

BELKNAP,SS.

4TH CIRCUIT COURT-DISTRICT DIVISION
LACONIA

STATE OF NEW HAMPSHIRE

V.

HEIDI LILLEY AND BARBARA MACKINNON

DOCKET #2015-CR-2800, 2801

ORDER

The Defendants appeared in response to citations filed by the State, Gilford Police Department. The complaints cite violations of the town's Ordinance, 3.4(G) (Prohibitions) #7: "(T)here shall be no skinny dipping, nude tanning, female topless sun bathing or exposure of genitalia allowed on Town Beach Property." The Defendants are represented counsel.

The parties entered a set of stipulations- that the Defendants are identified, that the Defendants were topless on the time and date of the complaint at the location cited, that the beach is town property, and that the township has authorized regulations of the beach.

The Defendants have filed a Motion to Dismiss, which has been objected to by the State. The Defendants have described the historical context of the movement to which the Defendants appeared on Gilford Beach. The participants object to the township's prohibition of appearing topless. They express the prohibition as being 'oppressive and censorship'. They represent that their movement is a "real life" equality movement.

The Defendants raise a number of defenses. The Defendants argue two Constitutional defenses. They argue that the ordinance (violation) is alleged to have offended the Defendants' rights to Equal Protection clause applied to the State through the 14th Amendment.

They further argue that their action and the corresponding action by the State violated their 1st Amendment protections to their free speech. They argue that their actions were symbolic speech and, as such, are protected.

The Defendants argue that the prohibition offends the anti-discrimination laws of the State RSA 354-A.

The Defendants further argue that the township is prohibited from the enforcing the prohibitions of the Town Ordinance in that the State is not a Home Rule state. The Defendants argue that the township has overstepped their authority to regulate their own community with an ordinance which prohibits activity which has not been prohibited by the State.

On September 6, 2015, in the late afternoon, the Gilford Police Department was summoned to the Gilford Town Beach on Varney Point Road on Lake Winnepesaukee in answer to a number of citizens' complaints. The complaints cited a number of women presenting themselves "topless" on the beach.

Sgt. Corey O'Connor, with 14 years of experience as an officer, testified to his response to the complaints coming into the police department. He spoke of his observations of the females and their toplessness. He described his contact with the women and his explanations. He was familiar with Ms. Lilley as resident of Gilford.

Officer Salmon testified to responding and finding a number of women to be topless on the beach and in the water. The women were instructed by the officer to cover themselves as he was present to enforce the ordinance of the town. The women described their positions as desirous of being treated as males do on the beach as to clothing/beachwear. The named Defendants were cited.

Ms. D'Agata testified for the State. She indicated that she has resided in Gilford for the past 17 years. She was present on the date in question at the beach with her 9 year old daughter. She observed the incident and was upset by the actions of the women. She identified two groups of women involved in the incident.

She found the actions of the women to be offensive with youngsters present on the beach that afternoon. She described her reaction as being shocked. She approached the women. She reported to the police her observations. She took pictures of the topless women presenting themselves on the beach. She believed that there were regulations prohibiting that action.

She described her actions as protecting the children. She believed that her actions were role modeling for her daughter. She, upon cross-examination, disagreed with counsel that the topless incident was an equal treatment issue. She found that the toplessness as inappropriate.

Ms. Demers next testified as a 9 year resident of Gilford. She was present at the beach with her husband and her 13 year old son. She was shocked and angry and confronted the women indicating that they should "put on their tops". She told them to "put their --- away".

She also called the police. The Defendants described her, specifically, interacting rudely with them. She indicated that she would move from the community if the regulation was not proper.

Mr. Landry testified to being present for the incident and described the incident generally. He felt that it was wrong for females to be at beach topless. He was concerned about the Defendants' action with families and children present.

The present case is alleged to be a part of a national movement identified as "Free the Nipple". No direct information was presented by the Defendants as to the movement. The Defendants testified that movement is directed at the equality of the sexes, the de-sexualization of the female breast, and their condemnation of, what they allege to be, 'a rape culture'.

