STATE COURT
DocketWatch®

WINTER
2013-2014

New Mexico Supreme Court: Wedding Photographer May Not Decline Business from Same-Sex Couple's Commitment Ceremony

*By Jordan Lorence**

On August 22, the New Mexico Supreme Court handed down a noteworthy opinion in a case involving the First Amendment rights of business owners. In *Elane Photography v. Willock*,[1] the court unanimously upheld a ruling against a small company, Elane Photography LLC, for declining to shoot a same-sex commitment ceremony due to the owners' beliefs on marriage. The New Mexico Supreme Court rejected the photographer's arguments that the company's rights to freedom of speech and religious liberty under federal and state law protected it from being forced to produce images.

I. Background

Elane Photography LLC is a small photography business in Albuquerque operated by husband and wife, Jon and Elaine Huguenin. Elaine works as the photographer. She specializes in the "photojournalistic" style of wedding photography, in which the photographers take expressive or spontaneous shots during the wedding day in the manner that news photographers do. Many believe the photojournalistic approach to wedding photography better communicates the emotions, interpersonal dynamics and ideas of the day than the traditional set shots of the wedding party standing together, etc. Elane Photography advertises its artistic skills on its website.

Vanessa Willock, a lesbian looking for a photographer to shoot her commitment ceremony to Misti Collingsworth, found the Elane Photography website, liked the examples of work that she saw, and then wrote an email inquiring whether Elaine would be "open to helping celebrate" her same-sex "commitment ceremony." Upon receiving this email, Elaine wrote an email politely declining to shoot their ceremony. Elaine did not want to use her photographic skills to communicate the message that marriage can be defined as other than one man and one woman as this was contrary to Elaine and Jon's beliefs. Two months later, Willock sent Elaine

... continued page 9

Illinois Supreme Court Ruling Explores Scope of Second Amendment

*By Tara A. Fumerton**

On September 12, 2013, in *People v. Aguilar*, the Illinois Supreme Court held that Illinois's blanket prohibition of the concealed carry of a firearm in public in its aggravated unlawful use of weapons ("AUUW") statute (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2008)) violated the second amendment to the U.S. Constitution, but that the portion of Illinois's unlawful possession of a firearm ("UPF") statute ((720 ILCS 5/24-3.1(a)(1) (West 2008)) that prohibited

... continued page 11

INSIDE

all agencies be housed within one of the 20 executive departments with the attempt to give some agencies quasi-independent status. New Jersey Turnpike Authority v. Parsons, 3 N.J. 235 (1949).

9 N.J. Stat. Ann. § 52:14C-3(a).

10 *In re* Plan for Abolition of Council on Affordable Housing, 424 N.J.Super. 419, 425 (N.J. App. Div. 2012).

11 62 N.J. 1, 297 A.2d 572 (1972).

12 424 N.J. Super at 430.

13 *In re* Plan for Abolition of Council on Affordable Housing, No. 070426, 2013 WL 3717751, at *14 (N.J. Jul. 10, 2013) (emphasis added).

14 *Id.* at *16 (emphasis added).

15 *Id.* at *19.

16 *Id.* at *23 (Patterson, J., dissenting).

17 *Id.* at *29 (Patterson, J., dissenting).

18 *Id. at* *27 (Patterson, J. dissenting).

19 *In re* Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, No. 067126, 2013 WL 53568707 (N.J. Sept. 26, 2013).

New Mexico Supreme Court: *Elane Photography v. Willock*

Continued from front cover...

another email, asking whether Elane Photography offers its "services to same-sex couples." Elaine responded that the Company does "not photograph same-sex weddings" and thanked Willock for her interest.

Although Willock and her partner found another photographer at a lower price than what Elane Photography would have charged, Willock filed a complaint with the State, claiming Elane Photography violated the state public accommodations law by engaging in sexual orientation discrimination. The State found probable cause, and accordingly subjected Elane Photography to a one day trial before a hearing examiner. Based on the hearing examiner's report, the New Mexico Commission on Human Rights found Elane Photography guilty of sexual orientation discrimination by a public accommodation, and ordered it to pay $6,637.94 in attorneys' fees. Elane Photography appealed, and lost at both the state district court and the New Mexico Court of Appeals. The New Mexico Supreme Court granted review and heard oral arguments in March 2013. On August 22, 2013, the New Mexico Supreme Court unanimously ruled against Elane Photography.

