

IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

WAYMAN SMITH, III, et al.,)
)
 Plaintiffs/Respondents,)
)
v.) Appeal No. WD62579
)
THE STATE OF MISSOURI, et al.,)
)
 Defendants/Appellants.)

Appeal from the
Circuit Court of Cole County, Missouri
Honorable Byron L. Kinder, Judge

REPLY BRIEF OF APPELLANTS THE STATE OF MISSOURI,
JEREMIAH (JAY) NIXON, NANCY FARMER and
JACQUELINE WHITE

JEREMIAH W. (JAY) NIXON
Attorney General

Robert Presson
Mo. Bar No. 23256
Assistant Attorney General
Broadway Building, 6th Floor
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-9456

Attorneys for Appellants

TABLE OF CONTENTS

	<i>Page(s)</i>
TABLE OF AUTHORITIES	2
POINTS RELIED ON	4
II.	5
ARGUMENT	6
I.	6
A. Introduction	6
B. Legal Expense Fund	8
C. The St. Louis Board of Police Commissioners	13
D. St. Louis Police Officers	16
II.	18
CONCLUSION	20
CERTIFICATE OF SERVICE	22
CERTIFICATE OF COMPLIANCE	23

TABLE OF AUTHORITIES

Cases:

<i>Cates v. Webster</i> , 727 S.W.2d 901 (Mo.banc 1987)	5, 7, 10, 15, 20
<i>Crain v. Mo. State Employees Retirement System</i> , 613 S.W.2d 912 (Mo.App. 1981)	19
<i>Dixon v. Holden</i> , 923 S.W.2d 370 (Mo.App. 1996)	19
<i>Fort Zumwalt School District v. State</i> , 896 S.W.2d 918 (Mo.banc 1995) . . .	19, 20
<i>Hawkins v. Missouri State Employees' Retirement System</i> , 487 S.W.2d 580 (Mo.App. 1972)	12
<i>Jones v. State Highway Commission</i> , 557 S.W.2d 225 (Mo. banc 1977)	5
<i>Palo v. Stangler</i> , 943 S.W.2d 683 (Mo.App. 1997)	19
<i>Roberts v. City of St. Louis</i> , 242 S.W.2d 293 (Mo. App. 1951)	17
<i>Rules of the Circuit Court of the Twenty-first Judicial Circuit</i> , 702 S.W.2d 457 (Mo. banc 1985)	12
<i>Slater v. City of St. Louis</i> , 548 S.W.2d 590 (Mo.App. 1977)	13
<i>State ex rel Hawes v. Mason</i> , 54 S.W. 524 (Mo. 1899)	5
<i>State ex rel Hawes v. Mason</i> , 54 S.W. 524 (Mo. 1899)	13
<i>State ex rel Sanders v. Cervantes</i> , 480 S.W.2d 898 (Mo.banc 1972)	14
<i>State ex rel Sayad v. Zych</i> , 642 S.W.2d 907 (Mo.banc 1982)	15
<i>State ex rel St. Louis Police Commissioners v. St. Louis County</i> , 34 Mo. 546 (1864)	13

State v. Olvera, 969 S.W.2d 715 (Mo.banc 1998) 14

V.S. DiCarlo Construction Co. v. State, 485 S.W.2d 52 (Mo. 1972) 19

Wolff Shoe Co. v. Director of Revenue, 762 S.W.2d 29 (Mo. Banc 1988) 7

Other:

Art. VI, § 22 7

Art. X, § 21 of the Missouri Constitution 15

§ 105.710.5 RSMo 1982 Supp. 11

§ 105.711 6, 9

§ 105.726 RSMo 11, 20

§ 217.055.4 RSMo 10

§ 253.067.4 RSMo 10

§ 42.007.5(6) RSMo 10

§ 51.020 RSMo 16

§ 536.150 RSMo 20

§ 544.157 RSMo 18

§ 58.020 RSMo 16

§ 60.010 RSMo 16

§ 660.608 RSMo 10

§ 84. 330 RSMo 2000 6, 8, 16

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)

Fort Zumwalt School District v. State, 896 S.W.2d 918 (Mo.banc 1995)

Roberts v. City of St. Louis, 242 S.W.2d 293 (Mo. App. 1951)

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.

