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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the Circuit Court of Cole County, the Honorable Byron L. Kinder, Judge, entered on January 27, 2003. The circuit court declared that the St. Louis Board of Police Commissioners and its police officers were entitled to coverage under § 105.711, et seq. RSMo, the Legal Expense Fund and entered a monetary award against the State. This appeal does not involve any of the matters reserved for the exclusive jurisdiction of the Missouri Supreme Court under the provisions of Article IV, § 3 of the Missouri Constitution and, therefore, jurisdiction rests in the Missouri Court of Appeals, Western District. § 477.070 RSMo 2000.

STATEMENT OF FACTS

In May 1999 counsel for the St. Louis Board of Police Commissioners (Board) began tendering to the Attorney General demands for the defense of certain civil suits filed against the Board and its officers and employees. On June 14, 1999 the Attorney General responded by declining to undertake representation of the Board and its officers and employees on the ground that they were not entitled to coverage under the Legal Expense Fund, § 105.711 RSMo. L.F. 360-366; 681-683.

On July 29, 1999 plaintiffs filed a petition in the Circuit Court of Cole County seeking a declaratory judgment that they were entitled to a defense and payment of any judgment or settlement pursuant to the Legal Expense Fund. The petition named as plaintiffs current and former members of the Board and individual police officers. The petition identified specific cases in which the Board had made a demand for defense that the Attorney General had declined and each plaintiff was sued in one or more of the cases. The defendants named were the State of Missouri and its Attorney General, Treasurer, and Commissioner of Administration. L.F. 7.

On June 23, 2000 the circuit court entered judgment in favor of the plaintiffs. L.F. 305. The defendants appealed. This Court issued an opinion that

reversed the judgment, holding that the Legal Expense Fund did not cover the plaintiffs. L.F. 333. The appeal was transferred by the Missouri Supreme Court which entered a decision that the judgment was not final for purposes of appeal because there remained pending a claim for monetary relief in connection with the specific cases identified in the petition. The case was therefore remanded to the circuit court. *Smith v. State*, 63 S.W.3d 218 (Mo.banc 2001).

Following the remand, defendants requested that the circuit court reconsider its earlier denial of defendants' Motion for Summary Judgment. L.F. 321. The court denied reconsideration. L.F. 354. Plaintiffs submitted a new Motion for Summary Judgment that included their claims for monetary relief. L.F. 355. On January 27, 2003 the circuit court again entered judgment in favor of plaintiffs, declaring that they were entitled to coverage under the Legal Expense Fund. The court also ruled on all of their claims for monetary relief. L.F. 792. Defendants appealed. L.F. 811.

The facts upon which the parties' cross-motions for summary judgment were submitted were essentially undisputed.

The St. Louis Metropolitan Police Department is governed by the Board of Police Commissioners. L.F. 173. The operations of the police department are not funded by the State. L.F. 201. The Board prepares a budget "to enable them to

discharge the duties hereby imposed upon them, and to meet the expenses of the police department" and to "pass upon all claims presented against them." §§ 84.210.1 & 84.210.2 RSMo. L.F.174-5. The Board obtains the funds to operate the police department in large part from the City of St. Louis. The municipal assembly must make the necessary appropriation, subject to Hancock Amendment (Art. X, § 21, Mo. Const.) limitations and revenues from governmental or private grants or forfeitures. §§ 84.160.5 & 84.210.1 RSMo. L.F. 201.

The Board authorizes the payment of salaries to police officers. The payments are then made by the appropriate disbursing officer of St. Louis City government. § 84.210.2 RSMo. The members of the Board are compensated in the same manner--by the St. Louis City disbursing officer. §§ 84.040 & 84.210.2 RSMo. L.F. 174-5.

The Board decides who to hire and fire for the police department. It decides who should be disciplined. It decides what benefits should be given to its employees. It decides how police officers are equipped and armed. §§ 84.100 84.120, 84.150 and 84.160.7-12 RSMo. L.F.175-6, 178.

From the enactment of the Legal Expense Fund in 1983 until 1999 the Board and its officers had never made a demand for coverage. L.F. 177. The St. Louis City Charter provides that all legal services required by the police

department "shall" be render by the St. Louis City Law Department (also known as the City Counselor's office). St. Louis City Charter, Art. X, § 2; Revised Code of the City of St. Louis .§ 3.10.020 (1948). L.F. 188. These provisions were in place at the time the Legal Expense Fund was enacted. Judgments against and settlements by the Board and its officers have been paid by the City Law Department since at least 1983. L.F. 177.

