

1982

Mini Spas, Inc. et al v. State of Utah et al : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH

STATE OF UTAH

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MINI SPAS, INC., d/b/a :
The King's Palace and :
RUSTY HANNA, et al., d/b/a :
The Society of Licensed :
Masseurs :

Plaintiffs and :
Appellants, :

vs. :

Case No. 18,076

STATE OF UTAH, SCOTT M. :
MATHESON, UTAH STATE :
DEPARTMENT OF REGISTRATION, :
and PAUL T. FORDHAM :

Defendants and :
Respondents. :

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BRIEF OF APPELLANT

---ooo0ooo---

Appeal From a Judgment Entered in the Third
Judicial District Court in and for Salt Lake County,
Dismissing Plaintiffs' Declaratory Judgment Action,
Honorable G. Hal Taylor

---ooo0ooo---

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RUSTY HANNA, et al., d/b/a :
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MASSEURS :

Plaintiffs and :
Appellants, :

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MATHESON, UTAH STATE :
DEPARTMENT OF REGISTRATION, :
and PAUL T. FORDHAM :

Defendants and :
Respondents. :

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BRIEF OF APPELLANTS

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STATEMENT OF NATURE OF CASE

This action for declaratory judgment was brought in the Third District Court of Salt Lake County by Mini Spas, Inc., a Utah Corporation operating a massage establishment; and a group of masseurs. Plaintiffs sought declaratory judgment on two causes of action. First, that the Massage Practice Act of 1981 be construed by the Court to permit the Division of Registration to create the Utah Board of Massage. Second, that a Writ of Mandamus be issued to compel the Division of Registration to create such a Board.

DISPOSITION IN THE LOWER COURT

There being no material facts in dispute, Plaintiffs and Defendants moved for Summary Judgment, which was granted to Defendants on both causes.

RELIEF SOUGHT ON APPEAL

Appellant seeks a judgment by the Court construing the Massage Practice Act of 1981 to eliminate the internal inconsistency by allowing licensing of Massage Technicians who have engaged in the practice of massage in the State of Utah for five (5) years before July 1, 1981 and who meet all the age and moral requirements specified in the act. Further, Appellant seeks a Writ of Mandamus requiring the Utah State Division of Registration to organize a Board of Massage and allow the Board to carry out its functions as specified in U.C.A. 58-47-1 et seq.

Alternatively Appellant seeks a remand of this case to the lower court for determination of the Utah State Legislature's intent and purpose in passing the Massage Practice Act of 1981.

STATEMENT OF FACTS

The Massage Practice Act of 1981 was enacted by the Utah Legislature in February of 1981. The purpose of the Act, according to this title, is as follows: "An Act relating to massage practice; providing for a Board of Massage; providing for licensure; and the setting, implementation and enforcement of standards for massage technicians and massage

establishments; and providing for an effective date."

However, there was an oversight in the drafting of the Act which has prevented its implementation. The problem is simply that the Board of Massage is to consist of one layman and four licensed massage technicians (see §58-47-3 U.C.A.). The Board of Massage must supervise and direct the administration of oral and written examinations which all applicants must pass before becoming licensed massage technicians. Therefore, no one can become a licensed massage technician in Utah until passing the examinations administered by the Board of Massage; but the Board of Massage cannot be constituted unless four licensed massage technicians can be found to sit on the Board. At the present time there are no massage technicians licensed by the State of Utah; and this statute has not been implemented by the Division of Registration of the Department of Business regulation although the date of implementation, July 1, 1981 has passed.

The City of South Salt Lake is currently attempting to regulate massage practice in spite of the fact that the State Legislature has passed comprehensive legislation providing for the state regulation of that practice. The ordinance passed by the city in its attempt to regulate massage practice poses the real and serious threat to the appellants of actually regulating their chosen line of work out of existence. Once the Massage Practice Act is effectuated the South Salt Lake City ordinances regulating massage practice in conflict with the state scheme will be inapplicable.

