SC91640

IN THE SUPREME COURT OF MISSOURI

ST. LOUIS ASSOCIATION OF REALTORS,

Plaintiff-Appellant,

vs.

CITY OF FERGUSON,

Defendant-Respondent.

Appeal from the Circuit Court of St. Louis County, Missouri, Honorable Mary Elizabeth Ott, Circuit Judge

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BRIEF OF MISSOURI MUNICIPAL LEAGUE (MML), AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT, CITY OF FERGUSON

THE MISSOURI MUNICIPAL LEAGUE

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INTEREST OF THE MISSOURI MUNICIPAL LEAGUE

All parties to this appeal have consented to the filing of suggestions by *Amicus Curiae*, the Missouri Municipal League, as required by Missouri Court Rule 84.05(f)(2).

The Missouri Municipal League (hereinafter referred to as "MML") is an independent not for profit association of 667 municipalities in the State of Missouri. MML members are political subdivisions. The MML provides for cooperation in formulating and promoting municipal policy and administration of local government at all levels to enhance the welfare and common interests of its members and their citizens.

Many MML members have adopted ordinances that establish minimum housing standards and minimum property maintenance requirements for property within the members' respective jurisdictions. Other members have enacted licensing requirements similar to the provisions adopted by the City of Ferguson, which are the subject of this lawsuit brought by the St. Louis Association of Realtors (hereinafter referred to as "SLAR").

The MML advocates, on behalf of its members, in favor of the proper exercise of governmental authority, against the inappropriate or unlawful usurpation of local authority, and in defense of unfounded attacks on local governmental action. At times, the MML's advocacy includes the filing of lawsuits challenging laws, initiatives or actions that affect the core interest of MML members such as (i) the state law affecting the payment of overtime to municipal employees including firefighters and police officers and (ii) the initiative to amend the eminent domain provisions set forth in the Missouri Constitution.

The MML believes that it is important to strike a proper balance between advocacy on behalf of members of an association that relates to the core principles of the association – those principles which bring the members together – and advocacy unrelated to an association's true purpose especially where only the most tenuous interest can be shown.

The MML in its suggestions will focus on the proper balance between these two concepts.

SUGGESTIONS BY AMICUS CURIAE

The MML adopts the statement of facts set forth by Respondent, City of Ferguson, (hereinafter referred to as "City" or "Ferguson") in its brief. The MML also fully supports and adopts the arguments set forth by the City.

The plaintiff in this declaratory judgment action is the St. Louis Association of Realtors (SLAR), an association of real estate brokers in the St. Louis Metropolitan Area that includes the City of Ferguson. The City enacted two ordinances (hereinafter referred to as "Ordinances") that are the subject of this declaratory judgment action, which require landlords and owners of property who lease single-family residential houses to secure a license from the City. As a condition of the license, the landlord is required to meet certain minimum housing standards prior to the leasing and occupancy of the property. The Ordinances are intended to protect the housing stock of municipalities by preventing the lease and occupation of substandard houses. *See*: MainStreet Organization of Realtors v. Calumet City, 505 F.3d 742, 743-744 (C.A.7 2007) Point of sale ordinance; Ashworth v. City of Moberly, 53 S.W.3d 564 (Mo. App. W.D. 2001) Rental housing ordinance challenged by persons subject to the ordinance; and City of University City v. MAJ Investment Corp., 884 S.W.2d 306 (Mo. App. E.D. 1994). Prosecution for violation of housing code.

SLAR does not own property, pay taxes or lease residential housing in the City. SLAR is an association of realtors, not landlords, taxpayers or even property owners although surely most of its 9,000 members pay taxes, own property and some may lease

property. Only a few members are landlords in the City subject to the Ordinances. Its argument for standing is based on the testimony of several witnesses at trial, its Bylaws and a Vision Statement. One member of SLAR testified that he owned and leased property in the City and that he had secured a City license to lease residential property. Two other witnesses testified that they had an ownership interest in separate companies that owned and leased residential property in the City and that both companies had secured a City license to lease property. SLAR also submitted as evidence its Bylaws, which show that it is an association of realtors for realtors. An organizational Vision Statement that is not part of the Bylaws states one of SLAR's objectives is to protect property rights. In order for this Vision Statement to be part of the Bylaws, a majority of the members of SLAR would have to vote in favor of adding this to the Bylaws. SLAR is prohibited by Article III of its Articles of Incorporation from engaging in or being directly interested in any business or enterprise designed for its own or the pecuniary profits of its members. Obviously, SLAR cannot claim any property right, interest or deprivation of any right in this case since the facts clearly show SLAR is not subject to the Ordinances nor does SLAR make any such claim. Whatever rights SLAR has, if any, are derivative and dependent upon its realtor members. National Solid Waste Management Ass'n v. Pine Belt Regional Solid Waste Management Authority, 389 F.3d 491, 497-99 (C.A.5 2004).

