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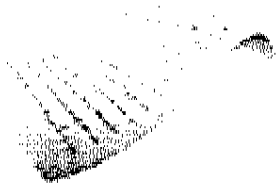
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IN THE MISSOURI SUPREME COURT

ALVIN BROOKS, et al.,)	
)	
Respondents,)	
)	
v.)	Case No. 85674
)	
STATE OF MISSOURI, et al.)	
)	
Appellants.)	

**MOTION FOR CLARIFICATION OR MODIFICATION OF
BRIEFING SCHEDULE**

Respondents are in a unique position. Their counsel do not seek to delay this case unnecessarily, but are scheduled to file a brief in this Court on December 19, 2004, long before the Trial Court judgment becomes final. If Respondents file their initial brief before the trial court judgment becomes final, Appellants can argue that Respondents have waived the Trial Court's jurisdiction over their motion for a new trial or, in the alternative, to amend judgment. (Exhibit 1) If Respondents file their notices of cross appeal, which typically precedes briefing, the Trial Court may lose jurisdiction and in turn, Respondents would lose their legal rights to post-trial relief from the Trial Court. Perhaps most importantly, until the Trial Court rules on the post-trial motions, there is no way to know who must take the laboring oar on appeal of certain issues, as explained below.

On November 7, 2003, the Honorable Steven R. Ohmer issued his Judgment and Order enjoining the Conceal and Carry Legislation. (Legal file

376-397). Less than two weeks later on November 20, 2003, Respondents, as Plaintiffs in the Trial Court, filed their motion for new trial, or in the alternative, to amend judgment seeking relief on the following limited grounds: (1) the Concealed and Carry Law violates the Hancock Amendment; (2) no injunction bond is authorized after entry of final judgment by the trial court; and (3) Plaintiffs' Petition should be amended to conform to the evidence presented at trial. (Exhibit 1). Appellants, as Defendants in the Trial Court, filed their responses to this motion and the matter is now properly briefed and pending before Judge Ohmer. (Exhibits 2,3 and 4)

On November 19, 2003, this Court issued its Order setting a briefing and argument schedule. The Trial Court issued an Order dated December 10, 2003 and post marked December 12, 2003, which Respondents received the following Monday, December 15, 2003. The Order set the post-trial motion for hearing on Thursday, December 18, 2003. Whether the Trial Court rules from the bench or later is unknown, but in any event, the current briefing schedule would require Respondents to file their brief in this Court on Friday December 19, 2003, the day following the Trial Court hearing. While Respondents are interested in expediting this case in a reasonable manner, this unexpected Trial Court hearing results in uncertainty. If the Trial Court finds that the Conceal and Carry Act violates the Hancock Amendment, then Appellants will have another issue to appeal and brief. Even if the Trial Court denies the post-trial motions, Respondents will not have sufficient time to consider and address whatever

ruling Judge Ohmer makes on December 18, 2003, or thereafter, before their brief is due the next day.

The post-trial motion was timely, pursuant to Rule 78.04, MRCP. Pursuant to Rule 81.05(a), MRCP, if a party timely files an authorized after-trial motion the judgment becomes final at the earlier of the following: "(A) Ninety days from the date of the last timely motion was filed, on which date all motions not ruled shall be deemed overruled; or (B) If all motions have been ruled, then the date of ruling of the last motion to be ruled or thirty days after entry of judgment, whichever is later." The Notices of Appeal filed by Appellants are premature and should be considered as filed immediately after the time the judgment becomes final for the purpose of appeal as set forth above. Rule 81.05(b), MRCP. In turn, Respondents have 10 days after the filing of Appellants' Notices of Appeal to file their Notice of Cross Appeal. Rule 81.04(b). Consequently, Respondents' Notice of Cross Appeal is not yet due. Appellants have already argued in Intervenor/Defendants memorandum in opposition to the post-trial motion that the Trial Court is "likely divested of jurisdiction by virtue of the Supreme Courts action" in ordering a briefing schedule for all issues. (Exhibit 3) Certainly if Respondents were to file notices of cross appeal, Appellants would claim that Respondents waived their right to a final decision by Judge Ohmer.

Appellants also seem to argue that because this Court considers all issues *de novo*, a final decision by the trial court is of no consequence. In

addition to flying in the face of this Court's efforts to require final judgments for purposes of appeal, this position wholly ignores Respondents' rights. Taken to its logical extreme, Appellants' argument would mean that there is no need to present legal issues to a trial court when there is *de novo* review on appeal. It is easy for the Appellants to take such a cavalier position, as they do not have \$250,000.00 tied up in a court ordered bond. Apparently, appellants have taken this position because they want to prevent release of the preliminary injunction bond, despite the fact that Appellants presented the Trial Court no authority justifying the retention of a preliminary injunction bond after the injunction becomes final. (Exhibit 4) Rather than admitting this lack of authority, Appellants simply try to avoid the issue by claiming that the trial court has lost jurisdiction and the matter can be handled on appeal. But that does not address the real and substantial harm to the individuals who have posted the bond that will result from their loss of use of these funds since October 10, 2003 while the case is briefed, argued and finally decided. Those individuals are entitled to a ruling by the Trial Court on this issue as part of the final judgment. A Trial Court ruling on the issue of the bond could avoid yet another issue on appeal.