The Defendants explained that they have appeared in other locales in topless conditions in furtherance of their efforts to demonstrate what they believe to be society/government's discrimination.

The Court notes that, over the centuries, the female breast has been the subject of great beauty in art, a subject of great tenderness and love as a baby receives their nutriment from their mother, is portrayed in movie entertainment as being more realistic, is portrayed in other forums as revealing- in the adult entertainment business.

It is noteworthy for the Court's analysis that as to the entertainment business, in particular the movie industry, the movie entertainment business has adopted a rating system to suggest a level of maturity under which the female breast is exposed. While not carrying any judicial sanction, the rating system represents a societal desire to recognize media's availability and dispersal of depictions of the female breast to the general public.

The ultimate question is whether the Defendants' lack of coverage for their breasts is fundamental right when the classification is gender based.

"The doctrine of Equal Protection demands that "all persons similarly situated should be treated alike, **Cleburne v. Cleburne Living Center**, 473 US 432,439 (1985) and therefore "(t)he first question in an equal protection analysis is whether the State action in question treats similarly situated person differently." **Appeal of Marmac**, 120 NH 53, 58 (1987)" **State v. La Porte**, 134 NH 73, 76 (1991)

The Defendants would argue that the Court must consider the class as gender discrimination.

There are no cases cited in New Hampshire for the conduct of toplessness. The State has cited the case of **State of New Jersey v. Arlene E. Vogt**, 775 A.2d 551 (2001). The case confronted the constitutionality of the ordinance prohibiting toplessness and found it “met constitutional muster since it gave a person of ordinary intelligence fair notice of the nature of the prohibited conduct.” **Vogt**, 554. Further, the court concluded that the prohibition “might not be so in other societies having different mores and customs, but the import and applicability of the prohibition to the conduct here in this societal context is beyond reasonable debate”. **Id.**, 554. This Court would concur.

In cross-examination, the Defendants have raised the question as to whether the toplessness was nudity. The **Vogt** Court, through their analysis, concluded that “(t)he common meaning of ‘nudity’ does not require total nakedness.” **Vogt**, p. 556. The Court held that toplessness does not reach a ‘substantial amount of constitutionally protected conduct’. “(t)here is no constitutional right for a woman to appear topless on a public beach.” **Vogt**, 557.

The Court further dismissed the issue of discrimination based upon gender, “(P)rotecting the public sensibilities is an important governmental interest based on an indisputable difference between the sexes. Further, the prohibition against females baring their breasts in public, although not offensive to everyone, as shown by the testimony of all three witnesses in this cases (and in the present case to the testimony of the Defendants and their witness), is still seen by society as unpalatable. Therefore, the ordinance does not violate the Equal Protection Clause of the 14th Amendment”. **Vogt** 557. (or in the present case, additionally, Part I Article #1 of the NH Constitution).

The Defendants argue that the **Vogt** Court reviewed the constitutionality of the New Jersey prohibition by the intermediate level of scrutiny.

Additional federal cases have concluded that “(T)here is no First Amendment right to sunbathe nude” **S. Florida Free Beaches v. Miami** 734 F.2d 608,609 (11th Cir. 1984). “In short, while nudity in the privacy of one’s own property and nudity in the context of artistic expression may be protected, it seems clear that nude sunbathing on a public beach is not a right of constitutional dimension.” **New England Naturalists Assoc. v. Larsen**, 693 F Supp. 76, 79 (1988). “Federal courts have consistently held that nude sunbathing is conduct rather than ‘expression’ and merits little, if any, constitutional protection...that nudity, like wearing long hair, was individual conduct rather than expression and was thus not a fundamental right.” **South Florida Free Beaches v. Miami** 548 F.Supp. 53, 56 (1982)

The Court finds that the demonstration on the beach on September 6, 2015, is not symbolic expression, as protected by the 1st Amendment of the US Constitution and by the New Hampshire Constitution. The Court does not find

that the prohibition against females appearing toplessness is invidious discrimination and is not a violation of the Equal Protection Clause.

