WD82933

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

TIFFANIE SOETAERT,
Appellant-Respondent,

vs.

NOVANI FLIPS, LLC and MOREKC1, LLC,
Respondents,
and
PLATINUM REALTY OF MISSOURI, LLC,
Respondent-Appellant.

On Appeal from the Circuit Court of Jackson County
Honorable Kevin Duane Harrell, Circuit Judge
Case No. 1716-CV01877

BRIEF OF *AMICUS CURIAE* MISSOURI REALTORS® IN SUPPORT OF RESPONDENT-APPELLANT PLATINUM REALTY OF MISSOURI, LLC

JONATHAN STERNBERG, Mo. #59533
Jonathan Sternberg, Attorney, P.C.
2323 Grand Boulevard #1100
Kansas City, Missouri 64108
Telephone: (816) 292-7020
Facsimile: (816) 292-7050
jonathan@sternberg-law.com
COUNSEL FOR AMICUS CURIAE

Table of Contents

Table of Authorities

Cases

Revised Statutes of Missouri

Missouri General Assembly Bills

Missouri Supreme Court Rules

Rules of the Missouri Court of Appeals, Western District

Other states' statutes

Other authorities

Interest of *Amicus Curiae*

Missouri REALTORS® ("the Association") is a benevolent corporation under Chapter 352, R.S.Mo. It is a statewide association of real estate professionals representing more than 22,000 Realtors statewide. Its articles of incorporation provide "objectives," which include combining individuals together "for the purpose of exerting a combined influence on matters affecting real estate interest [and] to advance the civic development and the economic growth of the State of Missouri." This includes participating as an *amicus* in court cases when the interests of its members are at stake.

The Association's members have a particular interest in this case, because it involves the application of statutes in Chapter 339, R.S.Mo. governing real estate agents. Like similar statutes enacted in many other states, the General Assembly designed these to remove real estate agents from common law agency and instead specifically circumscribe the liability that agents who represent sellers of property can face for their clients' nondisclosure of adverse material facts.

The trial court in this case shirked these direct statutory limitations. The Association files this brief to show the Court the importance of these limitations, as well as the detriment that allowing trial courts to do this would impose on Missouri's real estate professionals.

Consent of the Parties

Per Supreme Court Rule 84.05(f) and this Court's Rule 26, the Association has obtained the consent of Appellant-Respondent Tiffanie Soetaert, Respondent Novani Flips, LLC, and Respondent-Appellant Platinum Realty of Missouri, LLC ("Platinum Realty"), to file this brief as *amicus curiae* in support of Platinum Realty. The parties and the Association have filed a jointly signed stipulation along with this brief.

Jurisdictional Statement

The Association adopts the jurisdictional statement of Platinum Realty.

Statement of Facts

The Association adopts the statement of facts of Platinum Realty.

Points Relied On

The Association adopts the points relied on of Platinum Realty.

Argument

A. Summary

In amendments to Chapter 339, R.S.Mo. in the 1990s and 2000s, the General Assembly removed real estate agents from the common law of agency and instead shielded them from issues for which under the common law they might have been held significantly liable. In §§ 339.190.2 and 339.730.3, R.S.Mo., one set of common law principles that the General Assembly fundamentally changed were the duties that a seller's agent owes to a buyer.

Before these statutes, under the common law of agency a seller's agent might have been held vicariously liable for a client's failure to disclose an adverse material fact about the property, even one of which the agent did not know. Missouri statutes now expressly limit that liability, especially for nondisclosure in a client's disclosure statement, to facts of which the agent knew or should have known without independently inspecting the property, which the statutes equally absolve an agent of any duty to do.

Every court applying these statutes has held that no matter what cause of action a buyer brings against a seller's agent, the seller cannot be held liable to a buyer for failing to disclose adverse material facts of which it did not know or only could have known by independently inspecting the property to verify its client's statements. In so doing, Missouri joins the uniformity of courts in other states that have enacted material identical limitations on sellers' agents' liability to buyers. Those courts equally apply those limitations to all other causes of action, including those under consumer protection laws akin to the Missouri Merchandising Practices Act ("MMPA").

The trial court in this case ignored these express statutory limitations on a seller's agent's liability to a buyer. To give these statutes their intended force and effect, the trial court's judgment must be reversed.