II. Decision

A. Public Accommodation

The New Mexico Supreme Court found that Elane Photography was a public accommodation subject to New Mexico's Human Rights Act. By way of background, a public accommodation in general is a commercial enterprise that provides goods or services to the public. The New Mexico Human Rights Act prohibits "public accommodations" from discriminating against its customers based on "sexual orientation," among other characteristics. Elane Photography did not appeal the issue of whether it was a "public accommodation" under state law to the New Mexico Supreme Court, but did appeal the issue of whether it had engaged in "sexual orientation" discrimination under New Mexico law. Elane argued that it turned down the request because of the ceremony's message it would have to communicate via its photography, not the sexual orientation of the participants. Elane argued that it would photograph homosexuals in other contexts (e.g., shooting head shots for business advertising), but would not photograph stills of heterosexual actors depicting a same-sex wedding in a play. The high court disagreed, and upheld the lower court rulings that Elane had engaged in sexual orientation discrimination.

The New Mexico Supreme Court then addressed the various free speech and religious liberty defenses Elane raised in the case.

B. Compelled Speech

Elane first argued that the public accommodations statute, as applied to this situation, violated the company's First Amendment rights protecting it from compelled speech. The United States Supreme Court has ruled that the government may not force people to say the government's own message, in *West Virginia Board of Education v. Barnette*[2] (prohibiting public schools from forcing unwilling students to recite the Pledge of Allegiance) and *Wooley v. Maynard*[3] (New Hampshire cannot fine drivers who cover the state motto, "Live Free or Die" on their auto license plates, because of their opposition to that message).

Also, the U.S. Supreme Court has ruled that the First Amendment protects corporations from governmental compelled speech, even if the speech comes from private individuals and not the state actors.[4] Elane Photography also relied on the *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557 (1995), in which a unanimous Supreme Court reversed

the decision by the Massachusetts courts that found the privately-run Boston St. Patrick's Day Parade in violation of the state public accommodation law for declining to allow a group with a pro-homosexual message to march in the parade. The Supreme Court ruled that the public accommodations law, as applied to the parade organizers, violated the First Amendment prohibition on compelled speech. Additionally, Elane Photography argued that it did more than convey a message on marriage that it disagreed with—it created the expression itself, which is a greater violation of the protection against compelled speech.

The New Mexico Supreme Court carefully examined the compelled speech defense and rejected it. It ruled that this case is most like *Rumsfeld v. FAIR*,[5] in which the Supreme Court upheld a federal law requiring universities receiving federal funding to allow military recruiters to come on campus to interview students interested in joining the military. The U.S. Supreme Court rejected the universities' compelled speech claim. The New Mexico Supreme Court reasoned that state law merely required Elane Photography to offer the same services to all of its customers, the way the universities had to treat the military recruiters the same as all other recruiters, by providing them meeting space, sending out their meeting notices, etc. Like the schools in *Rumsfeld*, the New Mexico Supreme Court stated, the law here did not require Elane Photography to express support or opposition to any idea. This equal treatment requirement applies to businesses that create expression, the court ruled. "The reality is that because [Elane Photography] is a public accommodation, its provision of services can be regulated, even though those services include artistic and creative work," the court stated.

C. Religious Liberty

Religious liberty provisions also provided no defense for the photography company, according to the New Mexico Supreme Court. The Huguenins are evangelical Christians, who believe that the Bible teaches that marriage can only be defined as one man and one woman. Because the Huguenins believe they must live in accord with Biblical teaching in order to please the Lord, they could not in good conscience use their work to promote an alternative definition of marriage.

Elane Photography asserted protection under two religious liberty provisions—the First Amendment's Free Exercise Clause, and the New Mexico Religious Freedom Restoration Act ("NMRFRA"), a state statute that grants great protection than the First Amendment's Free Exercise Clause.

The court rejected Elane's defense under the Free Exercise Clause because the public accommodation law is a neutral law of general applicability, which means no Free Exercise protection exists under the U.S. Supreme Court's decision in *Employment Division v. Smith*.[6] Businesses generally must treat customers alike under the state public accommodations law.

The New Mexico Religious Freedom Restoration Act provides much broader protection than the federal Free Exercise Clause, because it protects those with religious objections even against laws that are neutral on their face about religion and apply generally to all. That statute requires the government to justify infringements on religious liberty with a compelling state interest, implemented by the least restrictive means. However, Elane Photography could not benefit from the protections provided by the NMRFRA, the New Mexico Supreme Court ruled, because the statute applies only to legal actions in which the government was a party. Therefore, the statute did not to apply to this case, because Vanessa Willock, not the State of New Mexico, was Elane Photography's opponent in court.

