IN THE UTAH COURT OF APPEALS

STATE OF UTAH

ZEN HEALING ARTS, L.L.C., d/b/a BEACHES BODYWORKS, JEFF STUCKI, and LEISA METCALF	:	
Plaintiffs/Appellants,	:	
vs.	:	
	:	Case No. 20160241-CA
UTAH STATE DEPARTMENT OF COMMERCE, UTAH DIVISION OF OCCUPATIONAL LICENSING, AND JOHN DOES I-X	:	
Defendant/Appellee.	:	

APPEAL FROM A JUDGMENT OF THE THIRD DISTRICT COURT
OF SALT LAKE COUNTY, UTAH, HON. BARRY G. LAWRENCE

BRIEF OF APPELLANT

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TABLE OF AUTHORITIES CITED

CASE AUTHORITY

STATUTES

RULES

CONSTITUTIONAL PROVISIONS CITED

CERTIFICATE OF WORD COUNT

Counsel for Appellant hereby certifies that the Brief contains 13,426 words, as a function of Word Perfect, exclusive of tables and indexes.

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STATEMENT OF JURISDICTION

The Supreme Court has appellate jurisdiction over all matters not specifically granted to the Court of Appeals, pursuant to Utah Code Ann. § 78A-3-102(3)(I). Pursuant to Utah Code Ann. § 78A-3-102(4), the Supreme Court may transfer all but a few defined cases to the Court of Appeals; and the Supreme Court did so in this case.

ISSUES PRESENTED FOR REVIEW

QUESTIONS OF LAW:

A. Is the remedy chosen by the District Court of Dismissal with Prejudice in regard to Plaintiffs' Declaratory Judgment Action, within the power of the Court to grant? The Court may only "refuse to render or enter a declaratory judgment or decree where a judgment or decree, if rendered or entered would not terminate the controversy giving rise to the proceeding.

This issue was preserved for Appeal by Plaintiffs' Defendant's Motion (under Rule 59 - insert details here). The question here involves statutory construction and constitutional interpretation. It is a legal question that is reviewed for correctness, according no deference to the decision of the District Court. See State v. J.M.S. (State ex rel. J.M.S.), 2011 UT 75, 280 P.3d 410 (Utah 2011); and Bushco v. Utah State Tax Commission, 2009 UT 73, 225 P.3d 153 (Utah 2009).

B. Is the Rule at issue within the power of the Division and/or Department to issue, and is it consistent with the statute it was designed to implement, interpret or administer?

This issue was preserved for Appeal by Plaintiffs' Trial Brief and Motion for Summary Judgment and Motion for (Rule 59). The question here involves statutory

construction and constitutional interpretation. It is a legal question that is reviewed for correctness, according no deference to the decision of the District Court. See State v. J.M.S. (State ex rel. J.M.S.), 2011 UT 75, 280 P.3d 410 (Utah 2011); and Bushco v. Utah State Tax Commission, 2009 UT 73, 225 P.3d 153 (Utah 2009).

C. Does the Rule itself, or the statute as modified by the Rule, deny Plaintiffs Due Process of Law, and is the Rule overbroad and/or unconstitutionally vague?

The question here involves statutory construction and constitutional interpretation. It is a legal question that is reviewed for correctness, according no deference to the decision of the District Court. See State v. J.M.S. (State ex rel. J.M.S.), 2011 UT 75, 280 P.3d 410 (Utah 2011); and Bushco v. Utah State Tax Commission, 2009 UT 73, 225 P.3d 153 (Utah 2009).

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CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES AT

ISSUE:

The following items will be reproduced in an Addendum hereto:

H.B. 243, 2011 General Session showing changes in definitions under the Massage Therapy Practice Act.

H.B. 114, 2012 General Session showing changes in definitions under the Massage Therapy Practice Act.

Utah Code Ann. § 58-1-502

Utah Code Ann. § 58-47b-102 (2012) (current)

Utah Code Ann. § 58-47b-201

Utah Code Ann. § 58-47b-501

Utah Code Ann. § 58-47b-503

Rule R156-47b-102 of Utah Division of Occupational and Professional Licensing

STATEMENT OF CASE

NATURE OF CASE

This is an appeal from the final Judgment of the Third District Court, Salt Lake City Department, Salt Lake County, dismissing with prejudice Plaintiff's Declaratory Judgment Action. Plaintiffs sought a Declaratory Judgment that Rule R156-47b-102 of Utah Division of Occupational and Professional Licensing is in conflict with the Massage Therapy Practice Act, Utah Code Ann. § 58-47b-102. Alternatively,

Plaintiffs sought a Declaratory Judgment that the state, as modified by the Rule, is overbroad and/or unconstitutionally vague.

The Complaint also included a Second Cause of Action for review of an informal decision of the Department of Commerce. Based on the Ruling requested above, Plaintiffs asked that citations issued to them for violations of the Massage Practice Act be dismissed. Those citations were issued by DOPL on or about September 1, 2012 at an establishment operated by Plaintiff XXX where Plaintiffs admit that they engaged in "light touch plus movement" of others for a fee. Plaintiffs contended that they did not engage in the practice of massage therapy as defined by statute, and that the citations were arbitrary and capricious attempts to interfere with a lawful business endeavor of which Defendants disapprove.

The Court held a Trial de Novo of issues previously before a hearing officer of the Division of Professional Licensing. Plaintiffs brought a Motion for Partial summary Judgment as to their First Cause of Action, resulting in a Partial Summary Judgment in their favor. That Judgment also substantially affected the Second Cause of Action, which involves the Administrative action by Defendants against Plaintiffs for the unlawful practice of massage therapy.

The Court later, sua sponte, "clarified" its Partial Summary Judgment. The

assigned Judge then retired. After a trial de novo on the outstanding citations, the Court canceled the Partial Summary Judgment in its entirety and Dismissed Plaintiffs' action with prejudice. In doing so, the Court upheld the contested Rule in its entirety and declined to construe it or to restrict it as the previous Judge had done in the Partial Summary Judgment.

STATEMENT OF FACTS

Plaintiff XXX, is a Utah Limited Liability Co. Its principal place of business is in Salt Lake County, State of Utah. Said Plaintiff operates a relaxation studio and is licensed by Salt Lake County. R.24. Treatments administered by Plaintiff include various spiritual healing arts that date back many centuries. This involves touching the skin to create energy, and to direct energy to various parts of the body. Id.

Treatment does not involve therapeutic massage, and every customer is required to sign a consent form acknowledging that they understand that they are not receiving a massage. R 25. Treatments may include the art of Reiki, which may include touching as a relaxation and healing technique. Massage techniques of "systematic manipulation" are not included. Id.

The Utah Division of Occupational and Professional Licensing is a Division of the Department of Commerce, and is charged, under Utah Code Ann. § 58-1-

106(1)(a) with adopting rules to administer the provisions of the Utah code within its jurisdiction. Utah Code § 58-47b-102 defines the practice of massage. That definition section was modified by the legislature in 2011 to broaden the definition of what was included in the term "massage therapy". The word "therapeutic" was removed from the definition. The Legislature, in 2012, largely reversed the law changes of 2011, restoring the word "therapeutic" to the massage therapy definition, and removing the term "recreational" under purposes. Those changes, and their effect on Division enforcement, are at issue in this action. Below is the current version of Section 58-47b-102, definitions: Note that bracketed terms have been removed, and underlined terms added, as the statute was changed in 2011 and 2011. Copies of the Bills showing the changes are in the Appendix, along with the full current version.

(3) "Homeostasis" means maintaining, stabilizing, or returning to equilibrium the muscular system.

