


OCT 15 2023

By  SALT LAKE COUNTY
Clerk

IN THE THIRD JUDICIAL DISTRICT, SALT LAKE COUNTY
STATE OF UTAH

ZEN HEALING ARTS, LLC, d/b/a
BEACHES BODYWORKS,
JEFF STUCKI, MIDDONAY ROMAN and
LIESA METCALF

Plaintiffs,

vs.

UTAH DEPARTMENT OF COMMERCE,
UTAH DIVISIONS OF OCCUPATIONAL
LICENSING, and JOHN DOES I-X

Defendants.

ORDER

Case No. 120900860

Judge: L.A. DEVER

The above entitled matter is before this Court on Plaintiff's Motion for Partial Summary Judgment. The Plaintiffs are requesting that the Court find that the Division's Rule R156-47b-102(8) is constitutionally overbroad, vague and violates the equal protection clause of the Constitution. The new rule states that "[m]anipulation as used in Subsection 58-47b-102(6)(b) means contact with movement over the clothed or unclothed body."

In interpreting statutes and rules, the Utah Court of Appeals has given direction to the trial court. As pointed out in State v Haltom, 2005 UT App 348, ¶ 19, 121 P.3d 42,

When interpreting statutes, our primary goal is to evince the true intent and purpose of the legislature. To discover that intent, we look first to the plain language of the statute. When examining the statutory language we assume the legislature used each term advisedly and in accordance with its ordinary meaning.

(quotations and citations omitted).

Coupled with the above, is a second directive. This directive gives guidance to the Court in reviewing administrative rules promulgated by State Agencies. As noted in Mt. Olympus Waters, Inc. v. Utah State Tax Comm'n, 877 P.2d 1271, 1273 (Ut. Ct. App. 1994).

[A valid rule] must be in harmony with its governing statute[.] Sanders Brine Shrimp v. State Tax Comm'n, 846 P.2d 1304, 1306 (Utah 1993) ("It is a long-standing principle of administrative law that an agency's rules must be consistent with its governing statutes. Thus, a rule that is out of harmony with a governing statute is invalid."). "*The authority of administrative agencies to promulgate rules and regulations 'is limited to those regulations which are consonant with the statutory framework, and neither contrary to the statute nor beyond its scope.'*" Dusty's, Inc. v. State Tax Comm'n, 842 P.2d 868, 871 n. 5 (Utah 1992) (per curiam) (quoting Crowther v. Nationwide Mut. Ins. Co., 762 P.2d 1119, 1122 (Utah App.1988)). It is up to the legislature . . . to restrict the statutory language used. [internal citation omitted]. Indeed, "an administrative interpretation out of harmony and contrary to the express provisions of a statute ... would in effect amend that statute." Olson Constr. Co. v. State Tax Comm'n, 12 Utah 2d 42, 45, 361 P.2d 1112, 1113 (1961).

(emphasis added).

As clearly pointed out by the court, it is up to the Legislature, not a State Division to restrict or expand the statutory language used. A Division's interpretation that is not in harmony with the statute or contrary to the express provisions of the statute would in effect be an attempt to amend the statute. Clearly, an action that is prohibited.

With these directives in mind, a review of the Massage Therapy Practice Act is

appropriate. It clearly provides in the definition section (58-47b-102) that a massage therapist is an individual licensed under Chapter 47B of the Act. Also, under section 102 is a detailed list what comprises the practice of massage therapy.

The Division amended Rule 156-47b in January of 2012, adding a definition to the term "manipulation." The Defendant's argue that the purpose of the amendment was to clarify the term manipulation in the act. They also stated it was to address issues of prostitution and illicit sexual activity. It is unclear on what basis the Division has authority to regulate activities outside of the confines of the Massage Therapy Practice Act. Clearly, the Division can appropriately sanction a massage therapist for violation of the provisions of Act. See Utah Code Ann. § 58-47b-501 et. seq. The Plaintiffs do not dispute that the Division has the authority to regulate licensed therapists and has the authority to sanction those claiming to be massage therapists that do not hold a license.

The Plaintiffs allege that the Division is attempting to expand the definition of massage by stating "manipulation means contact with movement." The Division is within its authority to expand or clarify terms by the use of rules as long as those actions do no run afoul of the Act. As pointed out in Merriam-Webster: "Manipulate is to move (muscles and bones) with your hands as a form of treatment." available at <http://www.merriam-webster.com/dictionary/manipulate> (accessed Oct. 7, 2013). The Division's definition in the rule does not appear to run afoul of the Act.

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 that 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. Id.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Gudmundson v. Del Ozone, 2010 UT 33, ¶44, 232 P.3d 1059 (citation and quotations omitted); see also Sanns v. Butterfield Ford, 2004 UT App 203, ¶6, 94 P.3d 301 ("A genuine issue of fact exists where, on the basis of the facts in the record, reasonable minds could differ on whether defendant's conduct measures up to the required standard." (citation omitted)).

This case involves an interpretation of the statute and the application of the Division's rule to the statute. There are no material facts in dispute. A Motion for Summary Judgment is properly before the Court.

Conclusion

The Plaintiff's Motion for Summary Judgment that the Rule R156-47b-102 (8) does not apply to individuals outside of the Massage Therapy Practice Act is well taken and the Motion is Granted.

Counsel for the Plaintiff to draft the appropriate Judgment in compliance with the Court's ruling.

Dated this 15th day of October, 2013

BY THE COURT




L. A. DEVER
DISTRICT JUDGE

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing ORDER was delivered this 15 day of October, 2013, in open Court to the following:

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Clerk of Court