First, the trial court should not have allowed the plaintiff buyer's claims to go to the jury at all. The buyer brought MMPA claims against a seller's agent, alleging the agent misrepresented or concealed water damage to the basement of a residential property. But there was no evidence the agent *actually knew* of the water damage or could have known about it without conducting an independent inspection. Under §§ 339.190.2 and 339.730.3, the trial court should have directed a verdict for the agent.

Second, even if the claims could have gone to the jury, the trial court rejected instructing the jury that it only could find the agent liable on the buyer's MMPA claims if, as §§ 339.190.2 and 339.730.3 require, the agent knew or should have known of the damage without performing an independent inspection. This effectively undid the General Assembly's circumscription of a seller's agent's duties, judicially returning the agent to the common law of agency and subjecting the agent to the very liability from which the General Assembly expressly sought to remove all sellers' agents.

Given the history and purpose of the General Assembly's amendments to Chapter 339, particularly §§ 339.190.2 and 339.730.3, affirming the trial court's judgment would amount to nullifying them. This Court should allow real estate agents the full protections the General Assembly gave them. It should reverse the trial court's judgment outright, or at the very least reverse the trial court's judgment and remand this case for a new trial.

B. Echoing identical statutes throughout America, §§ 339.190.2 and 339.730.3, R.S.Mo. expressly limit a seller's real estate agent's liability for nondisclosure of adverse material facts about the property, especially those in its client's disclosure statement, to facts of which the agent knew or should have known without conducting an independent inspection of the property.

1. Background to the statutes protecting real estate agents from liability for their clients' nondisclosures

Beginning in the 1960s, some courts across the United States began to use the common law of agency "to extend a [real estate] broker's duty to a buyer of whom he was not an agent." Valerie M. Sieverling, *The Changing Face of the Real Estate Professional: Keeping Pace*, 63 MO. L. REV. 581, 581 (Spring 1998) (citing, e.g., *Lingsch v. Savage*, 213 Cal.App.2d 729 (1st Dist. 1963); *Easton v. Strassburger*, 152 Cal.App.3d 90 (1st Dist. 1984); "Liability of Vendor's Real Estate Broker or Agent to Purchaser for Misrepresentation as to, or Nondisclosure of, Physical Defects of Property Sold," 8 A.L.R. 3d 550, 552-53 (1966) (collecting cases)).

In response to objections from real estate agents and groups like the Association that represent their interests that given the unique position of a real estate agent, this was unfair, state legislatures agreed and sought to "attempt a resolution" to this. *Id.* at 593. They enacted statutes shielding real estate agents from that kind of liability, restoring the recognition of their special relationship to their clients and to customers. *Id.* at 581; *see also* Sherry A. Mariea and Timothy T. Sigmund, *Real Estate Agents Bid Farewell to Common Law*, 54 J. MO. B. 96, 96 (Mar.-Apr. 1998). In Missouri, enacting this kind of protection was "a major goa[l]" of the state's real estate industry, including the Association. *Id.*

Beginning in 1996, *see* 1996 S.B. 664, the Missouri General Assembly thoroughly amended Chapter 339, R.S.Mo., which governs real estate agents, to provide that protection. "One of the major purposes of the new law [was] to create a 'statutory' agency which is intended to take the typical real estate agency relationship out of the realm of common law agency." Mariea and Sigmund, 54 J. MO. B. at 96. It "offer[s] liability protections for issues that under the common law often resulted in significant liability …." *Id.* at 99. And for "customers (particularly buyers)," it "bring real estate transactions closer to the concept of caveat emptor," *id.*, which means "let the buyer beware." BLACK'S LAW DICT. 276 (11th ed. 2019).

"[U]nder the new law, a licensee who enters into an agreement to perform the duties and obligations set forth in the new statutes becomes a 'limited agent.'" Mariea and Sigmund, 54 J. MO. B. at 96 (quoting § 339.710(14), R.S.Mo.). "The limited agent performs these duties and responsibilities for his or her 'client.'" *Id.* (quoting § 339.710(6)). "Other parties to the transaction, who are not in a brokerage relationship with a licensee, are referred to as 'customers.'" *Id.* (quoting § 339.710(9)).

As part of this, the General Assembly enacted two statutes in particular, §§ 339.190.2 and 339.730.3, to provide express protection to sellers' agents against liability to buyers for their clients' nondisclosure of adverse material facts concerning the subject properties. Instead, under them "[t]he only duty that a limited agent owes to a customer is to disclose all adverse material facts that the agent actually knows or should know" without conducting an independent inspection. Sieverling, 63 MO. L. REV. at 583.

