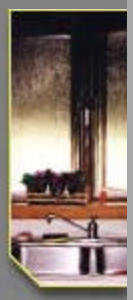

Breaking Legal Developments

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EXECUTIVE SUMMARY: This weekly newsletter covers:

1. Alabama Supreme Court Bars Unlicensed Alabama Experts from Testifying

(1) ALABAMA SUPREME COURT BARS UNLICENSED ALABAMA EXPERTS FROM TESTIFYING

In Mobile v. Hunter (July 28, 2006), 2006 Ala. LEXIS 175, the Alabama Supreme Court issued a wide ranging decision on expert testimony in the state of Alabama. It is believed subject to review by the Alabama Licensure Board currently.

The Board of Water and Sewer Commissioners of the City of Mobile ("the Water Board") appealed from an order of the Mobile Circuit Court declaring unconstitutional; in that order, the trial court also enjoined enforcement of that statute. The Supreme Court of Alabama reversed and remanded.

The plaintiffs in the trial court, James Hunter and his family members, sued the Water Board, alleging negligent design, construction, operation, and maintenance of the sanitary-sewer system that served their residence. The Hunters proffered the testimony of Roger Hicks as an expert in support of their claims. Hicks is certified as an "engineer intern" by the Board of Licensure for Professional Engineers and Land Surveyors ("the Licensure Board").

The Water Board moved to strike Hicks's testimony. The Water Board pointed out that the engineering profession is governed by Title 34, Chapter 11, Alabama Code 1975 ("the Licensure Act"). The Licensure Act sets forth those acts constituting "the practice of engineering." The Water Board also pointed out that, in 1997 the Alabama Legislature passed Act No. 97-683, Ala. Acts 1997, which amended, among other to include the term "testimony" within the definition of "the practice of engineering." The Water Board argued that, as a result of that 1997 amendment, Alabama law prohibited anyone from testifying under oath regarding engineering matters unless they were licensed as a "professional engineer" by the Licensure Board. Because Hicks was not a licensed "professional engineer," the Water Board argued, he was not qualified to testify as to the engineering matters at issue in this case.

The Hunters responded to this motion, presenting evidence indicating that, in the absence of that code Hicks would unquestionably qualify as an "expert" in this case. The Hunters argued that Hicks was trained as an engineer, that he was certified by the Licensure Board as an "engineer intern," and that he had approximately 17 years experience in sewer maintenance and related matters. The Hunters also argued that Hicks's proposed testimony was based on his education, training, and experience and

that his education, training, and experience were sufficient to qualify him as an expert witness in this case.

The Hunters also asserted that the Licensure Act was unconstitutional to the extent it purported to impose any penalty or criminal liability upon Hicks for providing opinion testimony in this case. The Hunters also argued that the title of Act No. 97-683 failed to comply with the single-subject" rule, and that the Licensure Act might have a field of operation but not to the extent of prohibiting otherwise qualified experts from testifying in a court of law. The Hunters also argued that the Licensure Act was unconstitutionally infirm on numerous other grounds.

The Hunters then moved the trial court to declare the Licensure Act unconstitutional to the extent it purported to prohibit persons from testifying regarding engineering matters in a court of law. The Hunters also requested that the trial court enjoin the enforcement of the Licensure Act to the extent that it inhibited or prevented the admission of testimony by certain individuals in an Alabama court of law.

After taking the deposition of Regina Dinger, the executive director of the Licensure Board, the Hunters amended their motion seeking to have the Licensure Act declared unconstitutional. In this amended motion, the Hunters alleged that the Licensure Act, as amended, was unconstitutionally vague because ordinary people could not understand what conduct the Act sought to prohibit. The Hunters asserted that Dinger's deposition testimony established that the Licensure Act was so vague that the Licensure Board could not even explain what conduct was prohibited by the statute.

After hearing arguments on the Hunters' amended motion, the trial court issued a 16-page order, declaring that the inclusion of the term "testimony" in the code created an unconstitutionally vague statute. The trial court also concluded that Act No. 97-683 violated the code. For these reasons, the trial court enjoined any application of the term "testimony," as that term is used in the code.

The Water Board appealed, raising the following issues:

"1. Whether Alabama Act. No. 97-683's amendment of Code to include 'testimony' among the services of professional engineers required to be licensed made the professional engineer licensure law unconstitutionally vague in violation of the due process provisions of the Alabama Constitution.