POINTS RELIED ON

I. The circuit court erred in granting summary judgment for plaintiffs because as a matter of law the St. Louis Board of Police Commissioners and its police officers are not entitled to Legal Expense Fund coverage in that the Board and its officers are not officers or employees of the State or any agency thereof to which the General Assembly intended to provide Legal Expense Fund coverage per § 105.711 RSMo. For purposes of the Legal Expense Fund, the Board is not an agency of the State because (1) historically the State has never provided legal representation to the Board and its officers in litigation and it has never paid any judgment rendered against them or settlements entered by them, (2) the State does not exercise day-to-day control over the Board, (3) the Board's responsibilities are geographically limited, and (4) the Board's operations, including the salaries to the Board and its officers, are not funded by the State. The Circuit Court's reliance upon § 84.330 RSMo and a decision interpreting the Hancock Amendment of the Missouri Constitution was erroneous because the statute and the Hancock Amendment are not in the same context as the Legal Expense Fund and do not reflect any intent by the General Assembly to grant the Board and its officers Legal Expense Fund coverage.

Cates v. Webster, 727 S.W.2d 901 (Mo.banc 1987)

State ex rel Hawes v. Mason, 54 S.W. 524 (Mo. 1899)

Carrington v. City of St. Louis, 1 S.W. 240 (Mo. 1886)

In Re the 1983 Budget for the Circuit Court of St. Louis County, 665 S.W.2d 943,
(Mo.banc 1984)

§ 105.711 RSMo 2000

II. The circuit court erred in granting monetary relief, including costs, in favor of plaintiffs against the State because such relief is in violation of the doctrine of sovereign immunity, in that, the Legal Expense Fund does not waive the State's immunity.

Jones v. State Highway Commission, 557 S.W.2d 225 (Mo. banc 1977)

State ex rel. Regional Justice Information Service Comm. v. Saitz, 798 S.W.2d 705 (Mo. banc 1990)

Richardson v. State Highway & Transportation Commission, 863 S.W.2d 876 (Mo. banc 1993)

§ 105.726 RSMo 2000

ARGUMENT

Standard of Review

Since judgment was entered on plaintiffs' Motion for Summary Judgment, this Court's review is *de novo*. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.* 854 S.W.2d 371, 376 (Mo.banc 1993); *Mid-Missouri Telephone Co. v. Alma Telephone Co.*, 18 S.W.3d 578, 581 (Mo.App. 2000).

I. The circuit court erred in granting summary judgment for plaintiffs because as a matter of law the St. Louis Board of Police Commissioners and its police officers are not entitled to Legal Expense Fund coverage in that the Board and its officers are not officers or employees of the State or any agency thereof to which the General Assembly intended to provide Legal Expense Fund coverage per § 105.711 RSMo. For purposes of the Legal Expense Fund, the Board is not an agency of the State because (1) historically the State has never provided legal representation to the Board and its officers in litigation and it has never paid any judgment rendered against them or settlements entered by them, (2) the State does not exercise day-to-day control over the Board, (3) the Board's responsibilities are geographically limited, and (4) the Board's operations, including the salaries to the Board and its officers, are not funded by the State. The Circuit Court's

reliance upon § 84. 330 RSMo and a decision interpreting the Hancock Amendment of the Missouri Constitution was erroneous because the statute and the Hancock Amendment are not in the same context as the Legal Expense Fund and do not reflect any intent by the General Assembly to grant the Board and its officers Legal Expense Fund coverage.