2. § 339.730.3, R.S.Mo.

Section 339.730.3 was enacted as part of the original 1996 amendment to Chapter 339 and has not been changed since. It provides in relevant part:

> A licensee acting as a seller's … agent owes no duty or obligation to a customer, except that a licensee shall disclose to any customer all adverse material facts actually known or that should have been known by the licensee. A seller's … agent owes no duty to conduct an independent inspection or discover any adverse material facts for the benefit of the customer and owes no duty to independently verify the accuracy or completeness of any statement made by the client or any independent inspector.

§ 339.730.3.

So, "[w]ith regard to duties and obligations to customers," § 339.730.3 "specifically require[s] limited agents to disclose to customers all adverse material facts actually known or that should have been known by the limited agent" but "states that a limited agent does not have any obligation, on behalf of a customer, to independently investigate the potential for certain adverse material facts or verify information provided by such agent's client." Mariea and Sigmund, 54 J. MO. B. at 97.

3. § 339.190.2, R.S.Mo.

Section 339.190.2 was enacted a few years later in a bill "relating to court procedures and court personnel." *See* 2004 S.B. 1211. It relates to nondisclosure of information in a seller's real estate disclosure, and provides in relevant part:

> A real estate licensee shall not be the subject of any action and no action shall be instituted against a real estate licensee for any information contained in a seller's disclosure for … real estate furnished to a buyer, unless the real estate licensee is a signatory

> to such or the licensee knew prior to closing that the statement was false or the licensee acted in reckless disregard as to whether the statement was true or false.

§ 339.190.2.

So, "[r]eal estate agents enjoy limited liability in connection with real estate disclosure statements by virtue of … § 339.190.2, which permits actions for misrepresentation only if the agent signs the statement, or, prior to closing, knew the statement was false or acted in reckless disregard of truth or falsity." 34 MO. PRAC. § 22:8.

While § 339.190.2 uses the phrase "knew … or acted in reckless disregard," in practice this is just another way of saying "knew or should have known," just as in § 339.730.3. This is because "reckless disregard" is "[t]he intentional commission of a harmful act or failure to do a required act when the actor knows or has reason to know of facts that would lead a reasonable person to realize that the actor's conduct both creates an unreasonable risk of harm to someone and involves a high degree of probability that substantial harm will result." BLACK'S LAW DICT. at 594.

4. Decisions applying §§ 339.190.2 and 339.730.3

Several reported opinions have applied §§ 339.190.2 and 339.730.3 to buyers' actions against sellers' agents for alleged nondisclosure of adverse material facts. None of these decisions involved claims under the MMPA. But given the protection these statutes were designed to afford agents, in each case the Court always has held that regardless of the cause of action the buyer chose to bring, the statutes only allowed the agent to be held liable if it (1) had actual knowledge of the undisclosed adverse material fact or (2) could

have known about it without independently inspecting the property to verify its client's statements, that is, without exercising the same ordinary diligence that the buyer could exercise.

In *Lowdermilk v. Vescovo Bldg. & Realty Co., Inc.*, the first decision to apply any of these statutes, this Court affirmed the trial court's grant of a new trial when a defendant seller's agent was found liable for "negligence per se" in failing to disclose an adverse material condition to plaintiff buyers. 91 S.W.3d 617, 629-30 (Mo. App. 2002).

One reason the trial court granted a new trial was that the buyers' "verdict directing instructions either impose[d] a duty of discovery and investigation upon the [sellers' agents] which is specifically excluded under § 339.730(3)," so these instructions "were improper statements of liability …." *Id.* at 625. This Court agreed. First, it noted the history and purpose of § 339.730.3:

> Section 339.730 is found within sections 339.710 through 339.860, entitled "Limited and Dual Agents, Designated Brokers and Agents." These are new provisions to Chapter 339 and became effective in 1997. One of the major purposes of these sections was to "create a 'statutory' agency which is intended to take the typical real estate agency relationship out of the realm of common law agency." Section 339.840 specifically provides that these provisions supercede [*sic*] "the common law of agency with respect to whom the fiduciary duties of an agent are owed in a real estate transaction, but do not limit civil actions for negligence, fraud, misrepresentation or breach of contract.

Id. at 629 (internal citations omitted).

