



AlaFile E-Notice

01-CV-2013-901678.00

Judge: ELISABETH A FRENCH

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NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

KEITH WESTPHAL ET AL V. J. DAVID NORTHCUTT III, DMD ET AL
01-CV-2013-901678.00

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IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

KEITH WESTPHAL, and)
JOYCE OSBORN WILSON,)

Plaintiffs,)

v.)

CASE NO. CV 13-901678-EAF

J. DAVID NORTHCUTT, III, DMD,)
BOBBY R. WELLS, DMD,)
STEPHEN R. STRICKLIN, DMD,)
THOMAS T. WILLIS, DMD,)
SAM J. CITRANO, JR., DMD,)
WILLIAM CHESSER, DMD, and)
SANDRA KAY ALEXANDER, RDH,)
in their official capacities as members of)
the Alabama Board of Dental Examiners,)

Defendants.)

FINAL ORDER

Pending before the Court are Motions for Summary Judgment filed by Plaintiffs Keith Westphal and Joyce Osborn Wilson and filed by Defendants J. David Northcutt, III, DMD, Bobby R. Wells, DMD, Stephen R. Stricklin, DMD, Thomas T. Willis, DMD, Sam J. Citrano, Jr., DMD, William Chesser, DMD, and Sandra Kay Alexander, RHD, (collectively hereinafter the “Dental Board”). A hearing was held on September 4, 2014. Charles Patterson, Paul M. Sherman and Arif Panju appeared on behalf of the Plaintiffs. Luther M. Dorr, Jr. and Susan F. Wilhem appeared on behalf of the Defendants. Plaintiffs allege constitutional violations under the Due Process and Equal Protection guarantees of the Alabama Constitution.

Pleading History

The Complaint for Declaratory and Injunctive Relief was filed on April 30, 2013. Plaintiffs brought this action asking the Court to declare the Alabama Dental Practices Act, Ala. Code §§ 34-9-1, *et seq.*, unconstitutional as it pertains to certain teeth-whitening services offered

by non-dentists. Count One was brought under the right to Due Process guaranteed by Article 1, Sections 6 and 13 of the Alabama Constitution of 1901. Count Two was brought pursuant to the Equal Protection clause of Article 1, Sections 1, 6, and 22 of the Alabama Constitution of 1901. The Dental Board filed an Answer on May 30, 2013. On August 5, 2013, the Dental Board filed a Motion for Judgment on the Pleadings. Plaintiffs responded to the motion on August 30, 2013. On October 1, 2013, this Court denied the Dental Board's Motion for Judgment on the Pleadings. A Modified Scheduling Order was entered and in accordance therewith, Motions for Summary were filed by both Plaintiffs and Defendants on August 8, 2014.

Findings of Fact

Plaintiffs Keith Westphal and Joyce Wilson are not licensed dentists. They seek to open businesses in Alabama offering teeth-whitening services to the public. Plaintiffs seek to operate their teeth-whitening business in mall kiosks, spas or as standalone business. Plaintiffs want to sell over-the-counter peroxide based teeth-whitening gels, instruct customers in the use of the product, provide an enhancing light for the application process, and provide customers with space to apply the product. Peroxide teeth-whitening products temporarily reduce the appearance of stains on the surface of teeth. Commercial whitening products are available for purchase in stores. LED enhancing lights are utilized with commercial teeth-whitening products and with at-home teeth-whitening kits.

Plaintiff Keith Westphal has owned and operated a Natural White teeth-whitening business in retail shopping centers in Cornelius, North Carolina since 2012. He does not have any dental training. Westphal uses BeamingWhite products which include a pen applicator and sixteen percent (16%) hydrogen peroxide. According to a BeamingWhite product guide, sixteen percent (16%) hydrogen peroxide is a very strong gel and is not suitable for home use. Teeth-

whitening may cause temporary pain and inflammation. The guide further advises that customers using the gel without supervision may hurt themselves. The guide warns Natural White employees to refrain from having direct contact with the patient's teeth. These products are not for use on pregnant women, minors under the age of fourteen (14), people with poor tooth enamel, decalcification, periodontal disease, gingivitis, gums in poor condition, braces, decay, exposed roots, open cavities, allergies to peroxide products, or those who have recent undergone oral surgery. Customers are asked to complete a form disclosing any conditions that would contraindicate whitening.

