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File No. 6139-73

October 12, 2018

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Elisabeth A. Shumaker, Esq.
Clerk of Court
United States Court of Appeals for the Tenth Circuit
Bryon White United States Courthouse
1823 Stout Street
Denver, Colorado 80257

Re: Notice of Supplemental Authority
Free the Nipple et. al. v. City of Fort Collins, Colorado, Case No. 17-1103


Dear Ms. Shumaker:

Defendant-Appellant City of Fort Collins, Colorado hereby submits this Notice of Supplemental Authority Pursuant to Fed. R. App. P. 28(j).

On August 23, 2018, the United States District Court for the District of Maryland decided ***Eline v. Town of Ocean City***, 2018 U.S. Dist. LEXIS 143951 (D. Md. Aug. 22, 2018) (enclosed). In ***Eline***, the District Court noted the District Court's decision below "appears to be an outlier, given the various decisions in both federal and state courts that do not favor Plaintiffs." ***Id.*** at *4 (citing cases). ***Eline*** supports the City's argument that Plaintiffs here demonstrate no likelihood of success on the merits because they describe no cognizable equal protection claim under applicable Fourteenth Amendment law. [Opening Brief, at pp. 9-33; Reply Brief at pp 1-17].

Thank you for your attention.

Very truly yours,


s/ Andrew D. Ringel
Andrew D. Ringel
and Gillian Dale
of HALL & EVANS, L.L.C.

Enclosure

Elisabeth A. Shumaker, Esq.
October 12, 2018
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Eline v. Town of Ocean City

United States District Court for the District of Maryland

August 22, 2018, Decided; August 23, 2018, Filed

CIVIL NO. MO-18-0145

Reporter

2018 U.S. Dist. LEXIS 143951 *

CHELSEA C. ELINE et al., Plaintiffs v. TOWN OF OCEAN CITY, Md., Defendant

Core Terms

ordinance, female, sensibilities, governmental interest, equal protection, Nipple—Fort, male, female breast, bare-chestedness, bare-chested, observations, MEMORANDUM, Residents, Wildlife, purposes, breast, nudity, opaque, top

Counsel: [*1] For Chelsea C Eline, Megan A Bryant, Rose R MacGregor, Christine E Coleman, Angela A Urban, Plaintiffs: Devon M Jacob, PRO HAC VICE, Jacob Litigation, Mechanicsburg, PA; Jason Gregory Downs, DownsCollins, P.A., Baltimore, MD.

For Town of Ocean City Maryland, Defendant: Bruce Frederick Bright, LEAD ATTORNEY, Ayres Jenkins Gordy and Almand PA, Ocean City, MD.

Judges: James K. Bredar, Chief United States District Judge.

Opinion by: James K. Bredar

Opinion

MEMORANDUM AND ORDER

Plaintiffs¹ have moved for preliminary injunctive relief in this case claiming a denial of equal protection under the *Fourteenth Amendment to the United States Constitution*.² (Mot. Prelim. Inj., ECF No. 21.) Plaintiffs,

¹ Plaintiffs are Chelsea C. Eline, Megan A. Bryant, Rose R. MacGregor, Christine E. Coleman, and Angela A. Urban.

² Plaintiffs have also asserted they are similarly injured under the Maryland Declaration of Rights, Article 46. (Compl. Count III.)

who are females, contend they have a "legal right to be bare-chested, in public, in the same places that men are permitted to be bare-chested, for purposes other than breastfeeding." (Mot. Prelim. Inj. Supp. Mem. 1, ECF No 22.) They further claim the Town of Ocean City, Maryland ("Ocean City"), has denied them equal protection of the law by enacting and enforcing Emergency Ordinance 2017-10, which bans "female bare-chestedness in public while permitting male bare-chestedness." (*Id.*)

The Court will hold a hearing on Plaintiffs' motion, which has been fully briefed (ECF Nos. 27, 28), on the [*2] date set at the end of this memorandum and order. In preparation for the hearing, the Court makes the following observations:

1. The United States Court of Appeals for the Fourth Circuit has previously addressed a similar contention in *United States v. Biocic*, 928 F.2d 112 (4th Cir. 1991). In that case, the person claiming constitutional injury had been cited for violating a United States Fish and Wildlife regulation that prohibited, on any national wildlife refuge, any act of indecency as defined by State or local law. The particular law at issue was § 9.3 of the Accomack County, Virginia, Code, which prohibited public nudity, defined in part as "the showing of the female breast with less than a fully opaque covering on any portion thereof below the top of the nipple." 928 F.2d at 113. The Court found no constitutional violation by enforcement of the code section. With regard to equal protection, the Court assumed without deciding "that a distinction based upon anatomical differences between male and female is gender-based for equal protection analysis purposes," but then went on to decide "that the distinction . . . is one that is substantially related to an important governmental interest, hence does not deny equal protection." *Id.* at 115. The Court

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identified [*3] the important governmental interest as "protecting the moral sensibilities of that substantial segment of society that still does not want to be exposed willy-nilly to public displays of various portions of their fellow citizens' anatomies that traditionally in this society have been regarded as erogenous zones. These still include (whether justifiably or not in the eyes of all) the female, but not the male, breast." *Id. at 115-16.*

2. The Ocean City ordinance at issue, codified as sections 58-191-194, sets forth various legislative findings, including, "Protecting the public sensibilities is an important governmental interest based on an indisputable difference between the sexes. Further, a prohibition against females baring their breasts in public, although not offensive to everyone, is still seen by society as unpalatable." Sec. 58-191(d). In keeping with that finding, the ordinance prohibits public nudity, defined in part as "Mess than [a] completely and opaquely covered . . . female breast below a point immediately above the top of the areola." Sec. 58-192(2).

3. The contested ordinance was enacted by duly elected representatives of the public who reside in Ocean City. The Court observes it is, at least, arguable that these representatives [*4] are authorized to speak, through legislation, in a manner that reflects the public's sensibilities.

4. Plaintiffs rely on one court decision from the District of Colorado that favors their position, *Free the Nipple—Fort Collins v. City of Fort Collins, Colorado*, 237 F. Supp. 3d 1126 (D. Colo. 2017). That case is currently on appeal to the Tenth Circuit, No. 17-1103.

5. The Colorado decision appears to be an outlier, given the various decisions in both federal and state courts that do not favor Plaintiffs. See, e.g., *Free the Nipple — Springfield Residents Promotion Equality v. City of Springfield, Missouri*, Case No. 15-3467-CV-S-BP, 2017 WL 6815041 (W.D. Mo. Oct. 4, 2017); *Book v. City of Daytona Beach, Florida*, Case No. 6:08-cv-1180-Orl-28DAB, 2009 U.S. Dist. LEXIS 103198, 2009 WL 3720932 (M.D. Fla. Nov. 5, 2009); *C.T v. Indiana*, 939 N.E.2d 626 (Ind. Ct. App. 2010); *City of Bowling Green v. Boume*, Case No. WD-07-007, 2007-Ohio-5748, 2007 WL 3120191 (Ohio Ct. App. Oct. 26, 2007); *Frandsen v. County of Brevard*, 800 So. 2d 757 (Fla. Dist. Ct. App. 2001); *New Jersey v. Vogt*, 341 N.J. Super. 407, 775 A.2d 551 (N.J. Super. Ct. App.

Div. 2001).

6. This Court will, as of course it must, respect the precedent set in *Biocic*.

At the hearing, the parties are free to present evidence on the question of whether public sensibilities are accurately reflected or not in the Ocean City ordinance.

The hearing will be held on September 21, 2018, at 11:00 a.m., in Courtroom 3D, United States Courthouse, 101 West Lombard Street, Baltimore, Maryland 21201.

SO ORDERED.

DATED this 22 day of August, 2018.

BY THE COURT:

/s/ James K. Breder

James K. Breder

Chief Judge

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