A. The History of the Legal Expense Fund

The issue in this appeal is whether the General Assembly intended to provide Legal Expense Fund coverage to the Board and its police officers when it enacted section 105.711 RSMo in 1983. The cardinal rule of statutory construction is to determine the intent of the legislature. *Campbell v. Labor & Industrial Relations Commission*, 907 S.W.2d 246 (Mo.App. 1995). In determining legislative intent, a court should consider the history of a statute, including its surrounding circumstances and the problem it sought to address. 907 S.W.2d at 249; *Person v. Scullin Steel Co.*, 523 S.W.2d 801, 803 (Mo.banc 1975); *State v. Duffy*, 8 S.W.3d 197, 202 (Mo.App. 1999). The rationale for this type of analysis was explained in *Perry v. Strawbridge*, 108 S.W.2d 641, 645 (Mo. 1908): "No statute enters a field which was before entirely unoccupied. It either affirms, modifies, or repeals some portion of the previously existing law. In order, therefore, to form a correct estimate of its scope and effect, it is necessary to have

a thorough understanding of the laws, both common and statutory, which heretofore were applicable to the same subject." Thus, to properly understand the Legal Expense Fund it is necessary to understand the laws that preceded it.

The Legal Expense Fund, section 105.711 RSMo, was the successor to the Tort Defense Fund, section 105.710 RSMo 1982 Supp. Although section 105.710 was first enacted in 1967, the Tort Defense Fund was not created until 1969. In 1967, section 105.710 merely authorized the director of the division of mental diseases, the director of the department of corrections, the administrative officer of any state mental institution or any division of the department of corrections to purchase insurance for the purpose of insuring their officers and employees against liability for damages arising from the performance of duties imposed upon them by law. Laws of Missouri 1967, p. 196.

In 1967 there had yet to be any waiver of sovereign immunity under any circumstances. *Jones v. State Highway Commission*, 557 S.W.2d 225, 230 (Mo. banc 1977); § 537.600 RSMo. So there was no direct liability of the State for the acts of its officers and employees. There was also no statutory authorization for the State to pay any judgments rendered against its officers and employees.

Purchasing insurance proved insufficient or unacceptable, because in 1969 the General Assembly amended section 105.710 to create the Tort Defense Fund.

It now authorized the comptroller to pay final judgments, arising from official duties, entered against certain officials and employees. Those covered included the directors of the department of corrections, the division of health, and the division of mental diseases and other officers and employees of those agencies. The attorney general was authorized to defend those covered. Laws of Missouri 1969, p. 187.

What had become the Tort Defense Fund statute was first amended in 1972. At that time the General Assembly extended coverage to the directors of the department of public health and welfare and the division of welfare, the curators and regents of institutions of higher education, and officers and employees of the division of welfare. It appears that although the director of the department of public health and welfare was covered, other officers and employees thereof, apart from the division of welfare, were not. Laws of Missouri 1972, pp. 641-2.

The General Assembly amended the Tort Defense Fund statute again the following year. It extended coverage to the adjutant general and members of the Missouri National Guard. Laws of Missouri 1973, pp. 190-1.

The law was amended again in 1974. The department of corrections was now identified as the division of corrections. The department of public health and welfare was replaced by the department of social services. The division of welfare

was replaced by the division of family services. The division of mental diseases was replaced by the department of mental health. In addition, coverage was extended to the head of the state parks in the department of natural resources and other officers and employees of the department of natural resources assigned to state parks and the administration thereof. Further, rather than payment by the comptroller, payment was now by the commissioner of administration. Laws of Missouri 1974, pp. 749-50.

That version lasted five years. But in 1979, section 105.710 was amended again. This time the General Assembly extended coverage to members and employees of the state highway patrol. Laws of Missouri 1979, pp. 299-300.

The amendments, in the first ten years of the Fund's existence, show two basic trends. First, coverage was being extended to officers and employees of state agencies that had not been previously covered. This was no doubt a reflection of the 1970's expansion of litigation against state officers and employees in federal courts. Second, the statute was being amended to reflect changes in state agency names due to organizational changes. The problem of dealing with these trends truly came to a head in 1982.

In 1982 three bills amended the Tort Defense Fund. Unfortunately, only two of the three could be reconciled. As a result, after the 1982 legislative session

there were two published versions of the Tort Defense Fund. § 105.710 RSMo 1982 Supp. The first change was part of a general bill regarding the department of social services. It extended coverage to the members of the cancer commission and to public defenders. Laws of Missouri 1982, pp. 407, 411-12. The extension of coverage to public defenders was also accomplished by a general bill regarding state public defenders. Laws of Missouri 1982, pp. 696-7. But that bill did not reference the cancer commission. Finally, as part of a general bill regarding corrections, section 105.710 was amended to change the reference from the division of corrections to the department of corrections and human resources. That bill did not refer to either the cancer commission or public defenders. It also had two subsections that the other two versions did not. Laws of Missouri 1982, pp. 435, 438-9.

