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IN THE SUPREME COURT OF THE STATE OF UTAH

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Clerk, Supreme Court

JAMES M. ALEXANDER, R. C. ALLRED, et al.,
Plaintiffs,

— vs. —

HAL S. BENNETT, DONALD HACKING and STEWART M. HANSON, COMMISSIONERS OF THE DEPARTMENT OF BUSINESS REGULATION OF THE STATE OF UTAH, et al.,
Defendants.

Case No. 8471

Brief of Defendants

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IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES M. ALEXANDER, R. C. ALLRED, et al., *Plaintiffs,* — vs. — HAL S. BENNETT, DONALD HACKING and STEWART M. HANSON, COMMISSIONERS OF THE DEPARTMENT OF BUSINESS REGULATION OF THE STATE OF UTAH, et al., *Defendants.*	Case No. 8471

Brief of Defendants

STATEMENT OF FACTS

Defendants essentially agree to the Statement of Facts of the plaintiffs but not to the conclusions of the plaintiffs set forth therein.

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STATEMENT OF POINTS

POINT I

THE PLAINTIFFS HAVE APPLIED FOR LICENSES TO TREAT HUMAN AILMENTS WITHOUT DRUGS OR MEDICINE AND WITHOUT OPERATIVE SURGERY; AND THEY MUST USE THE NAME OF THEIR SCHOOL IN THEIR LICENSE.

POINT II

THE COURT IS NOT BOUND BY THE INTERPRETATION OF A STATUTE BY AN ADMINISTRATIVE AGENCY; THE LICENSING STATUTES ARE UNAMBIGUOUS.

POINT III

PLAINTIFFS HAVE NOT QUALIFIED TO PRACTICE OBSTETRICS; AND IF SO QUALIFIED, THEY CANNOT USE DRUGS, MEDICINE OR SURGERY.

POINT IV

THE INTENDED ACTION OF THE DEPARTMENT OF REGISTRATION IS NOT A LICENSE REVOCATION PROCEEDING, BUT MERELY ONE TO MAKE THE LICENSE ISSUED CONFORM TO THE LAW.

ARGUMENT

POINT I

THE PLAINTIFFS HAVE APPLIED FOR LICENSES TO TREAT HUMAN AILMENTS WITHOUT DRUGS OR MEDICINE AND WITHOUT OPERATIVE SURGERY; AND THEY MUST USE THE NAME OF THEIR SCHOOL IN THEIR LICENSE.

All of the plaintiffs have made application for license under the provisions of Section 58-12-2, Utah Code Anno-

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tated 1953 (or under similar provision in prior laws), which reads in part as follows:

> "Every applicant for such license must:
>
> * * *
>
> "(2) Designate in his application whether he desires to practice medicine and surgery in all branches thereof or to treat human ailments without the use of drugs or medicine and without operative surgery. If he desires to treat human ailments without the use of drugs or medicines and without operative surgery, the designation shall be in accordance with the tenets of the professional school, college or institution of which he is a graduate."

It is to be noted that plaintiffs failed to cite or explain the foregoing statute in their brief. A mere reading of the section shows clearly that the Legislature intended that the applicant for the license designate the scope of his intended practice, and all of these plaintiffs have applied for a license to practice the treatment of human ailments *without* the use of drugs or medicine and *without* operative surgery.

It is also to be noted that the foregoing section makes only two classifications. It does not mention naturopaths, chiropractors, or any other of many "drugless healers." The only place the names of the various healing groups come to the forefront is by the applicant designating which name his school used. The statutes of our state do not otherwise authorize the issuance of a license to "naturopathic physicians."

When the foregoing section is read in conjunction with Section 58-12-3, Utah Code Annotated 1953, it be-

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comes clear that when subsection (3) says:

> "To practice the treatment of human ailments without the use of drugs or medicine and without operative surgery in accordance with the tenets of the professional school, college or institution of which the applicant is a graduate as designated in his application for license, * * *"

the Legislature had in mind only appending the proper name to the license and did not have in mind the granting of broad additional rights to practice. The plaintiffs would have us believe that the foregoing subsection is an "escalator" type provision which would enable the "drugless healer" groups to change the curriculum of their professional schools and thus ipso facto change or enlarge the scope of their practice even to the dispensing of drugs, medicine and performing surgery. Such a construction flies in the face of the prohibitive part of both of the foregoing sections which states that the practice shall be "*without* drugs or medicine and *without* operative surgery."

