBSTITUTE BRIEF FOR RESPONDENTS KREWSON, et al.

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POINTS RELIED ON

I. State appellants' point fails to demonstrate reversible error in the judgment of the circuit court, because the circuit court correctly concluded on the basis of undisputed facts that the State of Missouri, through the State Legal Expense Fund, is obligated to pay the entire judgment in the federal case against former St. Louis police officers Sharp and Garrett, in that the 2005 amendment of §105.726, RSMo, cannot be applied retrospectively to a liability claim against police officers that arose prior to the effective date of the 2005 amendment so as to strip the officers of state legal expense fund coverage, as such retrospective application is barred by both Mo.Const. art. I, §13 (forbidding retrospective laws) and §84.345, RSMo, governing liabilities of police officers arising prior to the transfer of the functions of the St. Louis Police Department from the state Board of Police Commissioners to the City of St. Louis.

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§105.726, RSMo 2000 and RSMo 2016

II. State appellants' point fails to demonstrate reversible error in the judgment below, because appellants are judicially estopped to deny liability to pay the judgment in favor of respondent Holmes, in that the Attorney General affirmatively represented to the federal court rendering the judgment that the judgment would be paid, thereby avoiding the posting of a supersedeas bond on appeal from the federal judgment, and that representation now binds the appellants.

Vacca v. Mo. Dept. of Labor & Indus. Relations, 575 S.W.3d 223 (Mo.banc 2019)

New Hampshire v. Maine, 532 U.S. 742 (2001)

Shockley v. Director, Div. of Child Support Enforcement, 980 S.W.2d 173 (Mo.App.E.D. 1998)

JURISDICTIONAL STATEMENT

Respondents Krewson, Battle-Turner, Gray, Irwin, Switzer and the City of St. Louis (hereinafter the "City respondents") accept the jurisdictional statement of appellants Steelman and Schmitt (hereinafter "State appellants"). City respondents further note that, since no cross-appeal has been filed, the Court lacks jurisdiction to entertain any claim on appeal that judgment can be entered against the City. *Cass County v. Dir. of Revenue*, 550 S.W.3d 70 (Mo.banc 2018).

STATEMENT OF FACTS

The City respondents consider that State appellants have included a great deal of argument regarding statutory construction in their statement of the case, and City respondents will address statutory construction issues in argument. As to the underlying facts and procedural history, City respondents accept State appellants' statement of facts at pp. 7-9 of their substitute brief, with the following supplement.

The federal suit giving rise to the judgment in favor of respondent Holmes was brought in 2012 against former officers Sharp and Garrett, and the Board of Police Commissioners of the City of St. Louis, an independent state agency, and not against the City of St. Louis, a charter city. D121, p. 3, ¶7. The Board tendered defense of itself to the Attorney General of Missouri, and the Attorney General duly defended the action on behalf of both the Board and the officers.

D122-D123. Judgment was entered against Sharp and Garrett only, and not against the Board. D125, 130. After Holmes demanded that the State pay the judgment against Sharp and Garrett, the State itself moved to intervene in the action and to stay execution pending appeal. D126-127. In arguing for a stay of execution without the posting of a supersedeas bond, the Attorney General represented to the federal court:

Plaintiff's Judgment is adequately secured. In the event it is upheld, the Judgment will be paid. The Defendant police officers, therefore, should not be subjected to forcible execution against their personal assets pending a decision on the post-trial motions and any appeals.

The Court, rather, should grant this Motion and stay execution on the Judgment pending resolution of post-judgment motions and appeals, without requiring the posting of any supersedeas bond. [D128, pp. 5-6.]

The Attorney General also represented to the federal court that the judgment in favor of plaintiff Holmes would be paid "either" by the State or the City. D128, pp. 3-4. At that time, the Attorney General did not represent the City, and there is no evidence that the City acceded to or authorized the representation about its obligation. See State Appellants' Substitute Appendix A7; D151, p. 5. The District Court granted the intervention, denied the stay motion, but did not require a supersedeas bond. D115, D129.

