IN THE SUPREME COURT OF MISSOURI

NO. SC91640

ST. LOUIS ASSOCIATION OF REALTORS,
APPELLANT,

v.

CITY OF FERGUSON,
RESPONDENT.

On Appeal From The Circuit Court of St. Louis County, Missouri
The Honorable Mary Elizabeth Ott, Circuit Judge, Division 31
Case No. 07CC-003604

SUBSTITUTE REPLY BRIEF OF APPELLANT

DEVEREUX MURPHY, LLC

STEPHEN C. MURPHY #23887
JOSEPH F. DEVEREUX, III, #62016
190 Carondelet Plaza, Suite 1100
ST. Louis, Missouri 63105
Telephone: (314) 721-1516
Facsimile: (314) 721-4434
smurphy@devereuxmurphy.com
jfdevereuxiii@devereuxmurphy.com

Attorneys for Appellant
St. Louis Association of Realtors

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The trial court erred in finding that Appellant lacks standing, because Appellant met all of the requirements of associational standing.

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ARGUMENT

THE TRIAL COURT ERRED IN FINDING THAT APPELLANT LACKS STANDING, BECAUSE APPELLANT MET ALL OF THE REQUIREMENTS OF ASSOCIATIONAL STANDING.

The parties agree that an association has standing to bring suit on behalf of its members when three conditions are satisfied: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 344 (1997). We have a significant disagreement as to what the actual trial record in this case contained with regard to those three conditions, and how they should be applied to that record.

1. Some Individual Member of SLAR Have Standing to Sue in Their Own Right.

Ferguson's argument is that only three SLAR members (one individually, two by ownership interest in limited liability companies) could have brought suit individually, and that those three would not have met the "case and controversy" requirement of Article III. The argument is, we submit, incorrect on both the law and the facts. Under Missouri law, we have found no specified or minimum number of association members required – one would be sufficient. And on the facts, Ferguson simply mistates the facts at the trial – the record is clear that the three members identified were not the only ones,

but there were others who qualified. Ferguson repeatedly refers to the ".03 percent," the "extremely small subset" of SLAR's 9,000 members, and so forth. The trial record is clear that the three members were representative of the membership, and that others qualified. It would defy common sense to require that all of the 9,000 members have the individual capacity to challenge an ordinance, and the case law clearly supports this.[1]

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[1] The record is clear that the Association did not hold out that only three of its members had individual standing:

- [Meggie Devereux]: Jim Crews, which is through a limited liability company; Glen Sperry, which is through his own name. And I'm told June 2008, Dennis Norman, through a LLC as well. But like I mentioned before, we don't maintain property records. There are additional members who own property in the City of Ferguson as rental property. (Tr. 44, emphasis added.)
- [Meggie Devereux]: There are additional members that we made contact with who weren't willing to participate in the lawsuit. So yes, there are additional members. (Tr. 46.)

Clearly, then, in the opinion of the Association's Governmental Affairs Director, there are more than the three individuals who actually testified who would qualify to bring suit themselves. The whole point of associational standing is to bring a claim as a representative – requiring every individual member to come forward and be qualified would defeat that purpose.

The individuals who did testify had a justiciable controversy with Ferguson that would have supported an individual challenge. Each had an ownership interest in rental property in the city that was subject to the ordinances, and its numerous requirements, that are here challenged.

The city's argument also ignores the significance of this challenge to the numerous other municipalities in the St. Louis area. As a trade association representing over 9,000 members, SLAR has an interest in the precedential impact of ordinances such as that of Ferguson – an impact felt potentially by SLAR members and their clients who may not own property in Ferguson but who own residential rental property in numerous other St. Louis area municipalities.

We found no case which requires a particular number or percentage of association members to have the right to bring suit individually. Indeed, the leading case on the subject, Warth v. Seldin, 422 U.S. 490, 511 (1975), specifically states that "any one of the [members]" is sufficient, and that requirement has been quoted frequently – including in many of the cases cited by Ferguson in its brief. See, e.g., United Food Commercial Workers Union, Local 751 v. Brown Group, Inc., 517 U.S. 544, 552 (1996); Hunt v. Washington State Advertising Comm'n, 432 U.S. 333, 342 (1977); Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers v. Brock, 477 U.S. 274, 282 (1986); Building & Construction Trades Council v. Downtown Development, Inc., 448 F.3d 138, 145 (2d Cir. 2006). The United Food court, supra at 555, specifically states

that the requirements in Article III of the Constitution are satisfied "by requiring an organization suing as representative to include at least one member with standing to present, in his or her own right, the claim (or type of claim) pleaded by the association." (Emphasis added.)

Thus, even if SLAR had conceded that it had only one member, Glen Sperry, who could have brought this claim in his own name, the first point of the three-prong test for associational standing would be met. Sperry owns a rental property in Ferguson and is directly impacted by the ordinances at issue here, which require him to take out a license, hire a manager who resides within twenty-five miles of the property, subject his property to periodic physical inspections, and so forth.

