IN CIRCUIT COURT OF MONITEAU COUNTY
STATE OF MISSOURI

RICHARD N. BARRY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CV704-29CC
	)	
STATE OF MISSOURI, et al.,	)	
	)	
Defendants.	)	

Defendant State of Missouri's Motion to Dismiss

Plaintiff fails to state a claim against the State upon which relief can be granted, or that is ripe, and the claim against the State must therefore be dismissed. Rule 55.27(a)(1) and (6).

1. Standard for dismissal of plaintiff's claims for relief

In adjudging a motion to dismiss, the court deems all facts pleaded as true, liberally construing the averments. *Sandy v. Schriro,* 39 S.W.3d 853, 855 (Mo. App. W.D. 2001). The petition must contain facts, not conclusions, that invoke principles of substantive law entitling plaintiffs to relief. *Id.* The sufficiency of the petition is jurisdictional. *Wright v. Dep't of Corrections,* 48 S.W.3d 662, 666 (Mo. App. W.D. 2001).

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).

The petition before this court does not plead facts invoking substantive principles of law that establish plaintiff's entitlement to relief.

II. Status of Missouri's Concealed Carry Law after *Brooks*

The decision that most directly addresses plaintiff's request for a declaratory relief against the State is *Brooks v. State* , 128 S.W.3d 844 (Mo. banc 2004)(copy attached). The mandate issued on March 30, 2004 and the decision is now final.

In *Brooks* , the Court held that the legislature constitutionally exercised its authority to regulate the carrying of concealed weapons in the State when it enacted Missouri's Concealed Carry Act, now codified at §§571.101 – 571.121, RSMo (Supp. 2003). However, in construing part of the law's funding mechanism, codified at §50.535, RSMo (Supp. 2003), the Court held that the law could, in certain respects, constitute an unfunded mandate and thus violate Mo. Const. art. X, sections 16 and 21.

Specifically, the Court explained that, under Mo. Const. art. X, sections 16 and 21, the State may not require new activities or services without providing funds sufficient to cover new costs. *Id* at 850. The $100 application fee that a sheriff is authorized to collect pursuant to §571.101.10 is, by that same provision, required to be deposited into the sheriff's revolving fund. And the Supreme Court held that, where funds are expended

under §50.535.2, the use of the funds is limited to training and equipment. *Id*. Therefore, to the extent that a sheriff directly incurs substantial costs for other purposes – purposes other than training and equipment – in connection with his or her issuance of certificates of qualification for concealed carry endorsements, the law imposes an unfunded mandate. *Id*.

The remedy for such a violation of the Hancock amendment is practical and limited. The Court held that where there is specific proof that a sheriff will directly incur substantial, increased costs that are unfunded, i.e., costs that go beyond training and equipment, that county is not required to comply with the Concealed Carry Act. *Id*. The question was ripe for adjudication in *Brooks* with respect to four Missouri counties (Camden, Cape Girardeau, Greene, and Jackson Counties), because the record contained specific evidence concerning those four, such as proof of increased personnel costs to do fingerprinting, perform background checks, and process applications; and to pay the State Highway Patrol to perform fingerprint analyses. *Id,* at 849. The Court therefore enjoined the State from enforcing the Concealed Carry Act with respect to the four counties, to the extent that the Act constitutes an unfunded mandate imposed on them. *Id,* at 850.

III. Plaintiff's claim against the State must be dismissed

Here, the petition raises two types of Hancock challenges, one directed against Moniteau County's activities, and the other directed against the State's actions. With regard to the former, plaintiff alleges that separate defendants Moniteau County and

Sheriff Jones violated Hancock by incurring and paying for costs for Concealed Carry applications without local voter approval. Petition, pp. 3-4. The State cannot be held liable on this claim, as Mo. Const. art. X, section 22 regulates the conduct of only political subdivisions of the State. We expect this claim to fail, as it lacks any basis in law or fact, but the State will not address it.

A. The court lacks subject matter jurisdiction of plaintiff's claim against the State, because the claim is not ripe

With regard to the claim against the State, plaintiff alleges that the State failed to fully fund the Concealed Carry Act and imposed an unfunded mandate. Petition, pp. 4-5, ¶¶ 8-9. Plaintiff asks for a declaratory judgment to that effect. Petition, p. 5. But plaintiff does not plead that the State has compelled or threatened to compel implementation of the application process in any county of the State. And in fact, in the wake of *Brooks*, the State has neither compelled nor threatened to compel this county or any other to implement the concealed carry application process. Defendant State's Answer, ¶9. Plaintiff's shortcoming of pleading is necessary to his claim, because if the State is not compelling or threatening to compel the conduct, there is no "mandate."

Declaratory judgment does not lie for hypothetical situations. *City of St. Louis v. Milentz,* 887 S.W.2d 709 (Mo. App. E.D. 1994). Because plaintiff does not plead, and cannot prove, that the State has compelled or threatened to compel this county to implement the concealed carry application process, plaintiff does not invoke substantive principles of law that establish a presently existing or ripe controversy.

B. Plaintiff does not state a claim against the State

Plaintiff also fails to plead what specific costs the sheriff has directly incurred that are not reimbursable by the application fee, i.e., the specific costs that are *not* costs for training and equipment. As discussed in Section II, above, the Supreme Court in *Brooks* did hold that the Concealed Carry Act's funding mechanism could violate Hancock. *Id,* at 850. But a court can only reach such a conclusion on a case by case basis, because the court must have before it specific evidence that a sheriff will directly incur costs beyond the §50.535.2 limitations of training and equipment. *Id*. No Hancock case can be decided on the basis of presumption. *Id*.

Even if plaintiff pleads and proves such costs, the only relief this court can grant is a limited injunction prohibiting the State from compelling Moniteau County and Sheriff Jones to undertake the processing of concealed carry applications. *Brooks,* at 850. But plaintiff seeks no injunction and, as noted above, such an injunction is not necessary as there is no possibility that the State will do that which would be enjoined.

WHEREFORE the court should dismiss all claims against the State and enter such other orders as are just and proper.

Respectfully submitted,

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Certificate of Service

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