To start the whitening process, a Natural White employee obtains the form and consent from the customer. A Natural White employee wears gloves, provides the customer with a cheek retractor and provides protective glasses. They provide a Vitamin E stick to treat sensitivity. They position the LED light in front of the customer's mouth. When requested by the customer, a Natural White employee applies a remineralization product to the customer's teeth. A whitening session may be repeated up to two times at the customer's request. When the customer leaves, a Natural White employee wipes down the chair, equipment, light and glasses with any available ammonia-based cleaner that Westphal or his employee(s) may have recently found on sale. Another pen is also available to customers for take home use. Westphal wants to expand the Natural White teeth-whitening business into Alabama.

Plaintiff Joyce Wilson is an Alabama resident who offered teeth-whitening services at a beauty salon and spa in Jasper, Alabama. In 2005, Wilson formed BEKS, Inc., a business that develops and sells BriteWhite teeth-whitening systems through the internet. In 2006, the Dental Board sent Wilson a cease-and desist letter instructing her to stop offering teeth-whitening services in Alabama. She subsequently sold her beauty salon and spa. Ms. Wilson formed an

advocacy group for non-dentists performing teeth-whitening called Council for Cosmetic Teeth-Whitening. The council advises teeth-whiteners to utilize extreme caution to ensure client safety.

Like Natural White, BrightWhite is an LED based teeth-whitening system. BrightWhite customers also review and sign a general information form. BriteWhite employees do not attempt to diagnose underlying tooth conditions. BriteWhite employees wear gloves and place a plastic barrier sleeve over an LED light integrated mouthpiece. BriteWhite's gel is the equivalent of twelve percent (12%) hydrogen peroxide. The customer either applies gel directly to their teeth and then puts in the mouthpiece, or the BriteWhite employees apply the gel to the mouthpiece and then the customer puts the mouthpiece in their own mouth. After the session, a BriteWhite employee discards the mouthpiece barrier sleeve and uses a disinfecting cleaner to clean the equipment and chair.

Dr. Michael Maniscalco is a licensed, practicing dentist in Birmingham, Alabama. He obtained a D.M.D. degree from the University of Alabama at Birmingham. He performs peroxide-based teeth whitening and has taken multiple continuing education courses on teeth-whitening. He conducts pretreatment examinations for the purposes of diagnosing contraindications to teeth-whitening. He utilizes masks, glasses, gloves, and medical-strength disinfectant cleaning products. He has witnessed peroxide burns of the lips and gums as well as cases of extreme sensitivity to teeth-whitening products.

Defendants' expert, Dr. Kenneth Tilashalski, is a dentist and professor at the University of Alabama at Birmingham. Teeth-whitening is included in the dental school's curriculum. Bleaching is covered in many disciplines and courses such as endodontics, operative dentistry and pathology. Dr. Tilashalski opines that health and safety concerns arise when non-dentist employees do not follow established protocols for teeth-whitening products and equipment.

Plaintiffs' expert, Dr. Martin Giniger, is a licensed dentist. He obtained a D.M.D. from Fairleigh Dickinson University School of Dental Medicine. He also obtained a MSD in Oral Medicine and a Ph.D. in biomedical Science from the University of Connecticut. He has been employed by or consulted for numerous professional and consumer oral care companies on developing and/or testing the safety and effectiveness of a variety of oral care products, including teeth-whiteners. Dr. Giniger acknowledges that teeth-whitening may cause temporary pain and inflammation. The Motion to Strike Dr. Martin Giniger's affidavit is DENIED.

Conclusions of Law

Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Ala. R. Civ. P. 56(c). The parties in this case agree that this case is due to be decided as a matter of law. As demonstrated below, the Court finds that the undisputed facts in this case are sufficient to defeat Plaintiffs' Motion for Summary Judgment and those facts support the granting of Defendants' Motion for Summary Judgment.

The Dental Board is responsible for enforcing the Alabama Dental Practices Act, Ala. Code §§ 34-9-1 to 90 (1975) regarding the practice of dentistry and the unlawful practice of dentistry. The practice of dentistry includes anyone who performs or attempts to perform any dental operation or dental service of any kind gratuitously or for any sort of fee. *Id.* § 34-9-6(1). Prerequisites to licensure include being at least nineteen (19) years old, of good moral character, a citizen of or legal resident of the United States, a graduate of a dental school or college accredited by the American Dental Association Commission on Dental Accreditation and approved by the board, and any other requirements set forth in any rule adopted by the Dental Board, including, but not limited to examination. *Id.* § 34-9-10. It is unlawful for any person to practice dentistry unless that person is a fully licensed dentist. *Id.* § 34-9-3. Violations of the Act

are punishable for each occurrence by up to one year in jail, a fine of five thousand dollars (\$5,000.00), or both. *Id.* § 34-9-5.