Any delay occasioned by loss of the Trial Court's jurisdiction over this matter will cause significant harm to Respondents and others. If the trial court cannot rule on this motion because it has lost jurisdiction, the persons who posted the bond will suffer significant financial harm. In addition, Respondents, as Plaintiffs below, moved the Trial Court to reconsider its denial of relief on

Hancock Amendment grounds, which is another significant constitutional issue in this case. Respondents believe and have asserted in their post-trial motion that the law and facts are strongly in their favor on this issue. They are entitled to reconsideration by the Trial Court outside of the shadow of the other constitutional issues, as this will determine who appeals the Hancock Amendment issue. The filing of a notice of cross appeal or brief on appeal could result in a loss of the right of Plaintiffs below to have these issues fully, finally and fairly adjudicated by the Trial Court. Consequently, Respondents seek an order clarifying or modifying the briefing schedules in light of these concerns. ¹

As a suggestion, Respondents propose that the oral arguments remain the same, assuming an expeditious ruling by the Trial Court, and that Plaintiffs file all briefs with this Court, including notices and briefs on cross-appeals, seven (7) days after the Trial Court fully disposes of the post-trial motion. In the event the Trial Court finds the conceal and carry enactment violates the Hancock Amendment, Appellants would have seven (7) days to appeal and brief that issue.

¹ If the Court is inclined to change the briefing or argument schedule, Respondents' counsel wish to advise the Court of one significant scheduling conflict. In early October, Respondents' counsel, Burton Newman, scheduled a family vacation which is prepaid from January 9 through January 17, 2004. He would be unable to participate in briefing or arguments during that time period.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The above signature(s) hereby certify that a copy of the foregoing was transmitted via facsimile this 16th day of December, 2003, to:

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COPY

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

ALVIN BROOKS, et al.,)	
)	Cause No. 034-02425
Plaintiffs,)	
)	Division No. 2
vs.)	
)	
STATE OF MISSOURI, et al.,)	
)	
Defendants.)	

MOTION FOR NEW TRIAL OR, IN THE ALTERNATIVE, TO AMEND JUDGMENT

Plaintiffs move the Court to enter its Order granting a new trial on the limited grounds specified below or, in the alternative, to amend the judgment entered on November 7, 2003, and as grounds and reasons in support thereof, and pursuant to Rules 78.01 and 78.04, Rules of Civil Procedure, state as follows:

1. Rule 78.01 provides in pertinent part as follows:

On a motion for a new trial of an action tried without a jury, the Court may - - - amend findings of fact or make new findings, and direct the entry of a new judgment.

The motion is to be filed not later than 30 days after the entry of judgment in accordance with Rule 78.04, which provides as follows:

Any motion for new trial or any motion to amend the judgment or opinion shall be filed not later than 30 days after the entry of judgment.

This Court's judgment was entered on November 7, 2003. This motion is timely filed in accordance with Rule 78.04.

2. An authorized after-trial motion is a motion for which the rules expressly provide. *State, Dept. of Labor and Industrial Relations v. Ron Woods Mechanical, Inc.*, 926 S.W.2d 537, 540 (Mo.App. 1966). The Supreme Court, in *Taylor v. United Parcel*

Service, Inc., 854 S.W.2d 390, 392 n.1 (Mo. banc 1993) recognized a motion to amend the judgment under the rule then known as Rule 73.01(a)(3), now Rule 78.04, as an authorized after-trial motion.

3. Plaintiffs move the Court to amend its judgment with respect to its findings and rulings pertaining to three issues on the basis that the Court reached erroneous conclusions based on the evidence, overlooked legal authorities or evidence of record, or entered judgment that was not supported by the law or evidence, as follows:

(A) Hancock Amendment

The Court denied Plaintiffs' relief under the Hancock Amendment, Article X, Section 21 of the Missouri Constitution. In so doing, the Court stated:

It is certainly questionable whether this law establishes a new activity on the part of existing Sheriffs' duties. See County of Jefferson v. Quick Trip Corp., 912 S.W.2d 487, 492 (Mo banc 1995). However, there is no evidence to support the proposition that the law will result in increased costs to the Sheriffs' offices of the State. It is clear that the One Hundred Dollar (\$100.00) application fee will be more than adequate to cover any increased costs. Therefore, this funding mechanism of the application and renewal fees under the law adequately satisfy the Hancock Amendment. Accordingly, Plaintiffs' challenge to the law under the Hancock Amendment - Article X, Section 21 is hereby DENIED. (Judgment and Order, pg. 4)

As explained in detail in Section I below, violations of the Hancock Amendment were wholly substantiated by the evidence before the Court. Accordingly, Plaintiffs seek a new trial on the issues relating to the Hancock Amendment under Article X, Section 21 or, in

the alternative, that the Court amend its findings, rulings and denial of relief under that section of the Hancock Amendment.

(B) Unauthorized Bond.

In its judgment of November 7, 2003, the Court ordered that:

the preliminary injunction bond posted by Plaintiffs pursuant to this Court's Order of October 10, 2003 in the amount of Two Hundred Fifty Thousand Dollars (\$250,000.00), secured shall remain in full force and effect pending appellate review. (Judgment and Order, pg. 21)

Plaintiffs' motion to reduce or suspend bond prior to entry of judgment was denied by the Court on October 23, 2003, and plaintiffs do not at this time challenge that ruling. However, whereas Rule 92.02 and Section 526.070, RS Mo. require that a bond be executed prior to the issuance of a **preliminary** injunction or **temporary** restraining order, both the Rule and the statute **specifically exclude** final hearings and judgments from the bond requirement. Furthermore, the Court has designated the bond as "secured," when the record discloses that the bond was posted in cash. Thus, the individuals who posted the cash bond have been and continue to be deprived of the use of their funds in a fashion not contemplated or authorized by law. Further discussion is contained in Section II below.

(C) Denial of Motion to Amend Pleadings.

At page 2 of its Order and Judgment, the Court denied Plaintiff's Verified Motion to Amend Pleadings. By rule, pleadings can be

amended following the entry of judgment. Accordingly, Plaintiffs seek the Court's reconsideration of its denial of the motion to amend the pleadings so that the pleadings include Article X, Section 16, 18 and 22 of the Hancock Amendment. See discussion in Section III below and separate motion filed contemporaneously.