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

Fort Zumwalt School District v. State, 896 S.W.2d 918 (Mo.banc 1995)

ARGUMENT

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. Introduction

The Board of Police Commissioners, et al, (Board) begin their brief by chiding the State defendants for ignoring the cardinal rule of statutory construction—determining legislative intent. The Board must have overlooked page 15 of the State’s brief. Not only did the State recognize the primacy of legislative intent, but it explained how, in the context of this case, that intent could best be determined—legislative history.

Moreover, the Board fails to heed its own advice. It gives very little attention to the General Assembly’s intent. Instead, its argument adopts a mechanical approach that assumes the terms state agency and state officer must have the same meaning in all statutes, regardless of the context. But context does matter, particularly in reference to the Legal Expense Fund. *Cates v. Webster*, 727 S.W.2d 901, 906 (Mo.banc 1987)(Supreme Court noted it did not have to decide whether a bailiff was a state employee for any purpose other than the Legal Expense Fund). In this case the issue is not whether the Board and its officers are a state agency or state officers in the context of Art. VI, § 22 or Art. X, § 21 of the Missouri Constitution, so the cases the Board relies upon are not on point.

Apart from its failure to analyze legislative intent in an appropriate context, the Board also ignores the principle it cites—words should be considered in their “plain and ordinary meaning.” *Wolff Shoe Co. v. Director of Revenue*, 762 S.W.2d 29, 31 (Mo. Banc 1988). For instance, the plain and ordinary meaning of the term state officer cannot be determined from a statutory declaration such as § 84.330 RSMo. If it were obvious that the plain and ordinary meaning of state officer included St. Louis police officers, no statutory declaration would have been necessary.

Instead, the General Assembly’s intent in creating the Legal Expense Fund, as reflected both in the act’s legislative history and the plain and ordinary meaning of its terminology, is that the Board and its officers are not entitled to Fund coverage.

B. Legal Expense Fund

The Board does not dispute the history leading up to the passage of the Legal Expense Fund, as recounted in the State’s brief. It does not dispute that the Fund’s predecessor, the Tort Defense Fund, applied only to certain officials and employees of agencies that were funded by the State and had statewide responsibilities. But it does disagree with the State’s conclusion that the Legal Expense Fund was intended to extend coverage only to additional agencies,

officials and employees that possessed those same characteristics—state funding and statewide responsibilities.

Instead, the Board argues that the General Assembly made a quantum leap in extending the coverage of the Legal Expense Fund. The Board concludes that the Fund was no longer limited to agencies funded by the State or with statewide responsibilities. But the Board offers no explanation why the General Assembly would have taken an action that, in comparison to its earlier statutes, represented such an extreme departure from its previous policy.

Not only is the Board’s interpretation of the Fund inexplicable, but it is not supported by the terminology of the statute. The Board claims that it is “nonsense” to argue that the Fund covers only those who are paid by the State. They point out that certain doctors employed by entities other than the State are covered by the Fund. See § 105.711.2(3)(b–e) RSMo. But these individuals are covered because of specific statutory provisions that explicitly grant coverage. The Board and its police officers are not health care providers covered by that section. The issue concerning them is whether they come within the general scope of coverage contained in § 105.711.2(2)—officers and employees of the State or any agency of the State.

While the Board’s reliance on subparagraph (3) of § 105.711.2 is misplaced and does not support its conclusion, it does raise an interesting point. Section 105.711.2(3)(a) grants coverage to certain health care providers employed by the State or an agency “under formal contract.” If Legal Expense Fund coverage was as broad as the Board believes, then this provision would have been unnecessary. The fact that the General Assembly deemed it necessary to explicitly grant this coverage demonstrates that those employed under a formal contract were not previously covered by the general language of officers or employees. Thus, the General Assembly has a more limited view of the Fund’s general coverage than does the Board.