In addition, the applicants have all designated that they were applying for a license to "treat human ailments without the use of drugs or medicine and without operative surgery" and they should be so limited.

POINT II

THE COURT IS NOT BOUND BY THE INTERPRETATION OF A STATUTE BY AN ADMINISTRATIVE AGENCY; THE LICENSING STATUTES ARE UNAMBIGUOUS.

The plaintiffs urge that there is an ambiguity in the statute and that now, by long administrative interpre-

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tation, the plaintiffs have gained rights not specified in the licensing statutes. If any strength is to be given to this proposition, then the plaintiffs should lose because, since at least 1921 to May, 1939, the same essential licensing provisions of our laws were uniformly construed by the Department of Business Regulation so as to exclude the use of drugs, medicine, and surgery, to which construction many of the plaintiffs gave their assent by many years of licensing. Then in May, 1939, the first licenses were issued which included obstetrics and minor surgery. However, the Department challenged the issuance of said licenses (p. 6 of petition; p. 13 of plaintiffs' brief; p. 9 of petition), but later the Department acquiesced in the opinions of the Attorney General (p. 8 of petition), but now the Department of Business Regulation has gone back to its pre-1939 position of interpretation. The most striking fact to be gained from the scrutiny of the record of administrative interpretation after 1939 is that there has not been any consistent, uniform, long-continued interpretation of the licensing statute in question.

What happened to the licensing provisions in 1939, so that new licenses were issued to these plaintiffs who were completely outside the scope of "drugless healing?" There was not any basic change in the licensing law in 1939! Section 58-12-2 and Section 58-12-3 were not changed. However, a new section (Section 58-12-22) was enacted which tightened up the educational requirements for "naturopathic physicians." Section 58-12-2(3) provides that an applicant for a license to treat human ailments without the use of drugs or medicine and without

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operative surgery must "Have the preliminary and professional education hereinafter provided for." The mere fact that the Legislature saw fit to require more education for a particular group of practitioners does not mean that by amending or adding to those requirements, the scope of their licenses was enlarged. This change in the educational requirement for "naturopathic physicians" apparently caused some uncertainty in the Department but it has now returned to its earlier construction of the licensing law.

Plaintiffs concede that an administrative interpretation is not binding on the Court (p. 45 of brief). It must also be recognized that even the administrative interpretation of an ambiguous statute is no more than persuasive to the Court because otherwise the Court would be ousted of its jurisdiction to review the actions of inferior tribunals. Further, if plaintiffs' argument be sound, then an administrative agency is powerless to correct its mistakes! That is not the law in Utah.

However, in this case, the plaintiffs are trying to compel the defendant agency to take an interpretation of a statute which it has repudiated. Certainly, the Court is free to decide what the law is without any concern as to what the administrative agency thinks the law is, and where the agency has changed its mind as to the interpretation, the former interpretation can certainly have no binding force on the Court.

The plaintiffs have searched diligently for some ambiguity in the licensing statutes which would justify the application of the "contemporaneous administrative

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interpretation" rule. The plantiffs cite Section 58-1-5, Utah Code Annotated 1953, as in some manner creating an ambiguity. We submit that it does not do so. Both chiropractors and naturopaths have their representative committees, as well as the other committee to represent those who want to treat human ailments without drugs or medicine and without operative surgery. The only significance this fact seems to have is that chiropractors and naturopaths have become so numerous and so well identified that it seemed proper to the Legislature to give them representative committees to assist the Department of Business Regulation. It still is basic that the only place that these groups are authorized to be licensed is under Section 58-12-2 in the category of those who apply for a license to "treat human ailments *without* the use of drugs or medicine and *without* operative surgery." It may be supposed that if some other "drugless healer" group becomes cohesive and well identified, they also may have a representative committee. However, it would appear obvious that the mere fact that a group has a representative committee does not give that committee authority to enlarge the scope of practice beyond the limits set by the Legislature. It is the prerogative of the Legislature to make such a change.

POINT III

PLAINTIFFS HAVE NOT QUALIFIED TO PRACTICE OBSTETRICS; AND IF SO QUALIFIED, THEY CANNOT USE DRUGS, MEDICINE OR SURGERY.

