

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2009-037208

03/15/2013

HONORABLE GEORGE H. FOSTER, JR.

CLERK OF THE COURT
A. Melchert
Deputy

CINDY VONG, et al.

CLINT BOLICK

v.

SUE SANSOM, et al.

SUE SANSOM
1721 E BROADWAY RD
TEMPE AZ 85282

EVAN HILLER

UNDER ADVISEMENT RULING

The Court conducted a two day bench trial in this case to consider the claims in the complaint filed by the Plaintiff and the defense set forth in the answer filed by the Defendants. Following the conclusion of the trial the Court took the matter under advisement. This is the decision based on the matters presented in trial including the evidence and the arguments of counsel.

As more specifically indicated in the findings of fact below, the Plaintiff has filed a complaint because the Defendant issued an order prohibiting the Plaintiff from conducting fish pedicures. The Plaintiff claims the prohibition violates Plaintiff's rights to due process and equal protection under the state and federal constitutions.

The Plaintiffs request relief in the form of a declaratory judgment that the Defendant does not have jurisdiction over its business operations and that the Defendant's actions violate state and federal constitutional rights. The complaint also seeks relief in the form of a preliminary and permanent injunction forbidding the Defendants from subjecting Plaintiff's business to regulation and from preventing the operation of the business. The complaint also seeks attorney's fees and costs and other relief as the Court deems just and proper.

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The Court finds, based on the findings of fact and conclusions of law below, that the Plaintiff is not entitled to its requested relief.

First, the Arizona Court of Appeals has found that the Plaintiff's business of performing fish pedicures is within the jurisdiction of the Defendant. Vong v. Aune, 2011 WL 1867409 (Ariz. App). Div. 1).

Second, this Court finds that the Defendant's actions have not prohibited the Plaintiff from operating its business; it has only prohibited the Plaintiff from performing fish pedicures ancillary to its business. The Plaintiff is not prohibited from otherwise conducting pedicures in compliance with the applicable regulations. In this regard, the Defendant has not violated the Plaintiff's right to due process or equal protection.

Third, because the Defendant does have jurisdiction and the actions taken by it do not violate the Plaintiff's rights she is not entitled to injunctive relief and she is not entitled to any award of attorneys' fees and costs. No other relief is appropriate.

Under Rule 52, A.R.Civ.P., when injunctive relief is requested the Court is required to make specific findings of fact and conclusions of law. Each party has submitted proposed findings of fact and conclusions of law which the Court has reviewed. The Court has adopted the finds and conclusions as follows.

FINDINGS OF FACT

Parties

1. Cindy Vong ("Vong") is a professional nail technician and aesthetician licensed by Arizona State Board of Cosmetology (the "Board").
2. Vong is the managing member of La Vie, L.L.C., an Arizona limited liability company.
3. Plaintiff Vong is the manager of VNK, L.L.C., an Arizona limited liability company. La Vie Nails ("La Vie") is a trade name owned by VNK, L.L.C.
4. The Board is a state agency and is empowered to regulate the cosmetology, aesthetics, and nail technology professions.
5. Defendant Donna Aune is the Executive Director of the Board.

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6. Vong imported the Garra Rufa and Chin Chin fish from China, purchased equipment, and remodeled the salon in order to provide the Spa Fish service (Vong Decl., ¶ 5).
7. Garra Rufa is a species of carp that does not have teeth.
8. Chin Chin are small fish that do develop sharp teeth.
9. In October 2008, Vong began providing fish pedicures at La Vie under the name “Spa Fish.” Spa Fish is a trade name owned by La Vie.
10. Vong’s fish pedicures involved patrons placing their feet in tanks of water in which Garra Rufa and Chin Chin fish removed skin from the patrons’ feet.
11. The fish used in Vong’s pedicures were housed in two large plastic trash cans lined with plastic sheeting and connected by plastic tubing.
12. At the beginning of business each day, Vong designated the tank with fewer fish in it as the “used” tank. Fish were taken from the other tank to perform pedicures and were placed in the “used” tank afterwards.
13. The two tanks of pedicure fish were connected by pipes or tubes and thus shared one water supply, which Vong ran through a UV filter.