This is also born out by other instances in which the General Assembly has explicitly granted Fund coverage. For instance, volunteers for the Missouri Veterans’ Commission “shall be deemed unpaid employees and shall be accorded the protection of the Legal Expense Fund.” § 42.007.5(6) RSMo. Similar statutes grant coverage to volunteers for other, but not all, state agencies. § 44.125.4 RSMo (volunteers for the State Emergency Management Agency); § 217.055.4 RSMo (volunteers for the Department of Corrections); § 252.245.4 RSMo (volunteers for the Department of Conservation); § 253.067.4 RSMo (volunteers for the Division of State Parks); and § 660.608 RSMo (**volunteers** for the

Department of Social Services). Thus, even though volunteers act for the State and under the supervision of state officers and employees, they were not covered by the Fund until the General Assembly explicitly granted coverage to them. In the absence of an explicit grant of coverage, the payment of officers and employees by the State is a crucial element of Legal Expense Fund coverage.

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

Plaintiffs also note that the Tort Defense Fund provided that its coverage was “part of the compensation to be paid” to those state officers and employees covered. Because that language is absent from the Legal Expense Fund, the Board argues that the General Assembly intended to cover individuals who were not paid by the State. But that conclusion is fallacious. The Legal Expense Fund did not eliminate the link between coverage and being compensated by the State. The use of the terms officers and employees still demonstrates that connection. What the Legal Expense Fund eliminated was that the coverage was no longer considered part of the compensation.

The reason for this change probably related to the State’s sovereign immunity. When Tort Defense Fund coverage was part of an employee’s compensation, the statute might have been viewed as granting an entitlement that would waive the State’s immunity. In fact, in 1982 the General Assembly

amended the Tort Defense Fund trying to limit the scope of any waiver. “To the extent the provisions of this section allow monetary recovery against the state of Missouri, the doctrine of sovereign immunity is waived but to no greater extent.” § 105.710.5 RSMo 1982 Supp. But the following year the General Assembly abandoned that approach. In enacting the Legal Expense Fund it explicitly disavowed any waiver of immunity, § 105.726 RSMo, and, as part of that, eliminated any implied waiver by dropping the language that coverage was part of an employee’s compensation. But this amendment does not change the fact that, absent a special provision, coverage is intended for those to whom the State pays compensation. And given the General Assembly’s obvious concern for the scope of the State’s liability, it is unlikely that it would extend coverage beyond traditional state agencies, officers and employees.

The Board also asserts that the State is incorrect in limiting Fund coverage to agencies, officers and employees who have statewide responsibility. The Board argues that this approach would exclude the judiciary from coverage, except for the Supreme Court. But the Board forgets that Missouri has a unified court system administered by the Chief Justice of the Supreme Court. *In re Rules of the Circuit Court of the Twenty-first Judicial Circuit*, 702 S.W.2d 457 (Mo. banc 1985). Circuit judges are judges of the State, not merely the circuit in which they

are elected or appointed. *Hawkins v. Missouri State Employees' Retirement System*, 487 S.W.2d 580, 582 (Mo.App. 1972). The General Assembly appropriates funds “to the court system of this State as a single unified department of government.” *Id.* At 583. Thus, the judiciary is no different than many other departments of state government that, for administrative reasons, is organized into sub-parts that have regional responsibilities. A circuit judge, like an official in a county Social Services office, is part of a state department with statewide responsibility and is covered by the Legal Expense Fund. But the Board is not part of such a statewide department.

The Board offers no sound reasons why the General Assembly would depart so drastically from its previous approach in granting coverage under the Tort Defense Fund. The same general approach continued and limited coverage to those agencies, officers and employees who are traditionally consider to be a part of state government—those funded and paid by the State. The circuit court’s conclusion to the contrary is erroneous.

C. The St. Louis Board of Police Commissioners

Again the Board does not disagree with the historical background of its creation, as summarized in the State’s brief. They simply ignore that historical context when viewing any reference to the Board as a state agency. But such

references are relevant only to whether the State may divorce control of the metropolitan police department, but not its funding, from the City of St. Louis. *State ex rel St. Louis Police Commissioners v. St. Louis County*, 34 Mo. 546 (1864); *State ex rel Hawes v. Mason*, 54 S.W. 524 (Mo. 1899). This same historical background was noted in *Slater v. City of St. Louis*, 548 S.W.2d 590 (Mo.App. 1977) in which the real issue was whether difference in treatment between airport police and metropolitan police was a violation of equal protection. But whether the General Assembly may constitutionally create this sort of system and require the City to fund it is a vastly different issue than currently faces this Court.

