SC97983

IN THE SUPREME COURT OF MISSOURI

MICHAEL HOLMES,
Plaintiff-Respondent,
v.

COMMISSIONER SARAH STEELMAN and
ATTORNEY GENERAL ERIC SCHMITT,
Defendants Appellants,
v.

MAYOR LYDA KREWSON, ET AL.,
Defendants-Respondents.

From the Circuit Court of the City of St. Louis, Missouri
The Honorable Joan L. Moriarty, Circuit Judge,
And, the Court of Appeals, Eastern District, Honorable Roy L. Richter, Judge,
with Hon. Robert M. Clayton III, and Hon. Angela T. Quigless, J., concurring.

SUBSTITUTE BRIEF OF PLAINTIFF-RESPONDENT MICHAEL HOLMES

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INTRODUCTION

For more than fifty years, the Missouri legislature has recognized the need to provide a mechanism for legal representation and payment of claims and judgments against state employees for conduct arising out of that employment. The most recent iteration is the State Legal Expense Fund ("SLEF or Fund"), a statutory form of insurance created by the General Assembly that provides the State of Missouri will provide representation and, if necessary, payment of judgments against state employees for actions taken upon conduct and arising out their employment. Between at least 1983 and 2005, police officers in the City of St. Louis were "state employees" for purposes of the Fund. *State v. Smith*, 152 S.W.3d 275, 277 (Mo. Banc 2005).

This matter concerns conduct by two St. Louis Metropolitan Police Officers, Shell Sharp and Bobby Lee Garrett, that took place in December of 2003—when they were "state employees" for SLEF purposes. The 2003 conduct of Sharp and Garrett was the subject of a civil rights suit brought by Appellee Michael Holmes in the federal district court in the Western District of Missouri. After Holmes filed suit, the two officers timely provided notice to the State via the Attorney General's Office, whose skilled attorneys represented them all the way through extensive pretrial proceedings, at a weeklong jury trial, and on appeal to the Eighth Circuit Court of Appeals.

Despite the State's best efforts otherwise, the jury entered a verdict in favor of Holmes in March 2016, and the Eighth Circuit Affirmed.

Nonetheless, the State of Missouri has now balked when it comes to actually paying the judgment, plus reasonable attorney's fees and costs, as it must under the SLEF. In support of this position, the State has argued the statutory process of shifting from state to local control of the St. Louis Metropolitan Police Department, which was not complete until 2012, has somehow absolved the State of its duties to pay for the judgment rendered against Sharp and Garrett. This circuit court rejected that proposition, as did the Court of Appeals. Indeed, adopting this proposition would mean interpreting the SLEF statutes to retroactively deprive Sharp and Garrett of the coverage to which they are entitled for actions taken in 2003. But, such a proposition is contrary to Missouri law—an insurer (here, the State) cannot retroactively limit coverage in this way and doing so would further violate the Missouri Constitution. Having accepted transfer, this Court should likewise affirm and declare that the State of Missouri must pay the judgment.

Additionally, the State of Missouri convinced the federal court that neither it or the City of St. Louis should be required to post an appeal bond in the almost four years that have transpired since the jury trial. The federal court entered that order after the State *guaranteed* that the judgment will

either be paid by the State of Missouri or the City of St. Louis, not the officers' themselves. This Court should enforce that guarantee.

STATEMENT OF THE CASE

I. Statement of Facts

Summary: In 2003, then-St. Louis Metropolitan Police Officers Shell Sharp and Bobby Garrett falsely accused Michael Holmes of a crime he did not commit. Doc 155, ¶1. Both Holmes and the prosecution later discovered that these officers had been engaged in corrupt police activities for years, falsely accusing innocent individuals of drug crimes and preparing false affidavits and police reports in pursuit of them. *Id.* ¶5. Tragically for Holmes, he spent more than five years in prison based on the officers' fabricated case against him. *Id.* ¶¶1-5. Holmes secured post-conviction relief, he was released, and the government voluntarily dismissed the charges against him.

Holmes filed a civil suit under 42 U.S.C. §1983 against the two officers. His case proceeded to trial, and the federal jury found that in 2003, the officers fabricated evidence in violation of Holmes' due process rights, falsely arrested him, and initiated his malicious prosecution. *Id.* ¶¶3-7, 11-12.

The jury awarded Holmes $2.5 million. *Id.* ¶12. To this day, however, Holmes has never collected any part of this judgment, nor has he been compensated any amount for the many years he spent in prison unjustly. The State of Missouri defended the officers in the federal lawsuit, *id.* ¶9, and

represented to the federal judge that either the State or the City of St. Louis would "definitely" pay this judgment. *Id.* ¶¶15-16.

A. Holmes's 2016 Jury Verdict Against Two Former St. Louis Police Officers Stems from Their Actions in 2003

On December 9, 2003, Plaintiff Michael Holmes was arrested at 5894 Cates Avenue in St. Louis by, among others, Shell Sharp and Bobby Lee Garret. Doc. 115 at ¶1. Sharp and Garrett were St. Louis Metropolitan Police Department Officers at the time, acting within the scope of their employment. Doc. 78 at ¶15. Together with Bobby Garrett, Shell Sharp concocted a false story wherein they claimed to receive an anonymous tip regarding Holmes and claimed to see Holmes conducting drug-related activities. *Holmes v. Slay*, 895 F.3d 993, 998 (8th Cir. 2018). The officers then authored a false police report concerning the December 9, 2003 arrest, and prepared a baseless warrant for Holmes' arrest. *Id.*; Doc. 115 at ¶¶2-3. As a result, Holmes was prosecuted and convicted of federal drug crimes stemming from his 2003 arrest at 5894 Cates Avenue. *Id.* ¶4.

In 2011, Holmes, who has always maintained his innocence of these crimes, was granted post-conviction relief under 28 U.S.C. § 2255. Doc. 120. In vacating the conviction, the federal district court (which had presided over the criminal trial), observed:

> Holmes did not give conflicting or inconsistent testimony at trial, and there was no evidence that he had made false statements to the police or in any court proceeding. Further, Holmes has consistently maintained that he is innocent and that Sharp and Garrett lied in their testimony.

Id. at 4.

His conviction was vacated. Rather than attempt a re-trial, the Government completely dismissed the charges against Holmes**.** Doc. 115 at ¶5. Thereafter, in December of 2012, Holmes commenced a civil rights suit pursuant to 42 U.S.C. § 1983, alleging that Sharp and Garrett had violated his civil rights (the "Federal Suit"). *Id.* at ¶6. In so doing, Holmes sought vindication of his claim that he had spent more than five years wrongfully convicted due to the misconduct of Shell Sharp and Bobby Garrett, an action that stemmed from the claim that Sharp's 2003 report was fabricated and that in 2003, Garrett conspired with Sharp to violate Holmes's right to due process in relation to that report. *Id.* at ¶7*; see also id.* at ¶¶11-12 (summarizing the claims at trial, the jury instructions, and the verdict).