Plaintiff brought suit for declaratory judgment in the Third District Court of Salt Lake County seeking to construe the state statute in such a manner as to allow its implementation. Plaintiff's Motion for Summary Judgment was denied and the District Court held that the statute, §58-47-1 U.C.A., et seq., was not overly broad, vague, or null and void, that the Court could not make changes in the wording of the statute, since it is a matter of Legislative Jurisdiction, no Writ of Mandamus could issue.

ARGUMENT

POINT I

IN PASSING THE MASSAGE PRACTICE ACT OF 1981 THE UTAH LEGISLATURE'S INTENT WAS TO PASS A VALID LAW PROVIDING FOR THE CREATION OF A BOARD OF MASSAGE.

Various profession, trades and occupations in Utah are regulated under title 58 of the Utah Code Annotated. §58-1-1(a) provides: There shall be a division of the State Government within the Department of Business Regulation known as the "Division of Registration," which shall be charged with administering the laws regulation professions, trades and occupations as in this title provided. §5 of the same chapter provides:

The functions of the Division of Registration shall be exercised . . . with the collaboration and assistance of representative committees, whether termed committees or boards, of the several professions, trades and occupations regulated under this title.

§6 (1) provides that the Director of Registration shall designate the numbers of the representative committees referred to in §58-1-5.

Chapter 47 of this title, the Massage Practice Act, outlining the requirements for the creation of a Board of Massage calls for the creation of such a board according to standard requirements established in §58-1-6 U.C.A. for professions, trades and occupations under the Registration Division. One of the standard requirements is that four (4) of the five (5) board members be licensed practitioners in good standing of the profession. However, it is apparent that the legislature was either ignorant of, or neglected to make allowance for the fact, that there are no licensed practitioners in good standing in the occupational category of massage technician; because it did not change the requirements for the appointment of the original Board of Massage to allow for that fact. This oversight has resulted in the impossibility of implementing the law as it is literally written. This problem was stated as follows in a letter dated May 28, 1981 from Counsel for Appellees to Counsel for Appellants:

The problem that we are facing in trying to create the Board as directed in the statute is as follows:

Up to this time there has been no licensed masseurs under this Act or any other state act in the State of Utah. (30) [now section 58-1-5 U.C.A.] calls for the establishing the Board with 'licensed' massage technicians. Nowhere in the Act has anyone been 'grandfathered' in, and before anyone can be appointed, including those that have been in practice for more than five years, they must be examined. The exam is to be given by and under the direction of the Board. We do not see how we can appoint a

Board of Licensed Massage Technicians when there are no licensed technicians to draw from.

There have been other boards created for the purpose of establishing the Board, certain individuals have been given special status. That was not done here, nor is there any provision in the act where a board can be impaneled to give the examination to licensed individuals.

It is not to be assumed that the legislature makes the practice of participating in exercises of futility by intentionally passing invalid or impossible laws. On the contrary, our form of government requires us to recognize the fact that when the legislature passes a law, that it has a purpose and intends that law to be valid.

The courts are obligated to make that presumption when dealing with statutory law. This court held in Millett v Clark Clinic Corp., 609 P.2d 934 (Utah 1980):

It is to be observed, moreover, that statutory enactments are to be so construed as to render all parts thereof relevant and meaningful, and that interpretations are to be avoided which render some part of a provision nonsensical or absurd. 609 P.2d at 936.

In the case of Salt Lake City v Salt Lake County, 568 P.2d 741 (Utah 1977) this court held that rules of construction were to be used only as aids in determining legislative intent and were not to get in the way of putting that intent into effect, as evidenced by the act as a whole, and wrote:

An even more fundamental rule of statutory interpretation helpful here is that the statute should be looked at in its entirety and in accordance with the purpose which was sought to be accomplished. 568 P.2d at 741.