In *White Smile USA, Inc. v. Bd. of Dental Examiners*, the Alabama Supreme Court held that providing teeth-whitening services constitutes the practice of dentistry and can be regulated by the State. 36 So. 3d 9, 14 (Ala. 2009). While the claims in *White Smile* are similar to the Plaintiffs' claims in the instant case, in *White Smile*, the plaintiffs did not bring any constitutional claims. *White Smile* was a statutory case regarding the definition of the practice of dentistry and whether teeth-whitening fell within that definition. The plaintiff in *White Smile* sought a declaratory judgment that the sale of a teeth-whitening product with in-store application performed at salons was not the practice of dentistry. The trial court held that the sale of teeth-whitening products and services does constitute the practice of dentistry. *Id.* at 13. The Alabama Supreme Court affirmed the trial court and held that the sale of teeth-whitening products with in-store application of the product in a salon was a "dental service" within the meaning of the Dental Services Act. *Id.* at 14.

In 2009, at the time of the *White Smile* holding, the Dental Practice Act did not include the specific reference to teeth-whitening. In 2011, the Alabama Legislature amended the Act to expressly define the practice of dentistry to include a person who "[p]rofesses to the public by any method to bleach human teeth, performs bleaching of the human teeth alone or within his or her business, or instructs the public within his or her business, or through any agent or employee of his or her business, in the use of any tooth bleaching product." *Id.* § 34-9-6(12). Plaintiffs brought the instant case with Due Process and Equal Protection claims after the Act was amended. Equal Protection requires that those who are similarly situated be treated alike and is

designed to prevent the arbitrary exercise of governmental power. Exercises of police power must comport with due process.

When reviewing a statute for the purpose of determining whether it violates the Alabama Constitution, this Court is to apply a presumption in favor of constitutionality and must seek to sustain the enactment of the Legislature which is a coequal branch of government. *See Reed v. Brunson*, 527 So. 2d 102 (Ala. 1988). Plaintiffs request that this Court apply the overbreadth challenge to constitutionality. Applying the overbreadth challenge, Plaintiffs must demonstrate that the Dental Practices Act's restriction does not bear a substantial relation to a legitimate governmental interest. Defendants suggest that this Court apply the rational basis test. Applying the rational basis test, Plaintiffs must demonstrate that the restriction on teeth-whitening has no rational basis.

Unless a case involves a suspect class or a fundamental right, the rational basis test is the correct standard to apply to a due process or equal protection challenge. *Gideon v. Alabama State Ethics Comm'n*, 379 So. 2d 570 (Ala. 1980). Suspect classes are determined by birth, race, alienage, or similar characteristics. *Id.* at 573. Fundamental rights include the right to vote, travel freely, associate freely and familial rights which fall within a recognized zone of privacy. *Id.* The instant case does not involve a suspect class or fundamental right. The rational basis test is therefore the correct standard to apply in this matter. "Under the rational basis test, the Court asks: (a) [w]hether the classification furthers a proper governmental purpose, and (b) whether the classification is rationally related to that purpose." *Id.* at 574. The undisputed facts in this case support the Legislature's interest in protecting the oral health and safety of Alabama citizens.

Plaintiffs' argument is that the primary effect of the Act's restriction of teeth-whitening is to protect dentists from competition. The Court finds that the Plaintiffs' argument is without

merit. Plaintiffs are unable to negate every conceivable basis for the Act's restriction on dental-whitening. The factual record in this case demonstrates numerous actual or potential health and safety risks. The Legislature should be concerned with protecting the oral health and safety of citizens. This is the rational basis for the statute. As long as there is any rational basis, the Plaintiffs' claims are due to be denied.

Regarding the issue of the overbreadth challenge, Plaintiffs rely on *City of Russellville v. Vulcan Materials Co.*, 382 So. 2d 525 (Ala. 1980). In that case, the issue was the validity of an ordinance regulating the detonation of explosives within the police jurisdiction and corporate limits of the City of Russellville. *Id.* at 526. Residents complained that blasting caused them annoyance and various sorts of property damage. *Id.* The City Council of Russellville adopted an Ordinance that restricted blasting within the police jurisdiction of Russellville to particle velocity of no greater than .4 inch/second. *Id.* At the time that the ordinance was adopted, both Vulcan and the City were under the mistaken assumption that the nearest dwelling to Vulcan's quarry was 1,100 feet away. *Id.* The parties later discovered that the city limits extended further than the parties had assumed and the nearest dwelling was actually 250 feet away from the quarry. *Id.* This discovery required the application of the .4 inch/second particle velocity standard of the ordinance. *Id.* Vulcan wanted a restriction of 1.0 inch/second which is the threshold particle velocity for materials used in building construction below which no damage will occur. *Id.*

Vulcan challenged the .4 inch/second restriction on the use of explosives near residential neighborhoods and argued that the ordinance imposed restrictions drastically more stringent than required by safety considerations. *Id.* at 527. At trial, the City introduced expert testimony that the .4 inch/second particle velocity contained in the Ordinance does not produce any greater

safety margin than a restriction of greater than 1.0 inch/second. *Id.* at 526. Vulcan contended that the Ordinance was an unreasonable exercise of police power. *Id.* at 526-527.