After discovery and summary judgment, *see Holmes v. Slay*, 2015 WL 1349598 (E.D. Mo. Mar. 25, 2015), the matter proceeded to trial. There, a jury found for Holmes and against Defendants Sharp and Garrett on all claims that were tried. *Id.* at ¶¶11-12. Among other things, while awarding Holmes damages of $2.5 million, on March 3, 2016, the jury found that Sharp and Garrett conspired to fabricate evidence—namely, the December 9, 2003 police

report—against Holmes in violation of due process. *Holmes*, 895 F.3d at 1002. Judgment was entered (the Federal Judgment), and affirmed on appeal by the Eighth Circuit Court of Appeals in a published opinion in 2018. *Id.* The District Court also granted Plaintiffs' counsel's request for attorney's fees and costs under 42 U.S.C. § 1988. Doc. 115 at ¶19.[1]

B. Post-Judgment Collection Efforts Fail, Despite State's Representation The Judgement Would Be Paid By the State City of St. Louis

After judgment was entered, Holmes requested the State to pay the judgment. *Id.* at ¶13. The State responded by filing a motion asking the federal court to stay enforcement of the judgment and waive the bond requirement of Federal Rule of Civil Procedure 62. *Id.* at ¶14. In support of its motion, the State informed the Court that "in the event it is upheld, the Judgment will definitely be paid, either by the State of Missouri through its

[1] In an attempt to indirectly tarnish Holmes' credibility, Appellants reference the outcome of Holmes' federal petition for a certificate of innocence ("COI"). *See* Sub. App. Br. at 8. These proceedings are entirely irrelevant. There is a core question before this Court about who has to pay the Federal Judgment, which the Eighth Circuit unanimously affirmed. Moreover, and tellingly, while the federal judge deciding the COI never heard live testimony about Holmes's innocence (or purported guilt), the federal civil jury did and found for in favor of Holmes. *See Holmes*, 895 F.3d at 998, *id.* at fn. 4. In the same vein, Appellants appear to imply that either the verdict or Holmes are to be faulted due to another incident involving Holmes and Garrett where Holmes ultimately entered an *Alford* plea but maintained his innocence. The Eighth Circuit affirmed the District Court's decision to exclude evidence of Holmes' 1995 *Alford* plea from the trial. In short, Holmes obtained a jury verdict because the jury recognized his innocence, and the State's efforts to invoke these irrelevant proceedings should be ignored.

SLEF or by the City of St. Louis." *Id. at* ¶16; *see also id.* at ¶15 (noting the State's representation that "because the Judgment—if upheld—will be paid either by the State of Missouri or by the City of St. Louis, the Court should waive any requirement that the Defendant police officer post any bond amount.").

Though the federal district court denied the State's motion for a stay of execution, the Court granted the State's request to waive the bond requirement (an indication that the Court relied on the State's promise to vouch for the security of the judgment). *Id.* at ¶18.

Throughout the Federal Suit, the Attorney General's Office ("AGO") represented and defended Sharp and Garrett. *Id.* at ¶9. It continued to represent the officers even after the remaining defendants were dismissed from the case at summary judgment, and continued that representation of Sharp and Garrett via an unsuccessful appeal to the Eighth Circuit Court of Appeals. *See Holmes*, 895 F.3d at 996.

Meanwhile, the City of St. Louis sent a tender letter to the State and invoked the provisions of the State Legal Expense Fund ("SLEF" or "Fund"). *Id.* The City noted that the "underlying incident that is the basis for this lawsuit is an arrest that occurred on December 9, 2003." *Id.* at ¶10.

C. The State Legal Expense Fund Statute Was Amended Several Times, But The State Has Consistently Maintained Some Responsibility for Covering St. Louis Police Officers So Long As Their Conduct Occurred While the Police Department Was Under State Control

The central dispute in this case is whether the State of Missouri or the City of St. Louis must pay the federal judgment on behalf of two St. Louis Metropolitan police officers who, at the time of their actions, were state employees for purposes of the Fund. The State's obligation to pay comes directly from the General Assembly—via the SLEF statute that, despite various amendments, has consistently reflected the principle that the State should cover judgments against police officers who are considered state employees. Although the contours of that protection changed over time as the shift from State to local control evolved between 2005 and 2012, SLEF coverage is available to protect police officers if they were considered State employees at the time of their *conduct*. This conduct-centered focus is evident in the plain language of the statute as it existed in 2003, and throughout each amendment, including the 2012 amendment that finally shifted control from the State to the City of St. Louis.

1. The Statute In 2003, When The Tortious Conduct Occurred

Many decades ago, the State of Missouri created mechanisms for ensuring that state employees would not face personal expense for judgments

against them. For example, in "1967, the General Assembly enacted the Tort [Defense] Fund [§ 105.710], . . . which provided a state fund for payment of judgments against specified governmental officials 'for acts arising out of and performed in connection with their official duties[.]'" *State ex rel. Koster v. Kansas Cty. Bd. Of Police Comm'nrs*, 532 S.W. 3d 191, 195 n.2 (Mo. App. 2017) (quoting 20A MO. PRAC., Admin. Prac. & Proc. § 13:7 n.107 (4th ed.)); *see also P.L.S. ex rel. Shelton v. Koster,* 360 S.W.3d 805, 809 (Mo. Ct. App. 2011), as modified (Jan. 31, 2012) (describing the Tort Defense Fund).

Then, in 1983 the General Assembly replaced the Tort Defense Fund and with the State Legal Expense Fund to protect state employees from liabilities arising out of their official conduct. *See* §105.711, RSMo; *see Shelton*, 360 S.W.3d at 809-10. Under the SLEF statute in 2003, when Sharp and Garrett completed the official conduct at issue here, Sharp and Garrett were considered employees of the State and protected by the SLEF. *See State v. Smith*, 152 S.W.3d 275, 277 (Mo. Banc 2005). This Court's interpretation of the SLEF statute is binding and controls the interpretation of the statute as it existed in 2003. *See* MO. CONST. ART. V, §2.

This Court, in *Smith*, held that St. Louis Metropolitan police officers are employees of the State. This was based on the plain language of a Missouri statute that classified St. Louis and Kansas City police officers as state employees. 152 S.W.3d at 278-80. Because the SLEF statute expressly

provided full protection to state employees, *Smith* held that St. Louis Metropolitan police officers—which includes Garrett and Sharp—were entitled to the full protection of the SLEF. *Id.* at 279 ("St. Louis police officers are both officers of the City and officers of the state. As officers of the state, they are covered by the SLEF.") (citing § 105.711.2(2)).

Section 105.711 makes clear that the monetary protection of the SLEF was available to state employees (in this case, police officers) once they engaged in on-the-job conduct—specifically, coverage was triggered "upon conduct . . . performed in connection with" official duties. §105.711, RSMo. The controlling provision read:

> Moneys in the [SLEF] *shall be available* for the payment of any claim or any amount required by any final judgment rendered by a court of competent jurisdiction against . . . any officer or employee of the State of Missouri . . . *upon conduct* of such officer or employee arising out of and performed in connection with his or her official duties on behalf of the state…

Id. (emphasis added).[2]

The availability of SLEF coverage to St. Louis officers in 2003 was a substantive right to which all such officers, including Sharp and Garrett, were entitled. *Sherf v. Koster*, 371 S.W. 3d, 903, 907 (Mo. App. 2012). In enacting this vested rights scheme, the General Assembly recognized that

[2] The State has attempted to obscure the plain language of the statute by adding the word "based" in the statute. Sup. App. Br. at 9. It simply is not there.

broad protection is needed for civil employees who are required to take risks on the job but might be unwilling to do so if they thought those risks would expose them to litigation and personal financial liability. *See State ex rel. Koster v. Kansas City Bd. of Police Commissioners,* 532 S.W.3d 191, 195 (Mo. Ct. App. 2017) (quoting *Kershaw v. City of Kansas City*, 440 S.W. 3d 448, 458 (Mo. Ct. App. 2014)).

2. The First Step Toward Local Control: The 2005 Amendments

In 2005, the Missouri legislature enacted new language that had the effect of changing the way police officers were protected by the SLEF, going forward. In so doing, however, the General Assembly did not eliminate SLEF coverage for conduct occurring before the amendment went into effect. For example, the SLEF was still required to cover, completely, claims that were already pending, so long as the employee seeking coverage gave adequate notice and cooperation to the AGO. *See Sherf*, 371 S.W. 3d at 906-07 (citing § 105.726.5, RSMo). In addition, the 2005 amendments *limited*—but did not end—the SLEF's contribution to financial protection for police officers, providing that the Fund would reimburse the Board of Police Commissioners (which oversaw management of the police department, and would be required to pay the entire judgment). *See* § 105.726.3, RSMo. Second and relatedly, the 2005 amendment ordered that SLEF's payments should take the form of

reimbursements to the entity that controlled the police department. The controlling entity was the Board of Police Commissioners from the 2005 enactment until November 2012 and then the City of St. Louis from to the present. Finally, the 2005 amendment ordered the AGO to represent the Board upon request in any liability claim filed against the Board *for which SLEF coverage was available*, but the AGO was now entitled to fair compensation for the cost of the representation. §105.726.4, RSMo.

