IN CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

ST. LOUIS COUNTY, MISSOURI, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 04CV323913
STATE OF MISSOURI,	)	
Defendant.	)	

Suggestions in Support of Defendant State of Missouri's Motion for Summary Judgment

The Hancock Amendment is a shield, not a sword. Article X, Sections 16 and 21, can only be invoked by a political subdivision as a defense when the State or a taxpayer seeks to compel performance of new or additional duties that result in substantial costs where no adequate funding mechanism for such costs has been provided by the General Assembly.

But here, no one is seeking to compel St. Louis County to perform the new or additional duties associated with the new Conceal Carry law. The County seeks to invoke the protection of this Court, but there is no one from whom it needs such protection. This is simply the wrong lawsuit, against the wrong party, at the wrong time.

Hypothetically, a resident of St. Louis County could seek a concealed weapons permit from the sheriff of St. Louis County and, if the sheriff refuses to process the application, sue to enforce the mandates of Section 571.101 *et seq.* Such a case, and only

such a case, would present the proper forum for St. Louis County to assert the Hancock Amendment (Article X, Sections 16 and 21) as a defense. Such a case, and only such a case, would also present a proper forum in which to litigate the issues St. Louis County has tried to "back-door" into this litigation: (1) who, under the St. Louis County Charter, is the proper official to perform the duties under Section 571.101, *et seq.*, and (2) whether St. Louis County must show that a delegation of conceal carry application duties by the sheriff to local police chiefs pursuant to Sections 50.535.3 and 571.101.2 would not succeed in relieving the County of unreimbursable expenses before raising a Hancock Amendment defense. But, this Court is not a proper forum for St. Louis County to address these hypothetical claims, and the State is not a proper party to defend them.

In *Brooks v. State*, 128 S.W.3d 844 (Mo. banc 2004), the Missouri Supreme Court held that, in enacting the Conceal Carry statute, the General Assembly had provided an adequate funding mechanism but, where specific evidence of unreimbursed expenses is shown, counties could not be compelled to perform the new or additional duties. Accordingly, the Court held that the four counties as to which such evidence had been shown (Jackson, Camden, Greene, and Cape Girardeau Counties) could not be compelled to process concealed weapons permit applications. Two have chosen to issue permits anyway, and two have chosen not to issue. The Attorney General has repeatedly and publicly acknowledged that, in the wake of *Brooks*, every county is authorized – but no county may be compelled – to issue conceal carry permits. In fact, among the counties

not covered by the *Brooks* injunction, some counties are processing permits, and some are not. Among the counties choosing to issue permits, only Moniteau County has been sued. Among the counties choosing not to issue permits (such as St. Louis County), no county has been sued by residents seeking permits.

But St. Louis County – for reasons we can only speculate about – has chosen not wait to see if such a lawsuit would ever materialize. Instead, St. Louis County is the only county in Missouri that has chosen to sue the State – which it admits has not sought to compel the County to comply with any duties under the Conceal Carry law – to seek judicial resolution of this non-issue, and to seek this Court's advisory opinions as to the two additional issues set forth above. Having chosen to litigate, however, St. Louis County must comply with the ordinary rules of law governing such actions. Its failure to do so gives the State a right to judgment as a matter of law.

I. Standards for summary judgment and declaratory relief

A. Summary judgment

Summary judgment is appropriate if the record demonstrates that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Rule 74.04(c)(3). The movant may rely on pleadings, discovery, or affidavits to demonstrate the lack of a genuine issue of fact. Rule 74.04(c)(1).

In response, the non-movant may not rest upon allegations contained in his pleadings. The non-movant must set forth, by affidavit or other evidentiary material,

specific facts showing there is a genuine issue for trial. Rule 74.04(e).

B. Declaratory judgment

An action for declaratory judgment "is not a panacea for all legal ills." *King Louie Bowling Corp. v. Missouri Ins. Guar. Assoc.,* 735 S.W.2d 35, 38 (Mo. App. W.D. 1987). To establish entitlement to relief, the plaintiffs are required to plead and prove: (1) the existence of a justiciable, presently existing controversy, rather than a hypothetical situation for which they seek an advisory opinion; (2) a legally protected interest, consisting of a pecuniary or personal interest directly at issue; and (3) a question ripe for judicial decision. *See, e.g., City of St. Louis v. Milentz,* 887 S.W.2d 709 (Mo. App. E.D. 1994).

II. Certain plaintiffs lack standing

The Hancock Amendment establishes taxpayer status as the standing criteria for those who would bring such a challenge. Mo.Const. art X, §23. Neither the County, nor Mr. Dooley in his official capacity as County Executive (Petition, p. 1, ¶¶ 1-2) have standing. The only proper plaintiff is Mr. Dooley in his personal, individual capacity, as a taxpayer (Petition, p. 1, ¶ 2), but not even his standing as a taxpayer entitles him to litigate the hypothetical claims raised herein.