This same holding was made in the case of Osuala v Aetna Life & Casualty, 608 P.2d 242 (Utah 1980), where the Court observed:

If there is doubt or uncertainty as to the meaning or application of an act, it is appropriate to analyze the act in its entirety, in the light of its objective, and to harmonize its provisions in accordance with the legislative intent and purpose. 608 P.2d at 243.

Also, in Robert H. Hinckley Inc. v State Tax Commission,

404 P.2d 662 (Utah 1965), in construing the legislative act calling for collection of sales taxes, the Court allowed a vendor who did business in an unusual manner to use an alternative system to the "bracket method" mandated by the State Tax Commission, but which did not work for this particular business. In doing so, the Court stated,

We cannot ascribe to the legislature an intent to make it impossible for a vendor to conform with its requirements. 404 P.2d at 668.

Again in Curtis v Harmon Electronics, Inc., 575 P.2d 1044 (Utah 1978), this Court stated:

A sound rule of statutory interpretation is that a statute is presumed not to be intended to produce absurd consequences and that where possible it will be given a reasonable and sensible construction. This Court recognizes its duty to render such interpretation of the laws as will best promote the protection of the public. 575 P.2d at 1046.

Finally, this Court held in Greaves v State, 528 P.2d 805 (Utah 1974):

Because the duty rests upon the courts to determine the scope of the powers of all three branches of government, they have a special responsibility to exercise a high degree of caution and restraint to keep themselves within the limitations of the judicial power, in order not to infringe upon the prerogatives of the executive or the legislative branches. In harmony with that policy, it is the well-established rule that legislative enactments

are endowed with a strong presumption of validity, and that they should not be declared unconstitutional if there is any reasonable basis upon which they can be found to come within the constitutional framework; and that a statute will not be stricken down as being unconstitutional unless it appears to be so beyond a reasonable doubt. 528 P.2d at 806, 807.

It appears to be the contention of Appellees herein that this Court has the option of leaving this law intact as written; but admit that it now makes no sense, and so should be ignored until the legislature has corrected its error. Appellants have cited no authority for this strange suggestion, and it appears from the authorities researched by Appellants that the only alternative this Court may have is to declare the statute void for vagueness. This, of course, is a result which neither side seeks, and one which would be to the detriment of all parties.

The intention of the Utah State Legislature to pass a valid Massage Practice Act providing for a functioning Board of Massage is further borne out by an examination of the responsibilities given by the legislature to the Board. §58-47-8 U.C.A. provides:

Any person who . . . presents a diploma or credentials issued by a school of massage approved by the American Massage and Therapy Association or its successor or like institute, representing study as determined by the Board of up to 1,000 hours and who passes a reasonable demonstrative, oral, and written examination, conducted by and under the supervision and direction of the Board, in the art of massage by hand . . . shall be entitled to be licensed and to be issued a license as a massage technician.

Obviously, the Board of Massage is intended by the legislature to function as a viable unit with definite responsibilities and duties in regard to the licensing of massage technicians. Further, §58-47-10 gives the Board authority to enter into reciprocal license agreements with other states. §58-47-11 gives the Board the authority to administer examinations to candidates for apprentice massage technicians. After the successful completion of the examination specified by the Board, the candidates may be licensed as Apprentice Massage Technicians by the Department of Business Regulation. The Board has other responsibilities in the evaluation of physical or mental competence of practitioners (§58-47-12), discipline within the occupation (§58-47-20) and in formulating post-graduate requirements for practitioners (§58-47-15). The obvious intent of the legislature in passing the Massage Practice Act was to provide for the licensing and regulation of massage technicians and establishments through the Division of Registration and the Utah Board of Massage. It is equally obvious that in following the standards set in the General Provisions of Title 58, the legislature unintentionally created an impossible situation due to the fact that there were no massage technicians already licensed by the State of Utah at the time the Massage Practice Act was passed. The simple fact that the legislature could have made special provisions for the formation of the original

board, taking into account the fact that there were no licensed practitioners in Utah, but failed to do so, does not indicate an intent to create an impossible situation, but rather indicates a simple oversight. This oversight can be legitimately rectified by this Court, by "grand-fathering" in a certain category of massage practitioners as suggested by Appellants.