"2. Whether Alabama Act No. 97-683, which, among other changes, added 'testimony' to the description of services provided by professional engineers required to be licensed was inadequately titled.

Moreover, the trial court did not receive evidence ore tenus; thus, there was no presumption of correctness attached to the trial court's order.

Additionally, the facts in this case were virtually undisputed; however, the parties differed in their application of the law to those facts. The trial court's application of the law to undisputed facts is reviewed de novo.

Applicable Code Sections

Title 34, Chapter 11, Alabama Code 1975, section 34-11-2(a), regulates the engineering profession in this State. It provides:

"No person in either public or private capacity shall practice or offer to practice engineering ..., unless he or she shall first have submitted evidence that he or she is qualified so to practice and shall be licensed by the board as hereinafter provided ...."

It was amended in 1997, defined "the practice of engineering" as:

"Any professional service or creative work, the adequate performance of which requires engineering education, training, and experience in the application of special knowledge of the mathematical, physical, and engineering sciences to such services or creative work as consultation, testimony, investigation, evaluation, [*9] planning, design and design coordination of engineering works and systems, planning the use of land and water, performing engineering surveys and studies, and the review of construction or other design products for the purpose of monitoring compliance with drawings and specifications; any of which embraces such services or work, either public or private, in connection with any utilities, structures, buildings, machines, equipment, processes, work systems, projects, and industrial or consumer products; equipment of a control, communications, computer, mechanical, electrical, hydraulic, pneumatic, or thermal nature, insofar as they involve safeguarding life, health, or property; and including other professional services necessary to the planning, progress, and completion of any engineering services."

(Emphasis added.) It made it a Class A misdemeanor for anyone to practice, offer to practice, or hold himself or herself out as qualified to practice engineering within this state without being licensed by the Licensure Board.

Additionally, Regulations 330-X-2-.01(2) and 330-X-2-.01(19), Alabama Administrative Code (Alabama State Board of Registration for Professional Engineers and Land Surveyors), provide additional guidance on the meaning of the terms used in the Licensure Act.

These cases establish that, in order to challenge a statute for vagueness, the challenger must fall within the group of persons affected or possibly affected by the statute. At a minimum, the challenger must have a concern that the statute might be unconstitutionally applied to him or her. However, in the case before us, the Licensure Act is not directly applicable to the Hunters. There is no question whether they are engaging in the "practice of engineering"; additionally, there is no question that the Hunters are not subject to the licensing requirement under the Licensure Act. Additionally, the Licensure Board has not attempted to prosecute the Hunters for an alleged violation of the Licensure Act. Thus, the Hunters are not even within the class of persons to whom the Licensure Act is directed, much less affected by its alleged vagueness.

However, Hicks, the Hunters' proffered expert witness, unquestionably falls within the proscription of the Licensure Act. It is undisputed that Hicks is not licensed as an engineer; it is also undisputed that Hicks's attempted to offer sworn testimony regarding engineering matters. Because Hicks falls squarely within the prohibition of the Licensure Act, the Hunters cannot successfully assert their facial challenge to the Licensure Act.

However, the Licensure Act has none of the indicia of vagueness found in the ordinance declared unconstitutional in City of Chicago. The Licensure Act is specific enough to allow the public to discern what conduct it seeks to prohibit; the statute unequivocally prohibits the "practice of engineering" without a license. Unlike the ordinance in City of Chicago, which required an officer to make a subjective determination of what constituted "loitering," the Licensure Act contains a detailed and objective definition of the "practice of engineering." This definition provides sufficient notice to the public as to the conduct the Licensure Act prohibits.

Simply because the Licensure Act requires specialized knowledge to properly apply the statute does not compel the conclusion that it is void because it is vague.

"'"Mere difficulty of ascertaining its meaning or the fact that it is susceptible of different interpretations will not render a statute or ordinance too vague or uncertain to be enforced."' The judicial power to declare a statute void for vagueness 'should be exercised only when a statute is so incomplete, so irreconcilably conflicting, or so vague or indefinite, that it cannot be executed, and the court is unable, by the application of the known and accepted rules of construction, to determine with any reasonable degree of certainty, what the legislature intended.'"

Vaughn v. State, 880 So. 2d 1178, 1195-96 (Ala. Crim. App. 2003) (citations omitted). As evidenced by

the fact that the Licensure Act clearly applies to Hicks, the Licensure Act does not rise to the level of vagueness found to exist in City of Chicago.