The Board's approach is simply to take any reference it can find to the Board as a state agency and plug it in to any other reference to a state agency, regardless of context. That approach can be dangerous. For instance, although the Supreme Court referred to the Board as a state agency, in the same case it also referred to St. Louis County as a state agency. 34 Mo. at 572. And the Supreme Court has also referred to the City of St. Louis as a state agency. "The state levies and requires one of its own agencies to collect and pay over the tax to liquidate a certain, not an unlimited, sum, when demanded by its other agency, the board; and it does not lie in the mouth of the city to plead other obligations as superior to

the demands of its creator.” 54 S.W at 531. Perhaps the City or County Counselor will next allege that all of their officers and employees are entitled to Legal Expense Fund coverage.

The Board’s reliance upon *State ex rel Sanders v. Cervantes*, 480 S.W.2d 898 (Mo.banc 1972) is also misplaced. The Board cites *Sanders* for the proposition that there must be judicial review “of the acts of any public official or administrative agency of this state.” *Id.* at 891. But being an officer or agency of this state is not the same as being a state agency or state officer. *State v. Olvera*, 969 S.W.2d 715 (Mo.banc 1998). Moreover, the Board ignores the whole point to the case. *Sanders* dealt with whether the General Assembly could constitutionally authorize the Board to make allowance for retirement benefits in its budget submitted to the City. The Supreme Court distinguished cases under the 1875 Constitution, noting that under the present Constitution retirement for municipal officers was authorized. 480 S.W.2d at 892-3. The Court’s conclusion that there is no constitutional barrier to the statutory power to grant retirement, implies that the Board and its officers were treated at municipal officers. Not only is that contrary to the conclusion the Board wishes to draw but it illustrates the importance of context when considering the meaning of statutory terms. *Cates* 727 S.W.2d at 905.

The importance of context is also demonstrated by *State ex rel Sayad v. Zych*, 642 S.W.2d 907 (Mo.banc 1982), another case relied on by the Board. There, the Supreme Court concluded that the Board was a state agency for purposes of Art. X, § 21 of the Missouri Constitution. Interestingly, the Supreme Court did not hold that the Board was a state agency for all parts of the Hancock Amendment, only § 21. The Supreme Court did not consider whether the Board is a state agency for purposes of calculating total state revenues or making refunds of excess revenues. The Board's approach goes far beyond possibly applying this holding to other parts of the Hancock Amendment. It uncritically applies the holding to a totally distinct area of law. The Supreme Court determined the status of the Board only in the limited context that was necessary for that case. Why the narrow holding in *Sayad* has no relevance to the instant case is fully explained in the State's opening brief.

The Board next argues that because the Governor issues commissions to officers under the Constitution, including the Board, they must be state officers under the Legal Expense Fund. But the Governor issues commissions to a wide variety of officials who are not state officers. § 51.020 RSMo (county clerks); § 54.030 RSMo (county treasurers); § 58.020 RSMo (county coroners); § 59.020 RSMo (county recorders of deeds); and § 60.010 RSMo (county surveyors).

The Board also points out that the General Assembly has, by statute, established the qualifications of police officers and set their salaries, among other things. But the General Assembly has similarly legislated with regard to county officers such as those listed above. Such standards that the General Assembly chooses to impose on its political subdivisions is irrelevant to whether it intended to grant them coverage under the Legal Expense Fund. Surely the Board does not suggest that all these officials are entitled to Legal Expense Fund coverage.

D. St. Louis Police Officers

The Board's primary support for its argument that police officers are entitled to Legal Expense Fund coverage continues to be that § 84.330 RSMo declares such officers to be officers of the State. But the Board continues to ignore that the statute also declares St. Louis police officers to be officers of the City. Which status applied has depended upon the context in which the issue arose. The context in this case is representation and indemnification of police officers in legal proceedings.

The State's opening brief noted that under the St. Louis City Charter the City Counselor was to provide legal services to the Board. In response the Board acknowledges that historically it or the City have generally indemnified police officers for judgments against them. But the Board notes that it is not legally

required to do so. *Roberts v. City of St. Louis*, 242 S.W.2d 293 (Mo. App. 1951) holds that it is discretionary with the City of St. Louis whether to represent and indemnify city police officers. But in reaching that conclusion the court of appeals rejected the City's argument that the City Charter provision did not apply to the police department created by the General Assembly, as opposed to a police department created by the City itself. The court of appeals noted that § 84.330 declared police officers to be officers of the City and that, therefore, the framers of the Charter must have intended to cover the police department then in existence. Thus, in the context of representation and indemnification of police, the court of appeals looked to their status as officers of the City.

