

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2011-021811

08/22/2012

HONORABLE MICHAEL J. HERROD

CLERK OF THE COURT  
M. Sahli  
Deputy

LAUREN BOICE, et al.

CHRISTINA M SANDEFUR

v.

DONNA AUNE, et al.

BRIDGET FITZGIBBONS  
HARRINGTON

MINUTE ENTRY

This matter comes before the Court on Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint. The Court has considered the Motion to Dismiss, Plaintiffs' Response, Defendants' Reply and Plaintiffs' Notice of Supplemental Legal Authority. The Court has also heard oral argument of the parties.

This matter is a facial and as-applied challenge to Arizona cosmetology statutes and their application to plaintiffs on due process, equal protection and free speech grounds.

For purposes of a Motion to Dismiss, the Court considers all well-plead facts in the Complaint to be true. The Complaint asserts that Plaintiff Boice runs a business known as Angels on Earth. Angels on Earth connects independent cosmetologists with three groups of people for the purpose of providing in-home cosmetology. Plaintiff Boice is not a cosmetologist and provides no cosmetology services herself. She runs the business by phone out of her home. Those three groups are (1) people who are homebound due to age or medical condition (2)

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2011-021811

08/22/2012

people who are providing care for someone who is homebound and (3) people who desire at-home services.

The original Complaint included only the first group. Following the filing of the original Complaint, the legislature amended ARS 32-574 to purportedly create an exemption for the first group. The first amended complaint adds the other two groups.

Prior to the amendment, the Board of Cosmetology (the Board) alleged that Plaintiffs violated three sections of Arizona law: ARS 32-574(A)(6), (9), and (10).

In an attempt to comply with the requirements of the Board, Ms. Boice obtained a salon license, rented space at an existing salon, posted her license and has posted copies of the licenses of the independent cosmetologists at the physical salon. Plaintiff Boice was also required to register a trade name and keep an appointment book at the physical salon location.

Count I seeks a declaration that the Board has no jurisdiction over Angels on Earth. The Court interprets this as an as-applied challenge, and not as a facial challenge.

Count II is a due process challenge under the U.S. Constitution and the Arizona Constitution as an as-applied challenge.

Count III is an Equal Protection challenge under the U.S. Constitution and a Privileges and Immunities challenge under the Arizona Constitution. It is also an as-applied challenge.

Count IV is a claim under the Free Speech clauses of the U.S. Constitution and the Arizona Constitution. It is also an as-applied challenge.

The only reference in the First Amended Complaint that may be interpreted as a facial challenge is in the prayer for relief seeking to find ARS 32-574(A)(6) unconstitutional. None of the specific counts make a facial challenge.

The Board also argues that the Plaintiffs lack standing, the as-applied claims are moot, and the new as-applied claims are unripe. The standing issue is based on the lack of any injury. The mootness claim is based on the new statute that arguably exempts the first group of customers. The unripe claim is based on the assertion that the Board has taken no action as to the newly plead groups two and three.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2011-021811

08/22/2012

As to the standing claim, the Court finds that Plaintiffs have standing by virtue of the exercise of jurisdiction by the Board over Plaintiffs.

As to the mootness claim, the Court finds that for purposes of this Motion only, the new statute may not clearly exempt all of group one. This issue is better brought in a Motion for Summary Judgment, after discovery.

As to the unripeness claim, the Court finds that the Board's assertion of jurisdiction over Plaintiff is sufficient to avoid the unripeness portion of the Motion. Therefore,

**IT IS ORDERED** granting the motion, in part and denying it, in part.

**IT IS ORDERED** granting the Motion to Dismiss to the extent it attempts to state a facial challenge.

**IT IS ORDERED** denying the balance of the Motion.

**IT IS FURTHER ORDERED** as follows:

Counsel and/or the parties are to meet personally to discuss all of the matters set forth in Rule 16(b), Ariz. R. Civ. P. Counsel and/or the parties shall prepare and file with the Court, no later than **5:00 p.m. on October 1, 2012**, a Joint proposed Scheduling Order, for discovery, motion and disclosure deadlines.

If the parties agree to the dates, they should prepare an Order **in the form attached hereto**, containing the provisions which are applicable to their case. For example, paragraph one of the Order set forth below need not be included in the parties' proposed Order if the parties intend to disclose their experts' identity and opinions at the same time they disclose their experts' areas of testimony. Similarly, if the parties agree to simultaneously disclose the identity and opinions of their expert witnesses, they need not include in their proposed Order the language set forth in paragraph 2a. and b., below.

The proposed Order shall include specific dates (06/05/2009 rather than 45 days from close of discovery). Do not incorporate a firm trial date in the proposed Order.

The Court will review the proposed Scheduling Order. If all is in order, the Court will set a status conference close to the discovery cutoff date. At the status conference, if the parties have completed discovery and are ready for trial, the Court will set firm dates for the final

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2011-021811

08/22/2012

pretrial management conference and the trial. If the parties are not ready for trial, the matter will be placed on the Inactive Calendar for dismissal within 60 days.

If counsel feel a pretrial conference is still necessary at this stage of the litigation, they should address the reasons why in the first paragraph of the proposed Scheduling Order.