In short, while the statute changed the mechanism of coverage to St. Louis police officers, it did not change the fundamental premise that SLEF monies shall be used to pay judgments against police officers for their on-the-job conduct, when that conduct occurred while the officers were still considered State employees. In fact, the 2005 amendments said this explicitly. §105.711.5, RSMo (providing: no "officer or employee 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").

3. Full City Control: The 2012 Amendments

The transition to City control was completed in November 2012, when St. Louis passed Proposition A and assumed control of the management and obligations of the SLMPD. *State ex rel. Hawley v. City of St. Louis*, 531 S.W.3d, 602, 604 (Mo. Ct. App. 2017). *Hawley* explained:

> the City passed Ordinance 69489, which provided for the establishment on September 1, 2013 of the City's own police force. And on September 1, 2013, the City assumed control over the force, which included its acceptance of the responsibility, ownership, and liability as the successor-in-interest of the Board's contractual obligations, indebtedness, and other lawful obligations.

Id. at 604.

To effectuate these changes, the General Assembly enacted amendments to two statues: §105.726.3 and §84.345. First, SLEF would now reimburse the City, not the Board, for claims/judgments against St. Louis police officers. §105.726.3. This is because the City was assuming control over the department. Second, consistent with earlier versions of the statute, the 2012 amendment based SLEF coverage on the date when the *officer's conduct took place.* §84.345.2, RSMo (adopted Nov. 6, 2012). That is, if the officer's conduct occurred back when officers were still State employees (not City employees), then SLEF had to continue paying the same amount it was paying before (as specified in the 2005 Amendments), though as reimbursement. This was true even if the claim or judgment was filed after the City assumed control of the police department. §84.345.2 ("for any claim, lawsuit, or other action arising out of actions occurring before the date of completion of the transfer" to local control, "the state shall continue to provide legal representation as set forth in § 105.726, and the state legal

expense fund shall continue to provide reimbursement for such claims under § 105.726"); *Hawley*, 531 S.W.3d at 605.

The State's summary table glosses over the crucial issues and following correctly summarizes the SLEF statute in relevant part:

WHEN DID THE TORTIOUS CONDUCT OCCUR?	**WAS POLICE OFFICER A STATE OR CITY EMPLOYEE?**	**WHO PAYS CLAIMS OR JUDGMENT AGAINST THE POLICE OFFICER?**	**RESPONSIBILITY TO PAY?**
1983 – Aug. 2005	State employee [*Smith*, 152 S.W.2d at 278; §84.330, RSMo*]*	State Legal Expense Fund [*Smith*, 152 S.W.2d at 281]	State pays entire amount[3] [§105.711]
August 2005 – Nov. 2012	State employee [§84.330, RSMo]	(1) Board *or* City of St. Louis **plus** (2) State Legal Expense Fund (§105.726 RSMo; §84.345, RSMo)	Either Board/SLEF or City/SLEF (depending on year) share responsibility.
Nov. 2012 – present	City employee (*see* Proposition A; §84.345, RSMo)	City of St. Louis	City pays the entire amount

[3] Under the pre-2005 and subsequent versions of the SLEF statute, attorneys' fees and costs are covered as well. *See Dixon v. Holden* ("*Dixon II*"), 963 S.W.2d 306, 307 (Mo. Ct. App. 1997).

D. State Court Proceedings Below

In the circuit court, all three parties to this declaratory judgment action—Holmes, the State of Missouri, and the City of St. Louis—moved for summary judgment. Sub. App'x, at A7. The circuit court reviewed the 2003 version of the SLEF statute, *Smith*, 152 S.W. 3d at 278-80, and other relevant provisions, *id.* at A7-A11, and ultimately concluded because "the claims in this case arose in 2003, well before the date of transfer to local control" the State was obligated to provide not only legal representation in the federal lawsuit but also pay for the Federal Judgment. *Id.* at A-12.

On appeal, the Court of Appeals affirmed, under different rationale than the circuit court. In addressing the State's first point of error, the Court of Appeal recognized the issue was "whether to apply the SLEF statute in effect in 2003, when the misconduct by Sharp and Garrett occurred, or the statute as amended in 2005." *Id.* at A18. The Court of Appeals examined the plain language of the statute, refusing to find the SLEF statutes ambiguous, and found that "the 2003 statute applies." *Id.* In addition, the Court of Appeals found that the 2003 statute, rather than the 2005 amendments, must apply because applying "the amended statute . . . would be an unconstitutional retrospective law." *Id.* at A19 (citing MO. CONST. ART 1, §13). After citing another Court of Appeals decision pointed to by both parties here, *Sherf v. Koster*, 371 S.W.3d 903, 904 (Mo. App. 2012), the Court of Appeals

held that "applying the amended statute in this case would clearly be retrospective application of a substantive law because Sharp and Garrett's misconduct occurred in 2003, when they were covered by the SLEF." Sub. App'x, at A20. The Court of appeals also rejected the State's arguments about "reimbursement," *id.* at A21-23, and held that because "the 2004 statutory amendments do not apply" here, Holmes is entitled to summary judgment. *Id.* at A23. The decision was unanimous; there was no dissent; and no request for transfer by any judge on the Court of Appeals. *Id.*

The State petitioned for transfer, which this Court granted.

ARGUMENT

The State offers no statutory interpretation of the SLEF statute as it existed in 2003. Both the Circuit Court and the Court of Appeals correctly concluded that the SLEF statute in effect at that time applies to Officers Garrett and Sharp's 2003 conduct, rather than a subsequently adopted version of the Statute. While the Court of Appeals' decision has, effectively, been vacated by the transfer, its analysis is still entirely correct and persuasive here. In particular, there cannot be any reasonable dispute that in 2003, as SLMPD officers, Sharp and Garret were "state employees" covered by SLEF (*see Smith*), and there should be no dispute that these officers' rights under that statutory regime were not retroactively stripped from them by subsequent amendments. Such an action would not only violate

the general rule against retroactivity of statutory amendments, but would further violate the Missouri constitution. In the end, the plain language, legislative history, and precedent each support the straight-forward conclusion that the SLEF Funds must be available to cover the officers' 2003 conduct that is the subject of this dispute.

I. The State of Missouri, through the State Legal Expense Fund, Must Pay The Entire Federal Judgment

The State's lone point of error is that the circuit court erred by finding that the SLEF must pay the Federal Judgment. But, as both the circuit court and court of appeals already found (though invoking different rationale), the Fund is absolutely required to pay the judgment. This Court should affirm.

A. In 2003, The State Legal Expense Fund Covered St. Louis Police Officers and Other "State Employees" for Conduct Arising Out of Their Duties

Dixon v. Holden, 923 S.W.2d 370 (Mo. App. 1996) (*Dixon I*), has been called the "central case interpreting the SLEF statutes," *Kershaw v. City of Kansas City*, 440 S.W.3d 448, 459 (Mo. App. 2014); *see also, e.g.*, *Betts-Lucas v. Hartmann*, 87 S.W.3d 310, 319-20) (describing *Dixon* as the "central case interpreting the Legal Expense Fund statutes"). There, the Court of Appeals explained that the SLEF is "a voluntary assumption of defense and payment [of claims] against State employee[s] sued for their *conduct* arising out of and performed in connection with official duties on behalf of the state." *Dixon I*,

923 S.W.2d at 379 (emphasis added); *see also Koster*, 532 S.W.3d at 194-95 (confirming this description of SLEF from *Dixon*).