The concurring opinion by Justice Bosson included a widely-reported discussion of the clash of rights in this case between the lesbian couple and the Huguenins' efforts to live their lives consistent with their religious beliefs. Justice Bosson wrote that in the "more focused world of the marketplace . . . the Huguenins have to channel their conduct, not their beliefs, so as to leave space for other Americans who believe something different. That compromise is part of the glue that holds us together as a nation. . . . In short, I would say to the Huguenins, with utmost respect: it is the price of citizenship."[7]

Alliance Defending Freedom, which has represented Elane Photography throughout this litigation, appealed the compelled speech claim to the U.S. Supreme Court. ADF expects the Supreme Court to decide whether to grant review of the case or not in late March 2014.

**Senior Counsel, Alliance Defending Freedom*

Endnotes

1 ___ N.M. ___, 309 P.3d 53 (2013).

2 319 U.S. 624 (1943).

3 430 U.S. 705 (1977).

4 *See* Miami Herald v. Tornillo, 418 U.S. 241 (1974) (Florida may not force a private newspaper to print responses from private individuals who disagree with the newspaper's editorial positions); Pacific Gas and Electric v. Public Utilities Commission of California, 475 U.S.

Washington Supreme Court Addresses Constitutionality of Water Pollution Control Mandate

*By Seth L. Cooper**

In *Lemire v. Department of Ecology* (2013),[1] the Washington Supreme Court addressed the constitutionality of an order made pursuant to the State's Water Pollution Control Act ("WPCA"). Lemire offers the Washington Supreme Court's latest take on evidentiary standards for reviewing administrative agency actions that affect property rights.

I. Background

At issue in *Lemire* was an administrative order issued by the Washington Department of Ecology ("Department") to cattle rancher Joseph Lemire pursuant to the WPCA.[2] The Department directed Lemire to take steps—namely constructing livestock fencing and off-stream water facilities to eliminate livestock access to the stream corridor—to curb activities it determined were polluting a creek that runs through Lemire's property.

Lemire challenged the order but the Pollution Control Hearings Board ("Board") upheld it on summary judgment. However, on administrative appeal the Columbia County Superior Court reversed the judgment and invalidated the Department's order. In its decision, the Superior Court ruled the Department's order was unsupported by substantial evidence and constituted a taking. Division Three of the Washington Court of Appeals certified the case directly to the Washington Supreme Court for review.

By an 8-1 vote, the Washington Supreme Court reversed the Superior Court on all counts. In an opinion written by Justice Debra Stephens,[3] the majority held that the Department acted within its authority, the order was supported by substantial evidence, and Lemire failed to establish that a taking occurred.

II. Majority Opinion: Substantial Evidence Analysis

The evidence presented by the Department at the administrative hearing consisted of reports of four visits to Lemire's property by a Department employee between

... continued page 14

1 (1986) (California commission may not force a regulated utility to include in its billing envelopes a newsletter from an activist group criticizing the company's actions).

5 547 U.S. 47 (2006).

6 494 872 (1990).

7 309 P.3d at 79.

Illinois Supreme Court Ruling Explores Scope of Second Amendment

Continued from front cover...

the possession of firearms by minors did not.[1] Upon denial of rehearing on December 19, 2013, the Court modified its opinion and clarified that its holding was limited to the "Class 4" form of the specified AUUW violation, leaving unanswered the question of whether other "classes" of a similar AUUW violation (such as a "Class 2" violation of the statute by a felon) would also be deemed unconstitutional and leading two Justices to dissent from the majority opinion, which was previously unanimous.[2]

The Illinois Supreme Court's ruling came on the heels of (and largely adopted) the Seventh Circuit's ruling in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), which similarly found that the AUUW's blanket prohibition on concealed carry of a firearm in public was unconstitutional. While the practical effect of the Court's ruling was largely mooted by the Illinois legislature's enactment after *Moore* of the Firearm Concealed Carry Act (*see* Pub. Act 98-0063 (eff. July 9, 2013)), which amended the AUUW to allow for a limited right to carry certain firearms in public, the ruling nevertheless provides insight into the outcome of future challenges to Illinois laws restricting and regulating the personal use of firearms.

I. Factual Background

At issue in *Aguilar* were defendant's second amendment challenges to his conviction for violating two Illinois gun control laws.[3] Police arrested defendant (who was then 17 years old) after they had investigated a group of teenagers who were making disturbances