

By J. Polanco
J. Polanco, Deputy

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
COUNTY OF MARICOPA,**

Hon. George H. Foster, Jr.

IN THE MATTER OF

CINDY VONG and LA VIE, LLC.,
Plaintiffs

RULING on
MOTIONS FOR SUMMARY
JUDGMENT
Case No CV2009-037208

v

DONNA AUNE, in her official capacity as
Executive Director of ASBC.,
Defendant

The Court took under advisement the matter of the motions for summary judgment filed by the Plaintiffs and the Defendant respectively. The Court has considered the motions, responses, replies and the arguments of counsel. Based on the matters presented the Court finds as follows.

This matter comes to the Court on remand from the Court of Appeals which made certain legal findings necessary to the determination of this cause. It found:

1. We conclude that fish pedicures fall within the plain meaning of A.R.S. § 32-501(10)(c), which defines "nail technology."
2. We have determined merely that the Board has jurisdiction over the practice [of fish pedicures].
3. Here, the complaint alleges sufficient facts—which if proven—could demonstrate that the Board's absolute prohibition of fish pedicures runs afoul of the equal protection or due process clauses under the rational basis test.
4. We affirm the dismissal of Vong's jurisdictional challenge. We reverse the dismissal of her constitutional claims and remand for further proceedings consistent with this decision. We deny her request for attorney's fees and costs because neither party has yet prevailed.

Vong v Aune, 2011 WL 1867409, Ariz.App. 1, 2011.

Summary judgment is appropriate when there are no issues of material fact and the movant is entitled to judgment as a matter of law. *Orme School v. Reeves*, 166 Ariz. 301, 802 P.2d 1000 (1990).

The facts in this matter at first blush are not in dispute. But each brief identifies material facts that are not supported by the record, or more importantly, not in admissible form.

The Defendant's Motion argues that the fish pedicure procedure failed to comply with the Board's normal rules "*and with the consensus of experts on the necessary safeguards for the procedure.*" Defendant's Motion, p.6, lls., 14 through 16 (emphasis added). The evidence of a consensus of experts is not presented, or the matters presented have not been proven to the Court's satisfaction as experts, or not supported by affidavit, and is only found in documents whose foundation has not been established or constitute hearsay.

Notwithstanding the lack of presentation of proper evidence, the Defendant concludes that the prohibition is rationally related to the State's compelling interest.

On the other hand, the Plaintiffs argue a number of things. First, they state that the Defendant failed to undertake studies to determine the proper way to regulate the practice of fish pedicures. The Plaintiffs cite no case law on point indicating that the Defendant has the burden to do so. The Plaintiffs argue that the Defendant bans fish pedicures while simultaneously allowing and regulating more dangerous cosmetology practice. Yet there is no evidence of what the more dangerous practices are and whether under the circumstances the regulations for those practices are relevant to this inquiry. In the face of this inadequacy, the Plaintiffs argue the Board has violated its right to equal protection. In the absence of admissible evidence, the Court cannot agree.

The regulations in question seek to protect the public by making sure the tool, for want of a better word, that is used to remove dead flesh from the feet of the Plaintiffs' customers can be properly sanitized. The Defendant's position is that is the point of the regulation. That because the Plaintiff is unable to show that the fish can be disinfected the use of those fish is prohibited.¹ The Court cannot say on this record that the position is irrational, or better stated, not rationally related to a compelling state interest.

The Court is mindful of the admonition of *Orme School, supra.*, which held:

¹ It would seem that being able to disinfect fish may be equally important where the fish, which are not "controlled" by any person, may remove live tissue. The evidentiary record is silent on this issue or at least the parties have not directed the Court to a discussion of it which they are required to do. *Mast v. Standard Oil Co. of California*, 140 Ariz. 1, 680 P.2d 137 (1984), (stating that it is neither the trial nor the appellate court's function to "perform counsel's work by searching the record to attempt to discover facts which establish or defeat the [summary judgment] motion.").

We hold, therefore, that although the trial judge must evaluate the evidence to some extent in ruling on a motion for summary judgment, the trial judge is to apply the same standards as used for a directed verdict. Either motion should be granted if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense. Thus, assuming discovery is complete,^{FN10} the judge should grant summary judgment if, on the state of the record, he would have to grant a motion for directed verdict at the trial.

Even though the parties have submitted numerous documents to support their respective positions, they fail to fully address the question presented.

IT IS ORDERED denying the Motions for Summary Judgment submitted by the Plaintiffs and the Defendant as there exist genuine issues of material fact as to whether the Defendant's regulation of the Plaintiffs' activity is rationally related to a compelling State interest.

6/12/12
DATE


Hon. GEORGE H. FOSTER, JR