The SLEF was enacted for policy purposes that have been, and continue to be, undermined by the State's continued refusal to pay the judgment against Sharp and Holmes. Namely, the Fund was created "to promote governmental efficiency and protect state business by protecting employees." *Dixon*, 923 S.W. at 381. In 2003, when Garrett and Sharp's tortious conduct occurred, they were "officers of the state" within the meaning of § 105.711, RMO; *Smith v. State* 152 S.W. 3d 275, 278-80 (Mo. 2005); *see also Koster*, 532 S.W.3d at 195. This fact is undisputed.

As a result, the State of Missouri was obligated to cover these officers for liability arising out of their police conduct. *Id.*; *accord Johnson v. Schmidt*, 719 S.W.2d 825, 828 (Mo. Ct. App. 1986) ("If appellant had been successful in his claim, then payment of those damages would have to be made from the State Legal Defense Fund, § 105.711, RSMo Supp.1984.")

To be sure, as it existed in 2003, the SLEF statute expressly provided:

> Moneys in the [SLEF] *shall be available* for the payment of any claim or any amount required by any final judgment … *upon conduct* of such officer or employee arising out of and *performed in connection with* his or her official duties on behalf of the state…

§105.711, RSMo (emphasis added).

The plain language of this provision establishes two things for present purposes. First, SLEF payment is mandatory, not permissive. *Id.* (moneys "shall" be available to covered officers). Second, the availability of SLEF coverage is triggered "upon conduct" of an officer performing official duties on behalf of the state. *Id.* ("upon conduct of such officer," the "[m]oneys in the [SLEF] shall be available…").[4]

In ordinary and unambiguous terms, this provision from the 2003 SLEF statute establishes the timing of a state employee's entitlement to coverage: at the point in time when an officer has engaged in official conduct that may expose her to liability, she is entitled to the protection of SLEF. *See* Merriam-Webster Dictionary, *available at* https://www.merriam-webster.com/dictionary (defining "upon" as synonymous with "on," which in turn is "used as a function word to indicate a time frame during which something takes place"). Should that conduct eventually result in a claim for payment, SLEF "shall" pay that amount. *Cf. Jordan v. Conner*, 22 Va. Cir. 381 (1991) ("upon payment" defined as synonymous with "on payment" and thus "has the right… to purchase the interest of others upon payment to them" interpreted to mean that "the right to purchase is actuated by payment") (internal quotations omitted); *Patterson v. McLean Credit Union*,

[4] There is no dispute that the federal judgment arose out of then-Officers Sharp and Garrett's conduct performed in connection with, and within the scope of, their official duties.

784 F. Supp. 268, 274 (M.D.N.C. 1992), *aff'd*, 39 F.3d 515 (4th Cir. 1994) ("'Upon' is defined as 'on.' 'On' is defined variously, but its most relevant definition is as a "function word to indicate position with regard to ... time....") (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2517, 1574)).

Any other reading would render the phrases "upon conduct" and "performed in connection with" meaningless and without effect, a result this Court's rules of statutory construction firmly prohibit. *See Gash v. Lafayette Cty.*, 245 S.W.3d 229, 232 (Mo. banc 2008) (citing *State ex rel. Burns v. Whittington*, 219 S.W.3d 224, 225 (Mo. banc 2007)); *Parktown Imports, Inc. v. Audi of America*, Inc., 278 S.W. 3d 670, 672 (Mo. banc 2009). Specifically, if the legislature had intended the claim or judgment to be the only thing covered by the Fund, it would simply have excluded the words "upon conduct" —as well as the phrase "performed in connection with" —entirely. The legislature also could have been explicit: filing a claim or obtaining a judgment is the only point at which an officer is covered. But that is not what the legislature wrote, and not how the statute reads.[5]

[5] New arguments for the first time in reply are forbidden, *Arch Ins. Co. v. Progressive Cas. Ins. Co.*, 294 S.W.3d 520, 525 (Mo. Ct. App. 2009). Accordingly, to the extent the State intends to proffer its view of "upon conduct" or any interpretation of the 2003 statute for the first time in reply, it has waived its right to do so. *Id.* For example, if the State were to argue that "upon conduct" merely refers to a scope-of-employment provision (which is perhaps why it attempted to add the word "based" to the statute), it should not be allowed to make such a contention in Reply. But, even assuming it

Courts may not re-write unambiguous statutes. *See, e.g., State v. Johnson*, 524 S.W.3d 505, 511 (Mo. 2017) (rejecting interpretation of a statute because "this Court would not only have to impermissibly add language to an unambiguous statute, but also impermissibly find [another section] to be superfluous"); *Bright v. Ray*, 520 S.W.3d 482, 487 (Mo. Ct. App. 2017) (rejecting interpretation of a statute that would "essentially rewrite the statute" on the basis that the Court did "not wish to add meaning to" the statute "beyond what the legislature clearly intended based on the plain meaning of the language used."). The General Assembly wrote that the moneys shall be available "*upon* conduct of" a state employee "performed in connection with" his or her official duties. The trigger for coverage was plainly the conduct, not the subsequent claim or judgment.

The State's brief gives no meaning or effect to the phrases "upon conduct" and "performed in connection with." Ignoring inconvenient terms in a statute is clearly forbidden. "Traditional rules of statutory construction require every word of a legislative enactment to be given meaning." *Spradlin*

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were permitted to do so, the State's interpretation would remain flawed. The word "based" is not in the statute, and phrase "upon conduct" is not merely a qualifier for the terms "claim or judgment" to be covered; that could have been achieved simply by providing that moneys shall be available for "any claim or any amount required by any final judgment against such officer or employee arising out of his or her official duties on behalf of the state," or even by simply stating "*for* conduct" instead of "*upon* conduct." The legislature did neither.

v. City of Fulton, 982 S.W.2d 255, 262 (Mo. 1988) (en banc). *See also OHM Properties, LLC v. Centrec Care, Inc.*, 302 S.W.3d 170, 173 (Mo. Ct. App. 2009) ("[I]t is presumed every word, clause, sentence and provision of a statute have effect; conversely, it will be presumed that idle verbiage or superfluous language was not inserted into a statute.") (internal citation omitted); *State v. Johnson*, 524 S.W.3d 505, 511 (Mo. 2017) (rejecting interpretation of a statute because "this Court would not only have to impermissibly add language to an unambiguous statute, but also impermissibly find [another section] to be superfluous"); *Bright v. Ray*, 520 S.W.3d 482, 487 (Mo. Ct. App. 2017) (rejecting interpretation of a statute that would "essentially rewrite the statute" on the basis that the Court did "not wish to add meaning to" the statute "beyond what the legislature clearly intended based on the plain meaning of the language used."); *Lemay Fire Prot. Dist. v. St. Louis Cty.*, 340 S.W.3d 292, 295 (Mo. Ct. App. 2011) ("A court may not add words by implication to a statute that is clear and unambiguous.") (internal citations omitted).

Here, the phrase "upon conduct" must be assumed to have a purpose within the statute, and that purpose is defined by its ordinary and usual meaning. *Spradlin*, 982 S.W.2d at 262; *Hawley,* 531 S.W.3d at 607 ("The construction of statutes is not to be hyper-technical, but rather, reasonable and logical, and is to give meaning to the statutes.") (internal citations

omitted). It means that when an officers' conduct takes place, they become entitled to, if needed, exercise their rights to defense and payment of any judgment via the SLEF.