SLAR claims in its Petition for Declaratory Judgment that the Ordinances: deprive its members, who are realtors, of due process of law; that the regulation of landlords in the ownership and leasing of residential property is not authorized by law; that the charge

for the landlords license violates the Hancock Amendment because it is an unauthorized tax not approved by the voters; and constitutes a taking of private property. SLAR claims in Paragraph 6 of its petition that it has the right to bring this lawsuit on behalf of its members "who own and lease residential property within Ferguson and who are subject to and directly affected by Ferguson's Licensing Program." SLAR requests relief on behalf of its members with respect to the "ownership and leasing of residential properties" and from the City taking any action against SLAR and "owners of residential properties" under the Ordinances. SLAR contends that its standing to challenge the Ordinances is based on "its representational status, on behalf of its members."

Based on the evidence, the trial court issued its Order and Judgment determining that SLAR as an association did not have standing to bring this lawsuit because it failed to satisfy the three-prong test for associational standing in Missouri. Outdoor Advertising Ass'n, Inc. v. Missouri State Highways and Transportation Com'n **,** 826 S.W.2d. 342 (Mo. banc 1992). The trial court in this case concludes in its Order and Judgment that "The Ordinances at issue in this matter do not affect Realtors nor those engaged in the Real Estate profession in any direct or indirect way." The Judgment further states that, "The SLAR members do not have a legally protectable interest herein."

The MML analysis of standing proceeds on two fronts. When examining the issue of associational standing the federal courts have used two basic approaches to determine standing. First, the language in Article III requiring a "case and controversy" mandates a floor that must be met in every federal case before the case can proceed. Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 12, 124 S.Ct. 2301, 2309 (U.S. 2004).

Every federal case must meet the "case and controversy" test under Article III. There is also prudential standing, another strand of the standing analysis, which is not dependent on any constitutional provision that goes beyond the floor required by Article III cases. United Food and Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 551, 116 S.Ct. 1529, 1534 (U.S. 1996). The MML analyzes the standing of SLAR under the three-part test established for associational standing in Outdoor Advertising Ass'n, Inc. v. Missouri State Highways and Transportation Com'n, Id. and under the concept of prudential standing. Prudential standing has been described as closely related to Article III standing, which embodies "judicially self-imposed limits on the exercise of federal jurisdiction." Elk Grove Unified School Dist. v. Newdow, 542 U.S. at 12.

When Missouri adopted the three-part test for associational standing in Outdoor Advertising Ass'n, Inc., Id. it was not limited by Article III "case and controversy" constitutional requirements. Nevertheless, Missouri followed the test for associational standing established in Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977), an Article III "case and controversy" decision. However, when deciding to follow the three-part test for associational standing, the court left room for consideration of other factors. "This should not preclude a holding in a particular case that the association is not an appropriate party to bring suit." Missouri Outdoor Advertising Ass'n, Inc. v. Missouri State Highways and Transp. Com'n at 344.

Prudential Standing

Prudential standing determines whether the plaintiff is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers. Proctor & Gamble Co. v. Amway Corp., 242 F.3d 539, 560 (C.A.5 2001). These judicially created limitations concern whether a plaintiff's grievance arguably falls within the zone of interests protected by the statutory provision invoked in the suit, whether the complaint raises abstract questions or a generalized grievance more properly addressed by the legislative branch, and whether the plaintiff is asserting his or her own legal rights and interests rather than the legal rights and interests of third parties. Proctor & Gamble Co. v. Amway Corp., at 560. Without these limitations, the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights. Warth v. Seldin, 422 U.S. 490, 500, 95 S.Ct. 2197, 2206 (U.S. 1975)

In MainStreet Organization of Realtors v. Calumet City, Ill., 505 F.3d 742, (C.A.7 2007), a case strikingly similar to this case, Judge Posner concluded that the MainStreet Organization of Realtors did not have standing to sue because realtors could not sue to enforce the legal rights of property owners. The MainStreet Organization of Realtors was suing to invalidate a Calumet City “point of sale” ordinance restricting the right of property owners to sell their property without first being inspected by the city.

> The brokers are not suing to enforce their constitutional property rights; they have no rights in commissions they may someday earn on

> sales of property with whose owners they have as yet no brokerage contract. They are suing to enforce the property rights of the owners of residential property. MainStreet Organization of Realtors v. Calumet City, Ill. at 746.