I. **Hancock Amendment**

A. **THE JUDGMENT DOES NOT ADDRESS THE HANCOCK ISSUES RAISED BY PLAINTIFFS; IT ONLY ADDRESSES A FALSE ISSUE RAISED BY DEFENDANTS**

Because the primary focus of this case has been on Article I, Section 23 of the Missouri Constitution, the parties may not have properly focused the Court on the Article X constitutional issues that arise from the Conceal and Carry Act. As a result, Plaintiffs ask the Court to amend its judgment by addressing Hancock issues that were not addressed. Attention has been misdirected to the adequacy of the \$100 permit fee. That is not the issue, but rather a false premise designed to divert attention from the real issue, which is the Missouri Legislature's limitation on how the concealed carry application fees can be spent.

The sufficiency of the \$100 application fees *if* they could be used to pay administration costs is irrelevant because under the explicit terms of the legislation, the fees may not be so used. It does not matter how much fee money is collected if it cannot be spent to pay for the State's mandates. Therefore, the evidence offered by the State of Missouri through three county sheriffs, that their \$100 fee would more than pay for the costs their counties would incur to administer the program was not relevant to the issues

raised by Plaintiffs. But this red herring did raise different Hancock violations that Plaintiffs had not anticipated in their pleadings. These additional constitutional violations, which caused Plaintiffs to file their motion to amend the pleadings to conform to the evidence, will be discussed later.

B. THE CONCEAL AND CARRY ACT VIOLATES ARTICLE X, SECTIONS 16 AND 21 ON THEIR FACE BECAUSE IT PROHIBITS COUNTIES AND OTHER POLITICAL SUBDIVISIONS FROM PAYING FOR THE NEW AND INCREASED ACTIVITIES AND SERVICES IT MANDATES

While the Missouri Legislature created a fee to pay for implementation of the Conceal and Carry Act, it also prohibited counties and other political subdivisions from using that fee to pay for most of the new or increased activities and services it mandated. Section 50.535.2 of the Act specifically states “This fund **shall** only be used by law enforcement agencies for the purchase of equipment and to provide training.” (Emphasis added) The Legislature’s use of the word “shall” in Section 50.535.2 means simply that the sheriffs’ revolving funds cannot be used to pay for implementation of the Act beyond training and equipping personnel.

As alleged in paragraph 21(a)(2)(i)(c) of the Amended Verified Petition, the Conceal and Carry Act prohibits the expenditure of application fees to pay for the many new or increased activities and services it mandates. In various provisions of Section 537.094 the Missouri Legislature set forth a myriad of new or increased activities and services county sheriffs or their designees “shall” perform to comply with the Conceal and Carry Act. Some of these mandates are summarized on pages 14-17 of Plaintiff’s Memorandum in Support of Permanent Injunction and Declaratory Relief. At trial, Plaintiffs submitted evidence supporting the allegations contained in paragraphs 21(a)(2)(i)(a), (b) and (c) of their Petition

which focused on the unique limiting language of the Conceal and Carry Act. See trial testimony of Captain Phillip Moran (Transcript p. 13-46) and Sheriff John Merritt (Transcript p. 46-52, 74, 93-109).

Plaintiffs offered testimony from Captain Phillip Moran, the Jackson County Sheriff's officer responsible for complying with this law, (Transcript p. 13, l. 13-p. 14, l. 4) that these new or increased activities or services will result in increased personnel costs of \$150,000.00. (Transcript p. 14, l. 18-p. 15, l. 14). Captain Moran also testified that Jackson County could not use the concealed carry application fees to pay the increased costs resulting from these mandated services and activities because it would violate the law on its face. (Transcript p. 30, l. 10-25; p. 40, l. 4-21). Captain Moran explained that is because the Legislature, for whatever reason, limited the expenditure of the "sheriff's revolving fund" to **only** "the purchase of equipment and to provide training." (Transcript p. 43, l. 24-p. 46, l. 1).

Captain Moran provided clear evidence of the increased costs to Jackson County of \$150,000.00. This is the amount the Jackson County Sheriff requested from the County Legislature to provide these new or increased activities or services since the State did not provide any funding. (Transcript p. 14, l. 18-p. 15, l. 14; p. 25, l. 16-p.30, l.5). Moreover, the sheriffs presented by the Attorney General admitted that they will be required to perform new or increased activities or services which will result in increased time and costs to their counties. (Transcript p. 63, l. 11-p. 71, l. 25). The Act, as written, violates the Hancock Amendment because it requires new or increased activities or services of counties and other political subdivisions without any way to pay for them, through application fees or any other state appropriation. (Transcript p. 25, l. 16-p.30, l. 9; p. 63, l. 11-p. 71, l. 25).

"Thus, by its plain language, a violation of Article X, §21 exists if both (1) a new or increased activity or service is required of a political subdivision by the State and (2) the political subdivision experiences increased costs in performing that activity or service." *Miller v. Department of Revenue*, 719 SW 2d 787, 788-789 (Mo. banc 1986). See also *Missouri Municipal League v. Brenner*, 740 SW 2d 957, 958 (Mo. banc 1987). Plaintiffs herein produced substantial evidence not only of new or increased activities or services required by the Conceal and Carry Act, as in the *Miller* case, but also of increased costs required to perform the mandated activities or services. The litany of new or increased activities or services testified to by Captain Moran (Transcript p. 25, l. 16-p. 30, l. 5) will cost the Jackson County Legislature \$150,000.00 for additional personnel to administer the Conceal and Carry Act. The State's witnesses admitted increased costs, from \$10,000 in Greene County (Transcript p. 46, l. 20-p. 47, l. 17) to the \$38 fee per application Cape Girardeau and the other counties will have to pay the State of Missouri for each fingerprint analysis. (Transcript p. 17, l. 22-p. 18, l. 23; p. 47, l. 18-p. 48, l. 22; p. 62, l. 5-9; p. 74 l. 5-18; p. 86 l. 8-p. 87 l. 24). The State's witnesses admitted that a number of the activities or services mandated by the Conceal and Carry Act were new or increased in relation to prior levels. (Transcript p. 63 l. 11-p. 71 l. 25).

