

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

SUBSTITUTE REPLY BRIEF OF APPELLANTS

ERIC S. SCHMITT
Attorney General

D. JOHN SAUER, #58721
Solicitor General

ZACHARY M. BLUESTONE, #69004
Deputy Solicitor General

KATHERINE S. WALSH, #37255
Assistant Attorney General

Missouri Attorney General's Office
815 Olive Street, Suite 200
St. Louis, MO 63101
Tel: (314) 340-7515
zachary.bluestone@ago.mo.gov

COUNSEL FOR APPELLANTS

TABLE OF CONTENTS

TABLE OF CONTENTS.....	2
TABLE OF AUTHORITIES	3
INTRODUCTION	5
ARGUMENT	6
I. The State is entitled to judgment as a matter of law because SLEF coverage does not vest until a claim is made, and by the time Holmes filed his claim in 2012, the SLEF statute expressly excluded coverage for “any police officer.”	6
A. Under the plain language of the SLEF statute, and consistent with this Court’s precedent, a state employee’s right to coverage does not vest until a claim is filed.	6
B. Respondents’ policy arguments cannot overcome the plain language of the SLEF statute.	11
C. The 2005 Amendment is not retrospective in barring SLEF coverage for claims filed after its effective date, as no right to coverage had vested at that time.	13
II. Judicial estoppel does not preclude Appellants from disputing SLEF coverage, as the State has always maintained that the City is responsible for indemnifying the former officers.....	17
CONCLUSION.....	20

TABLE OF AUTHORITIES

Cases

<i>66, Inc. v. Crestwood Commons Redev. Corp.</i> , 130 S.W.3d 573 (Mo. App. E.D. 2003)	7
<i>Arch Ins. Co. v. Progressive Cas. Ins. Co.</i> , 294 S.W.3d 520 (Mo. App. W.D. 2009)	7
<i>Cates v. Webster</i> , 727 S.W.2d 901 (Mo. banc 1987)	6, 8, 9, 14, 16
<i>Heck v. Humphrey</i> , 512 U.S. 477 (1994)	8
<i>In the Matter of the Care & Treatment of Murphy</i> , 477 S.W.3d 77 (Mo. App. E.D. 2015)	14
<i>Jordan v. Conner</i> , 22 Va. Cir. 381 (Va. Cir. Ct. 1991)	7
<i>Kesterson v. Wallut</i> , 157 S.W.3d 675 (Mo. App. W.D. 2004)	12
<i>Kirk v. Schaeffler Group USA, Inc.</i> , 887 F.3d 376 (8th Cir. 2018)	18
<i>Mo. Real Estate Comm’n v. Rayford</i> , 307 S.W.3d 686 (Mo. App. W.D. 2010)	13, 14
<i>New Hampshire v. Maine</i> , 532 U.S. 742 (2001)	18
<i>P.L.S. ex rel. Shelton v. Koster</i> , 360 S.W.3d 805 (Mo. App. W.D. 2012)	12
<i>Patterson v. McLean Credit Union</i> , 784 F. Supp. 268 (M.D.N.C. 1992)	7
<i>Sherf v. Koster</i> , 371 S.W.3d 903 (Mo. App. W.D. 2012)	9, 15, 16

<i>Spradlin v. City of Fulton</i> , 982 S.W.2d 255 (Mo. banc 1998)	11
<i>State ex rel. Koster v. Kan. City Bd. of Police Comm’rs</i> , 532 S.W.3d 191 (Mo. App. W.D. 2017)	9
<i>State ex rel. Meyer v. Cobb</i> , 467 S.W.2d 854 (Mo. 1971)	14
<i>State ex rel. Schottel v. Harman</i> , 208 S.W.3d 889 (Mo. banc 2006)	14
<i>Turner v. Sch. Dist. of Clayton</i> , 318 S.W.3d 660 (Mo. banc 2010)	11
<i>Vacca v. Dep’t of Labor & Indus. Relations</i> , 575 S.W.3d 223 (Mo. banc 2019)	18, 19