This is the way things stood in 1983 prior to the enactment of the Legal Expense Fund. Despite the many changes in the previous decade there were some glaring omissions. Although sovereign immunity had been partially waived in 1978, the Tort Defense Fund did not authorize the payment of any judgment rendered against the State or any agency thereof. There was no coverage for the governor or any other statewide elected official. Not all of the department of natural resources was covered. Not all of the department of social services was

covered. In addition to some agencies being only partially covered, other agencies were not covered at all, including the department of revenue, the department of elementary and secondary education and the office of administration. The judiciary and the legislature were not covered. The patchwork quilt of coverage was becoming rather frayed.

In 1983 the Tort Defense Fund was abolished and the Legal Expense Fund was created. No longer did the General Assembly attempt to identify by agency name each officer or employee covered. Instead, coverage was extended to the State or any agency thereof and any officers or employees of the State or any agency thereof. § 105.711 RSMo 1984 Supp. Although the Legal Expense Fund has been amended many times since then, that basic coverage, which is at issue in this appeal, has remained unchanged. This Court is now called upon to determine whether the Board and its police officers are entitled to coverage under that language.

The creation of the Legal Expense Fund was intended to remedy two problems. First, it solved the under inclusiveness of coverage under the Tort Defense Fund. All of the officers and employees who had been left outside coverage by the old Fund were now covered by the new Fund. *In Re the 1983 Budget for the Circuit Court of St. Louis County*, 665 S.W.2d 943, 944-5

(Mo.banc 1984)(Fund "extend[s] coverage to a broader range of state employees"). Second, by defining coverage generically, by reference to the State, its agencies and the officers and employees thereof, the General Assembly no longer had to worry about the possibility that organizational changes would inadvertently eliminate coverage. But the judgment below erroneously extends coverage beyond these two purposes.

Throughout its history the Tort Defense Fund had specifically identified certain agencies whose officers and employees were entitled to coverage. Each agency identified had certain characteristics. They all had statewide responsibilities. They were all funded by the State. Their officers and employees were all paid by the State. As a result, each was part of what was traditionally considered the executive branch of state government.

One obvious intent of the Legal Expense Fund was to extend coverage to all parts of the executive branch.¹ But there is nothing in the history or circumstances surrounding its enactment to support the notion that the General Assembly intended to extend coverage beyond the traditional understanding of what constitutes state government.

¹Of course, in the process, it also extended coverage to the legislative and judicial branches as well. 665 S.W.2d at 945.

Since its enactment in 1983 the State, most notably the Attorney General, has interpreted the Legal Expense Fund as applying to agencies, and their officers and employees, that have statewide responsibilities. This is similar to the Supreme Court's view of its jurisdiction over cases involving title to a state office. Such jurisdiction is limited to offices whose duties cover the whole state. *Patsy v. Olvera*, 969 S.W.2d 715 (Mo.banc 1998). Until 1999 this executive construction had never been disputed, even by the plaintiffs who would be the supposed beneficiaries of a different interpretation. This consistent interpretation by the executive official charged with the primary responsibility of applying the Legal Expense Fund is entitled to great weight. *Linton v. Mo. Veterinary Medical Board*, 988 S.W.2d 513, 517 (Mo.banc 1999). And in the last 20 years the General Assembly has never undertake to "correct" the Attorney General's interpretation.

But the Circuit Court interpreted the Legal Expense Fund as extending to an agency and officers that do not share the characteristics of the executive branch of state government. As a result, the interpretation by the Circuit Court is at odds with the intent of the General Assembly and should be reversed.

B. History of the St. Louis Board of Police Commissioners

The present St. Louis police department was created in 1861.² It replaced the municipal system that existed prior to that. *State ex rel Hawes v. Mason*, 54 S.W. 524, 525 (Mo. 1899). The police department was placed under the exclusive management and control of the Board of Police Commissioners. The police department was to be subject to no other control and to receive no orders or pay from any other authority. *Id.* The legislative intent was for the department to be independent of "local government pressures and maneuverings." *State ex rel. Sayad v. Zych*, 642 S.W.2d 907, 912 (Mo.banc 1982)(Judge Gunn dissenting). Currently the statutory provisions regarding the St. Louis police force are contained in sections 84.010--84.340 RSMo.

