

**IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI**

MISSOURI ROUNDTABLE FOR)	
LIFE,)	
)	
Plaintiff,)	
)	
v.)	
)	Case No. 08AC-CC00517
SARAH STEELMAN, <i>et al.</i>)	
)	
Defendants.)	

Judgment and Order

The issue before the Court is whether an existing legal controversy exists between the parties or whether Plaintiffs are seeking an advisory opinion as to the application of certain laws on possible but presently un contemplated future action by Defendants. For the reasons stated hereafter, the Court finds that this case presents no justiciable controversy for the Court to resolve and therefore dismisses Plaintiffs' petition.

Plaintiffs' Lawsuit

Plaintiffs, a Missouri taxpayer and an entity representing Missouri taxpayers, filed a petition under the Declaratory Judgment Act requesting that the Court issue several declarations regarding the validity of statutory restrictions on life science research funding authorized in 2008 by the General Assembly in Section 7.020 of House Bill 2007 (HB 2007). Defendants are the State Treasurer, the Office of Administration and its Commissioner, the Department of Economic Development and its Director, the Life Sciences Research Trust Fund, the Life Sciences Research Board (LSRB), the Missouri Technology Corporation (MTC) and its executive director Robert Monsees.

HB 2007 appropriates \$21 million to the Department of Economic Development for the Life Sciences Research Board (LSRB) “for distribution of grants and contract awards to Missouri public and private not-for-profit institutions to fund projects related to increasing Missouri’s research capacity, as provided in Sections 196.1100 through 196.1130.” The legislature specifically directed that the “funds shall be used exclusively on animal science, plant science, medical devices, biomaterials and composite research, diagnostics, nanotechnology related to drug development and delivery, clinical imaging, and information technology related to human health.”

Plaintiffs’ petition requests that the Court issue declarations to the effect that (i) HB 2007’s limitations regarding how the funds can be used (i.e., “exclusively for animal science, plant science, medical devices, biomaterials and composite research, diagnostics, nanotechnology related to drug development and delivery, clinical imaging, and information technology related to human health”) are valid and applicable to the funds; (ii) that the funds cannot be used for “abortion services,” “human cloning,” or “prohibited human research,” as those terms are defined in § 196.1127, RSMo.; and (iii) that Article III, § 38(d) of the Missouri Constitution does not invalidate § 196.1127. Pet., pp. 15-16.

Analysis

A court should grant a motion to dismiss for lack of subject matter jurisdiction whenever ‘it appears’ that the court lacks such jurisdiction.” *Parmer v. Bean*, 636 S.W.2d 691, 694 (Mo. App. E.D. 1982), citing Missouri Rule of Civil Procedure, Rule 55.27(g)(3). “Once a factual question of the court’s jurisdiction is raised, the movant

bears the burden of demonstrating that the court's exercise of jurisdiction is improper.”

Parmer, 636 S.W. 2d at 694. “As the term ‘appears’ suggests the quantum of proof is not high.” *Id.* “It must appear by a preponderance of the evidence that the court is without jurisdiction.” *Id.*

When a party brings an action under the Declaratory Judgment Act, “the court’s subject-matter jurisdiction [is] limited by the provisions of that section.” *Missouri Soybean Association v. The Missouri Clean Water Commission*, 102 S.W.3d 10, 22 (Mo. banc 2003). A justiciable controversy is a prerequisite of any case brought under the Declaratory Judgment Act, or any other court action for that matter. “A justiciable controversy exists where the plaintiff has a legally protectable interest at stake, a substantial controversy exists between parties with genuinely adverse interests, and that controversy is ripe for judicial determination.” *Missouri Health Care Ass’n v. Attorney General*, 953 S.W.2d 617, 620 (Mo. banc 1997).

Here, Plaintiffs’ lawsuit fails to meet the test for a justiciable controversy because there is no substantial controversy between parties with genuinely adverse interests. As noted above, the Plaintiffs’ petition asks the Court to issue declarations to the effect that: (i) HB 2007’s limitations regarding how the funds can be used (i.e., “exclusively for animal science, plant science, medical devices, biomaterials and composite research, diagnostics, nanotechnology related to drug development and delivery, clinical imaging, and information technology related to human health”) are valid and applicable to the funds; (ii) that the funds cannot be used for “abortion services,” “human cloning,” or “prohibited human research,” as those terms are defined in § 196.1127, RSMo.; and,

(iii) Article III, § 38(d) of the Missouri Constitution does not invalidate § 196.1127. Pet., pp. 15-16.

The only “controversy” that Plaintiffs allege to support any of these requested declarations is that “various members of the directors of the MTC, including the Chairman of the Board, Donn Rubin, take the position that the restrictions on the uses of public funds imposed by RSMo. § 196.1127 are unconstitutional and therefore unenforceable by virtue of Article III, § 38(d) of the Missouri Constitution.” Pet. ¶31.

This allegation does not create a justiciable controversy to support subject matter jurisdiction of this Court or the issuance of a declaratory judgment. MTC has no decision-making authority over funds appropriated by HB 2007.¹ That authority rests solely with the LSRB, § 196.1115, RSMo., and Plaintiffs do not allege that the LSRB takes a view with respect to how the funds may be spent that is inconsistent with § 196.1127, RSMo. The LSRB, for its part, agrees that the HB 2007 restrictions are valid and that funds appropriated by HB 2007 cannot be used for research projects that would be classified as “abortion services, human cloning, or prohibited human research” under

¹ Moreover, MTC has no discretionary authority over any funding or any decisions regarding funding. MTC’s role is purely administrative in support of the LSRB. As such, there is no relief that Plaintiffs can have against MTC in this action. MTC is not a proper party defendant in this action.

