DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CINDY VONG and LA VIE, LLC, Plaintiffs/Appellants, v. DONNA AUNE, in her official capacity as executive director of the ARIZONA STATE BOARD OF COSMETOLOGY, Defendant/Appellee.	No. 1 CA-CV 10-0587 A DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-037208

The Honorable Bethany G. Hicks, Judge

The Honorable George H. Foster, Jr., Judge

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Scharf-Norton Center for Constitutional Litigation — Phoenix
By Clint Bolick
And Carrie Ann Sitren
Attorneys for Appellants

Thomas C. Horne, Arizona Attorney General — Phoenix
By Lori S. Davis, Assistant Attorney General
And Bridget Fitzgibbons Harrington, Assistant Attorney General
Attorneys for Appellee

S W A N N, Judge

¶1 Cindy Vong and La Vie LLC (collectively, "Vong") sought declaratory and injunctive relief from a decision by the Arizona Board of Cosmetology ("Board") that ended Vong's ability to offer so-called "fish pedicures" to her salon customers. Vong entered into a consent order with the Board, and then brought a civil action attacking the Board's jurisdiction to regulate fish pedicures. The trial court dismissed the action, and Vong appeals. We conclude that fish pedicures fall within the statutory definition of "nail technology," and that the Board therefore has jurisdiction over the practice. Because Vong's collateral attack on the Board's jurisdiction fails as a matter of law, we affirm the trial court's dismissal of her complaint on state law grounds. But Vong had also raised constitutional challenges to the Board's actions, which the trial court dismissed without discussion. We conclude that Vong has stated colorable claims for relief under 42 U.S.C. § 1983 and the Arizona constitution, and we reverse the dismissal of those claims.

FACTS AND PROCEDURAL HISTORY

¶2 In 2008, Vong, a licensed nail technician and aesthetician, advertised and offered "Dr. Fish pedicures" at her licensed nail salon. Vong imported fish from China and remodeled her salon to provide the service, which used the fish to remove dead skin from customers' feet.

¶3 In October and November 2008, an inspector from the Board inspected Vong's business. After the inspection, the Board informed Vong that fish pedicures violated Arizona law and the Board's infection control and safety standards, because the procedure involved skin exfoliation and the fish constituted tools or equipment that could not be stored or sanitized in the prescribed manner. It informed Vong that its rules prohibited the presence of animals, except fish in an aquarium or service animals, in a salon. The letter advised Vong to "immediately refrain from offering or performing fish pedicures."

¶4 In February 2009, Vong and the Board participated in an "informal interview" to discuss the situation. In September 2009, the Board and Vong entered into a Consent Agreement "as a final disposition" of the matter. The agreement specified, *inter alia*, that it served as "evidence of a prior violation of the Board's interpretation of Arizona statutes and rules governing the practice of cosmetology" and that it was subject to Board approval, becoming "effective only when accepted by the Board and signed by the Executive Director." Vong also agreed that the Board could impose sanctions and that "sufficient evidence exists for the Board to make the Findings of Fact and Conclusions of Law" contained in an attached order. The second part of the agreement, signed by the Board's executive director,

set forth the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. The Arizona Board of Cosmetology is the duly constituted authority pursuant to A.R.S. § 32-501 *et seq.* for the regulation and control relating to the practice of cosmetology in the State of Arizona.

2. On or about October 28, 2008, the Board Investigator conducted an inspection of [the salon] and observed that salon had a large sign advertising "Dr Fish pedicures", salon had stations set up to perform fish pedicures and salon had the fish in two large aquatic tanks. On or about December 16, 2008, the Board Investigator called [the salon] inquiring about fish pedicures and was told specifically that the salon was continuing to offer the service.

CONCLUSIONS OF LAW

The conduct and circumstances described in paragraph 2 of the Findings of Fact constitute grounds for disciplinary action pursuant to A.R.S. § 32-572(A)(6) and § 32-574(A)(10) (violation of statute or rule) by violating A.R.S. §32-501(6) and (9) (scope of practice) and A.R.S. § 32-541 and A.A.C. R4-10-112(A)(5)(B)(1)(2)(C)(1)(2)(E)(1)(7)(G)(1)(2)(P)(3)(4)(T)(2)(3)(infection control and safety standards).

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the parties agree to the following provisions.