(6) "Practice of massage therapy" means:

(a) the examination, assessment, and evaluation of the soft tissue structures of the body for the purpose of devising a treatment plan to promote homeostasis;

(b) the systematic manual or mechanical manipulation of the soft tissue of the body for the [therapeutic] purpose of:

(i) promoting the therapeutic health and well-being of a client;

(ii) enhancing the circulation of the blood and lymph;

(iii) relaxing and lengthening muscles;

(iv) relieving pain;

(v) restoring metabolic balance; and

(vi) achieving homeostasis; [and]

(vii) [recreational] or other purposes;

(c) the use of the hands or a mechanical or electrical apparatus in connection with this Subsection (6);

(d) the use of rehabilitative procedures involving soft tissue of the body;

(e) range of motion of movements without spinal adjustment as set forth in Section 58-72-102;

(f) oil rubs, heat lamp, salt glows, hot and cold packs, or tub, shower, steam, and cabinet baths;

(g) manual traction and stretching exercise;

(h) correction of muscular distortion by treatment of the soft tissues of the body;

(i) counseling, education, and other advisory services to reduce the incidence and severity of physical disability, movement dysfunction, and pain;

Pursuant to Utah Code Ann. § 58-47b-501, it is unlawful to practice, engage in or attempt to practice "massage therapy without holding a current license as a massage therapist or a massage apprentice under this chapter." Pursuant to Utah Code Ann. § 58-47b-503, "any individual who commits an act of unlawful conduct under Section 58-47b-501 is guilty of a class A misdemeanor." A violation of the Massage Therapy Practice Act may also bring an administrative sanction, pursuant to Utah Code Ann. §§ 58-1-501 and 58-1-502, which may include fines of up to $1,000 and a "cease and desist order".

On or about December 15, 2011, Defendants published a Notice on their website of a proposed additional definition, to be included as a part of Rule R156-47b, known as the "Massage Therapy Practice Act Rule". That Rule, in Part R156-47b-102 contains definitions which are to assist in administering the provision of the Massage Therapy Act. The addition to the Rule states:

> (8) "Manipulation", as used in Subsection 58-47b-102(6)(b), means contact with movement, involving touching the clothed or unclothed body. R. 31, 159.

The Rule greatly expands what may be considered "massage".

Plaintiff XXX followed the instructions on the website and submitted written comments objecting to the adoption of the rule. He also appeared at the hearing at

which the rule was discussed and adopted, and made an oral presentation in opposition to the rule. He and a number of others filed written comments on or before the due date, opposing the change. The Division did not respond to the written comments. The Rule went into effect on January 26, 2012, without additional discussion. R. 57-58.

The 2012 legislative bill, HB 114, originally contained the same language as the Rule, adopted at around the same time. At a committee hearing on February 6, 2012, (only 10 days after the Rule went into effect) the expanded definition of massage therapy at issue here was dropped from the bill. The sponsor of the bill indicated that the definition had caused concerns from chiropractic physicians. R. 291.

Sally Stewart, a "Bureau Manager" over Massage Therapy for Defendant D.O.P.L. previously filed an affidavit with this Court, dated April 23, 2012, as to the circumstances of the adoption of the Rule, and stated as follows:

> Clarification also provided a written reference concerning potential abuses of the profession and public so as not to allow unqualified, unlicensed individuals to take advantage either physically or financially. The Division and the Board felt that the promulgation of the rule was necessary for the protection of the public and the profession. R. 170.

The decision of the Board was at least partially in reaction to unfavorable court

rulings in which attempts to use the Massage Therapy Practice Act as a weapon against escort agencies, had failed. See XXX, Case No. XXX, R. 294, in which the Court ruled that an escort who offered a "massage" as part of an escort appointment, along with "a sexy dance [or] the modeling of provocative lingerie". After listing the goals of a professional massage, from the Act, the Court stated:

> Arguably, the evidence may eventually show that Defendant's massage in this case *resulted* in some or all of these benefits. However, it is undisputed that Defendant never held herself out as a "massage therapist" or as an expert in massage. Moreover, it is not alleged that Defendant ever represented to her client that her massage techniques would result in any of these benefits or that the massage was being given of any of these therapeutic purposes. Therefore, there is no – and apparently will never be any – evidence that Defendant engaged in the massage "for the purpose of" achieving these results. R. 296. (Emphasis in original).

Agents of Defendant have testified in various administrative and court proceedings that the new definition in the Rule was "the position of the Division", even before the Rule was adopted, and without notice of that "position" to those who might be affected by it.

Ms Stewart testified in an administrative proceeding involving Plaintiffs XXXXX:

> Manipulation is just that, it is contact and movement. If you are merely laying your hands upon your body, that is not manipulation of tissue. If you take that hand and move it around, you are manipulating the soft tissues, whether you

> are doing so in a light fashion, a medium fashion or in a deep tissue type of practice." (Tr. 57) (Emphasis added). R. 314.

Ms. Stewart was later deposed in reference to this matter. According to Ms. Stewart, the rule was for purposes of clarification only. It was asked for by licensed professionals. She was involved in preparing the rule; but she does not determine who is required to be licensed. R.324. She was involved in the 2011 legislative changes because:

> There were some areas where a person may have claimed not to have been doing therapeutic massage and that had not been previously included in the language within the scope of practice. That word was removed because the individuals chose to regulate, not just therapeutic massage, but also recreational or relaxation massage. They are the same techniques but serve different purposes and that was discussed with various individuals. R.322.

> Rubbing a person with lotion would generally be considered to be a cosmetic process. However, in the practice of massage therapy, you are dealing with potential harm to an individual through sanitation, safety in terms of too much pressure, too little pressure, effleurage as a very light touch technique can close of lymphatic system, can cause health effects. You have contagion, you may have unsanitary conditions possible. You have an number of potential threats to the public safety and welfare. Id. (Emphasis added).

At a Preliminary Hearing in XXX, Third District Court, West Jordan Department, Case No. XXXX, held on January 31, 2012, Allison Robinson, an investigator for D.O.P.L, also testified:

> We have a definition that speaks to massage. There are a lot of different

> components to it. Mr. McCullough had touched on some of those components although it is the Divisions' position that not all of these components must be engaged in in order to be practicing massage therapy. However, the manipulation of soft tissue is mentioned and we view manipulation of soft tissue as any contact with movement. R.340.

Ms. Robinson, now Ms. Pettley, was also deposed on December 12, 2013. She has no college education; but she took a 5 week POST class for "special function police officer". R.341. She reads the statutes and rules on her own, to decide what the law is, and how it should be enforced. R.343. She knows generally the terms used in massage, through her own reading. She is "aware that there is a lymphatic system in the body" and that massage can enhance the circulation of it. R.344. The statute refers to "achieving homeostasis". She thinks she would know if she saw this being achieved; but it is "subjective", so she has "discretion" as to whether to cite. Id.

Ms. Pettley was not an investigator when the statutory changes were made in 2011. She was an investigator in 2012, when those changes were largely reversed. She did not believe that those changes were significant in her investigations, and did not make any changes because of them. The addition of the term "recreational purposes", and then its removal did not affect her work, as the law retained the term "for other purposes". Id. Her citations are "typically for contact with movement." She does not typically cite people for any of the other myriad "modalities" of massage,

such as counseling, educating or advising. Id.

According to Ms. Pettley, if a licensed escort rubs a client on the arm, to show affection,

> that would depend on whether he hired her to rub him." I would say if the client hired the escort to provide rubbing for him, that would be a violation of the Massage Therapy Practice Act.
>
> . . .what I'm saying is if he hired her to rub him in whatever capacity and he paid her, that would be a violation of the Massage Therapy Practice Act. R.345.

The term "manipulation", as in the contested rule, is her guideline. It does not matter that it is not applied in a therapeutic manner, or that it is not purported to have a health benefit. She cites people who touch other people for a fee, if there is movement with the touch. Id.

She states that "my plate is full with people that are touching each other." "The violation of the law is offensive to me, yes." She relies on her own reading of the statute and rule. R. 331. If an unmarried man receives a massage from his girlfriend, and he takes her to dinner to show his appreciation, Ms. Pettley believes that his would be a violation. R. 332. The following question and answer were part of the deposition:

> COUNSEL: But you really do have your plate full of people touching each other and it's - I mean it's so far you can't get around it, isn't it?

> WITNESS: It's a very - there is a very large population of people that are out there that are violating the Massage Therapy Practice Act, yes. R.346.

She was an investigator before the Rule at issue was passed in January, 2012; and she did not change her enforcement because of the Rule. Prior to that, "it was always the standard that the definition of massage therapy included contact with movement. It was just clarified in writing." Id.

Defendants named as an expert witness Ms. Sharon Muir, the Chair of the Board of Massage Therapy, as created by Utah Code Ann. § 58-47b-201. The duties of that Board include assisting the Division Director in governing the regulated profession, including suggesting Rules and setting requirements for licensure. See Utah Code Ann. § 58-1-202, 203. A member of the Board is to "assist the division in reviewing complaints concerning the unlawful or unprofessional conduct of a licensee. Utah Code Ann. § 58-47b-201(3)(a). (Emphasis added).