2. The Suit Is Germane to SLAR's Stated Purpose of Protecting Property Interests. Ferguson argues that the second test of associational standing is not met because the "interests sought by Appellant are not germane to the organization's purpose." (Respondent's Brief, 16.) This is based on Ferguson's assumptions about the purposes of SLAR and the reason its members joined, and ignores all of the evidence which supported the contention that challenging an ordinance which imposes various requirements on landlords which are perceived to be burdensome and unauthorized by law is germane to the organization's purpose.

Certainly, the clearest indications of the purposes of an organization are first, the purposes identified in its bylaws, and second, the actual work that an organization does in furtherance of those purposes. Here the protection of property rights, independent of brokerage activities, as such, is expressly adopted by SLAR in its bylaws. And the

testimony proved beyond question that one of the ongoing activities of SLAR, shown by its organizational structure, staffing, and prior municipal legal challenges, is to monitor, lobby, and where necessary, litigate to protect property rights. SLAR has previously litigated municipal efforts to require licensing of landlords, registration of vacant lots, and other non-brokerage restrictions. (Tr. 52-57.)

Ferguson simply asserts that "the members join the Association solely because of their practice as agents, brokers, or other similar professionals – people do not join the St. Louis Association of Realtors because they own property." There is nothing in the record to support this – how would Ferguson possibly know the motivations of 9,000 people, representing numerous professions related by one common interest – real estate. Although a majority of SLAR members may be in real estate sales, there are numerous classifications of membership: appraisers, managers, bankers, title companies, and so forth, as well as a commercial division. Moreover, the perceived impact of municipal ordinances on property values, limitations of transferability of property, and related matters are germane to the varied professionals who participate in different aspects of the sale and rental of real property. This is hardly the case of a medical association challenging a tax statue, as in Medical Association of Alabama v. Schweiker, 714 F.2d 107 (11th Cir. 1983), cited by Ferguson. Ordinances which directly impact real property are of clear and legitimate concern to professionals involved in professions related to sale, appraisal, management, and lending in real estate. SLAR is not an association of chiropractors or accountants, but real estate professionals.

The purposes of SLAR are set out very clearly in its bylaws, and specifically include the objective "to further the interests of home and other real property ownership" (Bylaws, Art. II, IV, emphasis added.) The organization's objectives also include, "to provide a unified medium for real estate owners and those engaged in the real estate profession whereby their interests may be safeguarded and advanced" (id., Art. II § 3, emphasis added), and "to unite those engaged in recognized branches of the real estate profession for the purpose of exerting a beneficial influence upon the profession and related interests" (id., Art. II § 1, emphasis added). The Association's Code of Ethics applies specifically to members' activities as principals (Standard of Practice 1-1). Clearly, then, SLAR's objectives apply not only to the profession and brokerage, but to ownership of property.[2] These purposes are affirmed by the Vision Statement, adopted prior to this lawsuit. And they are carried out by lobbying and court challenges brought or supported through the years by SLAR.[3]

[2] Ferguson's reference to Article III of SLAR's Articles of Consolidation is misplaced. Prohibiting "business or enterprise design for its own or the pecuniary profits of its members" is a standard limitation imposed by nonprofit corporation on themselves, and by statute.

[3] Ferguson argues that not all of these challenges were brought in SLAR's name (although some were). For a variety of reasons, particular challenges of ordinances were sought in the individual property owner or broker's name (for example, when the litigation took the form of defending a specific municipal citation), but the record is clear

There is no reason to believe, on the record, that members do not join SLAR for, at least in part, its role in challenging municipal ordinances which, in the view of SLAR's directors, negatively impact real property in the St. Louis area, since these activities are a long-standing effort by SLAR which would be known to prospective members. This is one way in which individual members of SLAR can help "create an effective vehicle for vindicating interests that they share with others." Building & Construction Trades, supra, at 148-49.

In Human Society v. Hodel, 840 F.2d 45 (D.C. Cir. 1988), the court found that the Humane Society had standing to challenge a federal administrative decision to expand hunting in wildlife refuges. The organization's purposes were several, including the protection of both animals and children, furtherance of "humane education" and cooperation with other organizations. Id. at 56, n. 9. The court's review of the pertinent United States Supreme Court cases "signals to us the importance of a reading of the

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that the litigation was supported by SLAR in all those cases. These cases were described at trial not as examples of other judicial holdings of associational standing, as such, but simply to illustrate the way in which SLAR supports litigation which does not necessarily directly relate to brokerage, but to other aspects of real property ownership. The case of City of Dellwood v. Twyford, 912 S.W. 2d 58 (Mo. 1995) (en banc), was nominally a challenge of two individuals, but was authorized, supersized and financed by SLAR, and SLAR's attorneys handled the case. Again, Dellwood is cited to demonstrate the types of activities that SLAR engages in, not held out as an associational standing case.