Should this Court decide that the legislative intent is not adequately clear for a determination at this point, Appellant requests the remand of this case to a lower court for a determination of the legislative intent.

POINT II

THIS COURT SHOULD INTERPRET THE MASSAGE PRACTICE ACT OF 1981 IN HARMONY WITH THE INTENT OF THE LEGISLATURE, AND IN SO DOING RESOLVE THE CONTRADICTION BETWEEN TWO PROVISIONS OF THE ACT.

Appellants do not maintain that all laws passed by the legislature are valid simply because the legislature intended them to be valid, but the courts must give the laws the presumption of validity.

This Court stated in Norville v State Tax Commission, 97 P.2d 937 (Utah 1940):

Statutes duly enacted by the legislature are presumed to be constitutional and valid (citations omitted). When there is ambiguity in the terms of a statute or when it is susceptible of two interpretations one of which would render it unconstitutional and the other bring it within the constitutional sanctions, the Court is bound to choose that

interpretation which would uphold the statute, and to pronounce a statute unconstitutional only when the case is so clear as to be free from doubt (citations omitted). 97 P.2d at 939.

The Court then went on to deal with problems in statutory language as follows:

As stated in Sutherland on Statutory Construction, §271, at page 320: 'In the exposition of a statute the intention of the law-maker will prevail over the literal sense of the terms; and its reason and intention will prevail over the strict letter.' 97 P.2d at 939.

Quoting from Endlich on the Interpretation of Statutes, §319, the Court stated:

A mistake apparent on the face of an act, which may be corrected by other language of the act, is never fatal. In all such cases it may, with propriety, be said that the context rectifies the error, and it is not the Court that assumes to correct the legislature...The Judicial Interpreter may deal with careless and inaccurate words and phrases in the same spirit as a critic deals with an obscure or corrupt text, when satisfied, on solid grounds, from the context or history of the enactment, or from the injustice, inconvenience, or absurdity of the consequences to which it would lead, then the language thus treated does not really express the intention and that this amendment probably does. 97 P.2d at 941.

Thus we see, that the Courts have the power to determine ambiguities in statutes, and to change words or phrases in statutes when that is needed in order to avoid an absurdity. The Supreme Court of the State of Oregon, in commenting on when such an ambiguity exists and when the Court should exercise its power to change language to effectuate a statute,

stated as follows, in the case of State v Rawson, 312 P.2d 849 (Or. 1957):

The Courts hold that even if an act is expressed in clear language, a conclusion may be warranted that an ambiguity exists if literal interpretation will produce an absurd result or one at variance with the policy of the legislature as a whole (citations omitted).

From Am Jur. we quote with approval: 'An ambiguity, justifying the interpretation of a statute, is not simply that arising from the meaning of particular words, but includes such as may arise in respect to the general scope and meaning of a statute when all its provisions are examined. The Courts regard an ambiguity to exist where the legislature has enacted two or more provisions or statutes which appear to be inconsistent. There is also authority for the rule that uncertainty as to the meaning of the statute may arise from the fact that giving a literal interpretation to the words would lead to such unreasonable, unjust, impractical, or absurd consequences as to compel a conviction that they could not have been intended by the legislature.' 312 P.2d at 856.

The cardinal rule of statutory construction is to ascertain the meaning of the legislature and give it effect, if such meaning is constitutional. In determining the intent many things are taken into consideration: language, the object to be accomplished, whether a literal interpretation of the language will lead to an impossibility or an absurdity, the history behind the act, and numerous other matters, no one of which is absolutely controlling as the legislative intent. It is from a combination of all these that the intent is deduced.... 312 P.2d at 857.

