

Summary of SC91125, *Kansas City Premier Apartments, Inc. v. Missouri Real Estate Commission*

Appeal from the Platte County circuit court, Judge Abe Shafer
Argued and submitted May 10, 2011; opinion issued July 19, 2011

Attorneys: Kansas City Premier Apartments was represented by David E. Roland of the Freedom Center of Missouri in St. Louis, (314) 604-6621, and the commission was represented by Edwin R. Frownfelter of the attorney general's office in Jefferson City, (573) 751-3321.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A company established to help owners of rental property locate prospective tenants appeals the trial court's judgment enjoining it from conducting certain business activities and denying its request for a declaration that its activities are not subject to the provisions of the state's real estate licensure laws. In a 5-2 decision written by Judge Zel M. Fischer, the Supreme Court of Missouri affirms the trial court's judgment. The company failed to demonstrate that the trial court erroneously declared or applied the law by entering an injunction against it. The company also failed to demonstrate that the challenged statutory provisions are unconstitutional restrictions on free speech, violate the constitutional rights to equal protection under the law, constitute a special law in violation of the state constitution, or are unconstitutionally vague.

Judge Michael A. Wolff dissents. He would find that the broad prohibition of the trial court's injunction violates the First Amendment as applied by the United States Supreme Court in a variety of commercial contexts, including a recent decision, and, therefore, would reverse the trial court's judgment and remand (send back) the case.

Facts: In 2001, two individuals – neither of whom has a Missouri real estate brokerage license – founded Kansas City Premier Apartments (KCPA) to assist owners of rental property in locating prospective tenants. Under its business model, KCPA enters into non-exclusive performance-based agreements with property owners, who agree to pay KCPA a fee for each new tenant who gives the property owner a card verifying that KCPA referred him or her to the rental property. KCPA offers a \$100 gift card to each prospective tenant who gives a card resulting in a payment to KCPA. KCPA operates through its website, www.kcpremierapts.com, which offers a searchable database of rental listings provided by property owners and that offers prospective tenants the option of direct, interactive contact with rental advisors – independent contractors who will answer questions the prospective tenants ask, recommend which properties to rent and contact property owners to arrange appointments. In 2004, based on a complaint it received, the state's real estate commission began investigating whether KCPA was engaged unlawfully in real estate activities. Two years later, the commission sent a letter stating it had determined that KCPA was conducting real estate activity without a Missouri real estate license in violation of state law and that it should cease immediately. Following an exchange of correspondence between KCPA and the commission, KCPA in April 2007 filed a lawsuit seeking a declaratory judgment that its business activities are not encompassed by the real estate statutes, that it is exempt from the statutes' licensure requirements, and that the commission's interpretation of the

statutes violates KCPA's rights under the state and federal constitutions. After two years of litigation, the commission filed its own petition for a preliminary injunction, seeking to bar KCPA from performing real estate activities. In 2010, the two cases were consolidated and tried. The trial court issued an injunction prohibiting KCPA from contracting with property owners to receive compensation in return for referring prospective tenants, from performing any act requiring real estate licensure, and from dispensing rebate cards to tenants. The court also denied KCPA's request for a declaratory judgment. KCPA appeals.

AFFIRMED.

Court en banc holds: (1) KCPA has failed to demonstrate that the trial court erroneously declared or applied the law in entering an injunction against KCPA. Chapter 339, RSMo Supp. 2010, addresses real estate licensure. Section 339.010.1 defines "real estate broker." Section 339.010.7(5) states that the provisions of chapter 339 do not apply to a person employed or retained to manage real property. The legislature's manifest intention in enacting chapter 339 is "to protect the public from the evils of fraud and incompetency," and any exemption from chapter 339 must be construed strictly in favor of the public. *Miller Nationwide Real Estate Corp. v. Sikeston Motel Corp.*, 418 S.W.2d 173, 176-177 (Mo. 1967). KCPA has failed to meet its burden of presenting a clear case that it fits under an exemption from chapter 339. The activities that can be performed by an unlicensed person "employed or retained to manage real property" are limited "to one or more of the ... activities" listed in subdivisions (a) through (e) of section 339.010.7(5). Of these, (d) is the most applicable to KCPA's activities. This subdivision allows the conveying of information prepared by an owner about a rental unit, a lease or application for lease by any person. KCPA's activities, however, are not limited enough to fit within this subdivision. Rather, KCPA provides other services that exceed all of the exemptions provided by section 339.010.7. These services include providing rental advisors who market select units to prospective tenants based on the prospective tenant's particular needs and providing detailed advice about apartment search strategies. Because none of the exemptions applies to these types of services, KCPA cannot rely on any of the exemptions.

(2) KCPA has failed to demonstrate that subdivisions (3), (4), (7), (8) and (10) of section 339.010.1 and section 339.010.7 are unconstitutional restrictions on the state and federal constitutional rights to free speech. If KCPA merely wanted to advertise or provide information, it would be exempt from regulation by the commission. In addition, the trial court's judgment does not enjoin KCPA from providing information, which would be considered protected commercial speech. The court's findings and conclusions indicate that KCPA did much more than provide information and, in fact, crossed over the line into activities limited to those the legislature has determined require a real estate license. These determinations are supported by substantial evidence and should be given deference. Further, KCPA does not deny that it engages in many of the activities the trial court found it performed. Many other courts have found that the regulation of certain professions – including those of lawyers, psychologists, securities broker-dealers, accountants and interior designers – is necessary to protect the public and, therefore, is not unconstitutional simply because the regulations had an incidental effect on the free speech rights of unlicensed individuals. Nonetheless, a state does not have unlimited power to restrict speech directly through the regulation of a profession.