Any activity or service beyond the purchase of equipment and the provision of training that entails more than a *de minimis* cost increase constitutes a violation of the Hancock Amendment. The word "any" as used in a constitutional provision is "all-comprehensive, and is equivalent to 'every'." *State ex re. Randolph County v. Walden*, 206 SW 2d 979, 983 (Mo. 1947). As the Supreme Court found in *Boone County Court v. State of Missouri*, 631 SW 2d 321, 325 (Mo. banc 1982): "Read in the alternative as they

are composed and broadly as required by the term 'any', 'service' refers to county governmental action performed for the benefit of its residents; 'activity' refers to the general functioning and operation of county government in performing services. 'Any activity' as applied to county functioning encompasses every increase in the level of operation in that government." The Supreme Court held in the *Boone County* case that a salary increase is "an increase in the level of any activity" under Article X, Section 21 of the Missouri Constitution.

In *City of Jefferson v. Missouri Department of Natural Resources*, 916 SW 2d 794, 796 (Mo. banc 1996) the Supreme Court held that approximately \$15,000, only one-tenth of the costs Jackson County alone will experience as a result of the Conceal and Carry Act, is more than a *de minimis* expenditure. The Court also held in *City v. Jefferson* that the 849 work hours projected to prepare the Jefferson City solid waste management plan is more than the *de minimis* increase in administrative costs that triggers a violation of the Hancock Amendment. Since the Greene County Sheriff has projected that 1,000 hours of additional personnel time will be required to comply with the Conceal and Carry Act, it is clear that this increase also triggers a violation.

This Court referred to *County of Jefferson v. Quick Trip Corporation*, 912 SW 2d 487, 491 (Mo. banc 1995) which merely held that the transfer of sales tax revenue for TIF financing purposes did not mandate new activities by a county because the mandate to do so was accomplished entirely by the city which collected the funds. In that case, the court specifically found that the county's administrative activity to calculate the amount due and write the checks to the City was *de minimis*. Nor was there any shifting of the tax burden from the State to the County since the transfer was between political subdivisions of the

State.

Based on the evidence presented by Plaintiffs here, the Jackson County Sheriff alone will have to write thousands of checks to the State of Missouri just to pay for the fingerprint analysis. (Transcript p.17, l. 22-p.18, l. 23; p. 21, l. 14-p. 23, l. 4) And this is only one small part of the mandated activities and services in the Concealed and Carry Act that will be performed not only in Jackson County, but repeatedly throughout the more than 100 counties in Missouri for years to come. (Transcript p. 19, l. 18; p. 20, l. 16; p. 25, l. 16; p.30, l. 5;mp. 63 l. 11-p. 71, l. 25; p. 89 l. 12-p. 93 l. 5). The costs of these new and increased activities and services are great enough to trigger the Hancock Amendment. Because the Conceal and Carry Act fails to appropriate funds to pay for such new and increased activities and services, it is clearly unconstitutional.

C. THE SCHEMES OFFERED BY THE STATE TO AVOID THIS LEGISLATIVE LIMITATION VIOLATE OTHER PROVISIONS OF THE CONCEAL AND CARRY ACT

Captain Moran also testified that Jackson County could not and would not shuffle funds around to pay for the Conceal and Carry Act because any such end run would violate the Hancock Amendment. (Transcript p. 43, l. 24-p. 46, l. 1). To the contrary, the sheriffs of Greene, Cape Girardeau and Camden counties came up with three different ways of shuffling funds to pay their increased costs, which raised new violations of either the Conceal and Carry Act or Article X, Section 16 et seq. of the Missouri Constitution. Jack L. Merritt, the Greene County Sheriff, testified that he anticipated an additional 1000 hours of part-time personnel costs per year for a total of approximately \$10,000 in increased costs. (Transcript p. 46 l. 20-p. 47, l. 17). He stated that he would use his discretionary fund containing civil fees collected in other matters to pay the State of Missouri's \$38

charge for a fingerprint analysis and then reimburse that fund out of the money collected from concealed carry applications. (Transcript p. 47, l. 18-p. 48, l. 22).

Sheriff Merritt admitted that Greene County would make money in the process because its costs to administer the Conceal and Carry Act would be significantly less than the \$100 fee he would charge for each application. (Transcript p. 51, l. 21-p. 52, l. 18; p. 106 l. 5-19). John Page, the Camden County Sheriff stated that he intended to obtain two checks from applicants, one in the amount of \$38 made payable to the State of Missouri for the fingerprint analysis and the other for the remaining \$62 of the \$100 authorized fee which he would deposit in his "revolving fund." (Transcript p. 62 l. 5-9). The Cape Girardeau Sheriff, Dwight Jordan testified that he would place the entire \$100 application fee in his revolving fund and pay the State of Missouri \$38 for each fingerprint analysis based on its monthly invoice. (Transcript p. 86 l. 8-p. 87 l. 24).