Instead, § 339.730 only "imposes on a licensee acting as a seller's … agent a circumscribed duty to disclose adverse material facts to a 'customer,'"

and specifically excludes a duty to independently investigate the client's disclosures. *Id.* For this reason, "the jury was not properly instructed on a viable theory of liability," and a new trial was required. *Id.* at 730.

Next, in *Lafarge N. Am., Inc. v. Discovery Group L.L.C.*, the U.S. Court of Appeals for the Eighth Circuit reviewed a diversity-jurisdiction summary judgment under Missouri law for a defendant real estate broker in a client's action against it for breach of contract, negligent and fraudulent misrepresentation, breach of fiduciary duty, negligence, and rescission, for failing to disclose that the property was located in a special sales tax district. 574 F.3d 973, 983 (8th Cir. 2009). It was undisputed that the broker had actual knowledge of this. *Id.* The Eighth Circuit held that § 339.730.3 therefore did not bar the client's action, but there was a genuine dispute of material fact whether the fact of the property being in the special sales tax district constituted an "adverse material fact" as defined in § 339.710(1). *Id.* If it was, then the broker could be held liable because it had actual knowledge of this, so the Eighth Circuit reversed the summary judgment. *Id.*

Finally, in *White v. Bowman*, this Court reviewed a summary judgment for a defendant seller's agent in a plaintiff buyer's lender's action against it for fraudulent and negligent misrepresentation and concealment due to the nondisclosure of a home's water-related conditions. 304 S.W.3d 141, 149 (Mo. App. 2009). This Court affirmed, citing both §§ 339.190.2 and 339.730.3. *Id.* at 149-51. The agent's "only knowledge of any undisclosed adverse condition was gleaned during her final walkthrough with the buyers, when she detected 'a small amount of mold or mildew on the wall near the window in

the downstairs room that was used for an office by the sellers.'" *Id.* at 150. The plaintiff claimed the agent "was obliged to disclose this last-minute discovery because it put her on notice that [her client's] disclosures were false." *Id.* The Court rejected this, holding that the agent had no independent duty to verify whether this was so, and the plaintiff was on "equal footing" with the agent "because 'ordinary diligence' on plaintiff's part would have revealed the condition." *Id.*

Therefore, no matter the cause of action, be it negligence (*Lowdermilk* and *Lafarge*), breach of contract, misrepresentation, or breach of fiduciary duty (*Lafarge* and *White*), under §§ 339.190.2 and 339.730.3 the law of Missouri is that an agent only is liable for failing to disclose an adverse material fact if the agent (1) had actual knowledge of that fact or (2) could have known about it without independently inspecting the property to verify its client's statements, that is, as in *White*, without exercising the same ordinary diligence that the buyer could exercise.

5. Missouri's statutory limitations on real estate agents' liability and case law applying them mirror those in other states, which also equally have extended these limitations to consumer protection laws akin to the MMPA.

Missouri is far from alone in having enacted statutes like § 339.190.2 and 339.730.3 that protect real estate agents from liability for nondisclosure of adverse material facts unless the agent had actual knowledge of it or could have known about it without independently inspecting the property.

One other state, Indiana, has enacted a nearly identical version of § 339.190.2 providing agents limited liability specifically in connection with real estate disclosure statements and making them actionable only if the

agent signs the statement, or, before closing, knew the statement was false or acted in reckless disregard of truth or falsity. *See* Ind. Code § 25-34.1-6-4(c), which provides in relevant part:

> A licensee is not liable for the information contained in a seller's real estate disclosure form …, unless:
>
> (1) the licensee signed the disclosure form; or
>
> (2) the licensee knew before closing occurred that the information was false or the licensee acted in reckless disregard as to whether the information was true or false.

Eight other states have enacted nearly identical versions of § 339.190.3, providing agents limited liability in connection with the general nondisclosure of adverse material facts, and absolving the agent of any duty to conduct an independent investigation of the property or to independently verify its client's statements. *See* (quoting each in relevant part and removing section identifiers):

- Colo. Rev. Stat. § 12-10-404(3)(a)-(b):

  > A broker acting as a seller's … agent owes no duty or obligation to the buyer …; except that a broker shall … disclose to any prospective buyer … all adverse material facts actually known by the broker.
  >
  > A seller's … agent owes no duty to conduct an independent inspection of the property for the benefit of the buyer … and owes no duty to independently verify the accuracy or completeness of any statement made by the seller … or any independent inspector.