The Board’s Investigation and Closure of Vong’s Fish Pedicure Business

14. Vong prepared a hygiene protocol. The protocol required the customers’ feet to be washed with antibacterial soap. The fish were to be placed in a clean tank immediately before the treatment and removed immediately afterward. The tank was to be cleaned and sanitized, dried in open air, and refilled with clean water before the next use. After treatment, the customers’ feet again were to be washed with antibacterial soap. The fish were kept in a community tank whose water was to be continuously recycled through a filter system and subjected to ultraviolet light to kill bacteria.
15. There is no evidence to prove the ultraviolet light killed any and all bacteria or viruses that might be transmitted by the fish to the water. All customers were to be informed of those procedures through a written notice. Any customer who desired a pedicure could have one afterward in a different part of the salon.
16. Vong charged \$30 for a 20-minute Spa Fish treatment.

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17. At the time Vong operated Spa Fish, her salon employed six persons.
18. On September 8, 2008, during a routine salon inspection of the La Vie salon, Vong asked Board investigator Linda Stroh about performing fish pedicures. Linda Stroh informed Vong that such procedures were not permitted under Board rules because they did not comply with its sanitation requirements. When Vong requested a formal answer from the Board, Linda Stroh promised to convey the Board's formal posture.
19. On or about September 10, 2008, following consultation with Sue Sansom, then the Executive Director of the Board, Linda Stroh telephoned La Vie to inform Vong that the Board would not permit fish pedicures because they did not comply with the Board's sanitation requirements. Because Vong was not available, Linda Stroh left this message with one of La Vie's employees.
20. Despite being twice warned that fish pedicures do not comply with Board Rules, Vong did not object to this determination by the Board before she began offering fish pedicure procedures in October 2008.
21. On or about October 29, 2008, pursuant to an anonymous complaint that Plaintiffs were offering fish pedicures, Board investigator Linda Stroh returned to La Vie and informed Phong "John" V. Nguyen, the licensee in charge, that fish pedicures were not permitted under Board rules. Linda Stroh also left a request for a written response from the salon within 10 working days.
22. On or about November 7, 2008, the Board received a letter from Vong, dated October 30, 2008, on La Vie Nails & Spa letterhead. In the letter, Vong denied the Board's jurisdiction over fish pedicures, denied any "commingling" of services between "Spa Fish" and La Vie, and enclosed copies of her "Spa Fish Policies and Procedures" and "Spa Fish Therapy Patron Notice."
23. On or about November 10, 2008, Donna Aune and Linda Stroh met with Vong at her salon. At this meeting, Donna Aune explained to Vong that fish pedicures are not permitted in Arizona salons, further explaining that fish pedicures are prohibited because they are not sanitary. Vong asked that she be allowed to continue offering the procedures as a "pilot program," and was told that the Board does not permit "pilot" or test programs.
24. During the November 10, 2008 meeting at La Vie, Donna Aune and Linda Stroh observed the layout of the salon, examined the fish pedicure equipment, and received a verbal explanation of the procedures.

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25. On or about November 13, 2008, Vong wrote to the Board, describing the procedures for her “Spa Fish” pedicures and proposing a pilot program to determine if any risks were presented to the public. Vong’s letter further characterized Spa Fish and La Vie as separate businesses, and disputed the applicability of Board regulations.

The Board’s Decision to Prohibit Fish Pedicures

26. On or about January 3, 2009, Vong received a letter from the Board, reiterating that fish pedicures constitute a violation of the Board’s statutes and rules.

27. At a monthly Board meeting in January 2009, the Board voted to offer a consent decree to Vong. Under the terms of the decree, Ms. Vong would pay \$750 and remove all live fish from La Vie.

28. At a monthly Board meeting in March 2009, Vong made a presentation to the Board, advocating that the Board permit her to perform fish pedicures. Following the presentation, the Board voted to offer the consent decree to Vong without further alteration.