While creative, none of these schemes for dealing with the limitations imposed by the Legislature in Sections 50.535.1 and 50.535.2 passes constitutional muster and some violate the Conceal and Carry Act itself. For example, Cape Girardeau's plan to pay the State of Missouri \$38 per application for fingerprint analysis is a clear violation of Section 50.535.2, as that expenditure has nothing to do with the purchase of equipment or the provision of training. Camden County's plan to obtain two separate checks in order to process the application violates Section 50.535.1 which requires that all fees collected "**shall be deposited by the county treasurer into a separate interest-bearing fund to be known as the county sheriff's revolving fund....**" (Emphasis added) The collection of \$38, which is not deposited into a sheriff's depository fund but instead diverted elsewhere, violates the Conceal and Carry Act on its face.

D. THE SCHEMES OFFERED BY THE STATE ALSO RESULT IN OTHER VIOLATIONS OF THE HANCOCK AMENDMENT FOUND IN ARTICLE X, SECTIONS 16, 21 AND 22

The uncontroverted evidence is that egregious Hancock violations will occur in Greene County. According to its sheriff, that county plans to shuffle funds from one account to another to avoid the Legislature's self imposed limitation to use the money collected only for the purchase of equipment and to provide training. First, the Greene County Sheriffs' proposed use of County revenue from other sources in his "discretionary fund" to pay for fingerprint analyses on behalf of applicants is clearly improper, whether or not this money is reimbursed. Second, any direct reimbursement of a sheriff's discretionary fund from his revolving fund containing application fees is clearly not permitted by Section 50.535.2. Third, the use of money collected from concealed carry applicants to purchase equipment or provide training having nothing to do with the Act is clearly a new fee, which was not approved by the voters. Even if the non-concealed carry training and equipment would have otherwise been purchased with the Greene County Sheriff's discretionary fund, this shuffling of accounts remains an illegal end run around the legislative limitations in the Conceal and Carry Act.

Moreover, this is particularly true if Greene County actually sees a net gain in fee income as Sheriff Merritt testified it would. (Transcript p. 51, l. 21-p. 52, l. 18; p. 106, l. 20-p. 107 l. 20). Greene County's proposed shuffling of funds between accounts in an attempt to comply with Sections 50.535.1 and 50.535.2 results in a number of clear violations of the Hancock Amendment, as discussed below. The States witnesses candidly and blithely admitted they will violate the law to make it work—a very dangerous precedent for officers sworn to uphold the law. (Transcript p. 86, l. 8-p. 88, l. 10)

A question exists as to whether the concealed carry application fee is considered a "user fee" under the five part test set forth in *Keller v. Marion County Ambulance Dist.*, 820 SW 2d 301, 303 (Mo. banc 1991). While Plaintiffs contend that this application fee is a "tax, license or fee" that requires voter approval under the Hancock Amendment when these factors are applied, the thrust to their argument is different. When money collected allegedly to pay for the Conceal and Carry Act is directed to other purposes as the Greene County Sheriff said he would do, (Transcript p. 50, l. 2-13; p. 106, l. 5-19) it clearly is no longer a user fee. Once the Greene County Sheriff has purchased equipment and trained employees for purposes of the Act, any other use of that fee income becomes a "tax, license or fee" that requires voter approval under Article X, Section 22. This is even more the case because the Greene County Sheriff admitted that the \$100 application fee he will charge will produce more revenue than his costs to comply with the Act (Transcript p. 51, l. 21-p. 52 l. 18; p. 106 l. 20-p. 107, l. 20), even after he has shuffled funds in an illegal attempt to comply with its provisions. By admitting that Greene County will profit from the concealed carry application fees there is no longer any doubt that Greene County will be taxing its citizens for purposes otherwise paid for by its general funds.

The same is true in Jackson County based upon the testimony of Captain Moran. He admitted that the application fees collected by the Sheriff will significantly exceed the \$150,000.00 personnel cost request made to the County Legislature. (Transcript p. 36 l. 10-p. 37, l. 24). Captain Moran stated that the Sheriff could not and would not use these excess funds for other purposes, unlike Sheriff Merritt, because there is no provision to expend them for purposes other than equipment and training. (Transcript p. 43, l. 24-p. 46, l. 1). In *Zahner v. City of Perryville*, 813 SW 2d 855, 859 (Mo. banc 1991) the

Supreme Court found that a special assessment for street improvements was not a fee or tax unless it raised revenue to defray other governmental expenditures, rather than compensating public officers for particular services rendered. The Greene County Sheriff clearly testified that the revenue raised beyond that necessary to provide services under the Act would be used to defray customary governmental expenditures normally paid out of county funds having nothing to do with the Conceal and Carry Act.

E. THE CONCEAL AND CARRY ACT AND THE SCHEMES OFFERED BY THE STATE ALL VIOLATE ARTICLE X, SECTIONS 16, 21 AND 22 OF THE MISSOURI CONSTITUTION

If not enjoined, the Conceal and Carry Act will eviscerate the Hancock Amendment and by doing so, evade the will of the people. The testimony offered by the State of Missouri through the Attorney General clearly shows not only the intent, but actual plans to avoid the constitutional provisions of Article X of the Missouri Constitution. Three county sheriffs, government officials sworn to uphold the state constitution, testified that they would administer the funds generated by the Conceal and Carry Act in violation of the Hancock Amendment or the Act itself. Between them, these sheriffs and presumably others like them will:

- (1) use the county sheriff's revolving fund for purposes other than the purchase of equipment or to provide training in violation of Section 50.535.2;
- (2) not deposit all of the application fees into the sheriff's revolving fund in violation of Section 50.535.1;
- (3) use money from other revenue sources to pay for activities or services mandated by the Conceal and Carry Act in violation of Article X, Sections 16 and 21;
- (4) use money from the county sheriff's revolving fund to purchase equipment and provide training having nothing to do with

implementation of the Conceal and Carry Act in violation of Article X, Section 22; and

- (5) charge application fees exceeding the cost of providing the new or increased services and activities to make other expenditures that would normally require a separate tax, license or fee approved by the voters also in violation of Article X, Section 22.