- Idaho Code § 54-2086(1)(d) and (5):

  > A broker has a duty "[t]o disclose to the seller/customer all adverse material facts actually known or which reasonably should have

been known by the licensee" but "owe[s] no duty to a buyer/customer to conduct an independent inspection of the property for the benefit of that buyer/customer and owe[s] no duty to independently verify the accuracy or completeness of any statement or representation made by the seller or any source reasonably believed by the licensee to be reliable."

- Kan. Stat. Ann. § 58-30106(d)(1)-(2):

  A seller's … agent owes no duty or obligation to a customer, except that a licensee shall disclose to any customer all adverse material facts actually known by the licensee ….

  A seller's … agent owes no duty to conduct an independent inspection of the property for the benefit of the customer and owes no duty to independently verify the accuracy or completeness of any statement made by the client or any qualified third party.

- Neb. Rev. Stat. § 76-2417(3)(a)-(b):

  A licensee acting as a seller's … agent owes no duty or obligation to a buyer … except that a licensee shall disclose in writing to the buyer … all adverse material facts actually known by the licensee.

  A seller's … agent owes no duty to conduct an independent inspection of the property for the benefit of the buyer … and owes no duty to independently verify the accuracy or completeness of any statement made by the client or any independent inspector.

- 60 Okla. Stat. § 836(C) and (E):

  "A real estate licensee has the duty to disclose to the purchaser any defects in the property actually known to the licensee which are not included in the disclosure statement or any amendment" but "has no duty to the seller or the purchaser to conduct an independent

inspection of the property and has no duty to independently verify the accuracy or completeness of any statement made by the seller in the disclaimer statement or the disclosure statement and any amendment."

- 63 Pa. Cons. Stat. § 455.606a(i):

  "Unless otherwise agreed, a licensee owes no duty to conduct an independent inspection of the property and owes no duty to independently verify the accuracy or completeness of any representation made by a consumer to a transaction reasonably believed by the licensee to be accurate and reliable."

- Wash. Rev. Code § 18.86.030(1)(d) and (2):

  A broker owes a duty "[t]o disclose all existing material facts known by the broker and not apparent or readily ascertainable to a party; provided that this subsection shall not be construed to imply any duty to investigate matters that the broker has not agreed to investigate[.]"

  Unless otherwise agreed, a broker owes no duty to conduct an independent inspection of the property or to conduct an independent investigation of either party's financial condition, and owes no duty to independently verify the accuracy or completeness of any statement made by either party or by any source reasonably believed by the broker to be reliable.

- Wyo. Stat. Ann. § 33-38-303(c)-(d);

  A licensee acting as a seller's agent owes no duty or obligation to the buyer, except that a licensee shall disclose to any prospective buyer all adverse material facts actually known by the licensee. … The licensee acting as a seller's agent shall not perpetuate a material misrepresentation of the seller which the licensee knows or should know is false.

> A seller's agent owes no duty to conduct an independent inspection of the property for the benefit of the buyer and owes no duty to independently verify the accuracy or completeness of any statement made by the seller or any independent inspector.

Moreover, just like this Court and the Eighth Circuit in applying §§ 339.190.2 and 339.730.3, in applying these statutes the courts of these states uniformly have allowed a seller's agent to be held liable for nondisclosure of an adverse material fact *only* if the agent had actual knowledge of it or could have known about it without independently inspecting the property.

One court allowed liability when the agent had actual knowledge of the nondisclosed fact. *See Fitzmorris v. Demas*, 116 P.3d 764, 767-68 (Kan. App. 2005) (where there was evidence that the seller's agent had actual knowledge of termite damage report, agent had statutory duty to disclose it to the buyer; summary judgment for the agent reversed).

But where there was no evidence that the agent had actual knowledge of the undisclosed adverse material fact or otherwise should have known of it without conducting an independent inspection, the courts in these states uniformly have held the agent could not be held liable. *See, e.g.*:

- *Moore v. Williams*, 192 P.3d 1275, 1277-79 (Okla. Civ. App. 2008) (affirming summary judgment for seller's real estate agent in buyer's action against it for nondisclosure that house had been used as a methamphetamine laboratory, where there was no evidence the agent knew that and statute absolved agent of any duty to independently verify that);
- *Carbajal v. Safary*, 216 P.3d 289, 290-91 (Okla. 2009) (affirming judgment for seller's real estate agent after trial in buyer's action

against it for failing to disclose structural problems with property, as the agent did all that was required under the statute when it informed the buyer that the engineering report he received was "clean," the buyer could not show that the agent had any actual knowledge otherwise, and under the statute the agent had no duty to independently verify the report); and

- *Throckmartin v. Century 21 Top Realty*, 226 P.3d 793, 808-09 (Wyo. 2010) (affirming summary judgment for intermediary agent in buyer's action against it for failing to disclose structural problems with house, as by statute the agent had no duty to conduct an independent investigation of the house to verify the seller's representations).