Constitutional Provisions

MO. CONST. art. I, Section 13	13
-------------------------------------	----

Statutes

Section 84.345, RSMo	10
Section 105.711, RSMo	6, 7, 8, 10, 12, 15, 16
Section 105.726, RSMo	9, 10, 11, 12, 13

INTRODUCTION

Respondents Holmes and the City of St. Louis seek to have the State pick up the tab for the judgment Holmes won against former St. Louis Police Officers Sharp and Garrett. While their interests differ, Holmes and the City advance similar arguments for why the 2005 Amendment to the SLEF statute does not bar coverage. In addition to misinterpreting the SLEF's coverage rules and advancing irrelevant policy arguments, Respondents claim that applying the 2005 Amendment here would be unconstitutionally retrospective because the underlying misconduct occurred in 2003. Yet the SLEF statute has always tied coverage to a claim or judgment rather than conduct, so any right to coverage could not have vested until Holmes filed suit in 2012. As such, applying the 2012 version of the SLEF statute is not retrospective, and doing so leads to the unavoidable conclusion that the State is not liable for Holmes's judgment.

In an effort to avoid addressing its own potential liability on remand, the City argues that judicial estoppel precludes the State from disputing SLEF coverage. But the City misconstrues the State's prior filing in federal court, which asserted that the judgment, if affirmed, would be paid by *either* the State *or* the City. This remains the State's position, as Appellants maintain that the City is liable for Holmes's judgment. As such, judicial estoppel does not apply.

Accordingly, this Court should enter judgment in favor of the State and remand for further proceedings to address the City's liability for the judgment.

ARGUMENT

- I. The State is entitled to judgment as a matter of law because SLEF coverage does not vest until a claim is made, and by the time Holmes filed his claim in 2012, the SLEF statute expressly excluded coverage for “any police officer.”**

In considering whether SLEF coverage applies to Holmes’s judgment, the circuit court found it dispositive that “[t]he claims at issue in this case arose out of actions occurring in 2003.” D151, p. 10; Sub. App. 12. Respondents urge this Court to follow the same approach for three main reasons: (1) their flawed interpretation of the SLEF statute, (2) two immaterial policy considerations, and (3) their misunderstanding of how retroactivity principles apply in this case. Each of these arguments fails under a proper reading of the SLEF statute.

A. Under the plain language of the SLEF statute, and consistent with this Court’s precedent, a state employee’s right to coverage does not vest until a claim is filed.

Both before and after the 2005 Amendment, the SLEF statute tied coverage to the filing of a claim or rendering of a judgment, not to the underlying conduct. *See* § 105.711.2, RSMo 2000 (“Moneys in the [SLEF] shall be available for the payment of *any claim* or any amount required by *any final judgment*.” (emphasis added)); § 105.711.2, RSMo 2005 (same). Indeed, this Court instructed in *Cates v. Webster* that “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.” 727 S.W.2d 901, 904 (Mo. banc 1987) (emphasis

added). Thus, under any version of the law, a state employee's entitlement to SLEF coverage vests—at the earliest—when a claim is filed.

Ignoring the “claim or judgment” language in the umbrella clause of section 105.711.2, Respondents seize on the phrase “upon conduct” in subdivision 2.¹ With no precedential support,² they suggest that “the availability of SLEF coverage is triggered ‘upon conduct’ of an officer performing official duties on behalf of the state.” Holmes Sub. Br. at 19–23; *see also* Krewson Sub. Br. at 13, 15 (same). But reading this phrase in the context of the broader provision makes it clear that “upon conduct” restricts coverage to liabilities arising out of

¹ Holmes suggests that the State is barred from replying to his interpretation of “upon conduct” by invoking the rule that a party cannot raise new claims in a reply brief. Holmes Sub. Br. at 20 n.5. Yet even the case Holmes cites makes clear that appellants are prohibited from asserting novel *assignments of error* in a reply, not from making new arguments—particularly not one that is responsive to the respondent's brief. *See Arch Ins. Co. v. Progressive Cas. Ins. Co.*, 294 S.W.3d 520, 524 n.5 (Mo. App. W.D. 2009); *see also 66, Inc. v. Crestwood Commons Redev. Corp.*, 130 S.W.3d 573, 584–85 (Mo. App. E.D. 2003). Moreover, the purpose of an appellant's brief is to identify errors in the decision under review, and given that the circuit court did not even mention the phrase “upon conduct,” there was no reason for the State to address it until Holmes raised this issue in his response.