It is undisputed that the relevant "conduct of the officers" here occurred in 2003, when Sharp and Garrett were state employees for SLEF purposes, not when Holmes's conviction was overturned or his federal lawsuit was filed. Accordingly, under the plain language of the SLEF statute in 2003, Sharp and Garrett's actions enjoyed SLEF coverage, because their conduct took place in December 2003—while they were employees of the State. No other interpretation is tenable, and no other should be given. *Preston v. State*, 33 S.W.3d 574, 578-79 (Mo. Ct. App. 2000) (plain language of the statue controls and courts do not engage in statutory construction where legislative intent is clear).[6]

[6] The State devotes its argument to attacking parts of the circuit court's rationale, but concedes the Court of Appeals reached the same conclusion albeit with different reasoning. Generally speaking, Appellee's arguments are more in line with the rationale provided by the Court of Appeals. Thus, while it is the case that the appellate decision is no longer precedent, it remains the case that this Court can—and should—should adopt its persuasive rationale and may affirm the judgment below on any basis discernable from the record. See *Curtis v. Missouri Democratic Party*, 548 S.W.3d 909, 918 (Mo. banc 2018) ("[T]his Court will affirm the circuit court's judgment if it is correct on any ground supported by the record, regardless of whether the trial court relied on that ground. This Court is primarily concerned with the correctness of the result, not the route taken by the trial court to reach it.") (internal quotation marks and citation omitted).

B. In Addition to Ignoring Plain Meaning, The State's Interpretation Contradicts The Purpose of the Fund

The General Assembly (like the City of St. Louis as well) has an interest in ensuring that public employees are not subject to possibly ruinous liability for actions taken in the scope of their public employment. In discerning the legislative intent, courts must "look also to the problem the legislature sought to address with the statute's enactment." *Hawley*, 531 S.W.3d at 607 (citing *Lincoln Cty. Stone Co., Inc. v. Koenig*, 21 S.W.3d 142, 146 (Mo. Ct. App. 2000)). "A statute must not be interpreted in such a way as to defeat its purpose." *Id.*

As recognized by Missouri courts, the Fund was created to give robust protection to public employees who were forced to make difficult, real-time decisions on the job. In order to incentivize employees to accept these public duties, the legislature recognized the need to insulate them from the risks of litigation that would ensue. The "fundamental purpose" of the Fund was:

> to protect the covered employees from the burden and expense of civil litigation relating to the performance of their duties. The purposes are apparent. A competent employee, who is in demand elsewhere, may be unwilling to work for the state without protection. Those who do serve may be unwilling to take necessary risks for fear of litigation.

Id. (citing *Kershaw v. City of Kansas City*, 440 S.W.3d 448, 458 (Mo. Ct. App. 2014).

Missouri courts have consistently interpreted the SLEF statute with this purpose in mind: protecting state employees from the risk of future liability. For instance, in *Dixon I*, the Court of Appeals affirmed a judgment creditor's ability to seek payment directly from the Fund following a judgment against a police officer under 42 U.S.C. § 1983. 923 S.W.2D 370. The court considered at length whether the police officer had to first make a payment and then get reimbursed, or whether the officer could rely on the State to pay the creditor directly. *Id.* at 378-80. In holding the latter, the court found significant that the statute sought to "protect and help defend and pay judgments against [the State's] employees." *Id.* at 378.

The *Dixon I* Court also recognized another underlying concern behind the statute: protecting plaintiffs from "erring public servants." It observed:

> Public policy and sensitivity toward state employees should prevent repeated payments and repeated attempts at collection. The Fund's insurance scheme will "in effect facilitate the bringing of actions against erring public servants, because the plaintiff is assured that the financial resources of the entity will stand behind the judgment," and the indirect liability will cause the entity "to exercise an additional degree of caution in the hiring and supervision of employees whose functions carry a greater risk of potential liability."

Id.

Like *Dixon I*, this action arises in the context of the State refusing to pay a judgment in a § 1983 suit against police officers, and the legislative purpose has heretofore gone unmet. *Dixon I* drew from a somewhat analogous

statutory scheme in Tennessee, where the court said: "[w]e recoil at any suggestion that a policeman or fireman, or any other wage-earner during this era of inflation is required to submit to the hurt, humiliation and financial detriment of having his wages garnisheed or of having to deplete his meager savings, or perhaps of having to sell his equity in his home in order to pay a judgment against him, and then, but only then, recover the money so paid.'" *Dixon I*, 923 S.W.2d at 377 (quoting *City of Memphis v. Roberts*, 528 S.W.2d 201 (Tenn. 1975)).

In applying that rationale to the SLEF statute (also applicable at the time of the conduct here), *Dixon I* explained that, it, too, "recoils at the idea that state employees must be humiliated by repeated actions as collections of judgments against them." *Id.* As a consequence, given the intent of the SLEF "statute to protect state employees as much as possible from the rigors of defending lawsuits borne out of state duties, then it defeats that purpose to have the employee pay from his or her pocket, or from the estate's assets, before being made whole." *Id.* Instead:

> By enacting § 105.711 et seq., the state has chosen to defend employees and pay on "any claim" or "any final judgment" rendered against "any employee of the state" upon "conduct arising out of, and performed in connection with official duties...." The state's obligation includes this case.

Id. The same is true here. This Court should decline to judicially rewrite a legislative enactment and unfairly limit the protections that police officers

and other first responders expected when they assumed risks as State employees.

In fact, the State's efforts have undermined the statutory purpose already. In the federal court, the State (and City of St. Louis) both refused to post a bond on the Federal Judgment—a position that convinced the federal district court to waive the bond requirement that normally attaches on appeal. Doc. 115, ¶¶13-18. However, the federal district court did not stay execution of the judgment, pushing the collection issue to the officers themselves. *Id.* This included Holmes intervening in Officer Sharp's bankruptcy proceedings and further seeking garnishment from Officer Garrett independently as well.[7] All of this is precisely what the Legislature sought to avoid.

[7] Since the Federal Judgment, former Officer Sharp has gone through bankruptcy proceedings, of which Holmes was required to intervene as a judgment creditor by seek a ruling that the Federal Judgment could not be discharged pursuant to 11 U.S.C. § 523(a)(6). *See Holmes v. Sharp*, No. 17-04060-399, Doc. No. 37 (granting summary judgment to Holmes). In addition, to ensure that Holmes retained a right to collect, the federal district court issued a writ of garnishment against former officer Garrett, who was then required to retain his own counsel to address these issues. *See Holmes v.* Garrett, 4:12cv-2333-HEA, Doc. Nos. 319, 320, & 322

C. The SLEF Regime Is Akin To An Occurrence-Based Form of Insurance That Covers Conduct That Occurred During the Policy Period, and the State's Obligations to Provide that Coverage Began After The Filing of Claim and Continued Thorough a Final Judgment

1. The SLEF is a Form of Insurance, Where the State Pays Directly Rather than an Indemnity Whereby State Employees Pay For Defense or Judgments First and Then Seek Payment from the State

The State critiques the circuit court for "confus[ing] 'coverage' under SLEF with 'reimbursement.'" Sub. App. Br. at 23. But, it is the State who has erred and confused matters. Fundamentally, the SLEF is a type of insurance whereby police officers (and other state employees) are covered for actions in the scope of their duty so long as they are state employees at the time of the act in question. By contrast, the SLEF is not an indemnification regime in which the State is only on the hook if a plaintiff receives a judgment and the defendant state-official has the means to actually pay the judgment and then seek reimbursement from the State. *See Cottey v. Schmitter*, 24 S.W.3d 126, 129 n.3 (Mo. App. 2000) (the "State Legal Expense Fund is one of insurance for state employees rather than one of indemnity"); *Dixon I*, 923 S.W.2d at 378-8); *cf. In re 1983 Budget for Circuit Court of St. Louis Cty., Mo.*, 665 S.W.2d 943, 945 (Mo. banc. 1984) (*1983 Budget*). This was the direct holding of *Dixon I*, 923 S.W.2d at 378-80, which Missouri Courts have followed consistently for years. If the SLEF were an "indemnity" for officers, then they

could be forced to pay judgments and then seek reimbursement from the State. *Dixon I*, 923 S.W.2d at 378-80. But, that proposition has been rejected because it would undermine the purposes of the statute by exposing state officials to potentially ruinous judgments that they would need to satisfy before seeking reimbursement from the State. *Id*. And, as explained above, that proposition is further contradicted by the language of the statute.