More importantly, the courts in these states uniformly have held that this limitation on liability applies equally to actions brought against the agents under consumer-protection statutes akin to the MMPA. Even then, to be held liable the agent still must have had actual knowledge of the undisclosed fact or otherwise be able to have known of it without conducting an independent inspection. *See, e.g.*:

- *Baumgarten v. Coppage*, 15 P.3d 304, 307-08 (Colo. App. 2000) (statutory limitations on real estate agent's liability applied to buyer's action against seller's broker for deceptive trade practices under the Colorado Consumer Protection Act; buyer could not maintain action over what broker subjectively should have known, because § 12-10-404(3)(a) only allowed liability for "actual knowledge" and absolved agent of duty to conduct independent inspection);

- *Osterhaus v. Toth*, 249 P.3d 888, 907-09 (Kan. 2011) (statutory limitations on real estate agent's liability applied to buyer's action against seller's agent for violation of the Kansas Consumer Protection Act by not disclosing structural defects to property, but summary judgment reversed because there was evidence agent had actual knowledge of reports disclosing that damage);
- *Stechschulte v. Jennings*, 298 P.3d 1083, 1099-1101 (Kan. 2013) (same; agent's only duty was to "competently pas[s] on what [was] known");
- *McGonigle v. Astle Realty*, No. 10-1273-MLB, 2013 WL 3819458 at *6-7 (D. Kan. July 22, 2013) (granting summary judgment to seller's agent on buyer's claims related to disclosure of existence of property owner's duty to maintain dam, including Kansas Consumer Protection Act claim, where agent provided buyer with all materials agent had been provided related to existence of dam and agreement to maintain it);
- *Ries v. Curtis*, No. 13-1400, 2014 WL 5364972 at *23 (E.D. Pa. Oct. 22, 2014) (granting summary judgment to seller's agent on buyer's claims related to disclosure of water damage and structural problems, including claim under the Pennsylvania Unfair Trade Practices and Consumer Protection Law, because there was no evidence that agent knew or should have known of the problems, and statute absolved agent of any duty to independently inspect property or verify accuracy of its client's statements).

That the limitations on agents' liability in §§ 339.190.2 and 339.730.3 and statutes like it apply to actions under the MMPA and statutes like it just

as they do any other cause of action makes sense. Just like these other states' statutes, the plain, unambiguous language of both Missouri statutes broadly applies to any cause of action alleging a violation of a legal duty.

"A licensee acting as a seller's … agent **owes no duty or obligation to a customer**, except that a licensee shall disclose to any customer all adverse material facts actually known or that should have been known by the licensee. A seller's … agent **owes no duty** to conduct an independent inspection or discover any adverse material facts for the benefit of the customer and **owes no duty** to independently verify the accuracy or completeness of any statement made by the client or any independent inspector." § 339.730.3 (emphasis added). "No duty" means "no duty."

Similarly, "[a] real estate licensee **shall not be the subject of any action and no action shall be instituted** against a real estate licensee for any information contained in a seller's disclosure …, unless …." § 339.190.2 (emphasis added). "Any action" and "no action" mean "any action" and "no action."

So, as with the virtually identical statutes in all these other states, this broad, all-encompassing language gives no sign that the General Assembly sought to exclude MMPA claims from their limitations on liability.

This especially makes sense because the MMPA is a general statute applying to all commercial activities generally, but §§ 339.190.2 and 339.730.3 apply specifically to real estate agents' duties and liabilities. "When the same subject matter is addressed in general terms in one statute and in specific terms in another, the more specific controls over the more

general." *Greenbriar Hills Country Club v. Dir. of Revenue*, 935 S.W.2d 36, 38 (Mo. banc 1996).

The MMPA governs consumer-protection claims in Missouri generally. Sections 339.190.2 and 339.730.3 expressly shield real estate agents from *all* liability for nondisclosure of adverse material facts unless the agent had actual knowledge of the fact or should have known about it without conducting an independent inspection, necessarily including the MMPA.