This method of organizing a metropolitan police force may seem curious to us today. But we need not look too far into the past to discern the reasons therefor. In 1932 the statute establishing the Kansas City Board of Police Commissioners was declared unconstitutional. *State ex rel. Field v. Smith*, 49 S.W.2d 74 (Mo.banc 1932). Control reverted to the city of Kansas City. In short order the police force became highly politicized. Police officers of the "wrong" political party were fired.

² In the prior appeal of this case, this Court's opinion dealt extensively with the history of the St. Louis police department. L.F. 333.

To maintain their jobs police officers were forced to make contributions to the party in control. In general, the police department became corrupt. The Board was reinstated in 1939. See *Pollard v. Board of Police Commissioners*, 665 S.W.2d 333, 335-6 (Mo.banc 1984). Like the Kansas City Board, the St. Louis Board was created to insulate the police force from the corrupting influence and control of machine politics.

But although the legislature intended to insulate the police department from local influence, it did not intend to place it under the control of the executive branch of State government. The police force was to receive orders from no source other than the Board. *Mason*, 54 S.W.2d at 525. Thus, there is no executive officer in Jefferson City who can direct the operations of the police. Section 84.170.2 RSMo gives the Board the authority to make all rules and regulations it judges necessary for the operation and governance of the police department. While there are certain legislative mandates on the Board, that is no different that legislative directives to any other political subdivision--counties, municipalities, school districts, etc. The General Assembly imposes such directives without the entities becoming state agencies.

Moreover, despite its insulation from municipal control, the Board and police department retain other indicia of a local governmental body. Although four

of the members of the Board are appointed by the Governor, they are required to be residents of the City. § 84.040 RSMo. Its duties are primarily local. The "board was charged with duties within the city of St. Louis." *State ex rel. the Police Commissioners of the City of St. Louis v. the County Court of St. Louis County*, 34 Mo. 546, 567 (Mo. 1864). Finally, the police department is not financially supported by the State. It is funded by the City, with the assistance of some grants and federal aid. L.F. 201. It has been funded by the City since its very inception. *Mason*, 54 S.W. at 525; *Am. Fire Alarm Co. v. Board of Police Commissioners of Kansas City*, 227 S.W. 114, 117 (Mo. 1920)("The expenses of the police systems, including the board of police of the cities, is borne entirely by the municipalities."). The salaries of the Board and its officers are not paid by the State. They are paid by funds from the City of St. Louis. L.F. 174, 176. Given that the Board and its officers do not share the essential characteristics of other agencies that the General Assembly granted Legal Expense Fund coverage, the Circuit Court's interpretation is erroneous.

C. The Board of Police Commissioners is Not a State Agency

To support its conclusion that the Board was a state agency as that term is used in the Legal Expense Fund, the circuit court relied on two cases: *Zych*, 642 S.W.2d 907; *Bittner v. City of St. Louis Board of Police Commissioners*, 925

S.W.2d 495 (Mo.App. 1996). L.F. 806. The flaw in the court's reasoning, however, was that these cases were in a totally different context than the Legal Expense Fund.

The meaning of a statutory term "must depend to some extent on the context in which it appears." *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 19 (Mo.banc 1995). The Supreme Court followed this admonition in its only opinion to discuss the scope of coverage of the Legal Expense Fund, *Cates v. Webster*, 727 S.W.2d 901 (Mo.banc 1987). Recognizing that the legislature had not defined "employee of the state or any agency thereof," the Supreme Court stated that "to determine the intent and meaning of the words they must be considered in their context and in keeping with statutes in pari materia." *Id.* at 905. The Supreme Court concluded that a bailiff of the Circuit Court was not a state employee for purposes of the Legal Expense Fund. The bailiff was paid by the county. The Court did not need to "decide whether [the bailiff] might be considered a state employee for other purposes." *Id.* at 906. The only context that mattered was the Legal Expense Fund.

Thus, although in *Zych*, 642 S.W.2d at 910 the Court held that the Board was "a state agency," it was only "for purposes of article X, section 21 of the Missouri Constitution," the unfunded mandate section of the Hancock

Amendment. The Court reached this conclusion because state law delegated to the Board a specific power that belonged to the State: the power to compel a municipality--the City of St. Louis--to provide funds for a police force. The Hancock Amendment limited the State's power to force a municipality to expend new funds. The narrow holding of *Zych* was that the State could not avoid the Hancock prohibition of unfunded mandates by delegating its power to create a funding mandate. *Id.* But this has no bearing on the meaning of "state agency" in the Legal Expense Fund.