This Court's first discussion of the Fund, which was in *1983 Budget*, confirms the correctness to viewing the SLEF as a form of insurance for state employees. There, this Court considered whether the judiciary of St. Louis County would be permitted to obtain excess insurance for its members. *Id*. In answering that question "no," this Court held that that "the purchase of professional liability insurance policies . . . would be duplicative of protection currently provided by the state." *Id*. Indeed, using the language of insurance, this Court recognized that the SLEF "supplants the former Tort Defense Fund, extending *coverage* to a broader range of state employees than that afforded by the Tort Defense Fund." *Id.* at 944-45 (emphasis added). The judiciary's challenge thus failed because it failed to show the existing coverage available under the SLEF statue was inadequate. *Id.* at 945 (emphasis added).

2. St. Louis Police Officers Were Covered By the Fund In 2003 For Claims Against Them, Even If Claims Were Filed after 2005

Under the SLEF, as with a typical occurrence policy, there is coverage for wrongful acts that occur within the policy period (here, "upon conduct" occurring when the SLEF was in effect), even if the claims were filed after the transition from State to local control began or was complete. The Fund must satisfy a valid claim arising from those wrongful acts regardless of whether the claim was filed during the period of time for which there was coverage so long as the state employees follow the procedural rules for notice and presentment of a claim to the AGO. *See, e.g.*, *Todd v. Missouri United Sch. Ins. Council*, 223 S.W.3d 156, 160 (Mo. banc 2007) ("'Occurrence' coverage provides insurance for events that occur within the period of the policy regardless of whether the claim 'is made during or after that time period.'") (citing *Wittner, Poger, Rosenblum & Spewak, P.C. v. Bar Plan Mut. Ins. Co.*, 969 S.W.2d 749, 752 (Mo. banc 1998)).

Indeed, a significant purpose of a typical occurrence policy is to provide both parties—the insurer and the insured—with certainty that their insurance coverage applies to *acts* that occur during a set period of time. Take the following straightforward hypothetical. If a driver covered by an occurrence policy for the year 2003 causes an accident that year, the 2003 occurrence policy provides coverage for damages arising from that accident

regardless of whether the injured party files a lawsuit the day after the accident or three years later. And if the hypothetical insurance company in this hypothetical decided to stop insuring the driver in 2005 but the lawsuit from the 2003 accident did not get filed until 2006, the insurer would not be to able to point to its decision to stop issuing new policies in 2005 as a basis to deny coverage over which the driver was entitled in 2003. Indeed, no reasonable insurance company would even consider making such an argument. But that is precisely the sort of argument the State is making here. Despite the fact that the SLEF covers the conduct at issue and the fact that Sharp and Garret satisfied all of the procedural notice requirements, the State still seeks to avoid paying their insurance because the State believes, essentially, that the legislature cancelled the insurance after the wrongful acts at issue occurred. But insurers cannot retroactively cancel coverage after losses occur. *See, e.g.*, *Lutsky v. Blue Cross Hosp. Serv. Inc.*, 695 S.W.2d 870, 876 (Mo. banc 1985) (holding that an insurance company cannot retroactively limit coverage that was previously unlimited (citing *Danzig v. Dikman*, 78 A.D.2d 303 (N.Y. App. 1980), and *Myers v. Kitsap Physicians Service,* 78 Wash.2d 286 (Wash. banc 1970)).

Properly construing the SLEF as a form of occurrence-based insurance policy means that (1) the tortious conduct in 2003 is what was *covered*, and (2) the filing of a claim is what *triggered* the obligation of the AGO to start

providing the benefits of that coverage, first representing officers Sharp and Garrett in the Federal Suit and now for paying the final judgment against them. *See* § 105.711.2, RSMo (requiring monies be available for a "final judgment"); *State ex rel Pryor v. Nelson*, 450 S.W.3d 811, 816 (Mo. Ct. App. 2014) (interpreting the "final judgment" language). Of course, if Holmes' conviction was never overturned (as the State points out, *see* Sub. App. Br. at 17 n.2) he would not have been able to file suit, and there would have been no opportunity to trigger the underlying protection for the officers' conduct that always occurred.

In sum, understood as a form of insurance, the "confusion" is clarified: the SLEF created protections akin to an "occurrence-based" insurance for state employees, which covered actions taken in 2003. The fact that Holmes's claim was (timely) filed in 2012, years after the covered wrongful acts occurred, did not—and, as explained below, *could not*—retroactively strip the officers of the *coverage* they had when their conduct took place. Holmes' claim merely triggered the obligation of the state to actually begin providing that preexisting coverage.

3. Filing a Claim Triggers The State's Obligation to Provide SLEF Protections, But Does Not Constitute Coverage

Putting aside the fact that the State offers almost no statutory interpretation of the statute effective in 2003, its argument is that, in the

context of the 2005 Amendments, the statute has "always tied *coverage* to the filing of a claim or the rendering of a judgment against covered state employees." Sub. App. Br. at 23-24. Not so. As described above, the *coverage* existed at the time of the conduct and, as with any other insurance policy, the State's obligation to provide the already-vested benefits of that coverage was merely set into motion once a claim was filed.

In making its argument, the State relies on a portion of *Cates v. Webster*, 727 S.W.3d 901, 904 (Mo Banc. 1987). But *Cates* is not to the contrary. There, the dispositive issue was whether a bailiff at a county courthouse enjoyed the SLEF protection. The answer was no, because the Court determined that the bailiff was not a state employee for purposes of § 105.7111.2(2). That is the core holding of *Cates*.

The Court also considered the argument that the Fund was not available to the bailiff because the statute had not even been enacted when the tortious conduct occurred, *nor* when the claim was filed. *Id.* at 904-05. In other words, the conduct and the claim occurred before SLEF existed and while SLEF's predecessor, the Tort Defense Fund, was in effect. This fact is particularly significant in light of the fact that Missouri law (both in the insurance context and constitutionally) prohibits retroactive elimination of substantive benefits.

Nonetheless, the State focuses on one sentence in *Cates* but ignores those that precede it, which are necessary for understanding the State's cherry-picked language:

> 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 "act[s] or transaction[s]," *State ex rel. St. Louis-San Francisco Ry. Co.*, 515 S.W.2d at 411, 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. at 904 (underlined emphasis added).

The State focuses on the language that the "protection provided to the employee under the Fund arises when the claim is made and extends to the time when a judgment might be rendered," but ignores *context* in which this Court made that statement. *Cates* was referring to the fact that, as explained above, invoking the protections under the Fund is only necessary (e.g., they only "arise") after a claim has been made; it does not happen automatically when tortious conduct occurs. This is simply the same as saying the obligation of an insurer to perform under an insurance contract for a period of time does not automatically begin not when the conduct occurs (e.g., the hypothetical

car accident) but "arise" after a claim or lawsuit was made (e.g., the lawsuit subsequent to the car accident). In other words, consistent with authorities treating SLEF as in insurance scheme, the *Cates* Court described the events that triggered an already-existing insurance policy and obligation to pay.

Fundamentally, *Cates* construed the SLEF statutes "broadly" in order to provide fulsome coverage to state employees, rather than adopt an interpretation—like the one proffered by the State here—that would eliminate coverage retroactively for actions taken while a state employee.[8] *Cates* dealt with the period of time wherein the SLEF had newly replaced the Tort Defense Fund. The Court interpreted the new statutory regime consistent with its purpose of achieving fulsome protection for state employees. In that light, *Cates* cannot not stand for the proposition that conduct taking place after the statute was enacted would *not* be covered. The State's attempt to retrospectively eliminate

[8] As explained, *Cates* did not discuss the scope of coverage; only what employees need to do well after their conduct to begin the process of obtaining their underlying benefit. Nor did *Cates* consider or address the bailiff's potential right to coverage under the Tort Defense Fund, particularly in light of the fact that Missouri law (both in the insurance context and constitutionally) prohibits retroactive elimination of substantive benefits. Thus, while the decision did not encounter or even address the circumstances here, the logical interpretation of *Cates'*s broad language is that it meant to *extended* protection not only for conduct but *also* to claims against state employees previously covered by a different fund. *Cates v. Webster*, 727 S.Wd.3d 901 (Mo banc. 1987).

protections that state employees depended on at the time of their actions is, thus, contrary to *Cates*.