This must be how these two statutes are read together with the MMPA, because "the courts cannot transcend the limits of their constitutional powers and engage in judicial legislations supplying omissions and remedying defects in matters delegated to a coordinate branch of our tripartite government." *Bd. of Educ. of City of St. Louis v. State*, 47 S.W.3d 366, 367 (Mo. banc 2001). And that branch, the General Assembly, "is presumed to know the existing law when enacting a new piece of legislation." *Greenbriar Hills Country Club v. Dir. of Revenue*, 47 S.W.3d 346, 352 (Mo. banc 2001). So, "where there are two or more provisions relating to the same subject matter they must, if reasonably possible, be construed so as to maintain the integrity of both." *Gross v. Merchants-Produce Bank*, 390 S.W.2d 591, 598 (Mo. App. 1965).

Maintaining the integrity of both the MMPA and §§ 339.190.2 and 339.730.3 is straightforward. Under § 339.730.3, a seller's estate agent "owes no duty or obligation to a customer," including under the MMPA, except to disclose adverse material facts actually known or that should have been known, and the agent "owes no duty," including under the MMPA, "to

conduct an independent inspection or discover any adverse material facts for the benefit of the customer and owes no duty," including under the MMPA, "to independently verify the accuracy or completeness of any statement made by the client or any independent inspector." Similarly, under § 339.190.2, "[a] real estate licensee shall not be the subject of any action," including under the MMPA, "and no action shall be instituted against a real estate licensee," including under the MMPA, "for any information contained in a seller's disclosure for … real estate furnished to a buyer, unless the real estate licensee is a signatory to such or the licensee knew prior to closing that the statement was false or the licensee acted in reckless disregard as to whether the statement was true or false."

The protection §§ 339.190.2 and 339.730.3 affords to sellers' agents is broad, uncomplicated, and clear-cut. These statutes remove sellers' agents from the ordinary common law principal-agent relationship, absolve them of any duty to discover or disclose any adverse material fact of which they did not have actual knowledge or of which they should not have known without independently inspecting the property, and absolve them of any duty to engage in that inspection. Regardless of the cause of action a plaintiff pursues, this is the only liability for nondisclosure the General Assembly places on them for nondisclosure of adverse facts.

C. The trial court's decision to allow the plaintiff's MMPA claims to go to the jury, and its refusal to instruct the jury on the limitations on liability in §§ 339.190.2 and 339.730.3, fail to apply these statutes' imitations on liability and must be reversed.

In this case, the trial court entirely ignored the special limitations on sellers' agents' liability that the General Assembly enacted in §§ 339.190.2

and 339.730.3. Instead, it treated Platinum Realty as though sellers' agents still are simply common law agents vicariously liable for their principals' nondisclosures.

As every other court to have applied these statutes or their virtually identical counterparts in other states have held, this is impermissible. If §§ 339.190.2 and 339.730.3 are to have the full force and effect the General Assembly intended, the trial court's judgment in this case must be reversed.

First, as Platinum Realty explains in its brief, there was no evidence that it misrepresented or concealed any material facts on the property of which it had actual knowledge or that it could have known without independently inspecting the property or verifying its client's representations were true, which under §§ 339.190.2 and 339.730.3 it had no duty to do. Instead, as in *White*, the plaintiff and Platinum Realty were on equal footing, and the plaintiff could have discovered the foundation water damage by exercising ordinary diligence through its own inspection. Accordingly, even construing the evidence in the light most favorable to the plaintiff, under §§ 339.190.2 and 339.730.3 the law of Missouri is that Platinum Realty could not have been liable for the nondisclosure.

But even more concerning is that though tasked with determining whether Platinum Realty was liable for the nondisclosure, the jury was never instructed on the actual legal standard to which §§ 339.190.2 and 339.730.3 limited its determination.

When a statutory requirement is not included in the Missouri Approved Instructions, an existing instruction must be modified so that it "follow[s] the

substantive law and [is] written so that it can be readily understood by a jury composed of ordinary people." *Kauzlarich v. Atchison Topeka & Santa Fe Ry. Co.*, 910 S.W.2d 254, 260 (Mo. banc 1995). The Supreme Court's rules recognize this, providing that "where there is no applicable MAI so that an instruction not in MAI must be given, … such instruction[] shall be simple, brief, impartial, free from argument, and shall not submit to the jury or require findings of detailed evidentiary facts." Rule 70.02(b). "In cases involving a statutory violation, it is generally sufficient to frame an instruction substantially in the language of the statute …." *Vandergriff v. Mo. Pac. Ry.*, 769 S.W.2d 99, 104 (Mo. banc 1989).