Ms. Muir prepared an Expert Report. She stated that:

> As Chair of the Board of Massage Therapy, I am aware of concerns raised by numerous parties that unlicensed massages including massages of a sexual nature were being performed under the guise of Reiki and that there was a need for clarification of DOPL's Rule governing the practice of massage therapy to keep illegal sex businesses out of the massage profession.
>
> It is my opinion that the Board and DOPL acted within the scope of their

> authority to regulate the massage therapy profession by promulgating the amendment to Rule 156-47b-102. The amendment to the rule was necessary to establish clarification in the guide lines as to what constitutes the practice of massage therapy.
>
> It is my opinion that this type of conduct and behavior is detrimental and seriously undermines the integrity of the massage therapy profession and the Reiki petitioners. R.374.

In answers to Interrogatories, Defendants state the following, regarding the reasons for the enactment of the Rule:

> Concerns were expressed by the Utah League of Cities and Towns, the State Board of Health, and Murray City about Reiki businesses and how they were being used as fronts for prostitution at a Massage Therapy Board Meeting held on September 20, 2011 which prompted a discussion for the rule amendment. Additionally, members of the public in attendance at the September 20, 2011 meeting expressed concerns about the misrepresentation of the practice of Reiki by individuals as fronts for sexually oriented businesses and prostitution. (Ans. #6).

In answers to Interrogatories, Defendants state the following, regarding the abuses of the profession" referred to in Ms. Stewart's previously filed affidavit:

> The actual or potential abuses referred to [in] Ms. Stewart's Affidavit of April 23, 2012 include physical harm, financial harm, being used as a vehicle for prostitution or sexual abuse and as a vehicle for human trafficking. (Ans. #12).
>
> The potential harm to the client of the recipient of a massage by someone who isn't licensed as a massage therapist are that they are deprived of the right to a legitimate massage and may be exposed to harm by an unlicensed person who does not do the massage in the right way. The client may also be exposed to illegal prostitution under the guise of massage therapy. In addition, unlicensed

massage therapists may be subject to human trafficking. (Ans. #15).

In Answers to Interrogatories regarding the function of "touch plus movement", Defendants stated:

> The massage practitioner is a professional who is engaged in the business of giving appropriate, nurturing, and ethical touch. The massage or body work profession is unique in that human touch is the primary vehicle whereby services are preformed. Whether it is relaxation, wellness massage, sports massage, Therapeutic Touch, or the specifically applied soft tissue manipulation of clinical massage, it is the beneficial human response to skillfully applied touch that is the basis for the success of the massage profession. Touch is an essential element for healthy growth and development. From a very early age, positive touch affects human physical and emotional health through our lives.
>
> Multiple studies show that the positive touch of massage reduces stress, lowers blood levels of cortisol and norepinepherine, while increasing levels of serotonin and dopamine. Low levels of serotonin and dopamine are evident in people who suffer from depression, whereas significantly higher levels are associated with elevated moods.
>
> In the therapeutic setting, the practitioner is the giver, and the client is the recipient of touch. The massage professional's business is to provide caring, compassionate touch to the client. Massage therapists practice it every day and are comfortable administering touch as therapy. (Ans. #26).

In Answers to Interrogatories regarding whether there was a limit on the licensing of the human touch, Defendants stated:

> It is Division and Board's position that "contact with movement involving touching the clothed or unclothed body" or another person relates to the scope of practice of massage therapy as set forth in the Massage Therapy Act 58-47b-

> 106 and does not involve incidental contact referenced such as shaking someone's hand or patting someone on the back." (Ans. #27).

But "touch plus movement' is not always massage, even it it is with lotion. The practice of Esthetics is related to the practice of massage and may overlap. According to Ms. Stewart in her deposition:

> A master esthetician also has the expanded expertise and additional training to do more complicated processes and to do lymphatic massage if so trained.
>
> A master esthetician is doing skin treatment.
>
> Placing lotion on the skin is a skin treatment. And, therefore would fall under a cosmetic treatment of the skin, which is part of the definition of the scope of practice for a master esthetician. R. 321-322. (Emphasis added).

Ms. Stewart also testified at the previous evidentiary hearing involving the individual Plaintiffs herein. It is her opinion that light or medium touching constitutes massage therapy, and is a form of mechanical manipulation of soft tissue. It is also her opinion that doing a body rub with lotion is massage therapy. Use of lotion can be used for either esthetics or massage therapy. R.309. Using light or medium touch to manipulate muscles and achieve relaxation is part of "the modality of effleurage" R.310. Soft tissue is defined as the muscles and related connective tissue by the statute. Id. Skin is connective tissue as well. R.311. If a person is using lotion and

is manipulating the soft tissue, it's still massage therapy.

> Whether they are using lotion, water, oil or any other substance, it is the act of a light touch massage therapy, the medium touch or whichever that is a violation of the practice of massage therapy, not that you are using the lotion per se, but that you are practicing massage therapy." R.313.

> Manipulation is just that, it is contact and movement. If you are merely laying your hands upon your body, that is not manipulation of tissue. If you take that hand and move it around, you are manipulating the soft tissues, whether you are doing so in a light fashion, a medium fashion or in a deep tissue type of practice." R.314.

Reiki may be hands on, but it does not involve manipulation of the tissues nor movement. R.315. It would not be possible for a person to apply lotion to someone's body without manipulating the soft tissue. R.317.

Plaintiffs retained Whitney W. Lowe as an expert witness. Mr. Lowe has taught massage at several schools, both private and public, and has written three books on the subject. He has also contributed to other books and written several peer-reviewed articles. His Expert Report was received by the Court at trial and made part of his testimony.

> The primary purpose of licensure for massage therapists is to protect public safety. In order to require licensing, there must be a demonstration of potential public harm that relates to the particular occupation being licensed, in this case, massage, and which can be mitigated by the licensing process. As a result, it is crucial to have a solid definition and parameters for what constitutes massage therapy. Each state that licenses massage makes choices

about how to define the practice. To be defensible, these definitions should reflect the generally accepted definitions and understanding of what constitutes massage therapy in the profession. Expert Report, Exhibit 5 at trial(sealed).

Mr. Lowe states that there is potential physical and psychological harm from untrained massage:

> In most states, the majority of complaints against practitioners involve psychological components and inappropriate behavior by practitioners as opposed to harm induced by improper massage techniques.
>
> Because many municipalities have a large job in cracking down on illicit and inappropriate mass services, it is understandable that professional licencing organizations would seek greater clarifications and opportunities to more specifically delineate the role and practice of massage therapists. Yet, simply casting a wider net for the definition of massage in an effort to include more individuals within the regulatory umbrella is not necessarily acting within the interest of public safety. Report p. 2.

Mr. Lowe states the following regarding the regulatory efforts of the Utah Division of Occupational and Professional Licensing to further "clarify the definition of massage therapy":

> The Utah DOL definition as a whole is consistent with other accepted definitions of massage in the profession. In particular it agrees with the definition provided by the National Center for Complementary and Alternative Medicine, at the National Institute of Health, which states, "in general therapists press, rub, and otherwise manipulate the muscles and other soft tissues of the body. People use massage for a variety of health related purposes, including to relieve pain, rehabilitate sports injuries, reduce stress, increase relaxation, address anxiety and depression, and aid general well

being."

It appears that the effort to expand the definition of massage with this practice act rule is to cast a wider net of regulation over a larger number of individuals in the hopes that this effort could reduce the number of people who are operating illicit massage establishments, but not calling their specific practice "massage therapy." While I understand the intent of the board's actions, the conceptual and semantic repercussions of this action are problematic.

There is no doubt that massage therapy includes "contact with movement, involving the touching of the clothed or unclothed body." Yet, what follows is an erroneous and implied assumption that any activity which involves said 'contact with movement' should be defined as massage. There are numerous healing arts practices such as Alexander Technique, Feldenkrais Method, Trager Method, Relexology, and Polarity Therapy, just to name a few, which involve contact with movement. However, these practices are not by definition massage therapy, and are routinely exempted from massage therapy methodologies as massage therapy. A defining difference being that these modalities are not massage oriented, which is direct intervention in soft-tissue (muscle, fascia, ligament, tendon)function.

It is highly problematic and inconsistent for the board to simply state that any activity involving contact with movement is by nature massage therapy and consequently subject to regulation under the massage therapy practice act. In addition to the aforementioned healing arts practices, numerous other practices such as yoga, martial arts, or even more traditional health care practices such as chiropractic or acupuncture could also fall under this definition. Report. P. 3-4.