Zych did not deal with whether the Board was part of the executive branch of state government. It did not deal with compensating the Board or funding its operations. It did not deal with legal actions against the Board or the responsibility for any judgments against the Board. Thus, all of the factors that went into the General Assembly's consideration of the Legal Expense Fund were absent in the Supreme Court's decision regarding the Hancock Amendment.

The circuit court relied heavily on the coincident timing of *Zych* --1982-- and the enactment of the Legal Expense Fund--1983. L.F. 806-7. However, the proximity in time of these two events is not a very persuasive tool for statutory construction. This appeal does not present a situation considering similar terminology in two enactments by the same legislative body. The Legal Expense

Fund was enacted by the General Assembly. The Hancock Amendment was enacted by the people pursuant to an initiative. The amendment was not one that was originally proposed by the General Assembly. As a result, there is no connection between the statute and the constitutional amendment in terms of the group of people who enacted them. The people's intent cannot be presumed to be identical to the General Assembly's--as demonstrated in *Akin v. Missouri Gaming Commission*, 956 S.W.2d 261 (Mo.banc 1997), where the Supreme Court held that the people and the General Assembly had intended the term "river" differently in a constitutional amendment and a statute.

Moreover, the Legal Expense Fund and the Hancock Amendment address two different problems. The Hancock Amendment, in part, addresses the State's power to impose additional duties on political subdivisions. On the other hand, "the State Legal Expense Fund exists to protect the covered employees from the burden and expense of civil litigation relating to the performance of their duties." *Cates*, 727 S.W.2d at 907 (Judge Blackmar concurring/dissenting). But at the time the Legal Expense Fund was passed, the St. Louis City Charter already provided legal services to the Board through the City Counselor and the Board's budget was to include all claims against it. L.F. 174-5. There is no indication that the General Assembly intended to change that arrangement. Since *Zych*, the State has not

undertaken to fund any of the Board's operations. It is inconsistent with that consistent legislative policy on Board funding to conclude that General Assembly intended, in the Legal Expense Fund, to fund the costs of the Board's legal defense and legal liability.

The other case relied upon by the circuit court is *Bittner*, 925 S.W.2d 495. But that decision merely holds that the Board is a "state created entity" entitled to sovereign immunity, and not that it was a agency of the State for any purpose, much less the Legal Expense Fund. *Id.* at 499. Whether an entity is state-created or whether it is entitled to sovereign immunity is irrelevant for purposes of the coverage of the Legal Expense Fund. Many governmental entities enjoy sovereign immunity but are not covered by the Fund. *Credit Acceptance Corp. v. Smith*, 991 S.W.2d 720 (Mo.App. 1999). *Bittner* offers no support for the circuit court's conclusion.

The Board is not a state agency within the meaning of the Legal Expense Fund. And its officers cannot be employees of a state agency or the State itself. The Board and its officers are paid out of the City treasury, not the State treasury. L.F. 174, 176.

D. St. Louis police are not State officers for Legal Expense Fund purposes.

The circuit court also held that St. Louis police officers were officers of the State as that term is used in the Legal Expense Fund. L.F. 807. The only authority cited for this conclusion is section 84.330 RSMo. But again, this takes the purported authority out of context, rendering the conclusion erroneous.

Section 84.330 RSMo provides: "The members of the [St. Louis] police force . . . are hereby declared to be officers of the said cities . . . and also to be officers of the state of Missouri, and shall be so deemed and taken in all courts having jurisdiction of offenses against the laws of this state or the ordinances of said cities." It is noteworthy that police officers are first declared to be officers of the City and only secondarily to be officers of the State. The circuit court's judgment gives no explanation why the secondary designation is deemed controlling in the context of the Legal Expense Fund. As courts have found over the years, which status is applicable depends on the context. In *Carrington v. City of St. Louis*, 1 S.W.240 (Mo. 1886) the Court noted that while police "officers are state officers for some purposes, they are also city officers . . . because, for reasons deemed best by the legislature, they are under the control of the commissioners,

but not the assembly. We see by express law they are made city officers." *Id.* at 241.