The Board of Police Commissioners transferred all assets and liabilities to the City of St. Louis, effective as of September 1, 2013, and the City accepted the "lawful obligations" of the Board. D135, p. 3. However, neither the Board nor the

City assumed any liability for tortious or unlawful acts of individual police officers. On the contrary, the Board addressed claims against officers on a case-by-case basis, and expressly reserved its right to refuse to defend or indemnify an officer if the officer's actions were not "substantially consistent with the law" and the Board's policies. This policy of the Board was expressed in a "special order" that is not an ordinance of the City or an agency regulation. D148. As noted above, in the Holmes case, the Board was not liable. D100, p. 4, ¶9; D102.

There is nothing in the record in the form of a statute, ordinance or charter provision that obligated the City to defend or indemnify individual officers either in 2003 or at any time thereafter. The full text of the City ordinance accepting transfer of assets and liabilities from the Board is not part of the record, but there is no dispute that the City ordinance accepting the transfer of assets and liabilities from the Board to the City does not reflect any agreement by the City to indemnify individual officers. See D78 & D87, ¶37.

Procedural History

City appellants accept State appellants' statement of the procedural history, noting only that no cross-appeal has been filed in this cause.

ARGUMENT

I. State appellants' first point fails to demonstrate reversible error in the judgment of the circuit court, because the circuit court correctly concluded on the basis of undisputed facts that the State of Missouri is obligated to pay the entire judgment in the federal case against former St. Louis police officers Sharp and Garrett, in that the 2005 amendment of §105.726, RSMo, cannot be applied retrospectively to a liability claim against police officers that arose prior to the effective date of the 2005 amendment so as to strip the officers of state legal expense fund coverage, as such retrospective application is barred by both Mo.Const. art. I, §13 (forbidding retrospective laws) and §84.345, RSMo, governing liabilities of police officers arising prior to the transfer of the functions of the St. Louis Police Department from the state Board of Police Commissioners to the City of St. Louis.

The judgment below was entered on cross-motions for summary judgment by all parties on plaintiff Holmes's claim for declaratory judgment.¹ State appellants acknowledge that there are no genuine issues of material fact in dispute. City respondents agree that this Court reviews the judgment for errors of law only, and so

¹ As noted above, only appellants Attorney General Schmitt and Commissioner Steelman have appealed from the judgment below.

review is essentially *de novo*. City respondents also agree in substance with appellants' description of the applicable rules of statutory construction. The only question here is whether the circuit court erroneously applied the law and misconstrued the applicable statutes. See, e.g., *Laclede County v. Douglass*, 43 S.W.3d 826 (Mo.banc 2001). The circuit court correctly applied the law.

This case turns on one crucial, undisputed fact: the conduct of Officers Sharp and Garrett giving rise to their liability occurred in 2003. At that time, the State Legal Expense Fund (“SLEF”) was in existence and the governing statute explicitly provided that the money in the fund “shall be available for the payment of *any claim . . . against . . . [a]ny officer or employee of the state of Missouri or any agency of the state . . . upon conduct of such officer or employee arising out of and performed in connection with his or her official duties . . .*” §105.711.2, RSMo 2000 [emphasis added]. That statutory language is unchanged to this day. Nothing in §105.726 at that time placed any limitation on the coverage extended by the SLEF. Under the plain language of §105.711.2, therefore, the judgment awarded to plaintiff Holmes in this action is payable from the SLEF, notwithstanding that the conduct of Officers Sharp and Garrett was criminal. *Betts-Lucas v. Hartmann*, 87 S.W.3d 310 (Mo.App.W.D. 2002).

In 2005, reacting to the Supreme Court's recognition that §105.711.2 extended coverage to officers employed by the St. Louis Board of Police Commissioners, a

state agency, *Smith v. State*, 152 S.W.3d 275 (Mo.banc 2005), the General Assembly amended §105.726 to add the language at the center of this case:

3. Moneys in the state legal expense fund shall not be available for the payment of any claim or any amount required by any final judgment rendered by a court of competent jurisdiction against a board of police commissioners established under chapter 84, including the commissioners, any police officer, notwithstanding sections 84.330 and 84.710, or other provisions of law, other employees, agents, representative, or any other individual or entity acting or purporting to act on its or their behalf. Such was the intent of the general assembly in the original enactment of sections 105.711 to 105.726, and it is made express by this section in light of the decision in *Wayman Smith, III, et al. v. State of Missouri*, 152 S.W.3d 275. Except that the commissioner of administration shall reimburse from the legal expense fund any board of police commissioners established under chapter 84 for liability claims otherwise eligible for payment under section 105.711 paid by such boards on an equal share basis per claim up to a maximum of one million dollars per fiscal year.²