The Alabama Supreme Court agreed with Vulcan's contention that the restriction would make their business economically infeasible and held that the ordinance was overbroad and thus unconstitutional. *Id.* at 527-28. The Court further held that "[t]he validity of a police power regulation... primarily depends on whether, under all the existing circumstances, the regulation is reasonable, and whether it is really designed to accomplish a purpose properly falling within the scope of police power." *Id.* at 527 (citing *Crabtree v. City of Birmingham*, 299 So. 2d 282 (Ala. 1974)). Municipal exercises of police power must be reasonable and bear a substantial connection to the public health, safety or morals. If a less restrictive standard produces the same degree of safety, the ordinance may be found unreasonable, unconstitutional, and void.

The Court finds that Plaintiffs' reliance on *City of Russellville* is misplaced. Expert testimony in the *City of Russellville* case established that a less restrictive standard would have the same effect on safety. Expert testimony in the instant case failed to convince this Court that the teeth-whitening presents no possible risk of harm to customers. The provision of dental services clearly falls within the realm of public health and safety. The Dental Practices Act addresses a legitimate governmental interest. Based upon the evidence in the record in the instant case, this Court finds that there is a substantial relation between the Dental Practice Act the health and safety concerns of Alabama citizens.

Plaintiffs' reliance on *State v. Lupo*, 984 So. 2d 395 (Ala. 2007) is not applicable to the instant action. The *Lupo* decision involved a statute that regulates interior decorating advice. The statute at issue required interior decorators to register with the Alabama State Board of Registration for Interior Designers. The Court held that the statute was overly broad. *Id.* at 406.

Plaintiffs Westphal and Wilson are not similarly situated to the Plaintiff in *Lupo*. While both may have an understandable interest in earning an honest living free from unreasonable governmental regulation, the *Lupo* interior decorating plaintiff was not attempting to do so at the conceivable expense of exposing citizens to harm. Unlike the statute at issue in *Lupo*, the Dental Services Act restriction on non-dentists is reasonably designed to protect the health of Alabama citizens.

The health risk to Alabama citizens from the use of up to sixteen percent (16%) hydrogen peroxide gel is not remote. Beaming White acknowledges that sixteen percent (16%) hydrogen peroxide gel is a very strong gel and is not suitable for home use. The products are not recommended for use on pregnant women, minors under the age of fourteen (14), people with poor tooth enamel, decalcification, periodontal disease, gingivitis, gums in poor condition, braces, decay, exposed roots, open cavities, allergies to peroxide products, or those who have recent undergone oral surgery. There is no evidence in the record of Plaintiffs' abilities to diagnose many of those conditions as they have not had any dental health training or education. Licensed dentists are capable diagnosing underlying conditions prior to teeth-whitening and are taught courses in pathology, operatives, endodontics and other instructive courses pertaining to teeth-whitening. Additional continuing education courses may expand on this medical foundation. There are other examples in the record of the risk of danger to Alabama customers including, but not limited to, the use of Vitamin E sticks for sensitivity, the need for gloves, and protective glasses. All of these examples support the policy of protecting the oral health and safety of citizens. Commercially available at-home kits do not present the same sanitary and infection concerns as the multiple use BriteWhite mouthpieces and the use of random on-sale cleaning products on other consumer equipment rather than medical-strength disinfectant cleaning products. The restriction bears a substantial relation to public health. Accordingly, the

statute is constitutional under both the more stringent overbreadth challenge and the more lenient rational basis test.

WHEREFORE, upon consideration of the factual record and authority, this Court declines to substitute its judgment for that of the Legislature. The Court finds that the Dental Practice Act's restriction on teeth-whitening is not unconstitutional. Plaintiffs have failed to demonstrate that the restrictions have no rational basis or no substantial relation to a legitimate government interest. Upon due consideration of the motions, responses, evidence in the record and oral arguments of counsel, the Court finds in favor of the Defendants. The Dental Board's Motion for Summary Judgment is GRANTED. Plaintiffs' Motion for Summary Judgment is DENIED. Costs are taxed to the Plaintiffs.

DONE and ORDERED this 3rd day of October, 2014.

/s/ Elisabeth A. French
ELISABETH A. FRENCH
CIRCUIT JUDGE

cc: All parties