Section 84.330 is, as noted above, part of an overall statutory system designed to insulate the police department from City control. *Mason*, 54 S.W. 524. The designation of the police as officers of the State, as well as the City, is part of the purpose to secure the independence of the police department. The reference to courts of criminal jurisdiction also indicates the dual designation of St. Louis police officers relates to their arrest powers for both state and city offenses. But neither purpose has any connection with the purpose of the Legal Expense Fund.

On the other hand, members of the police force are city officers for other purposes. In *State ex rel. Wander v. Kimmel*, 165 S.W. 1067 (Mo. 1914) the Supreme Court held that a St. Louis policeman was a city officer under a city ordinance prohibiting city officers from receiving witness fees. In *Carrington*, 1 S.W.240 the Supreme Court held that notice to a city police officer is notice to the City because of the officer's relation to the City. The Court considered the context of the particular cases to determine that the designation as a city officer applied. Similarly, in the context of the Legal Expense Fund the designation as a city officer applies and plaintiffs are not entitled to coverage.

In *Cates*, 727 S.W.2d 901 the Supreme Court also dealt with an employee that arguably had a dual status. The bailiff was paid by the county, although hired and controlled by the judge--a state officer. This is similar to the Board members who are appointed by a state officer, the Governor, but paid by a local government entity, the City. In holding that the bailiff was not entitled to Legal Expense Fund coverage, the Court concluded that legislative intent required focusing on the government entity that paid his salary. The Court rejected the control test. While control might be relevant to *respondeat superior*, it is irrelevant to the Legal Expense Fund. The Fund does not impose vicarious liability on the State. Instead, it provides protection to state employees against judgments and the costs of defending suits. *In re Budget*, 665 S.W.2d at 945. The Supreme Court concluded that the legislature intended to cover those to whom the State paid salaries. The court noted that the statute on circuit clerks, who are paid by the State, are state employees "for all purposes" except those listed. There is no comparable language in section 84.330 RSMo. Rather than for all purposes, the designation in section 84.330 is for limited purposes. Those limited purposes do not include the defense and payment of claims since the Legal Expense Fund was not established until over a century later. For purposes of the Fund, police officers are officers of the City and not entitled to coverage.

In analyzing the issue of Legal Expense Fund coverage for bailiffs, the Supreme Court relied upon a New Jersey decision similar to the instant case. *Township of Edison v. Hyland*, 383 A.2d 714 (N.J. Super.A.D. 1978). In that case the New Jersey court held that municipalities, not the county or state, were responsible for police officers' defense costs. The court stated that even though police officers were agents of the state for some purposes, they were not entitled to the benefit of a state statute intended to provide a defense for persons who were truly state employees. *Id.*

As noted above, the City Counselor has traditionally represented the Board and its officers, and judgments and settlements against them have traditionally been paid by funds appropriated by the City. Neither the circuit court nor the plaintiffs offered any explanation as to why the General Assembly would reject that long standing arrangement. Given that history, there is no reason to believe that the General Assembly intended to benefit the plaintiffs by providing Legal Expense Fund coverage when there were undisputed state officers and employees who were not covered prior to the Legal Expense Fund. The circuit court's declaration to the contrary should be reversed.

II. The Circuit Court erred in granting monetary relief, including costs, in favor of plaintiffs against the State because such relief is in violation of the doctrine of sovereign immunity, in that, the Legal Expense Fund does not waive the State's immunity.

The judgment below also granted monetary relief in the amount of \$35,065.35 against the State. L.F. 809. That relief is barred by sovereign immunity. In addition to naming the State, plaintiffs' naming of state defendants in their official capacities is a suit against the State. *Edwards v. McNeill*, 894 S.W.2d 678 (Mo.App. 1995). The monetary relief consisted of the costs of defense (attorneys fees) and the amounts of judgments or settlements arising from the specific cases identified in the petition. The circuit court also awarded the plaintiffs their costs in their declaratory judgment action.

This judgment constitutes a judicial waiver of the State's immunity. But Missouri law is clear that without legislative consent there can be no liability. *Kleban v. Morris*, 247 S.W.2d 832, 840 (Mo. 1952). Any waiver of immunity must come from the General Assembly and be clear on its face. *State ex rel. Regional Justice Information Service Comm. v. Saitz*, 798 S.W.2d 705, 708 (Mo. banc 1990).