Additionally, the court found no arbitrary or discriminatory enforcement of the Licensure Act. The definition of the "practice of engineering" is definite enough to allow an objective determination as to whether a person has engaged in that practice as defined. If the person engages in that practice without obtaining a license, he or she has violated the statute. This is in sharp contrast to the abstract and subjective analysis required by law enforcement in City of Chicago, supra, to determine whether the alleged loiterer had an apparent purpose for remaining in one place.

Moreover, if a person has any uncertainty as to whether his or her proposed testimony falls within the meaning of the "practice of engineering," the Licensure Act allows him or her to obtain an advisory opinion from the Licensure Board as to whether the statute has or will be triggered. See Regulation 330-X-1-.12, Ala. Admin. Code (Alabama State Board of Registration for Professional Engineers and Land Surveyors). Thus, a person wanting to testify to engineering matters within this State need not wait until after the testimony to determine whether it runs afoul of the Licensure Act. This again is in sharp contrast to the ordinance considered in City of Chicago. The court could find no deficiency in the Licensure Act based on the notice provided to the public by the Act or in the standards established for enforcement of that Act.

Additionally, it cannot be questioned that the Alabama Legislature has the power to regulate professions and to classify the activities subject to regulation as part of that profession. See, e.g., McCrory v. Wood, 277 Ala. 426, 171 So. 2d 241 (1965) (recognizing that the Alabama Legislature has the power to regulate the practice of optometry); State of Alabama ex rel. Attorney General v. Spann, 270 Ala. 396, 400, 118 So. 2d 740, 743 (1960) (acknowledging that the State has the power to regulate the practice of architecture; "We believe that it is within the discretion of the legislature to determine at what point licensing is to begin and at what point it shall end."); § 34-3-6, Ala. Code 1975 (requiring a license in order to practice law in Alabama); § 6-5-540 et seq., Ala. Code 1975, the "Alabama Medical Liability Act" (requiring, among other things, that any person wishing to testify as an expert witness for or against a defendant physician in a medical-malpractice action be a "similarly situated health care provider," i.e., must be licensed as a physician). Thus, it cannot be seriously disputed that the Alabama Legislature had the right to regulate the practice of engineering and to establish a credentialing requirement for engineers, if it saw fit.

In essence, the legislature has established that the minimum level of expertise required to qualify as an expert on engineering matters within Alabama is the same level required to obtain a license in Alabama. The legislature has the power to establish such standards. The Licensure Act no more infringes on constitutional rights than did the Alabama Medical Liability Act, which has passed constitutional muster. See Plitt v. Griggs, 585 So. 2d 1317 (Ala. 1991) (applying the rational-basis test to uphold the Alabama Medical Liability Act against an equal-protection challenge).

In support of their vagueness challenge, the Hunters rely on out-of-state decisions in which the courts concluded that, despite the wording of that state's licensing act, a witness need not hold an engineering license in order to testify as an expert in a court of law. See Thompson v. Gordon, 356 Ill. App. 3d 447, 827 N.E.2d 983, 293 Ill. Dec. 102 (2005); Baerwald v. Flores, 1997 NMCA 2, 122 N.M. 679, 930 P.2d 816 (Ct. App. 1997). These cases, however, are merely persuasive authority, and the court declined to follow them.

The court disagree with the emphasis placed by the trial court on Regina Dinger's deposition testimony. In its deposition notice served pursuant to Rule 30(b)(6), Ala. R. Civ. P., the Hunters did not request to depose a Water Board representative with expertise in engineering matters, or anyone capable of interpreting the "practice of engineering," or anyone capable of rendering an opinion on actual or alleged violations of the Licensure Act. Had the Hunters wished to obtain more definitive information regarding the Board's interpretation and application of the Licensing Act, they could have done so by deposing one or more of the members of the Licensure Board.

Additionally, Dinger is not an engineer, and at her deposition she expressly disclaimed the ability to determine who should be licensed under the Licensure Act. Ms. Dinger testified:

"I don't render the opinion on anybody's qualifications for licensure. That's not what my responsibility is. That's what my Board members' responsibilities are. I process the applications. I can't render the decisions on competency of who becomes licensed. That's a ... matter for the Board to render that decision."