1. **IT IS HEREBY ORDERED** that [Vong] shall **IMMEDIATELY** remove and keep out all fish from her salon with the exception of those

> allowed by Board Rule A.A.C. R4-10-112(T)(2) and **IMMEDIATELY CEASE** performing fish pedicures (including fish therapies) in the state of Arizona. This prohibition includes the use of fish in her salon in any manner other than what is authorized by A.A.C. R4-10-112(T)(2).
>
> 2. **IT IS FURTHER ORDERED** that the Board hereby issues a **PUBLIC REPROOF** against [Vong] for the Conclusions of Law stated herein. By issuing this Public Reproof the Board is declaring that the performing of fish pedicures in the State of Arizona violate [sic] the Board's statues and rules.

The Board mailed a copy of the document to Vong on September 21, 2009.

¶5 On November 30, 2009, Vong filed a complaint in Maricopa County Superior Court seeking injunctive and declaratory relief against Donna Aune, in her official capacity as the Board's executive director.[1] The complaint first claimed that Aune lacked jurisdiction over Vong's spa fish business because "spa fish therapy does not constitute the practice of cosmetology, aesthetics, or nail technology as those terms are defined in A.R.S. § 32-501(2), (6), or (10)" and because A.A.C.

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[1] The complaint also named the Board as a defendant, but the parties later agreed that the Board was not subject to suit. Aune argues on appeal that she is merely a "Board employee," that she has insufficient authority to enforce the Cosmetology Act, and that no justiciable controversy can exist between these parties. We disagree. Aune executed the order that implemented the Board's decision concerning Vong's fish pedicures, and is an appropriate party in her official capacity to represent the interests of the state against Vong's legal challenge.

R4-10-112 did "not encompass the use of fish for removing rough skin on feet." It also claimed state and federal constitutional violations pursuant to Ariz. Const. Art. 2, §§ 4 and 13, and the Fourteenth Amendment.

¶6 Aune filed a motion to dismiss. After full briefing and oral argument, the court granted the motion. The court's minute entry explained that it was unclear "whether this is an action for declaratory judgment or an attempt to secure review of the Board's administrative action . . . as manifested in the Consent Agreement," but concluded the complaint should be dismissed under either view:

> If this is treated as a declaratory judgment action, it is improper, as a party may not use a complaint for declaratory judgment as a substitute for a timely appeal for judicial review of an administrative order. . . . .
>
> On the other hand, if this is treated as an appeal for judicial review of an administrative order, it was required to be filed by November 2, 2009. It was not filed until November 30, 2009. Accordingly, it was untimely.

¶7 Vong moved for reconsideration and asserted that her complaint was a "collateral attack" on the Board's jurisdiction to regulate her business and was therefore "immune" from the rule requiring exhaustion of administrative remedies. She further asserted that Aune lacked personal jurisdiction over the spa fish business, lacked subject matter jurisdiction over spa

fish therapy, and had no jurisdiction to order the termination of Vong's business. The court denied the motion, explaining:

> implicit in the Court's ruling were determinations (i) that Plaintiffs' fish spa therapy constituted the practice of aesthetics and/or cosmetology, as those terms are defined in A.R.S. Section 32-501.2(a) and .6(b), (ii) that Plaintiffs' actions constituted unlawful acts within the proscriptions of A.R.S. Section 32-574 and, therefore, (iii) that Plaintiffs were subject to regulation by and the jurisdiction of the Board of Cosmetology . . . pursuant to the provisions of A.R.S. Sections 32-504.4.A.2, 32-572A.6 and 32-575, among others.
>
> Having determined that the Board had jurisdiction over the Plaintiffs (personal jurisdiction) and over the practice of fish spa therapy (subject matter jurisdiction), and that it had jurisdiction to censure or enjoin the Plaintiffs' activities (jurisdiction to take the action in question), the Court had no alternative but to treat this action as one for either a declaratory judgment or an appeal of an administrative order, in which cases it was either improper or untimely.

The court entered judgment dismissing the complaint.

¶8 Vong timely appeals. We have jurisdiction pursuant to A.R.S. § 12-2101(B).