Section 105.726, RSMo does not provide such a waiver. In fact, it disavows such a broad reading:

Nothing in sections 105.711 to 105.726 shall be construed to broaden the liability of the state of Missouri beyond the provisions of section 537.600 to 537.610, RSMo, . . .

In requesting monetary relief, plaintiffs relied on *Dixon v. Holden*, 923 S.W.2d 370 (Mo.App. 1996). In *Dixon* the Court erroneously viewed sovereign immunity as limited to tort actions. 923 S.W.2d at 379. But the State's immunity is not limited to actions in tort. Even *Jones v. State Highway Comm.*, 557 S.W.2d 225, 230 (Mo. banc 1977) which for a short time abrogated the State's tort immunity, did not purport to affect the broader scope of sovereign immunity or to impose liability upon the State or any of its agencies "for actions or omissions constituting the exercise of a legislative, judicial or executive function." Thus, sovereign immunity has barred numerous claims against the State other than those in tort. For example, in *Fort Zumwalt School District v. State*, 896 S.W.2d 918 (Mo.banc 1995) sovereign immunity prevented a monetary award based upon alleged violations of the Hancock Amendment. In *Kleban*, 247 S.W.2d 832 the Court stated that sovereign immunity prevented a suit for refund of illegally

collected taxes absent legislation authorizing a refund. In *Dixon* the Court simply failed to recognize that the State's immunity is broader than torts.

Section 105.726, proscribing extension of the State's liability, is not limited to tort actions. Section 105.726 maintains the State's immunity regarding judgments against its employees as it was prior to the enactment of section 537.600. As the Court explains in *Jones*, 557 S.W.2d at 530, this prior immunity includes claims based upon the exercise of an executive function. Since payments from the Legal Expense Fund must be with the approval of the Attorney General and the Commissioner of Administration, section 105.711.4 RSMo, their decisions regarding the proper scope of statutory coverage, even if erroneous, pertain to an executive function. Under the principles enunciated in *Jones*, sovereign immunity prohibits any claim for damages arising therefrom. Neither section 537.600 nor the Legal Expense Fund waives that immunity.

Moreover, since *Dixon*, this Court has now issued a decision in *Bachtel v. Bisbey*, No. WD 60723 (Mo.App. WD, August 27, 2002)(the legislature did not intend to expressly waive sovereign immunity in a statute that did not contain express consent or expressly create a cause of action). Similarly, the Legal Expense Fund does not expressly consent to suit or create a cause of action. It only authorizes the Commissioner and the Attorney General to approve payments from

the Fund. It is not a consent to a suit in order to compel payment from the Fund. Thus, no monetary relief can be awarded.

Moreover, even if the Legal Expense Fund waived the State's sovereign immunity for the underlying tort actions, that waiver does not include costs in plaintiffs' suit for declaratory judgment. Absent statutory authority, the State is not liable for costs, even in cases in which sovereign immunity has been waived for damages. *Richardson v. State Highway & Transportation Commission*, 863 S.W.2d 876,882 (Mo. banc 1993)(waiver of sovereign immunity in section 537.600 RSMo did not include costs.) Plaintiffs did not and cannot demonstrate that there is statutory authority for an award of costs against the State in their action for a declaratory judgment. As a result, the circuit court's award of costs to plaintiffs is erroneous.

CONCLUSION

St. Louis City Police officers and members of the St. Louis Board of Police Commissioners are not entitled to Legal Expense Fund coverage. Accordingly, the judgment in favor of plaintiffs should be reversed and the case remanded to the circuit court with directions to grant defendants' motion for summary judgment and enter judgment in defendants' favor. Alternatively, even if the declaratory

judgment is affirmed, the judgment awarding monetary relief to plaintiffs should be reversed pursuant to the doctrine of sovereign immunity.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing and a 3 ½" labeled diskette containing this brief were served, first class postage pre-paid, this 30th day of May, 2003, to:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the limitations contained in Missouri Rule 84.06, and that the brief contains 6,670 words.

The undersigned further certifies that the diskette simultaneously filed with the hard copies of the brief has been scanned and is virus free.

Assistant Attorney General

APPENDIX

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