If not enjoined, the Conceal and Carry Act will provide a road map for the Missouri Legislature or any of its political subdivisions to create a statutory scheme in which a new tax, license or fee is assessed to pay for new or increased activities or services, while part or all of the money received is diverted to pay for other unrelated government costs without a public vote. Such shuffling of various taxes, license or fees to make expenditures never intended by the people or by the legislature is, at best, misguided and at worst, fraudulent. The Missouri Legislature passed an Act that is plainly unconstitutional because on its face, it prohibits expenditure of funds necessary to pay for its implementation.

Plaintiffs respectfully request that this Court amend its judgment to hold that the Conceal and Carry Act violates Article X, Sections 16, 21 and 22 of the Missouri Constitution.

II. Amendment of Judgment to Release Bond

On October 10, 2003, this Court granted Plaintiffs' Application for Preliminary Injunction and set bond at \$250,000.00. The bond was posted in cash with Clerk of the Court. On October 23, 2003, this Court denied Plaintiffs' Motion to Reduce or Suspend Bond. The final hearing on issuance of a permanent injunction was held and concluded on October 23, 2003. In its Judgment and Order of November 7, 2003, this Court granted permanent injunctive relief in favor of Plaintiffs and ordered that the preliminary injunction

bond remain in full force and effect pending appellate review. The Court provided no legal authority to justify the retention of a cash or other bond following the entry of a judgment and permanent injunction.

There is no legal basis for this Court to hold the preliminary injunction bond in full force and effect after the Court has issued its judgment granting a permanent injunction.

Missouri Supreme Court Rule 92.02 provides, in pertinent part, that:

No injunction or temporary restraining order, **unless on final hearing or judgment**, shall issue in any case . . . until the plaintiff, or some responsible person for the plaintiff, shall have executed a bond . . . Missouri Supreme Court Rule 92.02(d) (emphasis added).

Similarly, Section 526.070 RSMo provides, in pertinent part, that:

No injunction, **unless on final hearing or judgment**, shall issue in any case . . . until the plaintiff, or some responsible person for him, shall have executed a bond . . . Section 526.070 RSMo (emphasis added).

In both instances, the phrase “unless on final hearing or judgment” removes final decisions from the requirement of a bond. The plain language of both Rule 92.02 and Section 526.070 prevents this Court from requiring that a bond be maintained following a judgment granting a permanent injunction. This Court’s order which holds the bond in full force and effect after the issuance of its judgment directly contradicts both Rule 92.02 and Section 526.070. The retention of the cash bond in the Court’s registry is invalid and prohibited by Supreme Court Rule, Missouri Statute and controlling case law.

The carving out of final rulings from the bond requirement is so clear that there is not an abundance of case law on this issue. Also, one must ask how, logically, it could be required that an injunction bond be maintained once a permanent ruling has been made, since the purpose of such a bond is to protect the defendant if the plaintiff does not

succeed on final judgment. E.g., Union State Bank of Clinton v. Dolan, 718 S.W.2d 522 (Mo. App. W.D. 1986). Once a final and permanent ruling has been made, there is no scheduled later event upon which the bond has any bearing. If an appeal is filed, the issuance of an appeal bond is an entirely separate consideration, and depends, among other things, upon whether the appellant is the plaintiff or the defendant.

Plaintiffs offer the following case law in further support of their position on this issue:

In Kreitz v. Kreitz, 750 S.W.2d 681 (Mo.App. E.D. 1988), the wife filed a motion for an injunction at the same time she filed a cross-petition for dissolution of marriage. In the decree of dissolution, the court entered a permanent injunction enjoining the husband from entering the wife's residence at any time. Husband contended that the court violated Rule 92.02(c) because it did not require the wife to execute a bond. The court held that husband's contention was without merit, because the permanent injunction of which husband complained was incorporated in a final decree of dissolution, and that Rule 92.02(c) reads: "No injunction or temporary restraining order, *unless on final hearing or judgment*, shall issue . . . until the plaintiff . . . shall have executed a bond . . ." Id. At 685 (emphasis in original).

In Pierce et al. v. Campbell et ux., 274 S.W. 875 (Mo.App. 1925), plaintiffs petitioned for injunctive relief to enjoin defendants from operating a boarding house. The court granted a temporary injunction in favor of plaintiffs. In the trial on the merits of the case and upon motions of defendants to dissolve the temporary injunction, the trial court found the injunction had been properly and providently issued, and found issues in favor of plaintiffs and against defendants. (The court did not issue a permanent injunction because

during the course of litigation the defendants moved from the residence and no longer had an interest in the property.)

The court interpreted the predecessor statute to 526.070 RSMo. The court stated that the trial court had “made a final determination of what the rights of the parties litigant were at the commencement of the suit and when the injunction was allowed.” Id. at 876. The court held that the final decree in the injunction suit must be regarded as res judicata in an action on the injunction bond, and that defendants had no right of action on the injunction bond. Id.

In Kenney v. Emge, 972 S.W.2d 616 (Mo. App. E.D. 1998), which involved multiple disputes between two equal shareholders of a small corporation, both parties sought injunctions. Although neither injunction was issued, plaintiff posted a bond on the day his petition was filed, whereas defendant never posted any bond. After the parties attempted mediation and entered into a stipulation as to certain actions and forbearances, a trial was held at which the court granted judgment in favor of the defendant. Plaintiff appealed, asserting that the trial court had acted outside its jurisdiction because it had not required defendant to post a bond before the hearing at which it granted defendant’s requests. The appellate court held that defendant was not required to post any bond, stating that “according to Rule 92.02(c), a bond is not required on final hearing or judgment.” Id. at 622.