DISCUSSION

¶9 When reviewing a motion to dismiss, we must "assume the truth of the well-pled factual allegations and indulge all reasonable inferences therefrom." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 7, 189 P.3d 344, 346 (2008). But

"mere conclusory statements are insufficient to state a claim upon which relief can be granted." *Id.* We review interpretation of statutes and administrative rules de novo. *Guminski v. Ariz. State Veterinary Med. Examining Bd.,* 201 Ariz. 180, 182, ¶ 10, 33 P.3d 514, 516 (App. 2001).

I. THE CONSENT AGREEMENT DID NOT DEPRIVE VONG OF THE RIGHT TO BRING THIS CHALLENGE.

¶10 Vong discontinued her fish pedicure business pursuant to the Consent Agreement, and filed the complaint to vindicate her right "to pursue a legitimate business in the face of [Aune's] arbitrary, oppressive, discriminatory, and unlawful actions that . . . prevented her from doing so." Aune contends that Vong's only avenue of prospective relief was a timely appeal of the order. We disagree. We understand Vong's Complaint to be an effort to establish a right to engage in the fish pedicure business in the future by (1) challenging the Board's statutory jurisdiction to regulate the practice at all, and (2) challenging the constitutionality of the Board's prohibition of the practice to the extent that state law grants the Board jurisdiction to do so. No law prevents Vong from mounting such a challenge.

¶11 To be sure, the consent agreement (and Vong's failure to appeal it) preclude her from seeking review of, or relief from, the Board's findings of fact or the public reproof it

imposed.[2] But Vong does not appear to challenge the findings of fact, and her consent to the order cannot constitute a waiver or bar for all time of her right to challenge prospectively the lawfulness of the government's regulation of her conduct.[3] Vong's constitutional claims for prospective relief have never been litigated in any forum, and the doctrine of res judicata does not apply to those claims.

¶12 We are mindful, however, that a collateral attack is limited to the issue of subject matter jurisdiction. *See State ex rel. Dandoy v. City of Phoenix,* 133 Ariz. 334, 338, 651 P.2d 862, 866 (App. 1982). We do not, therefore, address the Board's interpretation or application of its own rules to Vong -- we

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[2] In the consent order, Vong agreed that the Board had jurisdiction over *her*. But personal jurisdiction is not the issue -- the issue is whether the Board had authority to regulate the specific *practice* of fish pedicures. And subject matter jurisdiction cannot be conferred by stipulation. *Cf. Ad Hoc Committee of Parishioners of Our Lady of Sun Catholic Church, Inc. v. Reiss*, 223 Ariz. 505, 510, ¶ 10, 224 P.3d 1002, 1007 (App. 2010). Vong further agreed that she had committed a "prior violation of the Board's *interpretation* of Arizona statutes and rules." (emphasis added). But she did not concede the merits of the position she now advances.

[3] The day after oral argument on this accelerated appeal, Appellee filed a five-page "Supplemental Citation of Legal Authority" aimed at persuading us that the Board's Order precludes any § 1983 litigation under the doctrine of res judicata. ARCAP 17 allows supplemental authority after oral argument only "[w]hen pertinent and significant authorities come to the attention of a party after . . . oral argument. . . ." Counsel does not avow, and we do not perceive, that the nine cases cited came to her attention after oral argument. The filing is therefore improper under ARCAP 17.

consider only whether those rules exceed the Legislature's grant of jurisdiction to the Board or the limits on arbitrary regulation imposed by the state and federal constitutions.[4]

¶13 The Consent Agreement does more than regulate Vong's business. The Order provides that "the Board is declaring that the performing of fish pedicures in the State of Arizona violate[s] the Board's statutes and rules." The Board thereby used a single instance of discipline as a means of announcing a policy statement that acts as an effective prohibition of the practice statewide. In these circumstances, we conclude that there exists a justiciable dispute between Vong, the Board and its Executive Director concerning the Board's jurisdiction and the constitutionality of its declared position. *Cf. Citizens for Orderly Dev. & Env't v. City of Phoenix,* 112 Ariz. 258, 260, 540 P.2d 1239, 1241 (1975) ("The only proper method for testing the legality or constitutionality of a legislative enactment, be it municipal, county or state, is by judicial review [a]fter the enactment and passage of the offending ordinance, resolution or statute.").

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[4] At oral argument, counsel for Appellees conceded that no rules exist that specifically address -- or even contemplate -- the practice of fish pedicures. We have no occasion to consider the merits of any claimed defects in the existing rules at this juncture.