² Holmes does cite two cases to support his reading of temporal significance into the word “upon.” *See* Holmes Sub. Br. at 19–20. But these out-of-state cases are irrelevant for purposes of interpreting Missouri's SLEF statute, not only because the language interpreted is far different but also because they involve provisions that expressly relate to timing, thereby compelling a temporal interpretation. *See Jordan v. Conner*, 22 Va. Cir. 381, at *1 (Va. Cir. Ct. 1991) (interpreting contract provision governing when option could be exercised); *Patterson v. McLean Credit Union*, 784 F. Supp. 268, 273–74 (M.D.N.C. 1992) (interpreting Civil Rights Act provision concerning the statute's effective date).

official duties. *See* § 105.711.2(2). Respondents’ proposed reading of the statute is also incompatible with *Cates*, which rejected the claim that the timing of a state employee’s conduct has any effect on the availability of coverage. *See* 727 S.W.2d at 904 (explaining that claims and judgments are the two “alternative ‘acts or transactions’” under the SLEF statute that “trigger[] an obligation to pay money on behalf of an employee”).

The structure of the SLEF statute further belies Respondents’ interpretation. Section 105.711.2 extends coverage to a number of entities, which are separately identified in separate subdivisions. For the State and state agencies, the SLEF provides coverage without exception. § 105.711.2(1). For an “officer or employee of the State,” the statute limits coverage to claims and judgments based “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.” § 105.711.2(2). This structure confirms that the phrase “upon conduct” defines the scope of coverage; it is not a temporal trigger indicating when coverage begins. Otherwise, nothing would trigger coverage for the State, as subdivision 1 does not include similar language. *See* § 105.711.2(1). Moreover, to the extent this phrase is ambiguous, “it is to be strictly construed . . . in favor of immunity.” State’s Sub. Br. at 22 (collecting cases).

Here, Holmes’s claim against Sharp and Garrett did not even accrue until his conviction was vacated in 2011. *See Heck v. Humphrey*, 512 U.S. 477,

486–87 (1994) (holding that, to recover damages for a wrongful conviction, “a § 1983 plaintiff must prove that the conviction or sentence has been reversed”). More importantly, Holmes did not actually file his claim until December 2012, when he sued the Mayor of the City of St. Louis, the Board, Sharp and Garret. D78, pp. 4–5; D121. Applying the claim-or-judgment standard from *Cates*, any entitlement the former officers had to SLEF coverage would have vested at that time. Accordingly, the SLEF statute in effect in December 2012 provides the substantive rules for analyzing coverage.

Under this version of the statute, there is no basis for coverage of Holmes’s judgment. *See* State’s Sub. Br. at 13. In fact, section 105.726 expressly eschews coverage for claims against “any police officer.”³ *State ex rel. Koster v. Kan. City Bd. of Police Comm’rs*, 532 S.W.3d 191, 196 (Mo. App. W.D. 2017). While subsection 5 of that provision recognizes coverage for claims against police officers that were made before its effective date, the SLEF does not cover claims filed thereafter. *See Sherf v. Koster*, 371 S.W.3d 903, 907 (Mo. App. W.D. 2012).