In response to hypothetical situations posed by the Hunters' counsel, Dinger offered her personal opinions as to the proper interpretation of the Licensure Act. For these reasons, the court did not rely on Dinger's application of the Licensure Act to hypothetical situations to undermine what concluded it is an otherwise valid legislative act.

The court found the reasoning of Toussaint v. State Board of Medical Examiners, 303 S.C. 316, 400 S.E.2d 488 (1991), applicable to this case. In that case, a physician was charged with "unprofessional conduct" as defined by a statute directed at the regulation of physicians in South Carolina. The physician challenged that statute as unconstitutionally vague. However, the Supreme Court of South Carolina rejected these arguments:

"The constitutional standard for vagueness is the practical criterion of fair notice to those to whom the law applies. When the persons affected by the law constitute a select group with a specialized understanding of the subject being regulated, the degree of definiteness required to satisfy due process is measured by the common understanding and knowledge of the group. One to whose conduct the law clearly applies does not [*48] have standing to challenge it for vagueness."

303 S.C. at 320, 400 S.E.2d at 491 (citations omitted). The Supreme Court of South Carolina held that, when considered in light of the specialized knowledge and understanding of physicians, the statute was sufficiently definite to notify physicians -- the select group to which the statute was directed -- of those actions prohibited by the statute.

Like the statute at issue in Toussaint, the Licensure Act is sufficiently definite for engineers, the group of persons to whom it is addressed, to understand and apply its terms. For the above-stated reasons, the court concluded that the Licensure Act provides sufficient notice of the conduct it seeks to prohibit. Additionally, the Licensure Act does not authorize or encourage arbitrary enforcement. It therefore concluded that the trial court erred in declaring § 34-11-1, Ala. Code 1975, unconstitutionally vague.

Additionally, the Alabama Legislature has elected to regulate, among many other professions, physicians, lawyers, architects, certified public accountants, as well as engineers. However, simply because the legislature has not enacted identical licensing requirements for other professions does not require the conclusion that the Licensure Act is arbitrary or that engineers have been unfairly treated or unfairly singled out. This Court has recognized:

"[T]he legislature need not 'strike at all evils at the same time or in the same way.' It is legitimate for the legislature to proceed 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.' As the solution of the instant problem is a legitimate legislative objective and the classification used to achieve [*52] that objective is a reasonable one, the legislature here is not exceeding its constitutional prerogative ...."

Tyson v. Johns-Manville Sales Corp., 399 So. 2d 263, 272 (Ala. 1981) (citations omitted). See also Spann, 270 Ala. at 400, 118 So. 2d at 743 (concluding that a statutory licensing requirement and exceptions thereto applicable to architects were not unconstitutionally vague and did not improperly create a discriminatory classification; "It is within the scope of legislative authority to make classifications in its regulatory enactments. ... Mere inequality under such classification is not sufficient to invalidate a statute.").

Moreover, all of the above arguments amount to nothing more than the unfounded assertion that if a litigant's expert of choice is not permitted to testify, then the litigant's access to the courts is unfairly restricted. However, the Licensure Act does not deny or restrict the Hunters or any other litigant's access to the courts. As noted above, proffered expert witnesses often are disallowed for a variety of reasons without infringing on a litigant's right to access the courts. Additionally, there are ample licensed engineers in the State of Alabama whose testimony the Hunters may seek to use at trial. Moreover, if the expert of choice is from outside the State of Alabama, he or she merely needs to obtain certification in order to offer his or her testimony. The licensing process set forth by the Licensure Board is not overly burdensome, and we find nothing in this process to indicate that the Licensure Act is discriminatory or arbitrary.

The Licensure Act identifies its purpose as safeguarding life, health, and property and promoting the public welfare. § 34-11-1(7) and § 34-11-2(b), Ala. Code 1975. This is unquestionably a proper governmental purpose. Additionally, the legislature is well within its powers to conclude that offering sworn testimony regarding engineering matters constitutes the practice of engineering. That is the prerogative of the legislature, and we can find no deficiency in this conclusion. It is not irrational to assume that if persons who testify as to engineering matters have already met the requirements for licensure as a professional engineer in this state, then those persons are likely to have a desirable level of expertise and knowledge in engineering matters.