(a) The challenged provisions do not violate the federal constitutional right to free speech. To the extent that specific provisions of a regulatory scheme directly restrict speech, those provisions must survive either strict scrutiny or an intermediate scrutiny standard. The United States Supreme Court applies the lesser standard of intermediate scrutiny to state regulations of commercial speech, which is an “expression related solely to the economic interests of the speaker and its audience.” *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 561-63 (1980). Because the speech at issue here does not involve both “content based” and “speaker based” speech, the “heightened scrutiny” standard discussed in *Sorrell v. IMS Health*, 564 U.S. ____ (2011), does not apply. The information KCPA displays as part of its real estate activities is commercial speech. The state’s interest behind the challenged provisions is to protect the public from fraud and incompetence, which is a substantial government interest. The challenged provisions survive intermediate scrutiny. First, they directly advance a state interest because the licensure requirements relate directly to the honesty and competency the legislature seeks to assure in those who practice real estate in Missouri. Second, the government’s restrictions are not excessive; they do not reach beyond the state’s interest in regulating real estate brokers, nor do they regulate speech that poses no danger to that state interest.

(b) The challenged provisions also do not violate the right to free speech under article I, section 8 of the state constitution. The right to free speech is subject to the state’s inherent right to exercise its police power. *Missouri Libertarian Party v. Conger*, 88 S.W.3d 446, 448 (Mo. banc 2002). Chapter 339 serves an important interest and is a proper exercise of the state’s police power. *Miller Nationwide*, 418 S.W.2d at 177.

(3) The exemptions under section 339.010.7 do not violate equal protection under the federal constitution or article I, section 2 of the state constitution. Both constitutional provisions prohibit laws that treat similarly situated persons differently without adequate justification. Because there is no fundamental right to engage in the profession of real estate brokerage, chapter 339 is reviewed under the rational basis standard, under which there must be a plausible reason for the classification. Plausible reasons exist for each category of persons exempt from licensure by section 339.010.7. As such, they do not violate equal protection.

(4) Section 339.010.7 is not a special law in violation of article III, section 40(30) of the state constitution. Laws that create fixed categories based on some immutable characteristic may be special laws; laws that created open-ended categories are not. Here, many of the exemptions described in section 339.010.7 are open-ended.

(5) Subdivisions (3), (4), (7), (8) and (10) of section 339.010.1 and section 339.010.7 are not unconstitutionally vague. The words used in the challenged provisions are not vague; they clearly define the conduct prohibited. Words such as “negotiates,” “listing” and “assists or directs in the procuring of prospects for rental” have everyday meanings, understandable by persons of ordinary intelligence. They provided KCPA with adequate notice that it was acting in violation of chapter 339 by assisting and directing “in the procuring of prospects for rental.”

Dissenting opinion by Judge Wolff: The author would find that the broad prohibition of the trial court's injunction violates the First Amendment as applied by the United States Supreme Court in a variety of commercial contexts – including *Sorrell v. IMS Health*, 564 U.S. ____ (2011) – and, therefore, would reverse the trial court's judgment and remand (send back) the case. *Sorrell* struck down a Vermont law forbidding the sale of prescriber-specific information by pharmacies to pharmaceutical manufacturers and marketers, rejecting the state's explanation that the law was intended to protect public health and keep health care costs in check. In analyzing the law, the Supreme Court applied a heightened scrutiny standard because the law was a content-based – only forbidding the marketing of drugs – and a speaker-based – only silencing pharmaceutical manufacturers and marketers – prohibition on speech. It held that the speech's commercial nature did not negate the need for heightened scrutiny. Here, the activity at issue is KCPA's advertising of rental properties to consumers. The United States Supreme Court has held that advertising is a form of speech, and neither party here disputes that KCPA's conduct is commercial speech. There is no evidence here that KCPA's speech is false or misleading. The information KCPA provides serves a necessary function in the economy by giving consumers information necessary for them to make rational decisions about real estate rentals. Truthful, non-misleading commercial speech is protected by the First Amendment. As in *Sorrell*, the speech restrictions of chapter 339 are content-based – forbidding only the listing or advertising of rentals and homes – and speaker-based – only non-licensed persons are prohibited from speaking. In addition, the state's regulation of certain occupations restricts non-members from participating in economic markets and making a living in an otherwise lawful occupation. As such, heightened scrutiny is justified, and the state's regulation cannot survive such scrutiny. KCPA's conduct here constitutes speech that is not false or misleading and that does not advertise an illegal product or activity and, therefore, is protected by the First Amendment. The state's interest in preventing fraud and incompetence by persons engaged in marketing real estate does not justify its suppression of KCPA's speech. The state has not shown a nexus between truthful advertising and forbidding those not licensed in real estate from advertising, nor has it shown that having a license prevents fraud and deception. If the state wants an injunction limited to the use of false or deceptive information, it may be able to make the required showing. But here, the circuit court's injunction is too broad.