The implication of the standard of review is engaged in shifting the burden to the State in evidencing a compelling reason for the prohibition which the Defendants argue is a violation of the Defendants' Constitutionally protected rights. The Court agrees that "Strict Scrutiny is the correct standard to apply when determining the constitutionality of a statute that touches upon a fundamental right." (Paragraph #14 of the Defendant's Motion to Dismiss)

The township's prohibition, the Court finds, satisfies its burden of a compelling interest. The township's compelling interest is met in maintaining the beach as a natural resource to be enjoyed by young and old, men and women, families and single persons while preserving appropriate standards that allow the township to maintain their local values and mores and finds that the ordinance is "necessary to achieve a compelling governmental interest, reasonably related to its objective, and not unduly restrictive" Seabrook 138 NH 179.

The Court does not find that the prohibition violates any constitutionally protected right. The Defendants have offered neither evidence nor citation that toplessness at a public accommodation by the female gender is a constitutionally protected interest.

The Court further finds that the township is exercising its valid regulatory actions in furthering the township's compelling interest in finding that the movement "does not have 'a right to impose one's lifestyle on other who have an equal right to be left alone.'" Vogt 557

The Court agrees with the Defendants that the rulings in the Equality of Marriage recognize a 'fundamental right to marry' regardless of gender. In the present case, the Defendants lack a compelling argument that parallels can be drawn from the 'right to be topless' to the 'right to marry where "(l)t (marriage) is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." Griswald v. Connecticut, 381 US 479, 486 (1965). "Marriage is one of the 'basic civil rights of man', fundamental to our very existence and survival." Skinner v. Oklahoma, 316 US 535, 541 (1942)

The Court finds that toplessness is not such a right.

Further, the parallel arguments fall short in evidencing the substantial benefits of the toplessness which are prohibited by the ordinance and fail to substantiate that the purposed parallels warrant Constitutional protection.

The Defendants have alleged their "conduct involved expression and political speech and has artistic value". This Court relies on earlier noted findings

that the portrayed level of nudity/topless in the public does not rise to expression or political speech. The Court finds that the Defendants have presented no evidence that the activities of the Defendants were artistically valued and should be held so constitutionally.

The Court does not find the town's ordinance to have violated RSA 354-A. The township is not practicing any discrimination "against any of its inhabitants... not only threatens the rights and proper privileges of its inhabitants..." (RSA 354-A:1) Contrary to the Defendants' arguments, the ordinance did not deprive the Defendants of the use of the beach, its facilities nor their ability to enjoy the lake and its lakeside location. The ordinance does not deny access to the public accommodation based upon sex but regulates the conduct on the beach.

Finally, the Defendants argue that the township is without authority to criminalize the actions of the Defendants as it is beyond the jurisdiction granted in RSA 41:11. The Court finds that the township has the authority to "regulate" the use of the real property owned by the town.

The Defendants argue that there is no State statute which prohibits the public display of the female nipple or breast. RSA 645:1 Indecent Exposure and Lewdness.

New Hampshire's Criminal Code mandates that "No conduct or omission constitutes an offense unless it is a crime or violation ***under this code or under another statute.***" RSA 625:6 (Emphasis added).

"A violation (which this action is classified as) is an offense ***so designated by statute within or outside this code*** and, except as provided in this paragraph, any offense defined outside of this code for which there is no other penalty provided other than a fine or fine..." RSA 625:9, V.

The conduct complained of, while having no legitimacy under either the Federal or State Constitutions, is without prohibition under the Criminal Code or any other statutory authority allowing prosecution.

As there is no provision of State law which prohibits the exposure of the female breast in the public, the Court finds that the township lacked authority for a criminal prosecution which is neither prohibited by the Criminal Code nor by statute or enabling legislation.

Cases are dismissed.

Date: January 29, 2016


Judge James M. Carroll