II. THE BOARD HAS SUBJECT MATTER JURISDICTION OVER FISH PEDICURES AS A FORM OF "NAIL TECHNOLOGY."

¶14 Vong rightly points out that the trial court appears to have dismissed her state law claims on alternate grounds -- both that her action was not a true collateral challenge and that the Board actually had subject matter jurisdiction over Vong's activities. We affirm on the latter ground.

¶15 The complaint describes the fish pedicure as "a relaxing and reinvigorating experience in which . . . tiny carp . . . are used to remove dead skin" or "rough skin" from customers' feet. The fish were kept in a community tank whose water was "continuously recycled through a filter system and ultraviolet system." At the start of the service, the customer's feet were inspected for open wounds, rashes, or other irritations, and then washed with antibacterial soap. The customer then placed his or her feet in an individual tank and the fish were added. The fish were removed and placed in the communal tank immediately after the service, and the customer's feet washed with antibacterial soap. The essential question is whether this practice falls within any of the statutory categories of activities over which the Board has been granted jurisdiction.

¶16 The Board is empowered to administer and enforce rules and standards for the practice of cosmetology, aesthetics and

nail technology. A salon is "(a)n establishment operated for the purpose of engaging in the practice of cosmetology, aesthetics or nail technology, or any combination of the listed practices." A.R.S. § 32-501(11)(a). A.R.S. § 32-504 requires the Board to adopt, administer and enforce rules, including sanitary and safety requirements, both for salons and the practice of cosmetology, aesthetics and nail technology, including the development of "standards and requirements for the provision of salon services" in the state. A.R.S. § 32-504.

¶17 The trial court concluded that fish pedicures constituted "aesthetics" under A.R.S. § 32-501(2)(a) and "cosmetology" under § 32-501(6)(b). For the reasons set forth below, we disagree that the practice falls within the statutory definition of aesthetics or cosmetology. But "[w]e will affirm if the trial court's ruling is correct on any ground." *MacLean v. State Dep't of Educ.*, 195 Ariz. 235, 240, 986 P.2d 903, 908 (App. 1999). We conclude that fish pedicures fall within the plain meaning of A.R.S. § 32-501(10)(c), which defines "nail technology."

A. The Mere Presence of Fish on Salon Premises Did Not Create Jurisdiction.

¶18 Vong did not dispute that she owns and operates a nail salon in Arizona, and she was therefore generally subject to the Board's sanitary and safety requirements for salons. Aune

asserts that the Board's rules prohibit the presence of any "bird or animal, except fish aquariums and service animals," in salons. *See* A.A.C. R4-10-112(T).[5] Vong's complaint specified that she purchased the fish and remodeled her salon to accommodate the fish pedicure business, that the fish were maintained in a communal tank within the salon, and that they were moved to individual tanks when utilized to remove dead skin. We conclude that the rule is susceptible to two competing -- but equally implausible -- applications to these facts.

¶19 One reading of this Rule, which Aune advances, would lead us to the conclusion that the *practice* of fish pedicures is prohibited because the *fish* are "animals" not permitted to be in the salon. This reading ignores the fact that fish are specifically permitted by the rule, and by their nature fish must be kept in water. But the presence of fish in water (arguably an "aquarium") likewise does not dispose of the issue in Vong's favor, because the rule is silent concerning the activities of the fish. It seems plain to us that the Rule was drafted to apply to the mere presence of animals in salons, and

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[5] Aune appears to argue, not that the Rule creates jurisdiction, but that it implements the authority granted by A.R.S. § 32-504(A) to regulate sanitary conditions in salons. Because we conclude that the Rule does not support Aune's position, we must likewise conclude that there exists no basis on this record to conclude that the general grant of authority to ensure sanitation confers jurisdiction over the practice of fish pedicures.

not to their use.[6] We therefore conclude that A.A.C. R4-10-112(T) does not operate to bring fish pedicures within the Board's jurisdiction merely because the service occurred within the physical premises of a salon.

B. Fish Pedicures Are Not "Cosmetology."

¶20 A.R.S. § 32-501(6)(b) defines "cosmetology" to include "[m]assaging, cleansing, stimulating, manipulating, exercising, beautifying . . . either by hand or by mechanical or electrical appliances." Because fish are neither hands, mechanical nor electrical appliances, we conclude that the plain wording of the statute does not bring fish pedicures within the meaning of "cosmetology."