§ 196.1127, as is stated in the LSRB's interrogatory responses.² Mr. Sauer's affidavit does not controvert these facts. His allegations concern whether Article III, § 38(d) allows for the conduct of certain research that would be prohibited from receiving public funding under § 196.1127. But he does not aver that HB 2007 would allow public funding of research that is prohibited from receiving public funding under § 196.1127, or that the § 196.1127 restrictions are somehow invalid under Article III, § 38(d).

Given the LSRB's authority and its stance on the issues, the alignment of the parties is similar to the alignment in *County Court of Washington v. Murphy*, 658 S.W.2d 14 (Mo. banc 1983). In *County Court*, the plaintiff county court questioned the ability of the circuit court to authorize additional deputies and set their salaries pursuant to statute. The plaintiff paid the deputies pursuant to the circuit court's order and swore to follow that order, but then filed a petition for declaratory judgment asking for a declaration that the statute under which the circuit court had appointed the deputies was unconstitutional. 658 S.W.2d at 15. The Missouri Supreme Court held that the trial court had no authority to issue a declaratory judgment about the validity of a statute because there was no controversy over that issue after the plaintiff county court had sworn to pay the salaries. *Id.* at 16.

Here, Plaintiffs attempt to distinguish *County Court* by arguing that "Defendants do not make, or even offer, any irrevocable, binding agreement that the restrictions in

² None of the Defendants takes a different position. The State Treasurer explicitly agrees with this view.

Article III, § 38(d) do not apply to the restrictions imposed in H.B. 2007 on appropriations to the LSRTF [sic].” Plaintiffs’ Response to Defendants’ Suggestions in Support of their Motion to Dismiss, p. 11. But that is not what the *County Court* case required. The Supreme Court noted that where the plaintiffs there had “under oath, sworn to obey” the requirement of paying the salary, there was no case or controversy for any court to resolve, but the court did not hold that a sworn, under-oath statement was required. Even if a sworn statement were required, that requirement is met here because the LSRB’s interrogatory responses are verified under oath by the chair of the LSRB, on behalf of the LSRB, which voted unanimously to approve the statement.

Plaintiffs also argue in the alternative that their case presents a justiciable controversy because, they say, if § 196.1127 is determined to be unconstitutional under Article III, § 38(d), then any appropriation made to the LSRB for life science research funding under Chapter 196 of the Revised Statutes of Missouri is void under the non-severability provision of § 196.1127.6, RSMo. Section 196.1127.6, RSMo. provides that “[i]f any provision of this section is found to be invalid or unconstitutional, any appropriation subject to this section or any appropriation declared by any court to be subject to this section shall be void, invalid, and unenforceable.”

Defendants counter by arguing that the nature of the research projects on which money appropriated by HB 2007 can be expended is not affected by the existence of Article III, § 38(d). Defendants also argue that HB 2007 effectively restricts the expenditure of appropriated funds to those research projects listed therein and accomplishes the purpose of §196.1127.3 RSMo. by assuring that the appropriated funds

are not expended on abortion services, human cloning or prohibited human research as defined in § 196.1127.

Section 196.1127.6 provides that “[i]f any provision of this section *is found to be invalid or unconstitutional*, any appropriation subject to this section . . . shall be void.” But no party to this litigation alleges or asserts that the restrictions in § 196.1127.3 are invalid or unconstitutional. Plaintiffs’ petition affirmatively asks this Court to declare that “Article III, § 38 (d) of the Missouri Constitution does not affect or in any way or [sic] invalidate the restrictions imposed by RSMo . . . § 196.1127 expressly prohibiting the use of any funds for abortion services, human cloning, or prohibited human research....” Plaintiffs’ Pet., ¶ (C)(7), p. 16. Yet, none of the Defendants takes the position that any portion of § 196.1127 is invalid or unconstitutional either.³ There is thus no controversy before the Court on that issue.

In addition, Plaintiffs’ argument that that the non-severability provision of § 196.1127.6 might invalidate HB 2007 is dubious. The purpose of § 196.1127.3 – to prevent public funds from being appropriated for abortion services, human cloning or prohibited human research – is met by HB 2007 because HB 2007 contains limitations that specify the types of research projects for which the appropriated monies can be used, and all parties to the litigation agree that the listing of approved project types does not include any research that could constitute abortion services, human cloning or prohibited

³ The State Treasurer explicitly takes the position that § 196.1127 is constitutional.

human research as those terms are defined in § 196.1127.3. It is counter-intuitive for Plaintiffs to suggest (notably, they do not themselves argue that HB 2007 should be declared invalid) that the legislature would wish to have HB 2007 invalidated pursuant to § 196.1127.6 – assuming, but without deciding for purposes of this case, that a prior legislative act could constitutionally bind a subsequent legislature’s appropriation power in that manner.⁴

In the final analysis, Plaintiffs are asking the Court to issue advisory opinions that HB 2007 and § 196.1127 are valid laws. Without a controversy before the Court on these issues, however, it would offend separation of powers principles for the Court to issue preemptive pronouncements about the validity of these legislative acts.

Order

For the foregoing reasons, the Court hereby dismisses Plaintiffs’ petition.

So ordered this 12th day of November, 2008.

Richard G. Callahan
Circuit Court Judge, Division II

⁴ *Cf. State ex rel. The Kansas City Symphony v. State*, No. 06AC-CC01155, Judgment, p. 5 (noting that legislative promises “as to how revenues from a particular tax will be spent ... are but empty words that have no legal consequences”).