² As amended by the subsequent initiative propelling transfer of control of the Police Department to the City, the section now reads (emphasis added):

Moneys in the state legal expense fund shall not be available for the payment of any claim or any amount required by any final judgment rendered by a court of competent jurisdiction against a board of police commissioners established under chapter 84, including the commissioners, any police officer, notwithstanding sections 84.330 and 84.710, or other provisions of law, other employees, agents, representative, or any other individual or entity acting or purporting to act on its or their behalf. Such was the intent of the general assembly in the original enactment of sections 105.711 to 105.726, and it is made express by this section in light of the decision in *Wayman Smith, III, et al. v. State of Missouri*, 152 S.W.3d 275. Except that the commissioner of administration shall reimburse from the legal expense fund the board of police commissioners established under section 84.350, *and any successor-in-interest established pursuant to section 84.344*, for liability claims otherwise eligible for payment under section 105.711 paid by such board up to a maximum of one million dollars per fiscal year.

Obviously, this language, if applicable, would preclude or substantially diminish recovery from the Legal Expense Fund by the plaintiff Holmes in this case. However, the 2005 amendment cannot be applied to prevent Holmes' recovery from the Fund by reason of the judgment against Officers Sharp and Garrett, for two reasons.

First, nothing in the language of amended §105.726 indicates an intention by the General Assembly that it would apply retroactively. The amended statute leaves the language of §105.711 untouched. Thus, the coverage of §105.711.2 still literally extends to any claim against a state officer, regardless of when it arose, so long as it arises “upon conduct . . . arising out of and performed in connection with . . . official duties.” The amended §105.726 carves out an exception to the coverage for police officers employed by a state-created police board. Such officers are to be excluded from the operation of §105.711.2, but their employers can secure reimbursement from SLEF for liability claims “otherwise eligible for payment” under §105.711, if paid by such boards, up to one millions dollars per fiscal year.

Because statutes are generally construed to apply only prospectively, absent clear language to the contrary, §105.726.3 should be applied only to those claims arising after its effective date. If the General Assembly had intended to strip SLEF coverage from St. Louis and Kansas City police officers for actions taken before

2005, that language seemingly should have been written into §105.711, not enacted in a wholly separate statute. Claims arising “upon conduct . . . arising out of and performed in connection with” official duties executed prior to its effective date should remain eligible for coverage and payment under §105.711.2. Cf. *Desai v. Seneca Specialty Ins. Co.*, 581 S.W.3d 596 (Mo.banc 2019).

State ex rel. Hawley v. City of St. Louis, 531 S.W.3d 602 (Mo.App.E.D. 2017), while valuable for outlining the legislative and judicial history behind the current dispute, does not stand for the proposition that the 2005 amendment of §105.726 applies retroactively. The issue in *Hawley* was payment for representation and reimbursement for claims paid under the new statutory regime. The change in the Attorney General’s duties to represent City police officers and the Board was not challenged on the basis of retroactivity, and the statutory change in the matter of representation could be deemed a procedural change and so properly treated as retroactive.

Second, it is elementary that, under Mo.Const. art. I, §13,³ a retrospective law is forbidden. A law is unconstitutionally retrospective if it impairs vested

³ "That no *ex post facto* law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted."

rights acquired under existing laws: if a law creates a new obligation or attaches a new disability with respect to transactions or consideration already past or gives to something already done a different effect from that which it had when it transpired, the law is retrospective. E.g., *Accident Fund Ins. Co. v. Casey*, 550 S.W.3d 76 (Mo.banc 2018). The 2005 amendment to §105.726 plainly gives a different effect to the Expense Fund's coverage of the plaintiff Holmes's claim against Officers Sharp and Garrett, which arose prior to 2005.