Section 58-12-3, Utah Code Annotated 1953, provides that if an individual who has applied for a licence to

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practice the treatment of human ailments without the use of drugs or medicine and without operative surgery successfully passes *the examination* in obstetrics, his license shall set forth his right to practice obstetrics. The plaintiffs assume that the only interpretation to be put on this provision is that a person so licensed *must* use drugs, medicine and surgery in the practice of obstetrics. This conclusion does not necessarily follow. It is a matter of common knowledge that the midwife has practiced obstetrics in this State for many years even until the present time without medicine, drugs or surgery. It is also a matter of common knowledge that in recent years there has been a considerable amount of writings by medical professionals extolling the virtues of natural, painless childbirth achieved through psychiatry and/or hypnotic suggestion. In view of these known things, it is not at all incompatible with the concept of "drugless healing" to authorize a naturopath to practice obstetrics without the use of drugs or medicine and without operative surgery.

It is to be noted that Webster's International Dictionary defines "obstetrics" as the "science of midwifery; the art of assisting women in parturition; midwifery; the management of pregnancy and labor."

It is admitted by plaintiffs that the only examination to test the qualifications of naturopaths to practice obstetrics has been given by the naturopath committee established by Section 58-1-5(11). However, Section 58-1-5(9) provides:

> "For practitioners of medicine and surgery in all branches thereof, and for the practice of

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obstetrics only, a committee of five persons each of whom shall be a licensed practitioner of medicine and surgery in all branches thereof in this state * * *."

This foregoing section is the only place where the licensing statutes mention the committee or group that shall be concerned with the practice of obstetrics. Certainly, the Legislature did not intend to have various groups and committees each examining applicants for the purpose of practicing obstetrics in accordance with the particular committee's views on the subject. There would not be any uniform standard of qualification or practice which would most certainly range from the use of hypnosis to the use of surgery. It is submitted that the Legislature intended that the qualification of all persons desiring to practice obstetrics should be tested by one committee and that committee is the one created by Section 58-1-5(9), cited above. These plaintiffs have not been so qualified.

The plaintiffs seek some help for their position by referring to Section 58-12-3, which uses the words "without operative surgery." The point of their argument being to the effect that by implication, they may practice surgery as long as it is not "operative surgery." The only case coming to our attention where a statute using the words "operative surgery" has been construed by a court is the case of *State v. Thierfelder,* 114 Mont. 104, 132 P. 2d 1035, 1041, where the court said:

> "According to all medical authorities 'operative surgery' includes both major and minor surgery."

As far as obstetrics is concerned, plaintiffs have not

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classified the surgery which they consider has been authorized them by that part of the licensing statute. (For other cases, see opinion of Attorney General, #55-101, attached to petition.)

POINT IV

THE INTENDED ACTION OF THE DEPARTMENT OF REGISTRATION IS NOT A LICENSE REVOCATION PROCEEDING, BUT MERELY ONE TO MAKE THE LICENSE ISSUED CONFORM TO THE LAW.

In Point Five in their brief, plaintiffs assume that the threatened action of the defendants is one of revocation of outstanding licenses. We say that it is not a revocation proceeding. The Department has determined that through inadvertence, mistake, or incorrect advice, licenses have been issued which purport to grant to plaintiffs the right to practice in a professional area for which they are not authorized to apply and which the Department is not authorized to issue. It is a fundamental proposition that if an agency attempts to issue a license without authority, the license is void. All of the licensing authority which the Department holds has been delegated by the Legislature, and an attempted extension of the authority by the Department is a nullity.

Plaintiffs' Point Five deals with the revocation for cause of licenses otherwise validly issued. In this case, the only action threatened is to put proper limits on the license and not to revoke any license.

Plaintiffs also assent in their Point Five that no question of public health has been raised, nor has any question of qualification of plaintiffs been raised. Of

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course, a failure to raise the question of qualification or public health does not mean that such questions do not exist. However, since this action (of the Department) is not a revocation proceeding but merely to make the license conform to the licensing authority of the Department, it makes no difference whether plaintiffs are qualified or not. If the Department does not have the *authority* to license plaintiffs under their applications, to engage in the extended practice, then it makes no difference how qualified the applicant is. If plaintiffs wish to practice medicine and surgery, in all of its branches, let them so apply and demonstrate their qualifications. However, since plaintiffs have applied to be licensed to practice the "treatment of human ailments *without* drugs or medicine and *without* operative surgery," then let their licenses and practice be so limited. The prohibitive and limiting words are so clear in our licensing statute that there is not any reasonable room to say that they do not mean that these plaintiffs must confine their practice to the treatment of human ailments without drugs or medicine and without operative surgery.

CONCLUSION

Plaintiffs' application for a writ of mandamus should be denied, and order heretofore issued to the defendant should be quashed.

Respectfully submitted,

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