A. The County lacks standing.

The County does not plead that it has standing to sue. *See* Petition, p. 1, ¶1. And political subdivisions may not sue to enforce Sections 16 and 21 of the Hancock

Amendment because they are not "taxpayers." *Missouri Association of Counties v. Wilson*, 3 S.W.3d 772, 776-77 (Mo. banc 1999). Accordingly, summary judgment must be granted in the State's favor on the County's claims.

B. The County Executive in his official capacity lacks standing.

Similarly, Plaintiff Charlie Dooley, in his official capacity as County Executive of St. Louis County, Missouri, has no standing to pursue a Hancock claim. A suit in "official capacity" is merely a suit by the political subdivision itself and, as shown above, St. Louis County lacks standing to enforce the Hancock Amendment. *See State ex rel. Mathewson v. Bd. of Election Comm.,* 841 S.W.2d 633 (Mo. 1992)(Senate president pro-tem could not, in his official capacity, pursue an action in prohibition, as he had "no personal stake in the outcome" of case). Accordingly, summary judgment must be granted in the State's favor on the County Executive's claims that are brought in his official capacity.

II. The court lacks subject matter jurisdiction of plaintiffs' claims against the State, because they are not ripe.

A. The State has not sought or threatened to compel the county to implement the concealed weapons application process.

Plaintiffs allege that in enacting §571.101, the State has required the County to provide a new activity or service, but has not provided adequate funding for the County's increased costs, thus violating Hancock. Petition, pp. 3 and 4, ¶¶12, 14 and 17. But

plaintiffs do not plead that the State has compelled or threatened to compel implementation of the application process in St. Louis County. In fact, the parties stipulated that the State has not. Jt. Stip. ¶5.

The scenario for which plaintiffs seek a declaration is therefore hypothetical, and the claims are not ripe unless and until the State or a County resident seeks to compel the County to act. Declaratory judgment does not lie for hypothetical situations. *City of St. Louis v. Milentz,* 887 S.W.2d 709 (Mo. App. E.D. 1994). In view of the stipulation, summary judgment must be granted in the State's favor.

B. The county has not proved that the delegation option available to it under Sections 50.535.3 and 571.101.12 eliminates all substantial, unreimbursable expenses associated with the Conceal Carry law.

As noted above, if a resident had sued St. Louis County to compel the County to issue a concealed weapons permit, the County would be entitled to assert the Hancock Amendment as a defense. The success of this defense would turn on whether the County could prove that the Concealed Weapons law imposes new and substantial costs without a means to pay those expenses. The Supreme Court, in *Brooks*, noted that the provisions of Sections 50.535.3 and 571.101.12, which permit a sheriff of a first class county to designate one or more local police chiefs to accept and process Concealed Carry applications and use the application fees revolving fund to reimburse those police chiefs

for "any reasonable expenses related to accepting and processing such applications," would allow a county to "defer most, if not all," of the county's costs under the Concealed Carry Act. *Brooks*, 128 S.W.3d at 850.

Thus, hypothetically, in a proper case (which this is not), the success of the County's Hancock defense would turn on its ability to prove that such a delegation could not be made or would still leave the County with substantial new expenses that could not be reimbursed from the application fee revolving fund.[1] The County has made no effort to do so here. Because the County has chosen to try and use the Hancock Amendment as a sword, and not as a shield, it bears the burden of proving every element. They have failed to do so, and thus the State is entitled to judgment as a matter of law.

Declaratory judgment does not lie to adjudicate hypothetical situations. Sections 50.535.3 and 571.101.12 provide an alternative for first class counties that enables them to avoid incurring substantial unreimbursable costs, and thus a Hancock Amendment defense based upon an "unfunded mandate" theory must fail. St. Louis County has neither pled nor proved, in support of the declaratory judgment it seeks, that this

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[1] Nothing in Sections 50.535.3 or 571.101.12 suggests that charter counties are to be treated as anything other than "counties of the first classification" and thus such counties do have the delegation option referred to by the Supreme Court in *Brooks*. Here, St. Louis County has not suggested that its Charter prohibits such a delegation and, even if it did, such a prohibition would likely be of no effect. *See Information Technologies, Inc. v. St. Louis County and Regional Justice Inf. Service,* 14 S.W.3d 60, 63-64 (Mo.App., E.D. 2000) (constitutional authority to adopt charter does not permit invasion of province of general legislation involving public policy of state as a whole, governmental functions remain in state's control; police power is governmental function).

alternative provided by the General Assembly in the Concealed Weapons law will not work. Accordingly, the State is entitled to judgment as a matter of law.