The circuit court's conclusion in this case is amply supported by the Court of Appeals' construction of §105.726, as amended, in *Sherf v. Koster*, 371 S.W.3d 903 (Mo.App.W.D. 2012). In that case, involving the Kansas City police, a suit was filed against an officer on account of an incident occurring prior to 2005, but the Attorney General was never notified of the suit until after a judgment had been rendered against the officer. The Court of Appeals held that the 2005 amendments to §105.726 did not preclude coverage of the claim, as that would entail an unconstitutional retrospective application of the law: "It is clear that under the pre-2005 amendment to section 105.726.3 that Antoniak, as an employee of the Police Board, was entitled to coverage by the Fund. *Smith v. State*, 152 S.W.3d 275 (Mo. 2005). To the extent that a 2005 amendment would eliminate Antoniak's claim from coverage by the Fund, the amendment is substantive and can only be applied prospectively. *Lawson v. Ford Motor Co.*, 217 S.W.3d 345, 350 (Mo. App. E.D.

2007)." 371 S.W.3d at 907. However, the officer was properly denied coverage because he did not conform to the notice and cooperation requirements of the 2005 amendments, which were deemed procedural and could be retroactively applied.

The *Sherf* Court rested its conclusion about retrospective application of the coverage exclusion in §105.726.3 in part on the Supreme Court's holding in *Cates v. Webster*, 727 S.W.2d 901 (Mo.banc 1987), a case heavily relied on by State appellants here. In *Cates*, State appellants' constitutional shoe was on the other foot: a claim arose from an incident occurring prior to the creation of the State Legal Expense Fund. The Attorney General argued that there could be no coverage for the claim, because that would entail an unconstitutional retrospective application of §105.711. The Supreme Court rejected that argument, because §105.711 prescribed coverage *either* for a claim *or* for a judgment, so that a claim arising before the statute's effective date, but reduced to judgment after that date, was subject to coverage. The Court then proceeded to reject the employee's claim for coverage on the ground that, as a court bailiff paid by the county, he was not a state employee. 727 S.W.2d at 907.

In its discussion of the retrospective laws argument in *Cates*, which arguably is entirely *dicta* as it was unnecessary to the ultimate judgment, see, e.g., *State v. Richard*, 298 S.W.3d 529, 531 (Mo.banc 2009), the Supreme Court made two observations. First, the Court explained: "Appellant can succeed only if: (1) he

was an officer or employee of the state or any agency thereof; and (2) the claim is against conduct which arose out of and was performed in connection with his official duties on behalf of the state or any agency thereof." 727 S.W.2d at 904.

Second, the Court declared:

Under § 105.711.2, moneys in the State Legal Expense Fund shall be available for the payment of any claim or any amount required by any final judgment rendered by a court of competent jurisdiction. Because the subsection specifies the rendering of any final judgment as one of the alternative "acts or transactions," [citation omitted], triggering an obligation to pay money on behalf of an employee, the protection provided the employee under the Fund arises when the claim is made and extends to the time when a judgment might be rendered. From this we must conclude the legislature broadly intended to include those claims not yet reduced to final judgment. [*Id.*]

Superficially, the comment of the Supreme Court suggests that coverage under §105.711 is not applicable until a claim is actually asserted. However, the context indicates that the Court was differentiating between claims and judgments for purposes of applying the statutory coverage retroactively. The Court had no occasion to address the situation in the case at bar, where the conduct giving rise to the claim occurred prior to 2005 but the claim was not asserted until afterward. Although the Expense Fund is not insurance as such, it resembles insurance in that §105.711.2 refers to payment of "any claim against" a state officer or employee.

It is generally recognized that there are two categories of liability insurance policies: "occurrence" policies and "claims made" policies. The former make coverage available when a claim is asserted on account of an occurrence during the

period the policy is in force; the latter provide coverage only when a claim is actually asserted during the policy period, even if the injury occurred prior to the date of the policy. E.g., *Todd v. Missouri United School Ins. Council*, 223 S.W.3d 156 (Mo.banc 2007). It is evident from the plain language of §105.711 that it creates a species of "occurrence" coverage, and the opinion in *Cates* is compatible with that view. That is so because, by reason of the retrospective laws provision of the Missouri Bill of Rights, the General Assembly cannot simply strip away a state employee's right to coverage from the Expense Fund on the basis of the time of asserting a claim. The Expense Fund makes its moneys available to pay any claim arising out of the state employee's official conduct, and not just to pay only those claims asserted during the employee's tenure as an employee or during the time when any particular version of the Expense Fund statute is in force. The *Cates* Court recognized the truth of this proposition when it stated that the employee in that case could succeed "only if . . . the claim is *against conduct which arose out of and was performed* in connection with his official duties on behalf of the state or any agency thereof."