Based on the foregoing. Mr. Lowe gave his expert opinion:

It is my expert opinion that this current proposed rule change in the definition of massage therapy extends beyond the scope of accepted definitions and understanding. Effective enforcement of licensing laws for public safety are predicated on rational and reasonable definitions of scope of practice for that

licensing law. While I see the intent beyond the rule change, the wording of the change has served to cause greater confusion around the implementation of the Massage Practice Therapy Act.

The chief challenge remains to enforce the existing stature and rules around massage therapy based on the prior existing broader definition of massage, rather than regulating by application of only one of the defining characteristics included in the law.

On the Division's website is an application for a Massage Therapy license, including a curriculum list. The applicant is expected to list the courses he or she has completed, including the following requirements:

Anatomy, Physiology and Kinesiology - 125 hours minimum

Massage Theory Including the Five Basic Swedish Massage Strokes - 285 hours minimum

Professional Standards, Ethics and Business Practices - 35 hours minimum.

Sanitation and Universal Precautions Including CPR and First Aid - 15 hours minimum.

Clinic - 100 hours minimum

Pathology - 40 hours minimum

Other Related Massage Subjects as Approved by the Division - no specific requirement

Total hours - 600 hours minimum.

The application also includes "a criminal background check and fingerprint search".

Plaintiffs submitted a course description of the Professional Massage Therapy Program at the Utah College of Massage Therapy. The cost of the program is $11,828.17, plus books and supplies at $920.99. The course, if taken full time, will take 32 weeks, or 52 weeks, in the evening. R.353-355.

SUMMARY OF ARGUMENTS

The regulated profession of massage therapy is defined by statute, and is a healing art. DOPL and the Massage Board have reduced it to a caricature with a Rule which prohibits any person for "rubbing" another for a fee. The enforcement of the rule is arbitrary and capricious and the Rule and enforcement deny Plaintiffs Due Process. On one hand, DOPL officials say that putting lotion on the skin is a "comment" purpose; and on the other hand they cite properly licensed Estheticians merely because of who they may associate with. The chief investigator says she is nearly overwhelmed with cases of "people touching each other', and the reign of terror continues. The Rule is not a legitimate attempt to aid enforcement of the law, but is an attempt to become "morality police" without statutory authority, guidelines or training.

The Rule at issue is arbitrary, capricious, confusing and unconstitutionally vague, thus rending the underlying statute vague as well.

ARGUMENT

POINT I

THE MASSAGE RULE AT ISSUE IS NOT SUPPORTED BY SUBSTANTIAL FACTS.

According to Utah Code Ann. § 63G-3-602:

> (1)(a) Any person aggrieved by a rule may obtain judicial review of the rule by filing a complaint with the county clerk in the district court where the person resides or in the district court of Salt Lake County.
>
> (2)(b)When seeking judicial review of a rule, the person need not exhaust that person's administrative remedies if:
>
> > (i) less than six months has passed since the date that the rule became effective and the person had submitted verbal or written comments on the rule during the public comment period. (Emphasis added).

Defendants acknowledge Plaintiff XXX filed written comments in opposition to the Rule, on or about January 17, 2012; and that Plaintiff XXX and others made an oral presentation to a board meeting on January 17, 2012. Defendants further acknowledge that these actions "constitutes exhaustion of administrative remedies as required by the Utah Administrative Rulemaking Act. R. 160.

When an aggrieved party challenges a Rule in a Declaratory Judgment proceeding, the responding agency must file a responsive pleading, and must "file the administrative record of the rule, if any, with its responsive pleading." See Utah Code

Ann. § 63G-3-602. While the Division filed a responsive pleading, they did not supply the full "record", which should include a transcript of the hearing, and the meetings at which the rule change was discussed and adopted. A motion to compel the filing of the complete record (R. 224) was denied by Ruling dated 4/23/13, (R. 624). Defendants countered that they had supplied to Plaintiffs the audio recordings of meetings where the Rule had been discussed and voted upon. Defendants further stated that the State only pays for transcripts for indigent defendants in criminal matters. (R. 384-385). Both Defendants and the Court missed the point, that the statute specifically puts the burden on the agency to provide the entire record. According to Utah Code Ann. § 63G-3-602(4):

> The district court may grant relief to the petitioner by:
>
> (a) declaring the rule invalid if the court finds that:
>
> > (ii) the rule is not supported by substantial evidence when viewed in light of the whole administrative record.

The Court did hear testimony from Sharon Muir, the Chair of the State Massage Board. This Board consists of four licensed massage therapists, and one member of the general public. The Board's duties include "Recommending to the diurector appropriate rules." Utah Code Ann. § 58-1-202. The Court made Findings

of Fact based on Ms. Muir's testimony:

> 3. The Court found Ms. Muir to be credible, yet she too was heavily biased as an advocate of the State's position. Nonetheless, Ms. Muir demonstrated to the Court that she was an expert on massage therapy (and Reiki) based on her backgrounds and qualifications. Accordingly, the Court gave her opinions regarding the field of massage therapy great weight. In Ms. Muir's opinion, the conduct undertaken by the Plaintiffs - i.e., the alleged light touching on the arms, legs and back – did constitute massage, and in fact was a recognized modality known as "effleurage".
>
> 4. Ms. Muir also testified that it is important to regulate the filed of massage therapy and to require licenses to practice it in order to protect the integrity of the massage therapy profession.
>
> 69. According to Ms. Muir who was on the governing Board and had first hand knowledge of the Rule's passage, the Board promulgated Rule 156 (Rule"), Utah Admin. Code R156-47b, to define the term "manipulate" in the broadest sense possible - i.e., to reflect that contact plus any movement whatsoever, constitutes manipulation. The reason for such a broad construction was twofold, First, to make certain that Reike - which involves contact but no manipulation of the skin, i.e. channeling energy for alleged healing-durative purposes by contact with the skin - is not subject to the Massage Therapy Act. Second, to broadly define massage therapy to reflect the generally accepted notions of massage therapy: for example, deeming "light touch" as a modality of massage. (Emphasis in original)

The Court accepted Ms. Muir's testimony as to the needs and reasons for the rule at face value; including her characterizations of the testimony of those who made presentations at Board meetings. This is the whole point of the statute which requires the Court to review the "whole administrative record", rather than to just take the

word of those who have an interest in upholding the rule.

Further, Ms. Muir testified as a fact witness, as head of the Board. She also testified as an expert witness. Plaintiffs filed a Motion to Exclude Ms.Muir as an expert. R. 564. Plaintiffs pointed out her lack of expertise on some of the matters on which she offered testimony, such as the need to use regulations to protect the integrity of the profession (Finding 4); and they also pointed out that she was essentially testifying as an expert as to the reasonableness of her own action in adopting the rule, which is an obvious conflict of interest. She testified that she felt the Board and Division needed to do something to help law enforcement officials, who claimed that they needed additional regulation to fight prostitution. Ms. Muir has no training or expertise in the social problem of prostitution, and she has no law enforcement authority; but clearly she felt moved upon to "protect the public" from such activity, despite the fact she had no authority to do so. All of this would have been clear if the whole administrative record" had been filed with the Court, as required by law. Instead, Ms. Muir was allowed to say that she felt the Rule was necessary to protect the public, based on input from law enforcement officers. She

most certainly should not have been allowed to do this.[1]

It seems very clear from the "plain language" of the statute that it is the duty of the Court to review the "whole administrative record", and make a determination as to whether the rule is "supported by substantial evidence". The Defendants claim that providing audio tapes to Plaintiffs of hearings constitutes filing "the administrative record of the rule, if any"; but when viewed together with the requirement that the court determine, "whether the rule is supported by "substantial evidence when viewed in light of the whole administrative record", it is obvious that it is not the duty of Plaintiffs to prepare the record for the court to review. The Court below suggested that, if Plaintiffs wanted the Court to review the whole record, they could prepare a transcript as they would do in an appeal; but that certainly has no support in the statute. The burden is on the State to show that the Rule was based on substantial evidence, a burden the State made no attempt to bear. The Court has specific authority and direction to delve into the facts upon which the Rule is based. Is the Court expected to listen to audio recordings? That requirement makes no sense; but how else will the Court make the determination that the law requires it to

[1] There is no clear record of the Court ever ruling on Plaintiffs' Motion, but obviously the Court refused to exclude the testimony.

make? Why then, did the State not "file [the audio recordings] with its responsive pleading", rather than produce the recording to Plaintiffs as part of its discovery? Obviously, the Court did not listen to the recordings, or otherwise review the "whole administrative record". The interpretation of the statute endorsed by Defendants and the Court is not within reason. The failure of the Court to review whether the Rule was supported by substantial evidence, and to use the whole record, is fatal to the trial court's entire decision upholding the validity of the rule. Thus, the trial Court denied Plaintiffs Due Process of law by not requiring the State to justify its Rule, using its record, as required by statute. For this reason alone, the Judgment of the District Court should be reversed, and the matter should be remanded for proceedings in conformity with statute.