³ As discussed in the opening brief, *see* State’s Sub. Br. at 19–22, the circuit court erroneously concluded that section 105.726.3 excludes SLEF coverage for only the Board and not police officers, *see* D151, p. 10; Sub. App. 12. Both Holmes and the City concede that this provision affects coverage for police officers, as well. *See* Krewson Sub. Br. at 21–22 (“[U]nder the regime of § 105.726.3 . . . no coverage is provided to individual officers”); Holmes Sub. Br. at 11–12 (acknowledging that this provision “had the effect of changing the way police officers were protected by the SLEF”).

Despite the clarity of the 2005 Amendment, Holmes muddies matters by introducing two major errors. First, Holmes elides the critical distinctions between direct coverage, reimbursement, and legal representation. *See, e.g.*, State’s Sub. Br. at 13. For example, the table on page 14 of his substitute brief treats these three concepts as if they were identical. Likewise, Holmes’s argument about the need to harmonize sections 105.726 and 84.345 overlooks the fact that the latter provision has nothing to do with direct coverage for state employees. *See* Holmes Sub. Br. at 41–44; *see also id.* at 37 n.10 (confusing standard for direct coverage with the standard for reimbursement). Second, Holmes inaccurately indicates that the State believes “the statutory process of shifting from state to local control of the [SLMPD] . . . absolve[s] [it] of its duties to pay for the judgment.” *Id.* at 2. To be clear, the 2005 Amendment is the substantive change that removed the possibility of SLEF coverage. Avoiding these logical traps will dramatically simplify the Court’s analysis.

In sum, subsection 105.711.2 has always provided that a state employee’s right to coverage does not vest until a claim is made or a judgment is rendered. By the time Holmes filed suit in 2012, it was too late for the SLEF to cover any claims against SLMPD officers because the 2005 Amendment

proscribed direct coverage for claims filed after its effective date.⁴ See § 105.726.5. Accordingly, the SLEF is not liable for Holmes’s judgment.

B. Respondents’ policy arguments cannot overcome the plain language of the SLEF statute.

Perhaps recognizing that the text of the SLEF statute cannot bear their strained interpretation, Respondents fall back on two policy justifications for extending SLEF coverage. But given that “the [statutory] language is clear and unambiguous, there is no room for construction,” and the Court should not entertain these policy arguments. *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 669 (Mo. banc 2010) (per curiam); see also *Spradlin v. City of Fulton*, 982 S.W.2d 255, 261 (Mo. banc 1998) (“There is no room for construction even when a court may prefer a policy different from that enunciated by the legislature.”). In any event, both policy arguments fail on their own terms.

First, Holmes contends that the SLEF’s aims of “promot[ing] government efficiency and “protecting employees” have been “undermined by the State’s continued refusal to pay [Holmes’s] judgment.” Holmes Sub. Br. at 18. Yet the

⁴ Holmes mistakenly suggests that the State “concedes . . . [it] shares responsibility with the City [to] pay the Award.” Holmes Sub. Br. at 42 & n.12, 44. In observing that this case falls within SLEF Phase Three (reimbursement and fee-based representation), the opening brief expressly indicated that “the City *might* be entitled to reimbursement” but only “if it pays for the judgment.” State’s Sub. Br. at 18 (emphasis added). Even then, as the State also highlighted, the City would be entitled to reimbursement on an equal-share basis and only up to a maximum of \$1 million per fiscal year. *Id.* at 10.

2005 Amendment goes out of its way to clarify that the SLEF was never intended to cover police officers. *See* § 105.726.3 (explaining “the intent of the general assembly in the original enactment of sections 105.711 to 105.726, [which was] made express by this section in light of the [*Smith*] decision”). While it is true that the Fund serves an important function by shielding public employees from litigation risk, *see* Holmes Sub. Br. at 24–27, the State has competing demands on its limited resources, which include ensuring the solvency of the SLEF for those employees who were actually meant to be covered. To this end, the General Assembly very consciously cut off SLEF coverage for all claims against police officers that were not filed before August 28, 2005. *See* § 105.726.5. This Court should not disturb this considered policy judgment.