29. In September 21, 2009, Vong signed a consent order agreeing to stop offering fish pedicures.

30. Vong has ceased performing fish pedicures, but initiated this litigation challenging the Board’s prohibition.

31. The Board interprets its own sanitation regulations as prohibiting fish pedicures.

32. The Board considered how to apply its regulations to this particular case in the manner in which it normally determines how to apply regulations.

33. The Board does not normally retain outside experts to provide analysis prior to making determinations, and did not need outside expert analysis in making its determination that fish pedicures violated its sanitation regulations.

34. The Board’s rules on sanitation, set forth in A.C.C. Rule 4-10-112, are designed to protect clients from indirect or direct exposure to bacteria or infection.

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35. The Board has a legitimate interest in safeguarding the health and safety of consumers who are provided services in the professions it regulates.
36. The Board's sanitation regulations are intended to advance this legitimate interest in health and safety.
37. The Board's sanitation regulations require that any implement that may remove dead or living tissue from a client be disinfected or thrown away after use.
38. The Board has determined that the use of implements that have not been disinfected, and which come into contact with human skin, creates health and safety risks.
39. The Board has determined that this requirement that implements be disinfected or discarded applies to fish when they are used as the means of exfoliation in pedicure procedures.
40. The Board has determined that its enabling statutes or regulations do not allow it to authorize individuals to violate those statutes or regulations as part of a "pilot" or test program.
41. The Board's decision to prohibit fish pedicures is based upon its belief that because the fish cannot be disinfected and because they remove skin and can cause bleeding, fish pedicures create a risk that customers will be exposed to harmful bacteria and serious diseases.
42. Vong has no special training or knowledge in identifying diseased or disease-carrying fish.
43. Board personnel who observed Vong's "Spa Fish" operation and viewed her trash can holding tanks concluded that the fish pedicures offered by Vong were not safe or hygienic.

Risks of Fish Pedicures

44. In fish pedicure procedures as offered by Plaintiffs, dozens of small fish remove tissue from the feet of clients with their mouths.
45. Fish pedicures can cause skin breaks and bleeding.

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46. Water is a vector through which humans can contract a number of skin diseases and infections.
47. Garra rufa fish imported into the United Kingdom have been found to carry a variety of bacteria, some of which are transmissible to humans.
48. No credible evidence is offered indicating that fish pedicures provide any medical or health benefits. Instead, Plaintiffs espouse entertainment and relaxation as the only benefits of fish pedicures.
49. Plaintiffs' expert, Dr. Graham Jukes, opines that fish pedicures do carry a risk of infection or disease that cannot be entirely eliminated through adherence to any set of safety protocols.
50. Defendant's expert, Dr. Joseph Giancola, opines that fish pedicures carry a risk of infectious disease that cannot be completely eliminated through adherence to any set of safety protocols.
51. Communicable diseases that might be contracted through fish pedicures include HIV and Hepatitis.
52. There is scientific uncertainty as to the precise nature and probability of risks associated with fish pedicures and although the record bears no evidence of any reported case of disease or infection transmitted by means of a fish pedicure, it cannot be ruled out.

Differential Treatment

53. Fish pedicures are most closely analogous to other procedures regulated by the Board that involve the exfoliation of the skin by use of an implement or instrument.
54. The implement disinfection requirement is applied in exactly the same way to fish pedicures and other exfoliation procedures. Exfoliation procedures with disinfected implements are permitted, while those using implements that are not properly disinfected are prohibited.
55. Fish pedicures carry the risk of communicable disease, which is not a risk associated with chemical procedures.