This decision was followed by the Court of Appeals of Oregon in Baird v Electro Mart Factory Direct, Inc., 47 Or. App. 565, 615 P.2d 335 (Or. Ct. App. 1980) where the Court stated:

Because that legislative intent is manifest we must give effect to that intention even though to do so does violation to the literal meaning of its words (citation omitted). 615 P.2d at 338.

Only if this Court cannot find a reasonable and rational means of construing this statute and making it a valid law which can be implemented by the administrative body responsible for its execution, should it be declared invalid. This Court stated in a 1978 case that:

A sound rule of statutory interpretation is that a statute is presumed not to be intended to produce absurd consequences and that where possible it will be given a reasonable and sensible construction. This Court recognizes its duty to render such interpretation of the laws as will best promote the protection of the public. Curtis v Harmon Electronics, Inc. 575 P.2d 1044 (Utah 1978)

To successfully give a reasonable and sensible construction to a statute the Courts are occasionally required to modify to some degree the language found in the statutes. This Court would have to make a simple change in the Massage Practice Act of 1981 to eliminate the impossible situation dictated by the literal reading of the words of the act. The change sought by Appellants is to strike out the words requiring massage practitioners who meet the moral and age requirements of the act and who have engaged in the practice of massage in the State of Utah for five years before July 1, 1981, or who meet the education requirements, to pass the oral and written examinations specified in §58-47-8 U.C.A. This simple change would "grandfather" in a reasonably small group of massage

practitioners under the act. Such a resolution of this problem by this Court would be in harmony with the legislative intent as well as generally accepted and appropriate judicial interpretation of statutory law.

In giving effect to the intent of the legislature, the Courts may occasionally find it necessary to alter in some way the wording of some provision(s) of an act. Such is the predicament here. This has lead the Appellees to conjure up the constitutional principle of separation of powers which was summed up very succinctly by this Court in Young v Salt Lake City, 67 P. 1066 (1902).

It is ture that under the constitution, powers belonging to one department of government cannot be exercised by others. Courts cannot legislate or make laws.

In further support of this principle, the Appellees cite in their Memorandum in Support of Their Motion for Summary Judgment, the case of Kimball v City of Grantsville, 57 P. 1 (1899).

Independently of any repugnance between a legislative act, and any constitutional limitation or restriction, a court has no power to arrest its execution, however unwise or unjust, in the opinion of the court, it may be or whatever motives may have lead to its enactment.

Accepting this as sound doctrine, as we safely may, would not the judicial department itself be guilty of transcending its constitutional power were it to inquire into the expediency, wisdom, or justice of the legislation in question in this case?

This, in itself, would be an abuse, because it would be an usurpation of power by one department of the government which the people absolutely vested in another.

In citing this principle of the separation of powers, Appellees have incorrectly identified the issue. Appellants do not seek to undermine the principle of separation of powers. Appellants in no way request the Court to take upon itself any power properly vested in the legislative branch of government. Rather, Appellants request that this Court exercise its proper function in interpreting the statutory law promulgated by the other branch of government. The Courts have commonly recognized the necessity of departing at times from the strict language of a statute. In Board of Regents v Gillette, 30 N.W. 2d 296 the Court stated:

The rule is that words may be supplied by the Court in construing a statute where that is necessary to complete the sense thereof and give effect to the intention of the legislature manifested therein. This rule is especially applicable where it is necessary to do so to present the law from becoming a nullity. 30 N.W. 2d at 301.

The Missouri Court stated in Leibson v Henry, 204 S.W. 2d 310 (MO 1947):

It is a general rule that the courts, in the interpretation of a statute, may not take, strike, or read anything out of a statute, or delete, subtract, or omit anything therefrom. To the contrary, it is a cardinal rule of statutory construction that significance and effect should, if possible, be accorded to every word, phrase, sentence, and part of the act. However, there are cases in which words of a statute are so meaningless or inconsistent with the intention of the legislature otherwise plainly expressed in the statute, that they may be rejected as surplussage, and omitted, eliminated or disregarded. (quoted from 50 Am. Jur. Statutes, §31, page 219) 204 S.W. 2d at 350.