POINT IB

THE JUDGMENT OF THE COURT BELOW IS INTERNALLY INCONSISTENT AND IS NOT IN ACCORD WITH THE FACTS OR THE LAW.

The Declaratory Judgment Act, Utah Code Ann. § 78B-6-401, et seq., grants a district court "the power to issue declaratory judgments determining rights, status, and other legal relationships within its respective jurisdiction." This includes the power to interpret a statute, see Wasatch County v. Okelberry, 2008 UT 10 (Utah

2008), or to determine the constitutionality of a statute, see Grand County v. Emery County, 52 P.3d 1148, 2002 UT 57 (Utah 2002). The Declaratory Judgment Act specifically allows parties who may be in danger of enforcement action under a statute or rule to challenge either the validity or the interpretation of the statute without fear of that enforcement action.

Utah Code Ann. § 63G-3-602 (4), which specifically relates to Judicial review of rules, states specifically that the Court may grant relief by:

> (a) declaring the rule invalid if the court finds that:
>
> > (i) the rule violates constitutional or statutory law or the agency does not have the legal authority to make the rule.

The Utah Supreme Court has made it clear that the statute governs what the law is, not an administrative rule; and the Rule cannot add to or subtract from the statute. See Ferro v. Utah Dept. Of Commerce, 828 P.2d 507, 512 (n.7)(Utah App. 1992):

> Given the established rule that agency regulations may not "abridge, enlarge, extend or modify the statute creating the right or imposing the duty, IML Freight, Inc. v. Ottoson, 538 P.2d 296, 297 (Utah 1975), it is the stature, not the rule, that governs. If an agency regulation is not in harmony with the statute, it is invalid. (Emphasis added).

See also Rocky Mountain Energy v. Tax Com'n, 852 P.2d 284, 287 (Utah 1993): Rules are subordinate to statutes and cannot confer greater rights or disabilities.";

and Dorsey v. Department of Workforce Services, 2012 UT App 364 (Utah App. 2012). The Rule at issue here is not in harmony with the statute, and it seeks to greatly increase the reach of the Division over those not regulated by the statute. Thus, it is invalid.

The State must also show that the Rule does not exceed its authority, and does not modify the statute. The State claims that local law enforcement officials expressed concerns about non-therapeutic establishments or practitioners who might be engaged in prostitution or "human trafficking". Those activities are unlawful in themselves. As Plaintiffs' expert has stated, it is not a valid use of the Massage Therapy Practice Act to turn the Division into a police agency which investigates and prosecutes activity which is not within the statutory jurisdiction or authority of the Division. Abraham Lincoln is reputed to have said: "Calling a lamb's tale a leg does not make it one."[2] Calling a wide range of non-therapeutic touching "massage therapy", does not make it massage therapy. It demeans the practice of massage therapy and the Division to stoop to such ridiculous manipulation of a valid regulatory law. The Rule is arbitrary and capricious in that it seeks to punish

[2] Reminiscences of Abraham Lincoln by Distinguished men of his Time, Harper and Brothers Publishers, New York 1909 p. 242.

Plaintiffs and others for conduct which is not within the grant of authority to the Division of Occupational and Professional Licensing.

The trial Court agreed with Plaintiffs as it granted Partial Summary Judgment in their favor on December 2, 2013, stating in part:

> The issue before the Court is whether the Division is authorized to apply this definition to individuals or organizations outside the scope of their charge. The Division clearly does not have the authority to claim that any individual who has contact with movement with a third party is performing massage. See Mt. Olympus Waters, Inc. 877 P.2d at 1273.
>
> Plaintiffs' Motion for Summary Judgment concedes that the Division has the right to determine the parameters of operation of a massage therapist. The Division may, within the scope of the Act, define the range of activities that a therapist is allowed to do or is prohibited from doing. However, the Division may not define the scope of activities including manipulation, of individuals that are not licensed massage therapists or holding themselves out as massage therapists. R. 781. (Emphasis added).

The Partial Summary Judgment appeared to be a complete exoneration of the position of Plaintiffs. The Division was clearly doing exactly what the Court said they must not do: They were defining the unlawful practice of massage therapy simply by claiming "that any individual who has contact with movement with a third party is performing massage". Based on the ruling, Plaintiffs prepared for trial on the remaining issues, whether the individual Plaintiffs were doing something more than "touch plus movement", and were, in fact either "licensed massage therapists or

holding themselves out as massage therapists." It seemed pretty obvious that they were not, and were excluded from the Division's authority by the Partial Summary Judgment.

Trial was set for September 17, 2014. Defendants had the burden of proof as to whether specific Plaintiffs were unlawfully practicing massage therapy, and went forward. Defendant started right out by stating that DOPL investigators determined that:

> there were light touch - medium touch that was going on.
>
> They also said, some of them that they were using oils and lotions on the clients, R. 1031.
>
> there was also a statement from one of the client[s] that says he got light to medium touch and muscle touch. R. 1032.
>
> Ms. Pettley explains to them that what they're doing constitutes massage. She goes through the code with them and she says, Look, when you're doing any kind of touching with movement on the skin, when you're rubbing oils and lotions, that's considered massage. R. 1033. [3]

Plaintiffs' counsel objected to this evidence as precluded by the partial Summary Judgment. The Court took a recess, and returned to the bench to read in

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[3] Plaintiffs ordered a transcript and used excerpts in a motion; but the record does not show that the original transcript was filed with the court.

a "clarified" order by stating:

> However the Division may not define the scope of activities including manipulation, of individuals that are not licensed massage therapists or holding themselves out, by word or act, as massage therapists.

The State took the position that the "clarification" voided the Partial Summary Judgment which clearly ruled that the State could not consider "touch plus movement" as massage therapy without more. The clarification, however, did not alter or even refer to, the ruling that the Division does not have "the authority to claim that any individual who has contact with movement with a third party is performing massage."

The trial was thereafter continued, as the clarification materially affected the issues to be tried, and the presentations of the parties. Plaintiffs filed a Motion to Amend, pointing out that the original Ruling was legally correct, and that a "clarification" was not warranted. In fact, the addition of the three words to the Partial Summary Judgment was anything but a "clarification." Plaintiff pointed this out, and stated: "the problem with this clarification is that it is self contradictory and nearly impossible to comprehend." R. 1030.

Shortly after the Motion was filed, the Judge retired, leaving the Motion to be heard by an interim judge, who denied the Motion without comment. R. 1071.

The trial was reset for October 22 and 23, 2015, with a third Judge who had not been involved in the case over a period of almost three years. The Court now appeared to agree with the State that "touch plus movement" was sufficient to constitute the practice of massage therapy; but he did not signal the total shift in the Court's position, prior to trial.

Defendants presented testimony in support of their contention that "touch plus movement" was the practice of massage, despite the prior court ruling to the contrary. The State called three witnesses, including Sharon Muir, as referred to above. The State also called a police officer, Lt. Cupello; but "The Court found Lieutenant Cupello's testimony to be of little value." R. 1274. The third witness was Allyson Pettley, who had been the Division's chief investigator when the case was initiated, but who had been promoted to Bureau Chief at the time of trial. Her testimony was set out in some detail in the Statement of Facts above. Ms. Pettley and Ms. Muir especially decried the use of lotion in any activity involving "rubbing", as previously mentioned. Ms. Pettley contended that the use of lotion in addition to "rubbing" was most clearly the practice of massage therapy. This totally contradicted the previous testimony of Ms. Stewart, the former Bureau Chief, that the act of rubbing lotion on another person is more like esthetics:

A master esthetician is doing skin treatment.

> Placing lotion on the skin is a skin treatment. And, therefore would fall under a cosmetic treatment of the skin, which is part of the definition of the scope of practice for a master esthetician. R. 321-322.

