IN CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

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

Defendant State of Missouri's Motion to Dismiss

Plaintiffs have failed to state a claim upon which relief can be granted, that is ripe, or that names necessary and indispensable parties, and certain plaintiffs lack standing to proceed at all. Therefore this case must be dismissed. Rule 55.27(a)(1), (6) and (7).

I. Standard for dismissal of plaintiffs' 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 plaintiffs' entitlement to relief, nor does it reveal a presently existing or ripe controversy.

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

The decision that most directly addresses plaintiffs' request for 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. 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 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 full 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 this or 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, ¶12. Plaintiffs' shortcoming of pleading is necessary to their claims, because if the State is not compelling or threatening to compel the conduct, the claims are not ripe. *See* Petition, ¶¶15 and 18.

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. The county has not alleged whether it has pursued the alternative of designation to police chiefs under §§50.535.3 and 571.101.12

Plaintiffs' claims may not be ripe for another reason. Sections 50.535.3 and 571.101.12 permit a sheriff of a first class county to designate one of more police chiefs of any town, city, or municipality within such county to accept and process Concealed Carry applications. The statute further permits the county sheriff to reimburse the police chiefs, out of the revolving fund, for "any reasonable expenses related to accepting and processing such applications." The Supreme Court in *Brooks* held that this provision, in theory, allows a sheriff of a first class county "defer most, if not all," of the sheriff's costs under the Concealed Carry Act. *Brooks*, at 850.

St. Louis County is a first class county. But plaintiffs do not plead whether the county sheriff has designated, or is attempting to designate, local police chiefs within the county who are willing to process applications, or whether "most, if not all" of the county's costs under the Concealed Carry Act could be deferred by engaging local police chiefs to perform the tasks. If the assistance of local police chiefs is feasible, and if the county's costs can be deferred, then the county is not confronted by an unfunded mandate in any event.

Declaratory judgment does not lie to adjudicate hypothetical situations. Section 50.535.3 provides an alternative for first class counties that enables them to avoid incurring costs, at least in theory. That plaintiffs' petition is silent with respect to this

alternative may indicate that the claim is not ripe.

IV. Plaintiffs do not plead that their costs exceed those for which they are permitted to charge the application fee (training and equipment)

As discussed in Section II, above, the Supreme Court in *Brooks* did hold that the Concealed Carry law's funding mechanism could violate Hancock, because §50.535 limits the costs to which the application fee can be applied in certain circumstances. *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*.

Here, the plaintiffs did not plead that the $73.09 application costs are for things other than training and equipment. Indeed, the petition contains no allegations whatsoever of the costs that were factored into the figure. Therefore, the plaintiffs have failed to state a claim.

V. The declaration that plaintiffs seek is, in any event, unavailable

In both Counts I and II, plaintiffs ask that §571.101 be declared "unconstitutional and void" due to the alleged violation of Mo. Const. art. I, section 16 and 2. Petition, pp. 4-5.

But a statute that runs afoul of Mo. Const. art. I, section 16 and 21 for failure of funding is not declared "unconstitutional and void" – the statute simply cannot be enforced, by the state, against an unwilling local government. *See Brooks* , at 850

(ordering injunctive relief with respect to challenge under Mo. Const. art. I, section 16 and 21); *Fort Zumwalt School District v. State* , 896 S.W.2d 918, 923 (Mo. banc 1995) (adequate remedy for local government is declaratory judgment that relieves it of duty to perform). Further, the Supreme Court in *Brooks* approved the Concealed Carry law's funding mechanism, finding it satisfactory for Hancock purposes, except to the extent that specific evidence proves a specific county must incur substantial costs for purposes other than training and equipment in connection with issuing certificates of qualification for concealed carry endorsements. *Id*. Therefore, the plaintiffs are not, and can never be, entitled to the declaration that §571.101 is "unconstitutional and void" for the lack of funding.

Even if plaintiffs plead and prove such costs, the only relief this court can grant is a limited injunction prohibiting the State from compelling plaintiffs to undertake the processing of concealed carry applications. *Brooks,* at 850. But plaintiffs seek 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.

VI. Certain plaintiffs lack standing

The Supreme Court has held that 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, Plaintiff St. Louis County must be dismissed.

Similarly, Plaintiff Charlie Dooley, in his official capacity as County Executive of

St. Louis County, Missouri, has no standing to pursue his claims and, in that capacity, must be dismissed. 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).

Because neither the County nor the County Executive (in his official capacity) has standing to litigate these claims, the only plaintiff with standing to raise these claims before this Court is Mr. Dooley in his individual capacity as an asserted taxpayer.

VII. Plaintiffs have failed to name indispensable parties

Plaintiffs allege that the duties assigned by the Concealed Carry Act to the Sheriff of St. Louis County have, by that county's Charter, been reassigned to the Superintendent of the Police Department. Plaintiffs seek to have their interpretation in this regard incorporated into this Court's judgment. Rule 55.27(7), however, requires Plaintiffs' petition be dismissed for failure to join necessary and indispensable parties under Rule 52.04.

The State has no interest at stake in interpreting the effect of the St. Louis County Charter on the allocation of the duties in question. But certainly both the Sheriff and Superintendent of Police have such interests – and those interests are directly contradictory. So, too, it would seem, does the Director of the Department of Justice Services have an interest in this issue because even a cursory glance at the Charter

indicates that he or she may be the proper officer to discharge the duties in question. Plaintiffs' failure to name any of the parties with a real interest at stake, relying instead to proceed only against a party with no interest, is grounds for dismissal under Rule 55.27(a)(7) and Rule 52.04.

WHEREFORE the defendant's motion to dismiss should be granted, plaintiffs' claims should be dismissed, and the court should enter such other orders as are just and proper.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that a copy of the foregoing was mailed, postage prepaid, on this 26th day of April, 2004, to:

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