germaneness requirement that does not unduly confine the occasions on which the association may bring legal actions on behalf of members and thus significantly restrict the opportunities of associations to utilize their 'specialized expertise and research records' relating to the subject matter of the lawsuit." Id. at 59, quoting Brock. The court notes that "[t]his modest functional interpretation of the germaneness requirement is in obvious accord with common sense and legal understandings of the concept. Black's Law Dictionary, for example, defines 'germane' as in close relationship, appropriate, relative, pertinent…Case law from numerous jurisdictions on various points of law that rely on the concept germaneness also consistently regards the term as mandating pertinence or connection, but not substantial overlap, between the two subjects or items being compared. None of these cases…has construed 'germane' to mean central or to require more than pertinence between the object and the referent." Id. at 60 (emphasis added).

Ultimately, we submit that it is for the Association, its members, and its leadership to establish – by its bylaws, by its activities, by an analysis of its structure and how it spends its money – what are its purposes. Those purposes may evolve over time, and there may be more than one. All of the record in this case supports that SLAR's members believe themselves to be an association of people involved in various real estate activities who, as part of their purpose, want to shape and challenge municipal ordinances relating to real estate. This challenge is squarely within that purpose.

3. Individual Participation of the Association's Members Is Not Necessary.

Case law is clear that the third prong of the associational standing test is met when the relief sought is a declaratory judgment as opposed to damages. In cases where damages are sought, the allocation between different groups or individuals within the association may require their individual participation. But where the relief sought is simply a determination that the statute or ordinance itself is invalid, and therefore the remedy would apply equally to all who are affected, individual participation is not needed. Here, SLAR seeks no damages for itself or its members, but simply a declaratory judgment.

Ferguson maintains that there is a "conflict of interest" among individual members of SLAR, since "some members of the Association…may be tenants residing in residential rental property." Again, the city is simply assuming and conjecturing, outside the record, about an imaginary "conflict." As a representative of many diverse interests – buyers, sellers, brokers, bankers, appraisers, title companies, landlords, property managers, tenants, and so forth – drawn together by the several purposes set forth in the bylaws – SLAR seeks to enhance property values and the efficient sale and leasing of real property. The imposition of a license fee on a landlord increases costs which may be passed on to a tenant; being subjected to what SLAR regards as vague and contradictory classifications of landlords and unauthorized burdens of inspection and licensing are viewed as discouraging and depressing investment in residential rental property. Some portions of the ordinance could have the effect of terminating a tenant's right of occupancy which would, obviously, impact both landlord and tenant. Other requirements involve delving into a tenant's possible legal problems – for example "criminal conduct"

at or near the property would trigger processes which might be adverse to the tenant's interests. A review of the allegations in the petition, and the argument on the merits in our Brief, made it clear that SLAR is not opposed to minimum housing standards or appropriate housing inspections, and thus is not taking a position inconsistent with the interests of tenants. This is not a challenge to the maintenance of effective property codes, which SLAR supports and which benefit owners, tenants, and brokers alike.

In contrast, the case of Maryland Highway Contractors Ass'n v. State of Maryland, 933 F.2d 1246 (4th Cir. 1991), clearly pitted the interest of some of its members against the others, namely those who might benefit from enhanced minority participation requirements in construction projects versus those who would not. The purpose here is to remove expensive, burdensome requirements on rental property ownership – there is no evidence that a favorable outcome would not benefit all classifications of membership in SLAR, and therefore their individual participation would not be required. The decision to challenge the ordinance was made by the appropriate committee, and by the full board of directors, who are elected to represent all of the different classifications and interests of SLAR's members.

CONCLUSION

SLAR has met the three requirements of associational standing. First, it provided the testimony of several members who own residential rental property in Ferguson and, because they are directly impacted by the licensing and regulatory requirements of the ordinances, have a justiciable stake in challenging them. Second, the suit is germane to one of several stated purposes of SLAR, namely, the promotion of real property rights, and consistent with numerous ongoing activities of SLAR. And third, since no monetary award is sought, the suit does not require the individual participation of any member.

RULE 84.06(c) CERTIFICATION

The undersigned certified that this brief:

1. Includes the information required in Rule 55.03;

2. Compiles with the limitations contained in Rule 84.06(b); and

3. Contains words 2,716

DEVEREUX MURPHY LLC

Stephen C. Murphy #23887
Joseph F. Devereux, III, #62016
190 Carondelet Plaza, Suite 1100
St. Louis, Missouri 63105
Tel: (314) 721-1516
Fax: (314) 721-4434

Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 14th day of July, 2011, a true and correct copy of the above-noted Brief of Appellant and CD was mailed to the following:

Ms. Stephanie E. Karr
Curtis, Heinz, Garrett & O'Keefe, P.C.
130 S. Bemiston Ave., Suite 200
St. Louis, Missouri 63105

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 2,716, excluding the cover, table of contents, table of authorities, signature block, and certificates of service and compliance.

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