In this case, SLAR is suing to enforce the rights of landlords who are required to obtain a license from the City of Ferguson. Like the MainStreet Organization of Realtors, SLAR as an association of realtors does not have a property interest at stake in the rights of landlords who are subject to the City Ordinances. The Ordinances of the City do not impose any duty or obligation on realtors. It is the landlords' rights that are at issue in this case, not the remote and abstract interest of an association of realtors who have no property interest at stake in the Ordinances.

There are many reasons for prudential standing limiting the right of an association to bring a lawsuit when neither the right of the association nor its members are affected. First, as Judge Posner notes, the immediate victim – the landlords – are not able to assert their interest in controlling the litigation. Id. at 748. In addition, landlords subject to the Ordinances are entitled, if not required, to exhaust their administrative remedies thereby allowing an administrative agency of the City, as well as the landlord, an opportunity to resolve the conflict or further define the issues. The facts in this case were not developed showing how the Ordinances adversely impacted the realtors' interests. One witness for SLAR simply testified that he was a landlord who had secured a license and two witnesses testified they had an ownership interest in separate companies that had registered as landlords. There was no testimony how landlords, let alone realtors, were

deprived of due process, what property rights were lost or in jeopardy under the Ordinances and how the charge for the license violated the Hancock Amendment. Even though this case was decided on standing the failure to particularize how the interests of the relators as members of SLAR was impacted by connecting the interest of the members to the alleged harm was a failure of proof leaving to the imagination how the interest of SLAR members was impacted. Without some evidence showing the harm and impact of the Ordinances to realtors to support the allegations in the Petition for Declaratory Judgment, the court is forced to guess based on general abstract allegations by an association of realtors not impacted by the Ordinances. SLAR failed to show that there was injury to a legally protected right that its members enjoyed.

In Thomas v. City of Peoria, 580 F.3d 633, 636 -637 (C.A.7 2009), Judge Posner, elaborates on his opinion in MainStreet Organization of Realtors v. Calumet City, Ill., supra by explaining that allowing the suit to proceed would interfere with the primary victims and would add more to the burdens of the judiciary than to the deterrent effect of the law sued under. Judge Posner, in Thomas v. City of Peoria, Id. noted that the zone of interest test expresses a broader principle, related to the tort concept of remoteness of injury, illustrated by a number of common law cases. The principle that you cannot bring a lawsuit on behalf of a third party has a long standing common law history whether you call it remoteness, germaneness or some other term. Lawsuits brought by a person in a representational capacity for persons who are not injured or remotely affected by the applicable law waste resources of the judiciary and MML members, fail to define the issues adequately as shown by the record in this case and deprive the parties directly

affected – in this case landlords – of litigating issues that impact their obligations as landlords.

In Missouri Growth Ass'n v. Metropolitan St. Louis Sewer Dist., 941 S.W.2d 615, 621 (Mo. App. E.D. 1997) a case remarkably similar to this case, SLAR asserted that it had the right to represent its members. The court denied SLAR associational standing because real estate brokers do not pay their own sewer bills. “Furthermore, the paying of sewer bills is not “germane” to the general and vague purpose of promoting the interests of real estate dealers.” The court could have just as easily concluded that SLAR could not bring a suit to enforce the rights of persons who pay sewer bills.

The MML suggests that the common thread running though the facts and law in this case is the failure of SLAR to connect its core interest as an organization of realtors to the Ordinances at issue, which regulate landlords. Whether you call this germaneness, remoteness or just suing on behalf of third parties, when you have no interest in the Ordinances the fundamental flaw remains the same, SLAR and its members have no property interest or rights in the Ordinances.

Standing Under Three-Part Test

The criteria for associational standing are: (1) the members have standing to sue in their own right, (2) the interests that the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members. Outdoor Advertising Ass'n, Inc. v. Missouri State Highways and Transportation Com'n , supra.

1. Members Standing to Sue in their Own Right.

In order to satisfy this prong of the test, SLAR must show that there is a justiciable controversy**.** Home Builders Assn. of Greater St. Louis, Inc. v. City of Wildwood, 32 S.W.3d 612, 614 (Mo. App. 2000). "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)

SLAR did not show any harm or injury to its members as realtors under the first prong of the test because there were no facts showing how the members of SLAR as realtors were impacted by the Ordinances. Realtors have no right to sue in their own right. The Ordinances apply to landlords. In this case, SLAR does not have a legally protectable interest at stake because neither it nor its members have a property interest or any right at stake because the Ordinances apply to landlords not realtors. MainStreet Organization of Realtors v. Calumet City, Ill., supra. Association members were not harmed as realtors and if they brought a suit as a realtor they would not have standing anymore than if they brought a suit as a property owner. Of course, there was testimony

by a few of the 9,000 members who owned and leased property in the City, but as noted earlier in these Suggestions, there was no evidence of how their rights as realtors or even landlords were impacted.