In People v Stratton, 335 Ill. 455, 167 N.E. (Ill. 1929), the Supreme Court of Illinois, referring to the intention of the legislature in enacting a statutory provision, stated:

In giving effect to such intention, 'words may be modified, altered, omitted, or supplied so as to obviate any repugnancy or inconsistency with the legislative intent' (citations omitted). 'In construing a statute the court will not be confined to its literal meaning. A thing within the intention is regarded within the statute although not within the letter.' (citations omitted). 167 N.E. at 31.

The Tenth Circuit Court of Appeals also follows this principle as expressed in Town of Clayton v Colorado and S. RY. Company, 51 F.2d 977 (Tenth Cir. 1931).

The primary rule in the construction of statutes is to ascertain and give effect to the intent of a legislative body. (citations omitted). Where the language of the statute is plain and unambiguous, and conveys a clear and definite meaning, resort must not be had, ordinarily, to rules of construction, but the statutes must be given its plain and obvious meaning. (citations omitted).

Where, however, the language is of doubtful meaning, or where adherence to the strict letter would lead to injustice or absurdity, or result in contradictory provisions, it devolves upon the courts to ascertain the true meaning. (citations omitted).

The general design and purpose of a statute should be kept in mind and its provisions should be given a fair and reasonable construction with a view to perfecting its purpose and object. (citations omitted). 51 F.2d at 979.

In the same case the Tenth Circuit also stated:

It frequently happens that the true intention of a legislative body is not expressed by the language employed in the statute, when literally construed. In such cases, the intent of such legislative body can only be effectuated by a departure from a literal interpretation of the language employed.

Where such intention is plainly discernable from the provisions of the statute when considered as a whole, the real purpose and intent of the legislative body will prevail over the literal import of the words employed. 51 f.2d at 979.

In Norville v State Tax Commission, this Court cited a Montana case, as follows:

When the intention [of the legislature] can be gathered from the statute, words may be modified, altered, or supplied to give to the enactment the force and effect which the legislature intended. 97 P.2d at 940.

It is clear therefore, that this Court has the power and the responsibility to construe the Massage Practice Act in accordance with the intent of the legislature which intent can be determined quite clearly by a reading of the entire act. As the North Dakota Court said in Golden Valley Country v Lundin, 203 N.W. 316 (N.D. 1925):

But the legislative intention must be sought from the whole act, and not merely from parts of it; and where certain parts of an act are inconsistent with other provisions of the same act, then it becomes incumbent upon the courts to determine which must prevail in order to carry out the legislative purpose and intention. 203 N.W. at 319.

The intent of the Utah State Legislature would best be implemented under the Massage Practice Act of 1981 by "grandfathering" in and licensing a small category of massage technicians which would permit the establishment of the Board of Massage and the effective regulation by the state of massage technicians and massage establishments.

POINT III

THE ISSUANCE OF A WRIT OF MANDAMUS IS APPROPRIATE TO COMPEL THE APPELLEES TO CARRY OUT THEIR RESPONSIBILITIES IN ESTABLISHING THE UTAH BOARD OF MASSAGE AND IMPLEMENTING THE MASSAGE PRACTICE ACT OF 1981.

The construction of the Massage Practice Act of 1981 in accordance with the intent of the legislature would require action by the Division of Registration of the Department of Business Regulation. However, as manifested by the letter of May 28, 1981 sent to Counsel for the Appellants by Counsel for the Appellees, the Division will take no action until instructed by the Court.