IV. Plaintiffs have failed to name necessary and indispensable parties

It is unclear who, in St. Louis County, should perform the duties envisioned by the Concealed Carry law in the event that the County had chosen to issue permits. The General Assembly assigned such duties to the Sheriff. The St. Louis County Charter may leave those duties to with the Sheriff, or it may assign those duties to the Superintendent of the County's Police Department, or the Charter may assign those duties to the Director of the County's Department of Judicial Services. To a disinterested party – which the State certainly is as to this question – it is not clear. *Compare* St. Louis County Charter, Article IV, Section 4.275 (powers and duties of the Superintendent of Police) *with* Section 4.44 (Department of Justice Services). For the Court's reference, these provisions are attached hereto.[2]

St. Louis County asserts that these duties – which it has chosen not to perform in any event – would belong to the Superintendent of the Police Department (Petition, p. 2, ¶ 7) had the County chosen to undertake them. Certainly the State has no interest in litigating exactly which County official won't be performing the duties St. Louis County has chosen not to perform. Such a question is obviously hypothetical . . . to the point of

[2] The Court may take judicial notice of the County Charter. Mo.Const. art. IV, §18(j); *Tonkin v. Jackson County Merit System Comm'n,* 599 S.W.2d 25, 27 (Mo. App. WD 1980).

farce. Yet, farcically, St. Louis County seeks this Court to incorporate the County's view on this hypothetical question into the declaratory judgment the County seeks. *See* Petition, p. 4, ¶ 15 (claiming that "the allegations of Paragraphs 1 through 14 present questions that are ripe for judicial guidance" and that the court should "determine the rights and liabilities of the parties[.]").

Leaving aside the obvious (and dispositive) hypothetical nature of the question, the proper parties to litigate the issue are the County officials directly affected: the Sheriff, the Superintendent of the County's Police Department, and the Director of the County's Department of Judicial Services. None of these officials is a party to this case. Instead, the County has sued only the State, which has absolutely no interest in the resolution of this hypothetical non-dispute.

Plaintiffs' failure to join necessary and indispensable parties is a fundamental, jurisdictional defect that prevents this Court from rendering judgment in plaintiffs' favor. *See Mo. Nat. Educ. Assoc. v. Mo. State Bd. of Educ.*, 34 S.W.3d 266 (Mo.App., W.D. 2000) (in judicial review of union challenge to teacher salary rates, trial court's failure to join, as parties, the school districts that would be required to pay salary adjustments and penalties was reversible error). Accordingly, this Court must grant the State judgment as a matter of law on this issue.

V. The only possible remedy is an injunction, which Plaintiffs do not seek.

As noted above, if the State or a County resident had sought to compel the County to issue concealed weapons permits, the County would be entitled to assert the Hancock Amendment (Article X, Sections 16 and 21) as a defense. This is not that case. But even if St. Louis County could use the Hancock Amendment as a sword instead of a shield, and even if it had proven that the delegation option in Sections 50.535 and 571.101.12 cannot be used or does not relieve the County of all of its expenses (which the County failed to do, as argued above), the only remedy the County would be entitled to is an injunction prohibiting the State or County residents from seeking to compel the County to perform these duties. That is all that Supreme Court did in *Brooks*, 128 S.W.3d at 850 (ordering injunctive relief under Hancock with respect to four specific counties), and that is all that the Supreme Court has ever done in any Hancock Amendment case, *see e.g.*, *Fort Zumwalt School District v. State*, 896 S.W.2d 918, 923 (Mo. banc 1995) (adequate remedy for local government to relieve it of duty to perform).

In *Brooks*, the Supreme Court specifically refused to declare the Concealed Carry law "unconstitutional and void" and, in fact, declared the funding mechanism in the law satisfactory for Hancock purposes, except to the extent that specific evidence proves a specific county must incur substantial unreimbursable costs in connection with issuing concealed carry permits. *Brooks*, 128 S.W.3d at 850. Thus, even assuming that St. Louis County had made such a showing notwithstanding the delegation option available to it under Sections 50.535.3 and 571.101.12, which it did not, the only relief this Court could

grant is a limited injunction prohibiting the State from compelling the County to undertake the processing of concealed carry applications.

But the Court need not undertake even that exercise. Plaintiffs do not seek any injunction and, in any event, should not issue an injunction prohibiting the State from doing what the County has already stipulated the State is not doing. *See* Jt. Stip. ¶5.

WHEREFORE the defendant State of Missouri asks this Court to grant its motion for summary judgment against plaintiff with respect to all claims, and to enter such other orders as this Court deems just and proper.

Respectfully submitted,

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Certificate of Service

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