Second, Respondents argue that the SLEF should be interpreted to function like an occurrence-based insurance policy. But as the City itself concedes, “the SLEF Fund is not an insurance policy,” *see* Krewson Sub. Br. at 19, 23, rendering the analogy to ordinary insurance inapposite, *see Kesterson v. Wallut*, 157 S.W.3d 675, 684 (Mo. App. W.D. 2004) (explaining that the case Holmes cites, *Dixon*, “never clearly states what the Fund is” and reaffirming a prior decision, *Casady*, which found that “the Fund clearly is not insurance”); *see also P.L.S. ex rel. Shelton v. Koster*, 360 S.W.3d 805, 820 (Mo. App. W.D. 2012) (“This is not a case involving a contract of liability insurance.”). Even if the comparison were more fitting, though, Respondents offer no basis for

treating the SLEF as an occurrence versus claims-made policy apart from potential retroactivity concerns. *See* Holmes Sub. Br. at 30–32; Krewson Sub. Br. at 19–23. As described in the following section, this argument also fails. Thus, the Court should follow the plain text of the SLEF statute rather than enforcing the policies Respondents would have adopted.

C. The 2005 Amendment is not retrospective in barring SLEF coverage for claims filed after its effective date, as no right to coverage had vested at that time.

Respondents also contend that applying the 2005 Amendment to Holmes’s judgment would violate the prohibition on retrospective laws. *See* MO. CONST. art. I, § 13. Specifically, the City argues that, because Holmes’s arrest occurred in 2003 and because the SLEF provided coverage for police officers at that time, the 2005 Amendment cannot be applied to bar coverage. Krewson Br. at 15–21. Similarly, Holmes claims that a state employee’s entitlement to SLEF coverage is a substantive right that cannot be altered retroactively. Holmes Sub. Br. at 37–41. But retrospectivity concerns are irrelevant in the present case because the 2005 Amendment, by its very terms, applies *prospectively* to claims made after its effective date. *See* § 105.726.5 (providing coverage for any claims filed prior to August 2005 and withdrawing it only for those claims filed thereafter).

“Though the terms retroactive and retrospective are frequently interchanged, in fact they are not synonymous.” *Mo. Real Estate Comm’n v.*

Rayford, 307 S.W.3d 686, 690 (Mo. App. W.D. 2010). “A law is ‘retroactive’ in its operation when it looks or acts backward from its effective date and is retrospective ‘if it has the same effect as to past transactions or considerations as to future ones.’” *Id.* (quoting *State ex rel. Meyer v. Cobb*, 467 S.W.2d 854, 856 (Mo. 1971)). Missouri courts conduct a two-step analysis to determine whether a statute may be applied retroactively. The court first determines whether the law was intended to operate retroactively, and if so, it considers whether the law is unconstitutionally retrospective. *In the Matter of the Care & Treatment of Murphy*, 477 S.W.3d 77, 82 (Mo. App. E.D. 2015) (citing *State ex rel. Schottel v. Harman*, 208 S.W.3d 889, 892 (Mo. banc 2006)). Here, the analysis does not even reach step two, as no one claims the 2005 Amendment applies retroactively.

Respondents’ arguments concerning retrospectivity are based on the mistaken premise that SLEF coverage is triggered when the underlying conduct *occurs*. But even under the 2003 version of the SLEF statute, “protection” for state employees “arises when the claim is *made*.” *Cates*, 727 S.W.2d at 904 (emphasis added). Holmes made his claim in 2012, so any entitlement to coverage could not vest until then. As such, applying the substantive rules in effect at the time of filing does not constitute a violation under Article I, section 13. *See Schottel*, 208 S.W.3d at 892 (“A vested right must be something more than a mere expectation based upon an anticipated

continuance of existing law.” (quotation and alterations omitted)). In other words, because section 105.711 explicitly ties coverage to “claims” and “judgments,” any changes to the rules governing future claims or judgments are necessarily prospective in nature.