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CONCLUSIONS OF LAW

1. Fish pedicures are a nail technology procedure within the jurisdiction of the Board.
2. Plaintiffs' claims do not involve the loss of a fundamental right, and therefore are analyzed under rational basis review.
3. Plaintiffs' equal protection claims do not involve a suspect class, and therefore are analyzed under rational basis review.
4. Under rational basis review, Plaintiffs bear the burden of demonstrating, beyond a reasonable doubt, that there is no conceivable rational link between the Board's prohibition of fish pedicures and a legitimate state interest.
5. Plaintiffs have not met this burden.
6. Rational basis review does not require that the challenged regulation actually advance the legitimate interest it was promulgated to address.
7. It is not the role of this Court to rule upon the wisdom of the Board's decisions, only upon whether there is any conceivable set of circumstances under which the Board's decision would rationally be thought to advance a legitimate state interest.
8. There is factual uncertainty as to the degree of risk associated with permitting Board licensees to offer fish pedicures, but the evidence clearly demonstrates that this risk is not zero.
9. The Board is the governmental agency entrusted by the Arizona Legislature with regulating the professions of aesthetics, cosmetology, and nail techniques. The Board's determination of the appropriate degree of risk in regulating those professions should be disturbed only if the Board has acted arbitrarily or irrationally.
10. The Board believes that fish pedicures carry a risk of transmitting infectious disease. This belief is not irrational.
11. There is a rational link between the Board's legitimate interest in public health and safety and the prohibition of fish pedicures, since fish pedicures cannot transmit infectious disease if they are not performed.

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12. To the extent that fish pedicures are prohibited because the fish cannot be disinfected, fish pedicures are treated similarly to other nail technology, aesthetics, and cosmetology procedures that involve the use of implements.
13. To the extent that fish pedicures are prohibited while cosmetology and aesthetics procedures involving the use of chemicals are permitted, these procedures are not similarly situated. Even if they were similarly situated, there is a rational basis for treating fish pedicures differently because fish pedicures are more closely akin to procedures involving implements and because they carry a risk of communicable disease that is not present in procedures involving chemicals.
14. The Board's decision does not violate any provision of the Arizona Constitution or United States Constitution.
15. Defendants are entitled to judgment in their favor on all counts of the Plaintiffs' Complaint.
16. Donna Aune is the prevailing party in this matter and is entitled to her reasonable attorney's fees, expert fees, and costs incurred in this action under A.R.S. § 12-341 and 42 U.S.C. § 1988.

FURTHER DISCUSSION

State and Federal Claims Considered Together.

The Plaintiffs' state and federal Constitutional Claims can be considered together because the federal and state due process clauses contain nearly identical language and protect the e same interests. *State v Casey*, 205 Ariz. 359. Similarly Arizona courts have made clear that equal protection under the Arizona Constitution is substantially the same in effect as the Equal Protection Clause in the United States Constitution. *Chavez v. Brewer* 214 P.3d 397.

The Court has determined that the actions of the Defendant do not implicate a fundamental right and the Court will test the actions of the Defendant based on a rational basis analysis. As stated by our Supreme Court:

If a fundamental individual right is not implicated, the legislation is subject to a more relaxed review, usually to determine whether there is a "rational basis" for the legislation. This type of review involves significant deference to the judgment of the legislative body regarding both the propriety of governmental involvement in the area covered by the legislation and the reasonableness of the means chosen to achieve the

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legislative goals. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 728, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (declining to find a fundamental right to assisted suicide and applying rational basis review); *see also* Michael J. Phillips, *The Nonprivacy Applications of Substantive Due Process*, 21 Rutgers L.J. 537, 575–77 (1990) (discussing the various types of deferential, or “low-level,” review methods employed by the Supreme Court in different substantive due process contexts). To successfully attack legislation subject to this type of review, the challenger must prove that the legislation lacks any conceivable rational basis. *Heller v. Doe*, 509 U.S. 312, 320–21, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993).^{FN1}

FN1. Review methodology under substantive due process is similar to that employed under the equal protection doctrine; that is, there are differing levels of scrutiny depending upon the nature of the right involved, and the justification required for the legislation is greater or lesser depending upon the intensity of the scrutiny applied. *Nowak & Rotunda, supra*, § 11.4, at 383, § 11.7, at 404. Whether a piece of legislation is reviewed under the equal protection doctrine or the substantive due process doctrine depends upon its mechanics. If the legislation affects all persons, substantive due process applies. *Id.* § 11.4, at 383. If the legislation creates a classification and affects only members of the class, review under equal protection is appropriate. *Id.*