Judge Sykes concurring opinion in MainStreet Organization of Realtors v. Calumet City, at 747-754 is insightful. He concludes that the real estate brokers in MainStreet also failed to satisfy the three-prong test for associational standing because in every federal case the threshold question is whether or not the plaintiff has alleged a personal stake in the outcome of the controversy. Id. at 751. Judge Sykes calls the realtors connection tenuous and speculative and that the "interest asserted is not a legally protected one." Id. at 754. After all, in MainStreet the plaintiffs, as realtors had no interest in the ordinance, which regulated the interest of property owners. Federal jurisdiction can only be invoked, when the plaintiff has suffered some threatened or actual injury resulting from the putatively illegal action. Citing Warth, 422 U. S. 490, 498-499, 95 S.Ct. 2197, 2205. The party invoking federal jurisdiction has the burden of establishing the elements of standing and at the trial level they must be proven. Lujan v. Defenders of Wildlife, Inc., 504 U.S. 555, 560- 561, 112 S.Ct. 2130 (1992). In this case, SLAR failed to show its members as realtors had a personal stake in the outcome because the Ordinances did not apply to SLAR members as realtors. In addition, their claim is speculative and tenuous and SLAR failed to meet its burden of proof at the trial level. As Judge Sykes aptly put it, the claim in MainStreet is "doubly dismissable." The claim of SLAR in this case also deserves a similar fate.

2. Interests of the Association (SLAR)

The trial court in its Order and Judgment stated that the interest of SLAR was "remote, tangential and inconsistent with the majority of its own Bylaws, as to fail as a basis for standing in this litigation." While the MML suggests that the more direct and better analysis is to look to what rights are being enforced and whether or not realtors have an interest in Ordinances that regulate landlords as Judge Posner did in MainStreet Organization of Realtors v. Calumet City, supra. The same basic analysis applies to the second prong.

A corporation that claimed it was dedicated to the dissemination of erotic speech did not have standing to bring a claim on behalf of its employees challenging an ordinance that prohibited opposition to a police officer because it did not relate directly to the organizations purpose and was not germane. White's Place, Inc. v. Glover, 222 F.3d 1327, 1330 (C.A.11 2000) Similarly, a person who was mistakenly arrested for not paying his traffic tickets could not bring a lawsuit on behalf of other persons who paid their traffic tickets based on an alleged unlawful policy of the city to collect tickets because he was not within the zone of interest under the ordinance. Thomas v. City of Peoria, supra. Whether you call this remoteness, germaneness, zone of interest or a limitation on the right to sue for third parties, the result is that under these cases there is no standing. Certainly the fact that SLAR is an association - by and for realtors - demonstrates lack of connectivity, remoteness or germaneness. The fact that a few of its members might own and lease property in the City does not overcome the finding by the trial court that SLAR failed to satisfy the second prong of the test anymore than claiming

that the association has a mission to protect property rights. This is too general In addition, while there was an opportunity at trial to make a connection between realtors and landlords to show how the interest of realtors might be affected SLAR did not show how realtors are impacted by the Ordinances. There was no connection between the purpose of the Ordinances and the objectives of SLAR.

3. Neither the claims asserted nor the relief requested requires the participation of individual members.

In this case SLAR states that its standing is entirely dependent on its standing as an association. SLAR claims that the charge for the license fee violated the Hancock Amendment. SLAR has not paid a license fee.

A claim under the Hancock Amendment requires that a person who paid the license fee be joined in this action; therefore, SLAR fails to satisfy the third prong of the test. Missouri Association of Counties et al., v. Wilson, 3 S. W. 3d 772 (Mo. 1999); Firemen's Retirement System, et al. v. City of St. Louis, 2006 Mo. App. LEXIS 1234, (Mo. App. E.D. 2006).

CONCLUSION

The MML on behalf of its members urges this Court to affirm the trial court decision for the reasons herein stated.

Respectfully Submitted,

By:_____

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the requirements of Rule 55.03; and the limitations set forth in Rule 84.06(b) in that it contains 4,250 words and was produced using Microsoft Word 2000 Version; and that the CD accompanying this brief has been scanned for viruses and is certified to be virus free.

_____
Howard C. Wright, Jr.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy, along with a CD and email was provided to all attorneys of record by depositing same, postage prepaid with the United States Postal Service this 17th day of June, 2011, to:

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