If a Joint proposed Scheduling Order is not timely submitted, the Court will place the matter back on the Inactive Calendar for dismissal.

ALERT: eFiling through AZTurboCourt.gov is mandatory in civil cases for attorney-filed documents effective May 1, 2011. See Arizona Supreme Court Administrative Orders 2010-117 and 2011-010. The Court may impose sanctions against counsel to ensure compliance with this requirement after May 1, 2011.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2011-021811

08/22/2012

**[PROPOSED] SCHEDULING ORDER**

The Court has reviewed the parties' Joint Proposed Scheduling Order and adopts and/or modifies the days as follows:

**IT IS ORDERED** as follows:

1. The parties shall mutually and simultaneously disclose areas of expert testimony by **5:00 p.m. on \_\_\_\_\_, 2011. [or]**
  - a. Plaintiffs shall disclose areas of expert testimony by **5:00 p.m. on \_\_\_\_\_, 2011.**
  - b. Defendants shall disclose areas of expert testimony by **5:00 p.m. on \_\_\_\_\_, 2011.**
2. The parties shall mutually and simultaneously disclose the identity and opinions of their expert witnesses by **5:00 p.m. on \_\_\_\_\_, 2011. [or]**
  - a. Plaintiffs shall disclose the identity and opinions of their expert witnesses by **5:00 p.m. on \_\_\_\_\_, 2011.**
  - b. Defendants shall disclose the identity and opinions of their expert witnesses by **5:00 p.m. on \_\_\_\_\_, 2011.**
3. Any and all discovery requests shall be served by **5:00 p.m. on \_\_\_\_\_, 2011.**
4. The parties shall disclose all non-expert witnesses by **5:00 p.m. on \_\_\_\_\_, 2011. [or]**
  - a. Plaintiffs shall disclose areas of non-expert testimony by **5:00 p.m. on \_\_\_\_\_, 2011.**
  - b. Defendants shall disclose areas of non-expert testimony by **5:00 p.m. on \_\_\_\_\_, 2011.**

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2011-021811

08/22/2012

5. The parties shall mutually and simultaneously disclose their rebuttal expert witnesses and opinions by **5:00 p.m. on \_\_\_\_\_, 2011.**
6. All discovery shall be concluded by **5:00 p.m. on \_\_\_\_\_, 2011.**
7. The parties shall have exchanged up-to-date final Rule 26.1 Supplemental Disclosure Statements by **5:00 p.m. on \_\_\_\_\_, 2011.** This Order does not replace the parties' obligation to seasonably disclose on an on-going basis under Rule 26.1 as information becomes available.
8. Settlement conference (choose one):

The parties shall participate in private mediation by **5:00 p.m. on \_\_\_\_\_, 2011;**

**OR**

The parties shall participate in a mandatory settlement conference. This case is referred to the Court's Alternative Dispute Resolution for the appointment of a judge *pro tempore* to conduct a settlement conference. Counsel and/or the parties will receive a minute entry from ADR appointing the judge *pro tempore*. Counsel and any "pro per" parties will contact the appointed judge *pro tempore* to arrange the date, time, and location for the settlement conference. The judge *pro tempore* is requested to conduct a settlement conference not later than \_\_\_\_\_. The Office of Alternative Dispute Resolution will not do the scheduling of the settlement conference so please do not contact that office. If counsel prefer to use a private mediator to conduct the settlement conference, a Stipulation and Order re: Alternative to ADR must be presented to the Court by no later than 5:00 p.m. on ***(2 months before SC deadline)***. All counsel and their clients, or non-lawyer representatives who have full and complete authority to settle the case, shall personally appear and participate in good faith in the Settlement Conference. Sanctions may be imposed for failure to participate.

**All counsel and their clients, or non-lawyer representatives who have full and complete authority to settle the case, shall personally appear and participate in good faith in the Settlement Conference. Sanctions may be imposed for failure to participate.**

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2011-021811

08/22/2012

9. No expert witnesses, expert opinions, lay witnesses, or exhibits shall be used at trial other than those disclosed in a timely manner, except for good cause shown or written agreement of the parties.
10. All pretrial motions, other than motions *in limine*, must be filed by **5:00 p.m. on \_\_\_\_\_, 2011.**
11. A **Telephonic Pretrial Status/Scheduling Conference** is set for \_\_\_\_\_, 2011 at \_\_\_\_\_ **a.m./p.m.** for the purpose of assigning a trial date if the case has not settled. Counsel shall have their trial calendars available. Counsel for Plaintiff shall initiate the telephonic conference by first arranging the presence of all other counsel on the conference call and by calling this division at: **(602) 372-0359** promptly at the scheduled time.
12. Should any discovery disputes arise, counsel, prior to filing discovery motions, shall meet and confer pursuant to Rule 37, Ariz.R.Civ.P.
13. The dates set forth in this Order are FIRM dates and will not be extended or modified by this Court absent good cause. Lack of preparation will not ordinarily be considered good cause.
14. This case is removed from the Inactive Calendar and all requirements of Rule 38.1, Ariz.R.Civ.P., are waived unless and until otherwise ordered by the Court.

Dated: \_\_\_\_\_

---

HONORABLE MICHAEL J. HERROD  
JUDICIAL OFFICER OF THE SUPERIOR COURT