Respondents cite *Sherf v. Koster* in support of their contentions concerning retrospectivity. Yet this case only confirms the State’s interpretation. In *Sherf*, an arrestee filed a lawsuit against a police officer who assaulted him while he was in custody. 371 S.W.3d at 904. Sherf prevailed on his § 1983 claim, and thereafter, he made a demand for payment from the SLEF, which was denied. *Id.* at 905. Because Sherf filed his claim in April 2003—that is, “prior to August 28, 2005, the effective date of the amendments to the Fund’s authorizing statutes”—the Court of Appeals found the 2005 Amendment did not apply to bar coverage. *Id.* at 906–07. Unlike Sherf, Holmes did not file his claim until *after* the effective date of the 2005 Amendment, so retrospectivity concerns do not apply to this prospective application of section 105.725.⁵

⁵ As Holmes emphasizes, the officer in *Sherf* was not entitled to SLEF coverage because he never tendered the claim to the AGO. *See* Holmes Sub. Br. at 36 n.9. Nonetheless, the *Sherf* Court recognized that the “Legislature did not eliminate coverage for employees of Police Boards who had *claims pending*,” indicating that those who had not filed their claims by the effective date were beyond the veil of coverage. *See* 371 S.W.3d at 907 (emphasis added).

The City further advances the State's cause by observing that *Sherf* examined this Court's decision in *Cates*.⁶ Krewson Sub. Br. at 18. Indeed, the *Sherf* Court emphasized the very same language quoted above, recognizing that "the protection provided the employee under the Fund *arises when the claim is made.*" *Id.* at 908. Worse yet, the City acknowledges that this language "suggests that coverage under § 105.711 is not applicable until a claim is actually asserted." Krewson Sub. Br. at 19. In resisting this conclusion, the only argument the City musters is that *Cates* did not address the exact same scenario at issue here, as it involved liability for conduct occurring before the creation of SLEF coverage that was reduced to a judgment thereafter. But the City offers no basis for abandoning the claim-or-judgment standard now that SLEF coverage is being removed. In fact, equity and the principle that the General Assembly is aware of judicial decisions demand the same result.

In conclusion, Respondents' three arguments for extending SLEF coverage fail under a correct application of the relevant statutory provisions. As such, the State is not liable for Holmes's judgment. This Court should reverse the circuit court's contrary conclusion and remand for further proceedings as to the City's responsibility for indemnifying the officers.

⁶ The City notes that "the Attorney General attempted to use § 13 as a shield against liability in *Cates*" and insinuates something untoward in the State arguing that retrospectivity is not an issue now that the "constitutional shoe [i]s on the other foot." Krewson Sub. Br. at 18, 21. But it is the City that wants to have it both ways. It won coverage for the claim in *Cates*, which was filed *before* the SLEF statute went into effect, and now it seeks coverage for a claim filed *after* the 2005 Amendment.

II. Judicial estoppel does not preclude Appellants from disputing SLEF coverage, as the State has always maintained that the City is responsible for indemnifying the former SLMPD officers.

In his briefing before the Court of Appeals, Holmes argued that the State should be estopped from disclaiming SLEF coverage for his judgment because it stated in a prior federal filing that “the Judgment will definitely be paid, either by [the State] through its SLEF or by [the City].” Sub. App. 20–21 n.2. The Court of Appeals summarily rejected this theory in a footnote. *Id.* Because the State consistently has maintained that the City is responsible for indemnifying the former officers,⁷ the court found that its position in the present matter was not “clearly inconsistent” with the federal filing. *Id.* Apparently recognizing that estoppel does not apply, Holmes abandoned this issue upon transfer. But despite its clear inapplicability, the City invokes estoppel for the first time in its substitute brief. Krewson Sub. Br. at 23–27. This claim fails for the same reasons the Court of Appeals rejected Holmes’s identical argument.