¶ 8 What is a fundamental right? A fundamental right has been defined as one that is “ ‘deeply rooted in this Nation's history and tradition,’ ” or is so weighty as to be “ ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if [it] were sacrificed.’ ” *52 *Bowers v. Hardwick*, 478 U.S. 186, 191–92, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986)**756 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977)), and *Palko v. Connecticut*, 302 U.S. 319, 325, 326, 58 S.Ct. 149, 82 L.Ed. 288 (1937) (overruled on other grounds by *Benton v. Maryland*, 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969)).

State v Watson, 198 Ariz. 48, 51, 6 P.3d 752, 755 (2000).

The Plaintiffs have not alleged nor have they submitted evidence or law indicating the matters raised herein involve the interference with any fundamental rights. The facts indicate the Plaintiff wants to operate her spa wherein she practices nail technology by means which include, but is not limited to, fish pedicures. The prohibition in this case is not as to pedicures generally and the prohibition is not as to nail technology generally. The only prohibition is to the use of fish to remove dead skin from the feet of customers. Simply put, there is no fundamental Constitutional right to conducting pedicures by using fish as the implement of removal. Indeed,

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under the law the Plaintiff does not even have a fundamental right to pursue any particular profession, Caldwell v Pima County, 172 Ariz. 352 837 P.2d 154 (App. 1991)

The Plaintiffs advance the argument that the Board has violated her Constitutional rights by failing to establish regulations for the operation of fish spas. The Plaintiffs fail however to cite any authority that the Board has any obligation to do so. It is noted that ARS §§ 32 – 504.A.1 and 9 provide generally that the Board is mandated to “adopt rules which are necessary and proper for the administration of this chapter, including sanitary and safety requirements for salons and schools and sanitary and safety standards for the practice of cosmetology, aesthetics and nail technology” and “provide standards and requirements for the provision of salon services through mobile units and in customer locations. But the Plaintiffs have failed to show that the Board’s implementation of the rules in this case is not a proper exercise of the Board’s authority to the aims of the safety regulations. Moreover, nothing in the record indicates the prohibition was made arbitrarily or outside the Board’s jurisdiction.

The Plaintiffs present no authority that the Board must make regulations for each and every type of business that falls within the Board’s jurisdiction. There are no specific regulations per se for manicurists or pedicurists or people who give facials. Rather, the rules are drafted in such a manner such that all those who come under the Board’s jurisdiction adhere to standards which promote health and safety in the course of that activity. In this regard, the regulations requiring the implements that remove skin be disinfected are imposed equally. See, § R4-10-112, Arizona Administrative Code.

The evidence presented by the Plaintiffs suggests that the regulations must be designed to eliminate all risk of injury in the practice of cosmetology and nail technology. Alternatively, the argument is that because the regulation under the Administrative Code does not eliminate all risk, even with the sanitization of hands and the cleaning and disinfecting of instruments, and that there is always some risk involved, that the Board should somehow not require this particular implement, a fish, to be disinfected. Why? Because, the Plaintiffs argue, the fish are not implements.

No matter what label one gives the thing that removes flesh from the human body, the rules adopted by the Board requires that ”thing” to be disinfected towards the end of providing a reasonable level of health and safety. Even the Plaintiffs agree that placing other “implements on par with fish, that is eliminate the requirement that they be sanitized and disinfected, would be an unreasonable risk to the health and safety of the public.”

The Plaintiffs have been unable to provide any evidence to the Court that requiring the disinfecting of the thing that removes skins from the human body is not rationally related to a legitimate government end, health and safety. This Court finds that goal and the Board’s

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enforcement of the rules as it applies to fish pedicures to be rationally related to that legitimate government interest.