Platinum Realty proposed a verdict-directing instruction that took the ordinary MAI 39.01 for MMPA claims and simply modified it to add in the limitations in §§ 339.190.2 and 339.730.3 (D44). First, reciting the plain language of § 339.730.3, it added that the misrepresentation or concealment had to be of "a material fact about the condition of the real estate which was known or should have been known by [Platinum Realty] before the sale was closed without an independent investigation by [Platinum Realty]" (D44). Then, reciting the plain language of § 339.190.2, because the nondisclosure was alleged to have occurred on the seller's disclosure form, it added that the jury had to find it "acted with reckless disregard regarding the truth or falsity of the statements made in the seller's disclosure" (D44).

But the trial court refused. Instead, the jury was instructed only on the plaintiff's bare MMPA claim (D42 p. 10). There was no mention of the requirement of § 339.730.3 that any misrepresentation or concealment of a

material fact had to be one that Platinum Realty knew about or should have known about before the sale without an independent inspection. There was no mention of the requirement of § 339.190.2 that any nondisclosure on a seller's disclosure form had to have been with reckless disregard regarding the truth or falsity of the statements made in it.

This meant that the jury was not actually instructed on the heightened *scienter*, or state-of-mind, which §§ 339.190.2 and 339.730.3 required in order for it to find Platinum Realty liable. To the jury, it was as if these statutes had not been enacted and sellers' agents were still subject to common law doctrines of agency and lack the protections the General Assembly has afforded them.

Therefore, the trial court's verdict director did not follow the substantive law, but instead omitted a crucial limitation on what the jury had to find in order to hold Platinum Realty liable. This prejudiced Platinum Realty by allowing the jury to hold it liable without having to weigh whether it knew of the nondisclosed fact or should have known of it without an independent investigation, and without reckless disregard to the truth or falsity of the statements in the seller's disclosure.

The trial court's judgment must be reversed.

Conclusion

The Court should reverse the trial court's judgment against Platinum Realty without remand. Alternatively, the Court should reverse the trial court's judgment against Platinum Realty and remand this case for a new trial.

Respectfully submitted,

Jonathan Sternberg, Attorney, P.C.

by /s/Jonathan Sternberg

Jonathan Sternberg, Mo. #59533
2323 Grand Boulevard #1100
Kansas City, Missouri 64108
Telephone: (816) 292-7020
Facsimile: (816) 292-7050
jonathan@sternberg-law.com

COUNSEL FOR AMICUS CURIAE
MISSOURI REALTORS(R)

Certificate of Compliance

I certify that I prepared this brief using Microsoft Word for Office 365 in 13-point, Century Schoolbook font, which is not smaller than 13-point, Times New Roman font. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b) and this Court's Rule 41, as this brief contains 6,039 words.

/s/Jonathan Sternberg
Attorney

Certificate of Service

I certify that I signed the original of this brief of the appellant, which is being maintained by Jonathan Sternberg, Attorney, P.C. per Rule 55.03(a), and that on March 26, 2020, I filed a true and accurate Adobe PDF copy of this brief via the Court's electronic filing system, which notified the following of that filing:

Mr. Ronald R. Holliger 704 SW Bluebird Blue Springs, Missouri 64014 Telephone: (816) 547-5640 ronholliger@gmail.com	Counsel for Appellant-Respondent Tiffanie Soetaert
Ms. Diane Hastings Lewis Brown & Ruprecht P.C. 2323 Grand Boulevard #1100 Kansas City, Missouri 64108 Telephone: (816) 292-7000 dlewis@brlawkc.com	Counsel for Respondent-Appellant Platinum Realty of Missouri, LLC
Mr. Conrad Miller Miller Law Firm, P.A. 7199 West 98th Terrace Overland Park, Kansas 66212 Telephone: (913) 912-7070 conrad@mlfks.com	Counsel for Respondent Novani Flips, LLC
Mr. Michael J. Schilling Schilling Law, LLC 7199 West 98th Terrace #130 Overland Park, Kansas 66212 Telephone: (913) 353-4021 mike@schillinglawkc.com	Counsel for Respondent MoreKC1, LLC

/s/Jonathan Sternberg
Attorney