

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE CITY OF ROSEVILLE,

Plaintiff-Appellee,

v

EDWARD STROSS,

Defendant-Appellant.

UNPUBLISHED
February 21, 2008

No. 271764
Macomb Circuit Court
LC No. 2005-000694-AR

Before: Murphy, P.J., and Smolenski and Schuette, JJ.

SCHUETTE, J. (*dissenting*).

I respectfully dissent from the majority opinion of my very distinguished colleagues, Judges Murphy and Smolenski.

The majority holds that the City of Roseville (“Roseville”) sign variance restriction on lettering, as applied, is an unconstitutional restraint on defendant’s First Amendment rights. I disagree.

In order to determine whether the Roseville variance restrictions violate defendant’s First Amendment rights, it must first be determined whether defendant’s mural constitutes commercial or noncommercial speech. Commercial speech has been defined as “speech proposing a commercial transaction” or “expression related solely to the economic interests of the speaker and its audience.” *Rubin v Coors Brewing Co*, 514 US 476, 493; 115 S Ct 1585; 131 L Ed 2d 532 (1995) (internal quotation marks and citations omitted). The United States Supreme Court has recognized that it may be difficult to determine whether speech is properly classified as commercial or noncommercial. See *Bolger v Youngs Drug Products Corp*, 463 US 60, 66; 103 S Ct 2875; 77 L Ed 2d 469 (1983). The Court has identified three relevant factors to be utilized when determining whether speech is commercial: “(1) whether the speech in question is concededly an advertisement; (2) whether it makes reference to a specific product; and (3) whether it is motivated by economic interest.” *US Olympic Committee v American Media, Inc*, 156 F Supp 2d 1200, 1207 (D Colo, 2001), discussing *Bolger*, *supra* at 66-67.

Although the mural may not be an advertisement in the typical sense of that term, it is located on the building in which defendant operates his art studio, bears his signature as the artist, and serves to inform the public of his talent and artistic abilities. The mural itself is an example of the product that defendant, an artist for hire, offers for sale. Moreover, the obvious economic motivation for the mural is to draw attention to defendant’s talent in hope of attracting

persons in need of an artist's service. In addition, signage not located on the wall works in association with the mural to promote defendant's art studio and the sale of his work. Therefore, I agree with the circuit court that the mural is properly characterized as commercial speech.

As noted in the majority opinion, the *Central Hudson* test is used when assessing the constitutionality of commercial speech restrictions. The test has four prongs:

(1) Does the speech concern a lawful activity and is it not misleading, so that it falls within the protections of the First Amendment, and (2) is the government's restriction justified by a substantial governmental interest? If those two questions are answered "yes," then we must go on to ask: (3) Does the regulation directly advance the asserted governmental interest, and (4) is the regulation more extensive than necessary to serve the governmental interest? [*Rochester Hills v Schultz*, 459 Mich 486, 490-91; 592 NW2d 69 (1999), quoting *Central Hudson Gas & Electric Corp v Pub Service Comm of New York*, 447 US 557, 566; 100 S Ct 2343; 65 L Ed 2d 341 (1980) (internal citations omitted).]

The issue in this case concerns the fourth prong; whether the regulation is more extensive than necessary to serve the governmental interest.

Defendant's sign variance is a significant deviation from that permitted under the ordinance. The circuit court noted that "the mural was prominently displayed at a *major intersection* [and that the] location appeared to have been *uniquely visible*" (emphasis added). Defendant's mural is very large, apparently nearly eight times the 150-square-foot limit permitted in Roseville's ordinance. Given the mural's size and its unique location at a major intersection, a variance conditioned on "no lettering" is not too restrictive. The goals of traffic safety and aesthetics are achieved, and the restriction on lettering is narrowly tailored to achieve these objectives. Any lettering on a sign nearly eight times larger than that permitted by the ordinance is necessarily disruptive to the safety pattern at that location.

I would affirm the trial court's decision.

/s/ Bill Schuette