The Plaintiffs assert that the Board should explore and implement less restrictive means to regulate the practice of fish pedicures. Again, Plaintiffs cite no authority which requires the Defendant to do so or which indicates that the failure to do so is a violation of due process or equal protection. The Board on the other hand has a legitimate concern regarding the health and safety of the public. The Board simply requires that the instrument that is used to remove skin from feet be cleaned/disinfected /sterilized for the benefit of the health of the public.

The Plaintiffs on the other hand want the unbridled ability to use fish as that implement by arguing studies show the risk of infection is low. Yet, the Plaintiffs never cite any authority that the Board or any regulatory agency is required under the law to create a set of regulations for that practice by the Plaintiffs, or that the Defendant is bound under the law to do so for any practice that may somehow fall within the parameters of its jurisdiction. The Plaintiffs' claim that this failure is a denial of due process and equal protection is not supported by the law or the record.

The Equal Protection and Due Process Clauses protect against government action that is arbitrary, irrational, or not reasonably related to furthering a legitimate state purpose. *See, e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446–50, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). See also, *Coleman v. City of Mesa*, 230 Ariz. 352, ___P.3d___ (2012).

“In order to prove a substantive due process claim, [a plaintiff] must plead and prove that the government's action was ‘clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.’ ” *Lebbos*, 883 F.2d at 818 (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S.Ct. 114, 71 L.Ed. 303 (1926)). The same standard applies with regard to the Equal Protection claim. *See City of Cleburne*, 473 U.S. at 439–40, 105 S.Ct. 3249.

The Plaintiffs argue the Defendant has presented no evidence that fish pedicures as performed in other countries or jurisdictions have resulted in any reported cases of infection or disease transmitted from the fish or the water. It also contends that the fish are not “implements” as that term is defined in the applicable regulations further lending credence to the notion that the Defendant’s classification of the fish as implements and their prohibition is not rational. This Court cannot agree. If the fish are not implements then the Plaintiff fails to explain what they are. Further, the Defendant is under no obligation to produce evidence that no other persons have reported any illness from fish pedicures. As stated in *Heller v Doe by Doe*, 509 U.S. 312, 113 S.Ct. 2637 (1993):

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A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. “[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.” Beach Communications, supra, 508 U.S., at 315, 113 S.Ct. at 2098. See also, e.g., Vance v. Bradley, supra, 440 U.S., at 111, 99 S.Ct., at 949; Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 812, 96 S.Ct. 2488, 2499, 49 L.Ed.2d 220 (1976); Locomotive Firemen v. Chicago, R.I. & P.R. Co., 393 U.S. 129, 139, 89 S.Ct. 323, 328, 21 L.Ed.2d 289 (1968). A statute is presumed constitutional, see *supra*, at 2642, and “[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,” Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364, 93 S.Ct. 1001, 1006, 35 L.Ed.2d 351 (1973) (internal quotation marks omitted), whether or not the basis has a foundation in the *321 record. Finally, courts are compelled under rational basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it “ ‘is not made with mathematical nicety or because in practice it results in some inequality.’ ” Dandridge v. Williams, supra, 397 U.S., at 485, 90 S.Ct., at 1161, quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369 (1911). “The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.” Metropolis Theatre Co. v. Chicago, 228 U.S. 61, 69–70, 33 S.Ct. 441, 443, 57 L.Ed. 730 (1913).

Id. 509 U.S. 312 at 321, 113 S.Ct. 2637 at 2643. This Court has found that the actions of the Defendants were not arbitrary, irrational or unreasonable. Further, requiring the implements that remove dead skin from feet be disinfected has a rational and substantial relationship to promoting the public health, safety and welfare. The prohibition against using fish to remove such skin where the evidence is uncontroverted that the fish cannot be disinfected is a restriction that is entirely consistent with that legitimate government end.

For all the above reasons the Court finds in favor of the Defendant and relief is denied to the Plaintiffs.

The Court further finds that the parties pretrial raised the issue whether this matter was properly a declaratory judgment matter or an appeal from an administrative decision. The matter was tried to the Court seeking declaratory relief and any issue regarding the matter of an administrative appeal has been waived.

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