The injunction bond which this Court required plaintiffs to post should be released. This Court issued a permanent injunction as part of its judgment. Neither Rule 92.02 nor Section 526.070 provides any authority for the Court to require plaintiffs to maintain a bond

following the issuance of a final judgment.

III. Amendment of Judgment to Permit Amendment to Pleadings

On October 30, 2003, plaintiffs filed a Verified Motion to Amend Pleadings. This motion was denied by the Court without further comment in its Judgment and Order of November 7, 2003. Rule 55.33(b) specifically provides that amendments to conform to the evidence may be made upon motion after judgment.

The post-judgment amendments sought by plaintiffs specifically relate to their Amended Verified Petition, to which they seek amendment by addition of the following as paragraph 21(a)(2)(iii)::

Article X, Section 22 of the Missouri constitution also prohibits counties and other political subdivisions levying new, or increasing the current levy of "tax, license or fees without approval of the required majority of the qualified voters of that county or other political subdivision voting thereon." If a county or other political subdivision converts the concealed carry use fees for other purposes, such as the purchase of equipment or to provide training having nothing to do with the subject law, this constitutes the levy of a new or increased tax, license or fee without voter approval.

A county or other political subdivision cannot shift revenue from one source to an entirely different use, particularly if the result is an increase in net revenue, without a local public vote. Article X, Section 22, Mo. Const. Nor can the State of Missouri assess a user fee to be collected by a county or other political subdivision and authorize its use for purposes other than the law it supports. Article X, Sections 16 and 18, Mo. Const.

Plaintiffs have, by separate motion filed contemporaneously, raised the issue of post-judgment amendment of the pleadings. That motion is incorporated herein and addresses this issue in greater detail.

CONCLUSION

Plaintiffs, for the reasons stated above, pray for this Court's Order granting a new

trial on the issues raised relating to the Hancock Amendment or, in the alternative, to amend the Judgment in relation to those Hancock Amendment issues, and further amend the Judgment in respect to the unauthorized bond and the Court's denial of plaintiffs' request to amend the pleadings.

Respectfully submitted,

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IN CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

ALVIN BROOKS, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 034-02425
)	Division 2
STATE OF MISSOURI, et al.)	
)	
Defendants.)	

**The State and Attorney General's Suggestions in Opposition to
Plaintiffs' "Verified Motion to Amend Pleadings (Post-Judgment)" and
Plaintiffs' "Motion for New Trial or, in the Alternative, to Amend Judgment"**

The State and Attorney General have filed a Notice of Appeal in this case, and the Supreme Court has issued an order expediting briefing and argument. The State and Attorney General have already filed their main brief, and Plaintiffs' brief (in response to the State's appeal and on their cross-appeal, if any) is due on December 19, 2003. Instead, of tending to the task of briefing – which Plaintiffs told the Supreme Court would severely tax their capabilities were they required to do so expeditiously – Plaintiffs are now devoting their energies to unnecessary, baseless and repetitive motions in this Court. This Court should deny these motions, without argument or delay, and leave Plaintiffs to the Supreme Court process they have so often claimed to want.

Plaintiffs moved to amend their petition on October 8, 2003 (Tr. Vol. 1, pp. 12-13), as a pretense to create venue where none otherwise lawfully existed. This Court granted that motion. After trial and argument in this case, Plaintiffs again moved to amend their Amended Petition to add legal theories they had not thought to include in either of the first

two versions. This Court denied that motion. Plaintiffs now seek leave to amend a third time. This new motion is substantively the same as their second. They make no new arguments and, instead, are essentially asking this Court to reconsider its earlier denial.¹ The Court should deny this new motion for the same reasons contained in the State and Attorney General's suggestions in opposition to the first motion to amend, filed October 31, 2003, which we incorporate by reference.

The Court should also deny Plaintiffs' motion for new trial, or to amend the judgment. Post-judgment motions are an inappropriate time and manner to begin the process of developing legal theories and preparing briefs.² But that is what Plaintiffs are now doing. Moreover, the motion for a new trial is nothing more than re-argument of the issues at trial. Plaintiffs do not complain of procedural error, nor were there any. Plaintiffs do not propose to offer new evidence, nor would any be appropriate. The only basis Plaintiffs urge is that they believe this Court was wrong in certain aspects of its ruling. That is what appeals are for. Rule 78.07(b) provides:

¹ Plaintiffs' claim that an amendment is necessary because they were "surprised" at trial is breathtaking. Plaintiffs, after repeatedly representing to this Court and Defendants that would offer no evidence at trial, gave less than three days' notice when they changed their minds. Then, less than 48 hours before trial, they notified Defendants of the identity of their witness and offered to make him available one hour before trial. Defendants' witnesses, who were offered in response to Plaintiffs' decision to put on evidence, were identified and made known to Plaintiffs as quickly as possible.

² For example, the very day that Plaintiffs filed the case, they told this Court that they "[did not] anticipate filing any written briefs[.]" Tr. Vol. 1, p. 19.

In cases tried without a jury or with an advisory jury, neither a motion for a new trial nor a motion to amend the judgment or opinion is necessary to preserve any matter for appellate review.

If Plaintiffs believe that this Court, in entering judgment on only one of their arguments, incorrectly rejected one of more of the other arguments, they are free to seek review of those issues in the Supreme Court. Seeking further delay in this Court will not enhance Plaintiffs' ability to do so. This Court should deny Plaintiffs' motion for a new trial insofar as it seeks merely reconsideration or re-argument of Plaintiffs' claims.

The other part of Plaintiffs' motion for a new trial – to gain relief from the bond – is an issue for another day. Rule 92.02 absolutely required this Court to impose a bond, and the size of the bond was within this Court's discretion to fix. Plaintiffs cite no authority that absolutely requires this Court to dissolve the bond, right now. The question of whether the bond should be dissolved – or who is entitled to recover on the bond – is properly deferred until after the Supreme Court ultimately decides this case.