Apart from the statute, the Board argues that St. Louis police officers should be covered by the Legal Expense Fund because they are authorized to make arrests elsewhere in the State. § 84.090(10) RSMo. Even if their authority is as broad as the Board implies, the extent of their authority does not change the fact that their duties are primarily local. 34 Mo. at 567. Moreover, other municipal police officers have been granted authority to act outside their jurisdiction under certain circumstances. § 544.157 RSMo. Such authority is granted them, like St. Louis police officers, because the General Assembly has

deemed it appropriate for efficient law enforcement. Not in order to grant them Legal Expense Fund coverage.

Whether the Board and the City of St. Louis choose to represent and indemnify city police officers is no different than the situation facing other municipal police departments in the State. The question here is whether the General Assembly intended to single out the St. Louis police for special protection. It did not. The legislative history of the Legal Expense Fund indicates that coverage was intended only for officers that are traditionally considered part of state government. Because that does not include municipal police officers, the Board and its officers are not entitled to Fund coverage.

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.

As expected, the Board relies on *Dixon v. Holden*, 923 S.W.2d 370 (Mo.App. 1996) for the proposition that the doctrine of sovereign immunity does not prevent a monetary award against the State under the Legal Expense Fund. But the Board does not explain why *Dixon's* characterization of sovereign immunity as a defense in tort constituted an incorrect and erroneous limitation on

the State's immunity. Instead, they also cited *Palo v. Stangler*, 943 S.W.2d 683 (Mo.App. 1997) which makes the same mistake. "Sovereign immunity is a defense to a tort action against a governmental entity." *Id.* at 685. But, as explained in the State's opening brief, the doctrine is more than just protection in a tort action. It is a bar to suits against the State in general and to monetary liability of types other than damages in tort. *Fort Zumwalt School District v. State*, 896 S.W.2d 918, 923 (Mo.banc 1995). In reference to any judgment imposing a monetary liability on the State it cannot be said, as *Dixon* did, that the doctrine of sovereign immunity is irrelevant. The only appropriate inquiry is whether the immunity has been waived by the General Assembly.

The Board argues that there has been a waiver. Of course, the Legal Expense Fund is not a contract as in *V.S. DiCarlo Construction Co. v. State*, 485 S.W.2d 52 (Mo. 1972). But the Board also relies on *Crain v. Mo. State Employees Retirement System*, 613 S.W.2d 912, 917 (Mo.App. 1981) for the proposition that a waiver of immunity may be inferred from a statute that grants a benefit. *Crain* was a declaratory judgment action and it is not apparent from the opinion whether retroactive benefits were at issue in the case. In any event, it has no relevance to the Legal Expense Fund. A waiver of sovereign immunity cannot be inferred based on a statute that, like the Legal Expense Fund, explicitly

disclaims any waiver. § 105.726 RSMo. To do so would ignore the express intent of the General Assembly.

The Board also seeks to distinguish *Fort Zumwalt* because the Supreme Court held that it would not infer a waiver of immunity against a monetary liability when other less onerous remedies, such as declaratory judgment, were available. 896 S.W.2d at 923. The Board claims it has no other remedy. But it is mistaken. Any person who believes that the Attorney General has incorrectly denied Legal Expense Fund coverage can seek review of that decision by requesting a declaratory judgment under § 536.150 RSMo. See *Cates*, 727 S.W.2d 901.

Because the General Assembly explicitly disclaimed any waiver of sovereign immunity in the Legal Expense Fund and because any employee aggrieved by a denial of coverage may seek review thereof, the doctrine of sovereign immunity bars the monetary award included in the circuit court's judgment.

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.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

Robert Presson
Assistant Attorney General
Mo. Bar No. 23256
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-9456

Attorneys for Appellants

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 16th day of July, 2003, to:

Edward J. Hanlon
Deputy City Counselor
314 City Hall
St. Louis, MO 63103

Assistant Attorney General

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 4,497 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