So, "touch plus movement", especially with lotion, is massage, unless it isn't. And the state made no attempt to differentiate between the two disciplines. And, of course, the Division cannot differentiate between them either. A master esthetician, XXX, apparently for no other reason than that she was employed by Plaintiffs, was prosecuted in Davis County District Court for massage without a license, as a Class A Misdemeanor, through the efforts of Defendants was dismissed at Preliminary Hearing in Davis County, Case No. XXXX, on July 8, 2013. The Court, in its Dismissal Order, found the evidence was "insufficient to support a reasonable belief that Defendant practiced massage without a license." (Order dated July 8, 2013). That was followed by an administrative citation by DOPL in which both Ms. Pettley and Ms. Stewart participated. The citation was dismissed by their own hearing officer, because they failed to explain the difference between massage therapy and esthetics. It is clear, therefore, that "touch plus movement" without context, is not unlawful massage practice. Despite this. Ms. Pettley continues to claim that anyone who is hired "to provide rubbing for him, that would be a violation of the Massage

Therapy Practice Act." It seems pretty obvious that this is not true; but the Court validated that position in its final Judgment.

The Court took the matter under advisement and issued Findings of Fact and Conclusions of Law on November 13, 2015. The Court made the following Findings of Fact, in part:

> 3. The Court found Ms. Muir to be credible, yet she too was heavily biased as an advocate of the State's position. Nonetheless, Ms. Muir demonstrated to the Court that she was an expert on massage therapy (and Reiki) based on her backgrounds and qualifications. Accordingly, the Court gave her opinions regarding the field of massage therapy great weight. In Ms. Muir's opinion, the conduct undertaken by the Plaintiffs - i.e., the alleged light touching on the arms, legs and back – did constitute massage, and in fact was a recognized modality known as "effleurage".
>
> 4. Ms. Muir also testified that it is important to regulate the filed of massage therapy and to requite licenses to practice it in order to protect the integrity of the massage therapy profession.
>
> 10. Plaintiffs also called as an expert, Whitney Lowe. Mr. Lowe, through his background and experience, was also an expert in massage therapy and therefore, the Court treated him as such.
>
> 11. Mr. Lowe was called primarily to talk about the alleged "unfairness" of the administrative rule, see Utah Admin. Code R156-47b, on the grounds that defining manipulation as any "touch plus movement" was too broad a definition. Notwithstanding Mr. Lowe's testimony, the issue of the validity of said rule is a legal question and therefore, Mr. Lowe's testimony was only minimally helpful on that issue (because, as with Ms. Muir, the Court disregarded any purely legal conclusions or opinions.)

12. Although Mr. Lowe did not offer opinions concerning whether the Plaintiffs' light touch and the use of oils in this matter constituted massage, per se, he did agree that a generally accepted definition of massage includes activities in which therapists "press, rub, and otherwise manipulate the muscles and other soft tissues of the body. People use massage for a variety of health-related purposes, including to relieve pain, rehabilitate sports injuries, reduce stress, increase relaxation, address anxiety and depression, and aid general well-being." (Lowe Expert Report, Pls.' Ex. 5, at 3.) Mr. Lowe also testified that skin was a soft tissue and that placing oil on the body, or gliding across the skin could constitute a massage.

69. According to Ms. Muir who was on the governing Board and had first hand knowledge of the Rule's passage, the Board promulgated Rule 156 (Rule"), Utah Admin. Code R156-47b, to define the term "manipulate" in the broadest sense possible - i.e., to reflect that contact plus any movement whatsoever, constitutes manipulation. The reason for such a broad construction was twofold, First,. To make certain that Reike - which involves contact but no manipulation of the skin, i.e. channeling energy for alleged healing-durative purposes by contact with the skin - is not subject to the Massage Therapy Act. Second, to broadly define massage therapy to reflect the generally accepted notions of massage therapy: for example, deeming "light touch" as a modality of massage. (Emphasis in original).

70. Plaintiffs argue that such a broad definition of the term "manipulation" would effectively swallow the entire act. Plaintiffs follow that in doing so, DOPL has, by rule, expanded its regulatory authority to cover SOB's. While the Court agrees that DOPL may not, by rule, expand its regulatory scope beyond the governing statue, the Court concludes that the rule did not have that affect (sic).

71. For example, DOPL could not pass a rule that would have the affect (sic) of broadening the Act to encompass certain acts of intimate sexual conduct that are not "massage therapy." That, however, is not what the Rule does.

72. In fact, the Honorable L.A. Dever previously ruled that such action by

DOPL would be inappropriate. In his December 2, 2013 Order, as amended by his Order of September 17, 2014, Judge Dever held, "The Division may not define the scope of activities including manipulation, of individuals that are not licensed massage therapists or holding themselves out, by word or act, as massage therapists." The Court interprets that to mean that a rule may not empower DOPL to regulate people or conduct that the legislature has not permitted. (Emphasis added)

73. Here, however, the Rule is simply clarifying the statue; it is not expanding its reach to persons who would not ordinarily be covered by the Act. The rule makes it clear that any movement with contact - including light touch massage, which is a recognized modality of massage called "effluerage" - constitutes manipulation. See Utah Admin. Code R156-47b(10). The Rule did not cause DOPL to widen their regulatory web outside of the realm of massage therapuy.

82. In order to constitute massage therapy requiring a license, the following must also be shown: a) there must be payment for the services; b) the manipulation must be systematic: c) the manipulation must be to soft tissue: and d) the manipulation must be for one of the enumerated purposes stated in the statute. See e.g. Sec. 58-47b-102.

83. By promulgating a rule that broadly defined "manipulation." DOPL was not acting inconsistent with prior practice and did not cause people who were not already subject to the act, to suddenly become subject to the Act's reach. The Rule was not an impermissible use of DOPL's authority and had a reasonable and rational basis - to aid DOPL in regulating massage therapy and to help enforce its licensure provisioned.

The Court, specifically in Finding No. 82, appeared to agree that some restrictions were in order:

That paragraph contains two important restrictions: that touch plus movement must be "systematic" in order to be massage therapy; and it must be for purposes

enumerated in the statute. Those purposes have changed back and forth a bit with changes in the statute in 2011 and in 2012. The Division has changed NOTHING about its enforcement in accord with any statutory changes. The Court appears to be requiring them to do so. The 2011 amendment states that massage therapy may be for a "recreational" purpose, and the massage does not even have to "therapeutic". The 2012 change added back the requirement that massage therapy is therapeutic, and removed the "recreational" purpose. It left, however, the 2011 language "other purpose" at the end; and the Division has claimed that it was not really changed at all, because "recreational" is clearly an "other" purpose. Plaintiffs believe that the removal at the same time that the word "therapeutic" was restored suggests a return to a more healing-directed model. The Rule, of course, was promulgated before the 2012 changes were enacted; and the Division steadfastly claims that the changes in the law in 2012 make no difference as to what is and is not massage therapy. That position, once again, was validated by the Court, despite the fact that it has no "rational basis".

But then, the Court denied ALL relief to Plaintiffs, nullifying all of the language in Judge Dever's previous Partial Summary Judgment, and in its own Findings, reducing them to dicta.

The Court entered the following Conclusions of Law:

> 3. The rule promulgated by DOPL defining "manipulation" as any "touch plus contact" is a valid exercise of DOPL's rulemaking authority and is upheld.
>
> 4. All of Plaintiff's claims are to be dismissed with prejudice. All parties are to pay their costs and fees incurred in this matter.

And, after denying Plaintiffs' Motions to Amend or clarify the ruling. the Court entered Judgment:

> This matter is hereby DISMISSED WITH PREJUDICE. Judgment is hereby entered in favor of the Defendants. This shall stand as the final Order herein, fully and finally resolving this case, and any and all claims herein.

There is no explanation for this inconsistent ruling. Plaintiffs sued under the Declaratory Judgment Act to obtain Court guidance on the application of the statute and the validity of the Rule. That Rule cannot be read in a vacuum; it must be read in conjunction with the statements of the Division, and the track record of Division enforcement. It is certainly clear that the Division does indeed claim that any individual who has contact with movement with a third party is performing massage; and it enforces that view of the Rule, which is obviously invalid. The Court has told them they should not do this; and then has said it does not intend to give its opinion the force of law, thus allowing them to continue their unlawful enforcement. The Order should be entered in accord with the Partial Summary Judgment as amended,

and in accord with the final Findings of Fact that add additional guidelines for enforcement. Pursuant to the Declaratory Judgment statute, Plaintiffs are entitled to an order declaring their rights and responsibilities. The Court granted this, and then pulled it away without explanation. This is manifest error, and it should be reversed.

