

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**CHRISTOPHER M. KUEHNE,
APPELLANT
vs.**

**SUSAN L. HOGAN,
RESPONDENT**

DOCKET NUMBER WD71130

DATE: JUNE 8, 2010

Appeal from:

Jackson County Circuit Court
The Honorable David M. Byrn, Judge

Appellate Judges:

Division Two: Joseph M. Ellis, P.J., Victor C. Howard and James E. Welsh, JJ.

Attorneys:

Christopher Kuehne, Appellant Pro-se

Kathleen R. Robertson, for Respondent

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

CHRISTOPHER M. KUEHNE, APPELLANT

v.

SUSAN L. HOGAN, RESPONDENT

WD71130

Jackson County

Before Division Two Judges: Joseph M. Ellis, P.J., Victor C. Howard and James E. Welsh, JJ.

Christopher Kuehne was convicted of the first degree statutory rape and the first degree statutory sodomy of his daughter. After the denial of his Rule 29.15 motion, Kuehne filed a legal malpractice action against his post-conviction attorney, Susan Hogan. The trial court granted Hogan's motion to dismiss Kuehne's petition for failure to state a claim. Kuehne appeals.

AFFIRMED.

Division Two holds:

Where a previously convicted criminal defendant files a malpractice action against his post-conviction counsel, in order to satisfy the element of causation, he must show that he is actually innocent of the criminal charges and that, but for his post-conviction attorney's actions, he would have been acquitted at a new trial. However, where the criminal defendant's guilt was previously determined when he was convicted of the criminal charges, he is barred from asserting a collateral civil claim where actual innocence is an essential element.

Opinion by: Victor C. Howard, Judge

Date: June 8, 2010

Concurring opinion by Judge Joseph M. Ellis.

The author concurs in the result affirming the trial court's dismissal of Kuehne's petition with prejudice but writes separately that there is no need to carve out an unnecessary exception to long and well-settled tort law related to professional negligence by attorneys by adopting an actual innocence standard for criminal defendant plaintiffs, and such a standard creates the potential for absurd results. This case may be readily affirmed based upon the fact that public defenders, like Hogan, are shielded from liability for damages by the doctrine of official immunity. Official immunity applies because public defenders are public employees and the witness choice decisions challenged by the plaintiff were clearly discretionary in nature. Moreover, no compelling policy reason mandates that an exception to the official immunity doctrine be carved out to render it inapplicable to public defenders.

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