State appellants' argument is fundamentally incompatible with the plain meaning of the SLEF statute, construed in light of the constitutional retrospective laws provision. State appellants are functionally in the position of the health insurer in *Lutsky v. Blue Cross Hosp. Svc., Inc.*, 695 S.W.2d 870 (Mo.banc 1985),

trying to reduce or eliminate coverage after the coverage was initially triggered in accordance with the policy's terms at the time the insured's health expenses began.

Not only is State appellants' construction of §105.726.3 deficient; appellants' construction of Mo.Const. art. I, §13 is also deficient. The Attorney General attempted to use §13 as a shield against liability in *Cates*, but he now finds it convenient to ignore it so as to preclude liability here. This situation is exactly what §13 was intended to prevent. Without SLEF coverage, the judgment against Officers Sharp and Garrett may be worthless, because without that coverage, neither the State nor the City will be obliged to pay the judgment.⁴

City respondents agree that, under the regime of §105.726.3, the SLEF's obligation in regard to liabilities of City police officers is confined to reimbursing the Police Board or the City for any claims paid by those entities, and no coverage

⁴Unfortunately for plaintiff Holmes, the City has no legal obligation to indemnify Officers Sharp and Garrett. *Roberts v. City of St. Louis*, 242 S.W.2d 293 (Mo.App.St.L. 1951). Nothing in §84.343.3, RSMo Supp., affects this conclusion, as the City is obliged under that statute to accept liability only for contractual obligations, indebtedness or other lawful obligations *of the Board of Police Commissioners*, and the Board had no obligation to indemnify officers for claims based on tortious conduct.

is provided to individual officers as such. In this connection, the Fund could be obliged to pay the Board or the City if either had in fact paid the Holmes claim, up to \$1,000,000 in the fiscal year in which the claim was paid. See D85. Of course, as the record reveals, neither the Board nor the City has paid anything on the Holmes claim to date.

However, the reimbursement language of amended §105.726.3 is simply irrelevant to this case, and the circuit court's use of the term merely signified the SLEF's obligation to pay the Holmes judgment. Whether strictly construed or not, the statutes in force in 2003 conferred a right on Officers Sharp and Garrett to SLEF coverage as of the time of their tortious conduct. The statutes do not use the word "accrued"; they use the words "claim" and "arising."⁵ Section 105.711.2 mandates that the Fund shall be available to pay "any claim" against an officer

⁵ However, even in the context of "accrual" of an action, the law is clear that an action "accrues whenever the defendant's liability became perfect and complete. Whenever the defendant had done an act which made him liable in damages, and there was a person *in esse* to whom the damages ought to be paid and who might sue for and recover the same, then clearly the cause of action had accrued as against him." *State ex rel. Beisly v. Perigo*, 469 S.W.3d 434, 437-38 (Mo.banc 2015), quoting *Kennedy v. Burrier*, 36 Mo. 128, 130 (1865).

"arising out of" that officer's official conduct. The Holmes claim was and is a claim "arising out of" misconduct in 2003. Even though the SLEF Fund is not an insurance policy as such, it is still a promise of coverage of claims. The right to that coverage vested when the injury was inflicted, i.e., when the claim arose. That Holmes was disabled from pursuing the claim successfully until 2011 is irrelevant. As the Court of Appeals noted in *P.L.S. v. Koster*, 360 S.W.3d 805 (Mo.App.W.D. 2012), the intent of the amended §105.726.3 was to exempt the Fund from responsibility for *future* claims against the police boards and their officers, not to exempt the Fund from responsibility for claims which arose in the past from misconduct of those state officers.

The circuit court's decree is explicit: the Expense Fund "is required to indemnify . . . Officers Shell Sharp and Bobby Garrett for the judgment" in the federal case. That judgment should be affirmed.

II. State appellants' point fails to demonstrate reversible error in the judgment below, because appellants are judicially estopped to deny liability to pay the judgment in favor of respondent Holmes, in that the Attorney General affirmatively represented to the federal court rendering the judgment that the judgment "definitely" would be paid, thereby avoiding the posting of a supersedeas bond on appeal from the federal judgment, and that representation now binds the State appellants.

It is elementary that a judgment, if correct, can be affirmed on any cognizable basis, because the appellate courts are concerned with the trial court's judgment, not its reasoning. This is particularly true of declaratory judgments. E.g., *Rouner v. Wise*, 446 S.W.3d 242, 249 (Mo.banc 2014).