POINT II

THE MASSAGE RULE AT ISSUE IS ARBITRARY, CAPRICIOUS, AND IS OUTSIDE OF THE SCOPE OF THE STATUTE IT SEEKS TO "CLARIFY".

The burden is to be on the State to prove that the Rule is not "arbitrary and capricious", and is supported by substantial evidence. The Rule is based on an overly broad reading of the Massage Therapy Practice Act, one which renders the statute itself as unconstitutionally overbroad as applied to Plaintiff, as it sweeps within its ambit much constitutionally protected conduct or speech. See XXXXX, 768 XXXXX(Utah 1989) and XXXXXXX, 2009 UT XXXXXX (Utah 2009). See also the recent decision of this Court in XXXXX, 2016 UT App XXX.[4] While a massage is not directly speech, all parties agree that the right of one person to touch another is most fundamental. R. 249-250. Many entertainers touch audience members as part

[4] While the Court did not reach the constitutional issues, it rejected an expansive definition of "sexual activity" as outside the language of the statute.

of the entertainment. This is especially true for exotic dancers, for whom some touch is intrinsic to the performance. It is also rendered hopelessly vague in its attempts to prohibit all touching. The practice of massage therapy as defined by the Utah code includes a substantial list of activities. "Massage therapy " must be "systematic", and is part of an overall treatment akin to physical therapy. The use of this statute and this Rule to prevent ALL touching of one person by another in which there is any form of remuneration, without a professional license, is arbitrary, capricious, and violates the general rule that legislation and regulations must have a "rational basis".

Plaintiffs here admit that they may put their hands on another person's skin, and move them. That, in and of itself is obviously not the practice of massage therapy as defined by statute. It is at least as likely that it is within the purview of a master esthetician. See again Utah Code Ann. § 58-11a-102(34)(a)(ii):

> (34) (a) "Practice of master-level esthetics" means:
>
> > (ii) lymphatic massage by manual or other means as defined by rule.

Rule 156-11a-102, states, in part:

> (19) "Lymphatic massage" as used in Subsection 58-11a-102(34(a)(ii) and 58-11)(e), means a method using a light rhythmic pressure applied by manual or other means to the skin using specific lymphatic maneuvers to promote drainage of the lymphatic fluid through the tissue.

> (20) "Manipulating", as used in Subsection 58-11a-102(34)(a), means applying a light pressure by hands to the skin.

So, manipulation is not quite the same under the two rules, each of which purport to regulate "massage". As the District Court said in XXX, a lay person is not likely to be qualified to tell the difference. And, Ms. Pettley certainly qualifies as a lay person, as she is not trained in either discipline and is essentially self-taught. What appears to be the dividing line between the two disciplines is the word "therapy", not the word "massage". And the Rule at issue here has allowed the Division to engage in wholesale enforcement activity without worrying about whether the touching has anything to do with "therapy." That is what renders the Rule arbitrary, capricious, and unconstitutionally vague. It is what encouraged the Division to prosecute a license Master Esthetician in the District Court, and failing that, to pursue administrative remedies, which also failed. Lymphatic massage, pursuant to Utah Code Ann. § 58-11a-102(34)(i), can be performed on pretty much any part of the body, including "head, face, neck, torso, abdomen, back, arms, legs, feet, eyebrows, or eyelashes." If that misses any part of the body, it is certainly not obvious. Note that the word "movement" is not included as a necessary part of "lymphatic massage", though obviously it is not precluded. Does it follow, that touch, involving light

pressure, by hands on the skin, is the unlawful practice of esthetics? That sounds preposterous; but it is no more so than the Rule at issue in this case.

The legislature clearly did not contemplate the sheer volume and variety of actions that are now required to be licensed, if done for a fee. R. 339-346. Given Ms. Pettley's personally aggressive stance concerning those who touch others, it is anyone's guess where the line may be. She agrees that enforcement of the Rule may be "subjective", and that she has some "discretion" as to how and when it is enforced. Id.. What kind of touching might bring the weight of the State down on the heads of the offender? Would this include something as innocuous as a waitress touching a customer she is waiting on in a restaurant? Some service staff believe that tipping increases with such signs of friendliness. What about a trainer in a gym, who does nothing more than guide someone as to how to exercise or use a piece of equipment? How many people must live in fear of the stray "touch with movement", if done in any kind of commercial setting?[5]

The target of this action is the arbitrary, capricious and overbroad interpretation

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[5] Utah Code Ann. § 76-10-1302 prohibits masturbation of one person by another for a fee; but that is only a Class B misdemeanor. Lotion might well be used for lubrication. Could the legislature rationally have made rubbing a person's arm a Class A misdemeanor?

of the Act by the Division, and its in-house investigators. That policy is most specifically contained in the Rule at issue; but Ms. Pettley insists that the Division has pursued its current policies based on an "understanding", even before the Rule was adopted.

The Division has taken upon itself the authority to construe the Massage Therapy Practice Act in an extremely broad manner; and clearly their determinations have swallowed up the act as written. Such a policy gives an officer, either one of their own, or an officer in a political subdivision, an unlawful amount of discretion to decide when a crime has been committed. Such discretion was prohibited by the Supreme Court, in Houston v. Hill, 482 U.S. 451, 465 (1987):

> Laws that provide the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them . . . [are] not narrowly tailored to prohibit only disorderly conduct or fighting words.

A Defendant is entitled to a criminal statute which has clear standards and guidelines, so the Defendant will know when he or she has violated it. As the U. S. Supreme Court stated in Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972):

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act

> accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards fo those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked. (Emphasis added).

The Tenth Circuit Court, citing Kolender v. Lawson, 461 U.S. 352, 357 (1983), held, in U.S. v. Apollo Energies, 611 F.3d 679, 687 (10th Cir. 2010):

> First, due process requires citizens be given fair notice of what conduct is criminal. A criminal statute cannot be so vague that "ordinary people" are uncertain of its meaning. See Kolender v. Lawson, 461 U.S. 352, 357 (1983). However, even when a statute is specific about what acts are criminal, our due process analysis is not complete. When, as here, predicate acts which result in criminal violations are commonly and ordinarily not criminal, we must ask the fair notice question yet again.

The Utah Supreme Court, in State v. Mooney, 2004 UT 49, 98 P. 3d 420 (Utah 2004), a case with First Amendment implications, also cited Kolender:

> Both the United States and Utah Constitutions protect citizens from deprivation of liberty or property absent due process of law. U.S. Const. Amends V & XIV, §1; Utah Const. art. I, §7. The Utah Controlled Substances Act imposes substantial criminal penalties on those found guilty of violating its provisions. Our constitutional guarantees of due process require that penal statutes define criminal offenses "with sufficient definiteness that ordinary people understand what conduct is prohibited." Kolender v. Lawson, 461 U.S. 352, 357 (1983);

Ms. Pettley is determined to arrest and prosecute several people who have committed what most observers would agree is an innocent act. The policy and the Rule allow police officers to decide for themselves, based on a "suspicion" when "contact plus movement" is a crime. It seems pretty clear that a determination is being made based on be a suspicion of prostitution or some other "inappropriate" activity. The Division is charged with regulating and policing its own practitioners; but the law has not given the Division general police powers. They have taken these powers upon themselves without proper legislative authority, apparently in an effort to fight "prostitution and human trafficking".

Ms. Pettley, has very limited training as a "special function" law enforcement officer. She has no particular education for her position; and she apparently does not even have much supervision. It is her intent to go out and find people who touch other people for a fee, and to cite them for a Class A Misdemeanor. Certainly, the suppression of these vices is not part of the regulation of massage. Yet the Division claims that the passage of this one sentence rule gives them that authority.

The problem here is that the Rule is apparently designed, and clearly being enforced, in a manner aimed at adult entertainers. It is only these people, looked

down upon by the authorities, who are the objects of criminal enforcement. The dividing line between "incidental touching" and that which will result in an arrest, is entirely in the minds of the law enforcement officers.

The burden surely must be on the government to produce SOME evidence that such draconian use of the law is both necessary and proper. The enforcement activities of the Division and its allies are not contemplated by the Statute; and the Division has no authority to add to the law, especially in light of the specific determination of the legislature not to enact this change.