Additionally, it is not irrational to assume that those persons who are unable to meet the licensing requirements of this State are less likely to have a desirable level of education and experience regarding engineering matters. For these reasons, the legislature could have concluded that imposing a licensing requirement on those persons wishing to provide sworn testimony regarding engineering matters would further the stated goal of safeguarding life, health, and property and promoting the public welfare. Additionally, legislation necessarily involves some degree of line-drawing. United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179, 101 S. Ct. 453, 66 L. Ed. 2d 368 (1980). In Tyson v. Johns-Manville Sales Corp., supra, superseded by statute as recognized in Johnson v. Garlock, Inc., 682 So. 2d 25 (Ala. 1996), this Court addressed an equal-protection challenge to a statute:

"[I]t is important to state that we cannot find [a legislative] Act invalid 'because [we] think there are elements therein which are violative of natural justice, ... harsh or in some degree unfair ... or ... of doubtful propriety. All of these questions of propriety, wisdom, necessity, utility, and expedience are held exclusively for the legislative bodies... [T]he only question for the court to decide is one of power, not of expediency or [*57] wisdom.' Whether in fact the Act will efficaciously or wisely accomplish the purposes of the Act is not the question; the equal protection clause is satisfied by our conclusion that the legislature could rationally have decided that it would do so.'

"'[The legislature is] not required to convince the courts of the correctness of [its] legislative judgments. Rather, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."

"'...

"'[I]t is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature.'

"...

"A statutory discrimination between classes is held to be relevant to a permissible, legislative purpose if any state of facts reasonably may be conceived to justify it.

"The health, safety, and the provision of a remedy for Alabama citizens who are exposed to asbestos and thereby suffer injury are legitimate and reasonable objectives of the legislature."

399 So. 2d at 271-72 (citations omitted).

Additionally, as noted above, the Alabama Legislature has chosen to regulate professions other than engineering. It simply has chosen not to regulate those professions in the same manner as it did the engineering profession. However, the Equal Protection Clause does not require that the legislature treat each classification the same. See Tyson, 399 So. 2d at 272 (quoted above); see also Spann, 270 Ala. at 400, 118 So. 2d at 743 ("It is within the scope of legislative authority to make classifications in its regulatory enactments. ... Mere inequality under such classification is not sufficient to invalidate a statute.").

The court found that the effect of Act No. 97-683 -- requiring a professional engineering license in order to testify under oath as to engineering matters -- was rationally and reasonably related to the legislature's stated goal of regulating the practice of engineering in order to safeguard life, health, and property and to promote the public welfare. See § 34-11-1(7), and § 34-11-2(b), Ala. Code 1975. Thus, the legislature could have concluded that imposing a licensing requirement on those persons wishing to testify as to engineering matters would further the stated purposes of the Licensure Act. Accordingly, the licensure requirement of § 34-11-1(7), Ala. Code 1975, does not violate the Equal Protection Clause of the United States Constitution or equal protection of the laws as guaranteed by the Alabama Constitution.

This Court unquestionably has the authority to adopt those rules necessary to govern the judicial process, at both the trial and appellate levels. However, where the rules adopted by this Court conflict with a subsequent legislative enactment, the legislative enactment takes precedence. See, e.g., Ex parte Kennedy, 656 So. 2d 365 (1995) (recognizing that where the legislature adopts a general act of statewide application, the legislature may change the rules promulgated by this Court that govern the administration of all courts).

Next, the Hunters argue that the Licensure Act, as amended, violates the Interstate Commerce Clause, Art. I, § 8, cl. 3, of the United States Constitution. They argue that the Licensure Act interferes with interstate commerce by prohibiting out-of-state engineers from testifying in Alabama courts and that this prohibition has no putative local benefit to justify the interference.

However, the Licensure Act does not prohibit out-of-state engineers from testifying in Alabama or prohibit them from serving as forensic experts in this State. The Act merely requires that out-of-state engineers wishing to testify obtain local certification before doing so. The burden of registration is de minimis compared to the benefit obtained by the Licensure Act: the protection of life, health, and property that is obtained by regulating the practice of engineering. That is all that is required. See Pike v. Bruce Church, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."). See also 397 U.S. at 144 (recognizing that the field of public safety is unquestionably appropriate for local regulation).

Act No. 97-683 did not violate Art. IV, § 45, Const. of Alabama of 1901. Additionally, § 34-11-1, Ala. Code 1975 (as amended), was not unconstitutionally vague. The court found no merit in the other constitutional arguments asserted by the Hunters. The court reversed the judgment of the trial court and remand this case for further proceedings. The injunction issued by the trial court was hereby dissolved.

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