C. Fish Pedicures are not "Aesthetics."

¶21 A.R.S. § 32-501(2)(a) defines "aesthetics" to include "[m]assaging, cleansing, stimulating, manipulating, exercising, beautifying or applying oils, creams, antiseptics, clays, lotions or other preparations, either by hand or by mechanical or electrical appliances." Again, fish are neither manual, electrical or mechanical appliances. Nor are they oils, creams or other media mentioned in the statute. We conclude that the statute does not apply to Vong's practice.

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[6] We have little doubt, for example, that a trained service dog that is permitted under this Rule to be *present* in the salon would not thereby have the unfettered ability to participate in the removal of skin from patrons' feet.

D. Fish Pedicures Are a Form of "Nail Technology."

¶22 A.R.S. § 32-501(10)(c) defines "nail technology" to include "[m]assaging and cleaning a person's hands, arms, legs and feet." Here, Vong affirmatively alleged that the service included cleaning the customers' feet with antibacterial soap before and after exposure to the fish, and that the fish "are used to remove dead skin." We find no ambiguity in the legislature's use of the word "clean" that would preclude us from deciding as a matter of law that the services described in the complaint include "cleaning."[7] Though the use of fish as a means of cleaning feet may be unusual, the nail technology statute is not limited to specific cleaning techniques. We have little difficulty concluding that the statute by its plain terms applies to all "cleaning" services, by whatever means.

¶23 Fish pedicures, therefore, fall within the statutory jurisdiction of the Board. Because Vong can only challenge subject matter jurisdiction in a collateral attack, we are precluded from delving deeper into any contention that the Board misapplied its rules, and we therefore affirm the dismissal of this portion of her complaint.

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[7] Webster's New Twentieth Century Dictionary of the English Language, 2d Ed., includes within the definition of the verb "clean" the phrase "to remove all foreign matter."

III. VONG'S CONSTITUTIONAL CLAIMS SHOULD NOT HAVE BEEN DISMISSED PURSUANT TO RULE 12(b)(6).

¶24 The remainder of Vong's action consists of a constitutional challenge to the Board's prohibition of fish pedicures. In essence, Vong contends that the singling out of fish pedicures for disadvantageous treatment violates her right to equal protection, and that the regulations prohibiting her conduct are irrational and arbitrary in violation of the due process clauses of the federal and Arizona constitutions.[8]

¶25 Vong alleges that her method of performing fish pedicures presents no safety risk to the public, and that the Board's rules cannot rationally apply to a service that was not contemplated when they were drafted. "When adjudicating a Rule 12(b)(6) motion to dismiss, Arizona courts look only to the pleading itself and consider the well-pled factual allegations contained therein." *Cullen*, 218 Ariz. at 419, ¶ 7, 189 P.3d at 346. "We will uphold dismissal only if the plaintiff would not be entitled to relief under any facts susceptible of proof in the statement of the claim." *Dressler v. Morrison*, 212 Ariz. 279, 281, ¶ 11, 130 P.3d 978, 980 (2006) (internal quotations

[8] With respect to this claim, the questions surrounding Vong's failure to pursue an appeal of the Board's action is irrelevant. "[T]here is no requirement that a plaintiff exhaust administrative remedies before bringing a § 1983 action." *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 192 (1985).

omitted). 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. *See, e.g., Buehman v. Bechtel,* 57 Ariz. 363, 114 P.2d 227 (1941) (holding unconstitutional the regulation of the practice of photography for hire). We have determined merely that the Board has jurisdiction over the practice. We have not determined that the Board's application of rules that did not contemplate the practice at the time of their adoption passes constitutional muster, and the present posture of this case does not permit us to engage in that inquiry.

¶26 We express no opinion concerning Vong's likelihood of success on the merits of her constitutional claim. We merely acknowledge the settled rule in Arizona that she is entitled to present evidence in support of a colorable constitutional theory, and therefore reverse the dismissal of her constitutional claims.

CONCLUSION

¶27 For the foregoing reasons 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. *See* A.R.S. §§ 12-341, -348.

/s/
_____
PETER B. SWANN, Presiding Judge

CONCURRING:

/s/
_____
PATRICK IRVINE, Judge

/s/
_____
MAURICE PORTLEY, Judge