⁷ The City treats it as a foregone conclusion that it “has no legal obligation to indemnify Officers Sharp and Garrett” and insinuates that the parties agree there is no basis for suggesting otherwise. *See* Krewson Sub. Br. at 11, 21 n.4. To be clear, both the State and Holmes (in the alternative) maintain that the City is responsible for Holmes’s judgment under SO 3-05 and Ordinance 69489. *See* D148; D135, p.3. That said, the circuit court never reached the question of the City’s liability, so the best course would be to remand the case for consideration of this issue after entering judgment for the State. On a related note, it is irrelevant that “Holmes has not cross-appealed,” *see* Krewson Sub. Br. at 26, as the circuit court never ruled on his claims against the City.

Judicial estoppel “prevent[s] parties from playing fast and loose with the judicial process by taking inconsistent positions in two different proceedings.”

Vacca v. Dep’t of Labor & Indus. Relations, 575 S.W.3d 223, 225 (Mo. banc 2019).

In determining whether estoppel applies, courts generally consider three factors:

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 [the] earlier position A[nd 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.

Id. at 232–33 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001)).

As this Court recently explained, these factors do not represent “fixed elements” or an “exhaustive formula.” *Id.* at 231, 233. Nonetheless, the Court also indicated that a party asserting estoppel must make a threshold “showing that the prior statement and the current statement are [actually] inconsistent.” *Id.* at 234–35 & n.6; *see also Kirk v. Schaeffler Group USA, Inc.*, 887 F.3d 376, 385 (8th Cir. 2018) (“If a party’s positions can be reconciled, there is no need to protect the integrity of the judicial process from inconsistent positions. Thus, Missouri courts routinely reject invitations to apply judicial estoppel upon determining that two positions are not clearly inconsistent.”). Like Holmes, the City fails to show any inconsistency in the State’s position, and thus, estoppel does not apply.

The State’s position in the present case is entirely consistent with the stay motion it filed in federal court, as both assert that the City—not the

State—is responsible for indemnifying the former officers. *See* D128. In summarizing the federal filing, the City suggests that the State guaranteed payment of Holmes’s judgment by saying that it “would definitely be paid” by the State *or the City*. Krewson Sub. Br. at 24, 26. The City then attempts to paper over the latter scenario because “the State had no business making any representations on behalf of the City.” *Id.* But the stay motion did not purport to make a representation on behalf of the City or to guarantee payment itself; rather, it advanced the State’s legal theory of an ongoing dispute concerning SLEF coverage. Indeed, the filing clearly explained that “[t]he State of Missouri is now engaged in a dispute with the City of St. Louis regarding who may be responsible for indemnif[ication]” before going on to suggest that one of the two government entities would be responsible for the judgment. D128, p. 2. While recognizing that a court might find the State liable, it was the State’s position then—as it is now—that City must indemnify the former officers. Thus, given that there is no inconsistency between the stay motion and the State’s denial of SLEF coverage now, judicial estoppel is simply not applicable.⁸

⁸ Although the lack of inconsistency is sufficient to preclude estoppel, it is also not clear that the State’s mere argument against SLEF coverage would “impose an unfair detriment on the [City].” *See Vacca*, 575 S.W.3d at 233. Indeed, the City’s own brief identifies potential harm to Holmes, taxpayers, Sharp, and Garrett but not to the City itself. Krewson Sub. Br. at 26–27.

CONCLUSION

For the foregoing reasons and those detailed in the Substitute Brief of Appellants, the State requests that this Court reverse the judgment of the circuit court and enter summary judgment in favor of Appellants.

Respectfully submitted,

ERIC S. SCHMITT

Attorney General

/s/ Zachary M. Bluestone

D. JOHN SAUER, #58721

Solicitor General

ZACHARY M. BLUESTONE, #69004

Deputy Solicitor General

KATHERINE S. WALSH, #37255

Assistant Attorney General

Missouri Attorney General's Office

815 Olive Street, Suite 200

St. Louis, MO 63101

Tel: (314) 340-7515

Fax: (314) 340-7029

zachary.bluestone@ago.mo.gov

COUNSEL FOR APPELLANTS

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that on December 30, 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 4,610 words.

/s/ Zachary M. Bluestone
ZACHARY M. BLUESTONE