Properly contextualized, *Cates* is consistent with providing coverage in the situation here: the officers' conduct was covered for actions taken in 2003 because it was undertaken while the SLEF regime provided protection to state employees (including St. Louis police officers), the act that triggered the obligation of the State to begin providing that coverage by defending the officers in court (as it did) was the filing of a claim, and the obligation to pay money was triggered when the final judgment rendered against the officers for their 2003 conduct when they were state employees.[9]

[9] The State claims that *Sherf v. Coster*, 371 S.W.3d 903 (Mo App. 2012), applied the "claim or judgment" rule from *Cates* in that case. This statement is completely incorrect, if not misleading. For one, *Cates* did not create this sort of rule. In addition, *Sherf* was decided not on the basis of an absence of *coverage* but because the claimant failed to follow the *procedural* rules requiring him to tender his claim to the Attorney General for defense; something he refused to do until after a verdict against him. *Sherf*, 371 S.Wd. at 907. Then, in rejecting an analogy to *Cates* as addressing a "categorically different question" than the one it addressed, the Court confirmed that the failure "to provide notice and cooperate with the Attorney General in his defense [was] fatal to Sherf's claim that he is entitled to recover from the Fund." *Id.* Failure to present a claim to the AGO, as required by statute, is a noncontroversial basis for refusal to provide payment. *E.g.*, *Vasic v. State*, 943 S.W.2d 757 (Mo. Ct. App. 1997) (failure to include AGO in defense precluded payment from the SLEF). Here, there is no dispute that Sharp and Garret gave adequate notice to the Attorney General's office, which proceeded to defend them throughout the federal case. *See* Doc. 115 at ¶¶9-10.

Moreover, the State's reading of *Cates* conflicts directly with the plain language of the operative SLEF statute ("upon conduct…performed in connection with official duties," 105.711, RSMo) as well as the 2012 Amendment (attaching SLEF payments to claims "arising out of *actions occurring* before the date of completion of the transfer' to local control,'" 84.345.2, RSMo). Both of those statutes recognize that SLEF protection depends on the timing of the conduct, not the claim.[10]

D. Applying a subsequent version of the statute to conduct that was fully protected in 2003 is unconstitutional.

There is a further reason to reject the State's interpretation of the Statute: doing so would mean depriving police officers of their substantive rights—a form of insurance through the SLEF—that existed in 2003 when they undertook their actions.

1. Substantive Rights Cannot Be Altered Retroactively.

The Missouri Constitution prohibits laws that alter substantive rights from being applied retroactively. *See* MO. CONST. ART. I, § 13 (prohibiting retrospective laws which take away or impair vested rights acquired under existing law or create a new duty, or attach a new disability in respect to

[10] Put differently, if the "claim or judgment" standard were applied to the 2012 Amendments, the City would pay entire judgments without SLEF reimbursement even if the officer's tortious actions occurred before the City took control of the department, but even the State appears to concede that is not the proper reading of the 2012 Amendment. See Sub. App. Br. at 12-13.

transactions or considerations already past); *Nance v. Maxon Elec., Inc.,* 395 S.W.3d 527, 537 (Mo. Ct. App. 2012) ("If the amendment to the statute is substantive, then it cannot be applied retroactively."); *Gunter v. Bono,* 914 S.W.2d 437, 441 (Mo. Ct. App. 1996) ("Statutes which create or destroy substantive rights cannot be applied retroactively.").

2. The SLEF Statute Created A Substantive Right to Coverage For Official Conduct.

The SLEF statute created a "substantive" right to coverage for tort claims against state employees for conduct taken in such a capacity. *See Sherf v. Koster*, 371 S.W.3d 903, 907 (Mo. Ct. App. 2012) (any amendment to SLEF statute that would eliminate the right to SLEF coverage would constitute a "substantive" amendment); *McGull v. Board of Police Commissioners of the City of St. Louis et al.,* Cause No. 0722-CC09485, at 9-10 (Mo. Cir. Ct. March 10, 2010) (the right to be defended by and have judgments paid by the State is a "substantive" right). The right to defense and coverage, as explained above, vests "upon conduct" of the covered employee, according to the plain and unambiguous language of the SLEF statute. Indeed, it takes little to imagine how costly and distracting from their duties it would be for state officials to have to retain their own private counsel, and then pay that counsel, and then possibly pay for a judgement against them, when all along they thought that their actions were covered by

their employer, the State. The General Assembly provided substantive benefits that state employees need. Taken together, courts cannot interpret the 2005 amendment in such a way as to strip state employees of previously existing rights to coverage. To do so would violate the Missouri Constitution's rule forbidding retroactive deprivations of substantive rights.

The Missouri Appellate Court reached precisely this conclusion about the 2005 Amendments to the SLEF statute in *Sherf v. Koster*, holding:

> 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.

Sherf, 371 S.W.3d at 907 (citing *Lawson v. Ford Motor Co.*, 217 S.W.3d 345, 350 (Mo. Ct. App. 2007)).

The prohibition against retrospective application of the 2005 Amendment finds support in analogous statutory contexts, including a statute removing dollar limits on tort awards and a statute allowing pre-judgment interest. *See, e.g.*, *State ex rel. St. Louis-San Francisco Ry. Co. v. Buder*, 515 S.W.2d 409, 411 (Mo. 1974) (law removing the $50,000 recovery limitation in wrongful death actions cannot be applied retrospectively); *Good Hope Missionary Baptist Church v. St. Louis Alarm Monitoring Co.*, 358 S.W.3d 528, 534 (Mo. Ct. App. 2012) ("Because application of 408.040 RSMo

Supp.2005 would take away a substantive right acquired by Good Hope under the law existing at the time it sent the demand letter, the portions of section 408.040 RSMo Supp.2005 relating to pre-judgment interest cannot be applied retroactively without violating the constitutional ban on laws retrospective in operation."). This Court in *Buder* succinctly explained the rationale behind the rule:

> It is best to keep in mind that the underlying repugnance to the retrospective application of laws is that an act or transaction, to which certain legal effects were ascribed at the time they transpired, should not, without cogent reasons, thereafter be subject to a different set of effects which alter the rights and liabilities of the parties thereto.

Buder, 515 S.W.2d at 411.

Appellants have asked this Court for a ruling that ignores *Buder* and *Sherf,* and would plainly violate the Missouri Constitution itself. Appellants have filed to identify a *single* other court that has granted the relief it seeks here: specifically, no other court has held as a matter of law that pre-2005 conduct by state officials in the course of their duties is exempt from SLEF coverage. Though Appellants do not acknowledge it, their appeal invites this Court to be the first to make such a sweeping and impactful ruling.

This Court should decline the invitation. In keeping with the constitutionally mandated prohibition on retroactive deprivations of substantive rights, any substantive changes made by the 2005 Amendment

must be applied prospectively, not retrospectively. The 2005 Amendment cannot strip Sharp and Garrett of the SLEF coverage to which they were entitled in 2003.