State appellants, speaking through an assistant attorney general, assured the federal court without qualification that respondent Holmes's judgment "would be paid." D128, pp. 5-6. Although at one point the State asserted that the Holmes judgment would be paid "either" by the SLEF or the City, the gist of the State's representation to the Court was that the judgment would be paid. The only entity for which the Attorney General could make such a representation at the time was the State.

This Court recently had occasion to examine the doctrine of judicial estoppel very thoroughly in *Vacca v. Mo. Dept. of Labor & Industrial Relations*, 575 S.W.3d 223 (Mo.banc 2019). There, the Court set out of the principles of law to be observed in applying the doctrine, relying heavily on the reasoning of the United States Supreme Court in *New Hampshire v. Maine*, 532 U.S. 223, 232-33 (2001), viz. [citations omitted]:

New Hampshire . . . reviewed the development of the doctrine in the federal courts, noting prior federal decisions:

have uniformly recognized that its purpose is "to protect the integrity of the judicial process," . . . by "prohibiting parties from deliberately

changing positions according to the exigencies of the moment," . . . ("Judicial estoppel is a doctrine intended to prevent the perversion of the judicial process.").

. . . Of course, this is also the way Missouri courts have described the purpose of the doctrine. *New Hampshire* further noted, based on its review of these cases, it had identified three factors that these federal decisions generally had found helpful to consider in deciding whether to invoke judicial estoppel:

First, a party's later position must be "clearly inconsistent" with its earlier position. . . . Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled," . . . Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," . . ., and thus poses little threat to judicial integrity. . . . A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

. . .

New Hampshire recognized these factors often are relevant in determining whether to invoke judicial estoppel. But, the Supreme Court took pains to note that, because of the equitable and discretionary nature of judicial estoppel, "[t]he circumstances under which judicial estoppel **may** appropriately be invoked are probably not reducible to any general formulation of principle." . . . *New Hampshire* went on to caution the courts that, in "enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations **may** inform the doctrine's application in specific factual contexts."

In the case at bar, the Court of Appeals summarily rejected respondent Holmes's assertion of judicial estoppel, briefly noting that the State's position in

the federal case was not “clearly” inconsistent. Sub.App. A20-A21, n. 2. City respondents respectfully disagree with that analysis. The State represented that the judgment would “definitely” be paid. Albeit the State also asserted that payment would be by the SLEF or the City, the State had no business making any representation on behalf of the City. In doing so, the State compounded the reasons for estoppel: the State in effect made a misrepresentation to the court. Nevertheless, the State positively represented that the judgment would be paid, the State succeeded in attaining its objective, and allowing the State to deny SLEF liability at this point works a severe detriment to respondent Holmes. The ingredients of judicial estoppel are present.

Even if the Court decides that the 2005 amendment to §105.726 can be applied retroactively, the Court simply cannot reward the State for its re-shuffling of the deck in this case. Respondent Holmes has not cross-appealed in this case, and so he cannot now contend that the City is liable to pay the judgment. E.g., *Cass County v. Dir. of Revenue*, 550 S.W.3d 70 (Mo.banc 2018). The State, and only the State, has left Holmes (and Sharp and Garrett, the State’s erstwhile clients) in the unjust predicament of having no recourse to a supersedeas bond and no other party responsible for the judgment. Judicial estoppel is a device to protect the dignity of the courts. Until 2005, Holmes’s claim unquestionably would have been covered by the SLEF. It works no injustice to the State, but a very great

injustice to Holmes, the City's taxpayers, and Sharp and Garrett (unsavory though they proved to be) to allow the State to evade its previous representations to the federal court. The Holmes judgment can and should be paid—by the SLEF.

CONCLUSION

The City respondents respectfully submit that the judgment below should be affirmed.

Respectfully submitted,

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Certificate of Service and Certification under Rule 84.06(c)

The undersigned counsel certifies that the foregoing respondent's brief was served on counsel for all parties by e-mail on the 11th day of December 2019, and counsel further certifies that the brief includes the information required by Rule 55.03, with a signed original in counsel's possession, that the brief complies with the limitations contained in Rule 84.06(b) and Local Rules, and that the total number of words is 5235.

/s/Robert H. Dierker 23671