With this Rule, the Division has strayed out of the regulation of a profession, and turned its main focus onto people who touch other people, without being part of the profession. The actions at issue here are actions capable of being performed by any person upon any person. It does not take any training whatsoever for one person to say to another: "let me just rub your back and shoulders, and make you relax." If such activity is the unlicenced practice of a regulated profession, there is no validity whatsoever in the issuance of a license or in regulation of the profession. In fact, massage therapy is much more than that. Defendants, prior to filing their Answer to Plaintiffs' Complaint, filed a Motion to Dismiss the Complaint. In their Memorandum in Support of the Motion, they entitled a whole section of their

Memorandum:

> PLAINTIFF'S CONTENTION THAT MASSAGE THERAPY IS A SPECIFICALLY DEFINED PROFESSION HAS NO BASIS IN STATUTORY CONSTRUCTION OR LEGISLATIVE HISTORY.
>
> Plaintiff makes a tortured argument that massage therapy is a specifically-defined profession but provides no legislative history or decisional law to support that argument. R. 38.

They denied it again in Paragraph 7 of their Answer to Plaintiff's Complaint: "Defendants also deny that Massage Therapy is a specifically defined profession." R. 159. That statement is so obviously false and nonsensical as to need no further rebuttal. If it is not a defined profession, what is it? Why is it regulated and licensed by the Division of Professional Licensing; and why does it take months of specific schooling and a proficiency test to obtain a license?

Defendant also pointed out below that the legislature changed the definitions in its 2011 amendments to eliminate the requirement that massage therapy be therapeutic. So, the State seems to agree that, in its zeal to stop people from touching each other, an effort was made to destroy massage therapy as a profession. Such an admission is mind boggling. Much of the damage the legislature did to the profession in 2011 was reversed in 2012, and massage therapy is once again therapeutic. If the 2011 amendments removed the need for massage to be therapeutic, and the 2012

amendments restored that requirement, how can those changes be totally ignored by the Division? How can the Division claim that its enforcement has undergone no changes as the statute expanded and contracted? The changes clearly are contradictory, and appear to reflect confusion in what is to be accomplished. Apparently, the Rule at issue has been deemed by the Division to insulate it from legislative changes; and the Division has no authority to do so in this manner.

It cannot be emphasized too much that the Division seeks to criminally prosecute, those who engage in the touching of another person's skin for commercial purposes. The testimony of the Bureau Manager and her investigator is clear. It is their intent to actually license touching by one person of another, and to require 600 hours of training, at a cost of thousands of dollars. The scope of the power grab is simply breathtaking. It obviously is not reasonable for the Division to take upon itself this kind of authority.

See again the decision in xxxxxx. That decision, rendered before the 2011 amendments, completely rejects the overbroad authority claimed by the Division. That decision is very much at odds with the decision of the trial court in this matter. Perhaps those amendments were intended, in part, to overturn that decision, or to preclude others like it; but those changes were repealed only one year later.

At the very time when a new bill defining the practice of massage therapy was introduced in the legislature, the Division was attempting to amend the law by using its rule-making powers. Ms. Stewart denies involvement in the 2012 legislative activity, R. 327; but it is an unlikely coincidence that the exact same language defining "manipulation" was simultaneously introduced in the legislature and by the Division. Ms. Stewart and her cohorts were not dissuaded by the removal of the identical language from the 2012 Bill. So, the legislature declined to pass the new definition, apparently because of concerns by other professionals. Yet the Division claims that the definition can be "implied" within the existing law. That claim is preposterous. The Division does not appear to making a good faith effort to enforce the law as it exists, but instead to engage in a moral crusade against perceived evils which does not fall within their statutory authority.

In Clayton v. Steinagel, 885 F.Supp.2d 1212 (D. Utah 2012), Plaintiffs sought declaratory relief in Federal Court against the Division of Professional Licensing. They claimed that the Division's licensing and regulation of the practice of African hair braiding as cosmetology was "arbitrary, excessive, and anachronistic". The Plaintiff there claimed the denial of rights under:

the Due Process, Privileges or Immunities, and Equal Protection Clauses of the

> Fourteenth Amendment of the United States Constitution as well as the Inherent and Inalienable Rights, Due Process, and Uniform Operation Clauses of the Utah Constitution.

The Federal District Court in Utah stated the standard of proof:

> Review of both Plaintiff's Due Process and Equal protection claims must be based on the rational relation test. The Court must decide whether there is any rational connection between Utah's regulatory scheme and public health and safety when applied to Jestina. 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 public health, safety, morals or general welfare." While the fit between this interest and the means employed need not be perfect, it must be reasonable. "There must be some congruity between the means employed and the stated end or the test would be a nullity." The Supreme Court has long recognized that "a state can require high standards of qualification" to pursue an occupation, "but any qualification must have a rational connection with the applicant's fitness or capacity" to engage in the chosen profession." Courts have also made it clear that may not "treat persons performing different skills as if their professions were one and the same, i.e., . . . attempt to squeeze two professions into a single, identical mold," because this results in standards of qualification that have no rational connection to a person's actual profession. Id. At 1214.

The State countered:

> that the styling of hair, including hair braiding, requires knowledge of sanitation, sterilization, diseases of the skin and scalp as well as an understanding of business and business laws including state and local health requirements. Sanitation and sterilization requirements are necessary to protect the public and the licensed professionals from harm caused by the transmission of lice and diseases like HIV AIDS. Id.

The Court looked at the training necessary for a cosmetology license in Utah. It

found that "1400 to 1600 of the 2000 hours of the mandatory curriculum are irrelevant to African hairbraiding." It also found that "the State admits that it cannot guarantee that the subjects it claims are relevant to African hair braiding will be given more than minimal time in any cosmetology/barber school". The State did not know if any schools in Utah taught anything about African hair braiding; and admitted that the standard textbooks "total 1700 pages, but only 38 pages mention braids of any kind, much less African braids." The State also admitted that its exam to obtain a cosmetology license does not include any mention of African hair braiding. And finally, the State admitted that "it never considered African hairbraiding when creating its licensing scheme." Id. At 1216. The Court found that the State's requirement of a cosmetology license was irrational, in imposing irrelevant and burdensome requirements on African hairbraiders. Id. The District Court in Southern California reached the same conclusion in the earlier case of Cornwell v. Hamilton, 80 F.Supp.2d 1101 (1999).

Likewise, Plaintiffs claim that the application of a professional massage therapy licensing scheme to a simple process of touching the skin and moving the hands, is irrational and unconstitutional. The chief investigator for DOPL stated in her deposition that something as simple as a romantic partner who caresses her

significant other, followed by that partner buying her dinner to show appreciation, runs afoul of the law. Can anyone claim with a straight face, that this kind of contact, if remuneration follows in any form, requires 32 weeks of course work and training, at a cost of over $12,000? The arbitrary and capricious nature of the regulations enacted by the Division could not be more obvious. In fact, if the Division were not so serious, the whole thing would be nothing but laughable. This Court is urged to tell the Division that their regulations are beyond silly, and that they are indeed "arbitrary, excessive, and anachronistic", and also that they are irrelevant and unduly burdensome. The regulations deny both equal protection and substantive due process. They do not comport with the requirements of the statute, and are thus beyond the duty and authority of the Division to enact.

Obviously, it is also instructive that the Utah Legislature considered a change in the law to add this definition to the Massage Therapy Act, and declined to proceed with that change.

CONCLUSION

The Rule at issue here not only unlawfully extends the Massage Therapy Practice Act, it involves Division personnel in general law enforcement, in an apparent effort to fight "prostitution and human trafficking" and involve the Division

in an area where it has no jurisdiction, and no business. The Rule and its enforcement are entirely arbitrary and capricious, and allow the Division's "special function" investigators unlawful discretion on who and how to cite those accused of "contact with movement." The Court's power extends to reviewing that record to determine if the rule is supported by substantial facts. The record does not show substantial facts which support the division abandoning its mission to regulate a profession, in favor of persecution of those with whom the Division does not agree.

DATED this____ day of September, 2016.

W. ANDREW MCCULLOUGH, L.L.C.

_____

W. Andrew McCullough
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of September, 2016, I hand delivered two true and correct copies of the foregoing Brief of Appellant, to STANFORD PURSER, Deputy Solicitor General, 160 East 300 South, Sixth Floor, Salt Lake City, UT.

ADDENDUM A

ADDENDUM B

ADDENDUM C

ADDENDUM D