E. The State's Position is Inconsistent With the Statutory Scheme And Would Produce Unreasonable and Absurd Results

Further support for the position that the pre-2005 statute based the right to coverage on the conduct, not the claim or judgment, lies in the 2012 Amendment, which addressed the transfer of police control from the State to the City. With this amendment, the legislature expressly required SLEF to pay for claims or judgments against police officers based on the *date of the underlying conduct*. §84.345.2. The date of the claim or judgment did not trigger Fund protection. *Id.* If the tortious conduct occurred when the police was under state control, SLEF was obligated to pay. If the conduct took place after the City assumed control, SLEF had no obligation to pay.

The State pays short-shrift to this provision, arguing that it is "irrelevant to the present matter." The State's argument is wrong for at least two reasons.

First, as noted above, §84.345.2 reflects the legislature's intent to maintain a *conduct*-focused approach to coverage (*i.e.*, basing SLEF availability on the date of the conduct, not the date of the claim/judgment), which makes sense in light of the underlying purposes of the statute (see

supra, Part I, B). In fact, §84.345 merely adapted the existing SLEF statutory scheme to the new reality of City control over the police department. There is nothing in either the statutory language nor the caselaw which suggests that §84.345, or the 2012 amendments to the SLEF statute itself, were intended to dramatically change the nature of the coverage or the way it worked. For conduct beginning in August 2005 and going forward, the entity that operated the police departments paid claims or judgments against police officers, *but* even then the State was not entirely off the hook—it was still required to reimburse the Board..[11]

Second, the State's position in this appeal is inconsistent. On the one hand, it argues that we should ignore the language §84.345, which is clearly hostile to the State's position. On the other, the State asserts the 2012 Amendments govern this case, which involved pre-transfer tortious conduct but post-transfer claims, and so it effectively concedes for the first time in this declaratory judgment action that the State shares responsibility with the City pay the Award.[12] *See* Sub. App. Br. at 17, 23.

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[11] Indeed, the State's own table places the 2012 amendments in "Phase Three" together with the 2005 amendments, as to conduct occurring pre-City control. Sub. App. Br. at 13.

[12] While Holmes agrees with the State has responsibility for this Award, the parties disagree that the State has only partial responsibility. As explained above, the legislature does not have the authority to limit SLEF payments retrospectively, and thus this amendment cannot limit the payments available for pre-amendment conduct (such as torts committed in 2003). The

At bottom, the entire SLEF statute must be construed as a whole and its provision read in harmony with one another. *Hawley,* 531 S.W.3d at 607.

Finally, it is well established that a statute "should be interpreted to avoid absurd results" *McCollum v. Dir. of Revenue*, 906 S.W.2d 368, 369 (Mo. banc 1995); *see, e.g.*, *State v. Liberty*, 370 S.W.3d 537, 553 (Mo. 2012) (applying this principle to construe a statutory amendment in a manner that avoids absurd results). The State's position invites, rather than avoids, such outcomes. For example, suppose that the same day Officers Sharp and Garrett arrested Holmes, two other people were falsely charged by St. Louis Police Department officers, one being acquitted in 2004 and the other not being exonerated until 2015. Under the State's interpretation of the statute, the level of *coverage* each one of these officers was entitled to would be different, even though they all (hypothetically) engaged in the exact same misconduct on the exact same day. In another scenario, suppose Officers Sharp and Garrett arrested Holmes and one other person with him, but Holmes exonerated in 2016 and his co-defendant was exonerated much earlier, in 2004 (a scenario that is not uncommon). Here, the State's reading would mean that the Officers would be protected for the 2004 lawsuit but not

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operative statute is what existed in 2003, when the police officers committed all of the actions that gave rise to the claims and judgment. If, however, this Court accepts the State's view, then as argued in Part II, *infra*, the State and City should share responsibility for this Judgement.

for Holmes' lawsuit, even though both involved the exact same conduct on the same day. The Legislature did not intend such an absurd result.

II. Either The State Or The City Must Pay The Entire Federal Judgment.

There is a third party to this declaratory judgment action—the City of St. Louis. And, the State of Missouri has guaranteed that either the City of St. Louis or State of Missouri will pay the judgment against Sharp and Garret, saying, "in the event it is upheld, the Judgment will definitely be paid, either by the State of Missouri through its SLEF or by the City of St. Louis." App. A-005. This Court should enforce that guarantee.

First, as explained above, the State should be required to pay the entire judgement.

Alternatively, even if the Court were to find that the City was required to pay, the State is still on the hook, at least partially, to reimburse the City (the State, apparently, concedes this fact, *see* Sub. App. Br. 23). To be sure, while the City has not filed a substitute brief, this Court should keep in mind the fact that the SLEF's current statutory reimbursement obligation presumes an obligation by either the Board or the City of St. Louis (or its predecessor, the Board) to pay liabilities arising out of pre-transfer conduct (but after the 2005 Amendments). Effective September 1, 2013, the City of St. Louis took over control of the St. Louis Metropolitan Police Department. *See*

Hawley, 531 S.W.3d at 604. In so doing, it accepted the responsibility, ownership, and liability as the successor-in-interest of the Board's contractual obligations, indebtedness, and other obligations. *Id.* at 604.

After the City assumed the responsibilities and liabilities of the police department, judgment was entered in favor of Holmes and against the two former officers in 2016. *See* Doc. 125. The Eighth Circuit Court of Appeals affirmed that judgment in 2018. Accordingly, the plain language of Ordinance 69489 imposes responsibility on the City to satisfy this judgment.

Moreover, SLEF must reimburse the City up to $1 million. On this score, §84.345.2 is instructive. The *Hawley* Court interpreted this provision as requiring SLEF to "continue to provide reimbursement for all claims arising out of actions occurring before the date the transfer of ownership and control of the Board to the City was completed, which was September 1, 2013." *Hawley*, 531 S.W.3d at 610. Furthermore, "Section 84.345.2 extends the pre-September 1, 2013 reimbursement coverage specifically 'to all claims, lawsuits, and other actions brought against any commissioner, police officer, employee, agent, representative, or any individual or entity acting or purporting to act on its or their behalf.'" *Id*. Accordingly, if this Court believes that the current version of the SLEF statute applies here, then the foregoing authorities require the City to pay the judgment and obtain partial reimbursement from SLEF.

In fact, this is exactly what has happened with similar cases recently. That is, the State has voluntarily paid all or part of two federal civil rights settlements in analogous cases. In 2012, Stephen Jones filed a §1983 wrongful conviction lawsuit against the same two police officers Shell Sharp and Bobby Garrett. Mr. Jones was arrested in 1997, convicted thereafter, and his conviction was vacated in 2010. In 2014, the *Jones* case settled and the State paid $1,000,000 out of the SLEF. *See* Doc. 115 at ¶¶26-27.

Similarly, in 2014, another wrongful conviction case against some of the same officers by Plaintiff Matthew Cox was settled. In that matter, the City paid the settlement, and then SLEF reimbursed the City. *See id.* at ¶28-30. The *Jones* and *Cox* lawsuits were consolidated with Michael Holmes' lawsuit throughout discovery. While the amount of Mr. Holmes' judgment is higher, that provides no reason for the State or City to escape liability.

Taken together, the statutory scheme requires the State and the City to ensure payment of the Holmes judgment. While there are ample legal grounds on which to affirm the Circuit Court's ruling that SLEF must entirely indemnify the federal judgment, there is also ample legal support for this Court to order the City to pay the entire judgment and for SLEF to reimburse it. The State is now suggesting this outcome as well.

CONCLUSION

For the foregoing reasons, the plain language of the SLEF statute requires the Fund to pay the federal judgment against the two then-St. Louis Metropolitan police officers, plus associated fees and costs. Alternatively, the Federal judgment should be paid in full by the City of St. Louis, and the State shall be ordered to reimburse the City in accordance with the statutory requirements.

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that on December 12, 2019, the forgoing brief was filed through the Missouri CaseNet e-filing system, which will send notice to all counsel of record. I also certify that this brief complies with the limitations in Rule No. 84.06(b) and that the brief contains 11,519 words using the Microsoft Word software word counting feature.

/s/ *James W. Eason*