The propriety of the issuance of a Writ of Mandamus requiring the Division of Registration to perform its duty is clear from this Court's disposition of the case of Archer v Utah State Land Board, 392 P.2d 622 (Utah 1964). The Court first stated that:

[T]here appears to be ample constitutional, statutory, and case law authority giving and vesting in the several district courts authority to issue Writs in the nature of Mandamus when it is made to appear that the Administrative Board or officer has a clear statutory duty to perform a certain act and it or he refuses to do so. (392 P.2d at 623).

The Court subsequently dealt with the issue of sovereign immunity of State organs from Writs of Mandamus. The Court dispensed with this contention by saying simply: "We find no merit in this contention as applied to a Mandamus proceeding." 392 P.2d at 624

POINT IV

THE RELIEF SOUGHT HERE BY APPELLANTS IS NECESSARY FOR THEIR CONTINUED OPERATION AS A LEGITIMATE BUSINESS.

On January 19, 1981, this Court, in the companion cases of Redwood Gym v Salt Lake County Commission, 624 P.2d 1138 (Utah 1981) and Hollingsworth v The City of South Salt Lake, 624 P.2d 1149 (Utah 1981) held that city and county ordinances prohibiting the giving of massages to members of the opposite sex were valid, even though they might put individual massage practitioners out of business, if they were necessary to prohibit prostitution and other illegal acts. Within one month from the date of that decision, the State of Utah passed an alternative regulation scheme, to achieve the same overall goals without forcing legitimate massage operators out of business. That this act preempts the field is evident from the fact that both Salt Lake County and the City of South Salt Lake have since amended their massage ordinances to exempt those who are licensed by the State of Utah. It is of utmost importance to those who practice the legitimate business of massage in this state that the state commence the issuing of licenses under the act.

In addition, §58-47-5 U.C.A. makes it unlawful to practice massage without a license issued by the state. It now appears that all those who engage in the business of massage in Utah are doing so illegally and may be subjecting themselves to possible prosecution, although that prosecution may not be

successful, given the correct state of the law. In the case of State Ex Rel. Board of Exam in Optometry v Lawton, 523 P.2d 1064 (Okla 1974), the court, in referring to the state's declaratory judgment statute, said:

The legislature intended for factual situations such as this to come within the confines of the statute. It is apparent from a reading of the statute that a prospective litigant need not hazard the breach of a particular statute as a condition precedent to the bringing of an action under the term of the declaratory judgment statute. The statute provides the determination may be made either before or after there has been a breach of any legal duty or obligation. The fact that Lawton could be subject to criminal prosecution and lose his license if he were found to be in violation of the statute certainly renders it a matter of justiciable controversy. The practice and business affairs of Lawton should not be inhibited or held in suspense while he waits to see if the Board construes his office location as a violation of the statute, and if so, whether it will decide to act against him. 523 P.2d at 1066.


As with the Oklahoma Plaintiff, Appellants herein are taking the risk of being put out of business or of being criminally prosecuted while they wait for almost another year to see if the legislature will act to correct its mistake, as the Attorney General suggests. That is just the kind of absurd consequence the Courts can and should avoid by using inherent and statutory powers to make the law work.

CONCLUSION

This Court should enter its order construing the Massage Practice Act of 1981 in such a way as to allow it to make sense, and in harmony with the obvious intent of the legislature. In the alternative, the case should be remanded to

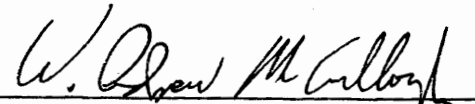
the District Court for Salt Lake County for the purpose of taking testimony regarding legislative intent so as to allow construction of the act. Once such action is taken, it becomes appropriate to issue a Writ of Mandamus directing Appellees to do their statutory duties.

RESPECTFULLY SUBMITTED this 20th day of March, 1982.


W. Andrew McCullough
Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that I mailed 2 true and correct copies of the foregoing Brief of Appellants, postage prepaid, to David L. Wilkinson, Attorney for Defendants and Appellees, State Capitol Building, Salt Lake City, Utah 84114.


W. Andrew McCullough