In sum: This court should deny Plaintiffs' motion to amend the pleadings, and their motion for new trial, because Plaintiffs raise nothing new, nothing of merit, nothing that must be decided by this Court at this time, and nothing that – in any event – cannot be addressed by the Supreme Court on appeal. Oral argument on the motions would not materially benefit this Court. This Court should move quickly and without delay in denying the motions, to prevent prejudice to any party, including Plaintiffs whose deadline for briefing in the Supreme Court is set regardless of the outcome of these motions.

WHEREFORE, the State and Attorney General ask that this Court deny without argument or delay Plaintiffs' motion to amend the pleadings, and their motion for new trial or amendment of the judgment. Defendants further ask that this Court enter such other orders as are proper and necessary to resolve all matters in the trial of this case so that the Supreme Court's review can go forward without delay.

Respectfully submitted,

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IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

<i>ALVIN BROOKS, et al.</i>)	
)	
<i>Plaintiffs,</i>)	
)	
v.)	
)	<i>Cause No. 034-02425</i>
<i>STATE OF MISSOURI, a state</i>)	
<i>government, et al.,</i>)	<i>Division No.</i>
)	
<i>Defendants,</i>)	
<i>and</i>)	
)	
<i>BULL'S EYE, LLC, GERI STEPHENS,</i>)	
<i>President of Bulls Eye, LLC and JIM</i>)	
<i>STEPHENS,</i>)	
)	
<i>Defendants/Intervenors.</i>)	

**INTERVENOR/DEFENDANTS' MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION FOR NEW TRIAL OR, IN THE ALTERNATIVE,
TO AMEND JUDGMENT**

Plaintiffs have filed a motion before this Court, seeking to amend the Judgment entered in their favor. As a threshold matter, that judgment has been appealed to the Supreme Court. The Supreme Court has issued an Order, setting a briefing schedule for all issues. This Court is likely divested of jurisdiction by virtue of the Supreme Court's action. Should the Trial Court choose to entertain this motion, however, intervenor/defendants would offer this response.

In part, plaintiffs seek the release of the court-ordered bond, defendants' only security against error. Intervenor/defendants previously filed a Motion for Retention of Injunction Bond by the Circuit Court Pending Appeal. That motion described the Court's discretion in retaining

the bond. Retention was and is particularly important in this case, where all parties, and this Court, acknowledged that final disposition would come in the Supreme Court. Plaintiffs represented that their primary concern was with an immediate appeal, and encouraged this Court to maintain the status quo created by the preliminary injunction until the Supreme Court could consider the propriety of injunctive relief. (10/23/03 Transcript, pp. 112, 114). Plaintiffs now seek the cover of the Trial Court's ruling, arguing that its sanctioning of the injunction absolves them from responsibility for any wrongdoing. This is disingenuous.

Intervenor/defendant previously cited authority for retaining the bond in their Motion for Retention. See Rule 92.03. That analysis is incorporated herein by reference. The law approves this retention, as does equity. Plaintiffs offer no countervailing statutory authority. They instead read a negative inference into a silent rule and statute, arguing that the bond is prohibited because it is not specifically addressed. This is faulty legal reasoning.

Plaintiffs cite Rule 92.02 and RSMo § 526.070, both of which address the necessity of a bond at the preliminary injunction stage. Clearly, neither rule creates an absolute requirement that a bond issue with a permanent injunction. But plaintiffs make the leap, with no further authority, that this language "prevents" a bond for permanent injunction. The language says no such thing.

Further, plaintiffs cite no relevant case law on the subject. Kreitz v. Kreitz, 750 S.W.2d 681 (Mo. App. E.D. 1988) merely states that there is no absolute requirement of a bond for a permanent injunction. Pierce v. Campbell, 274 S.W. 875 (Mo. App. 1925) involves a completely irrelevant fact pattern, where defendant cured the need for an injunction after it issued, then sought damages for the issuance. Kenney v. Emge, 972 S.W.2d 616 (Mo. App. E.D. 1998) again states that a trial court does not err in refusing to order a bond when final judgment is issued.

Certificate of Service

The undersigned certifies that a copy of the foregoing was sent by United States mail, postage pre-paid, this 24 day of Nov., 2003, to the following counsel of record:

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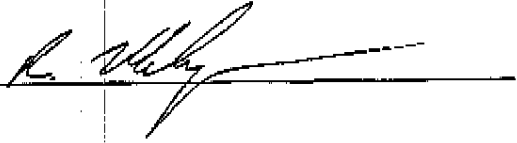
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A handwritten signature in black ink, appearing to read "P. Wilson", is written over a horizontal line. The signature is fluid and cursive.

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IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

ALVIN BROOKS, et al.,)	
)	Cause No. 034-02425
Plaintiffs,)	
)	Division No. 2
vs.)	
)	
STATE OF MISSOURI, et al.,)	
)	
Defendants.)	

PLAINTIFFS' REPLY MEMO IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR NEW TRIAL OR, IN THE ALTERNATIVE, TO AMEND JUDGMENT

Neither the State, the Attorney General or the Intervenor, in their opposing memoranda, have provided this Court with a single case or any other authority in opposition to the points raised by Plaintiffs in their post-trial motions. These Defendants are unable to convince this Court that any of the arguments raised by Plaintiffs are not legally justified and correct.

Therefore, Plaintiffs renew their prayer for relief seeking this Court's Order granting a new trial on the issues raised related to the Hancock Amendment or, in the alternative, to amend the Judgment in relation to those Hancock Amendment issues, and further to amend the Judgment in respect to the unauthorized bond and the Court's denial of Plaintiffs' request to amend the pleadings.

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