

1982

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

Plaintiffs and  
Appellants,

vs.

STATE OF UTAH, SCOTT M.  
MATHESON, UTAH STATE DE-  
PARTMENT OF REGISTRATION, and  
PAUL T. FORDHAM,

Defendants and  
Respondents.

Case No. 18,076

RESPONDENTS' BRIEF

Appeal from the Judgment of the Third Judi-  
cial District Court for Salt Lake County  
Honorable G. Hal Taylor, Judge, Granting  
Defendants' Motion for Summary Judgment

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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,

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BRIEF OF RESPONDENTS

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STATEMENT OF NATURE OF CASE

The State Division of Registration has not issued licenses under The Massage Practice Act because the Legislature failed to provide any means to establish a Board which can give the required examinations. The Division maintains that the legislature must amend the statute in order to implement the licensing provisions.

DISPOSITION IN THE LOWER COURT

Both parties moved for Summary Judgment, with the District Court granting the Division's Motion on the grounds

that U.C.A. 58-47-1 et seq is not implementable and that the internal problems were such that it would take legislative, not judicial action to correct.

#### RELIEF SOUGHT ON APPEAL

Respondents seek affirmation of the lower court's ruling requiring the Utah Legislature to make the necessary changes so that the act can be implemented.

#### STATEMENT OF FACTS

The 1981 Utah State Legislature enacted Senate Bill 267, The Massage Practice Act (hereinafter referred to as Act). Since that time the "Act" has been codified as Sections 58-47-1 et seq, Utah Code Annotated (1981 Supplement). The Act created a statutory scheme for the licensure of masseurs practicing within the state. As part of the licensure system the Act provided for the establishment of the Utah Board of Massage (hereinafter referred to as Board). Among other things, the Board is to oversee the licensure of "massage technicians." The initial exam is to be given by and under the direction of the Board. Prior to the passage of the Act there were no licensed masseurs under the Act or any other state Act in the State of Utah.

When the Director of the State Division of Registration (hereinafter referred to as Director) attempted to create the Board, he was faced with an impossible situation. Section 58-4-73, U.C. A. (1981 Supp.) states that the Board is to



be created pursuant to the requirements of Chapter 1 of Title 58, U.C.A. Under the instructions provided the Director of the Department in Section 58-1-6, U.C.A. (1981 Supp.), the Board is to be comprised of 5 members. Of the 5 members, 4 are to be licensed massage technicians and one from the general public. Since the Board is to prepare, oversee and direct the examinations required for becoming massage technicians, and further, since there are presently no massage technicians who are licensed, there is no way the Department can appoint a Board. The Director has no choice but to follow the statutes. In the absence of qualified licensed masseurs, it is simply impossible to establish the Board and to license anyone under the Act.

When the Director failed to implement the licensing provisions, plaintiffs initiated this action in district court seeking a declaratory judgment requiring the creation of the Board. Defendants countered by asking for summary judgment, there being no disputed facts. The motions of both parties came on for hearing before the Honorable G. Hal Taylor in September of 1981. After hearing oral arguments from both parties, Judge Taylor issued an order finding that the Court could not make the necessary changes in the wording of the statute, "that matter being one of legislative jurisdiction." Defendants' motion for summary judgment was granted.



## ARGUMENT

### I.

THE LANGUAGE OF THE STATUTE IS CLEAR AND UNAMBIGUOUS. THERE IS NO NEED TO RESORT TO THE PRINCIPLES OF STATUTORY CONSTRUCTION.

It has long been the established policy of this court to refrain from the use of statutory construction when the language used in a disputed statute is clear and unambiguous. This principle was emphasized in the case of State v. Archuletta, 526 P.2d 911 (Utah, 1974), where the court stated:

"The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction." [citing United States v. Wiltberger, 5 Wheat 76, 95, 5 L. Ed. 37 (1920) (at 912)]

There is no ambiguity in the words of the sections of the Act which created the Board. The meaning of the statute is clear, precise and subject to only one interpretation. Section 58-47-3, U.C.A. (1981 Supp.) indicates that the Board is to be established pursuant to guidelines found in Section 58-1-6, U.C.A. (1981 Supp.). Therefore, the Board should have five members, four licensed massage technicians and one member of the general public. Section 58-47-8, U.C.A., (1981 Supp.) indicates that in order to become a licensed massage technician, one must be examined. The exam is to be given by and under the direction of the Board. Because there are no licensed massage technicians, the Board cannot be created. There is no ambiguity in the Act. The result is clear and precise. Absent licensed technicians, the Divi-

sion cannot empanel the Board. The examination is not waived for anyone. Only the educational requirements are waived for those individuals who have been practicing for five years or longer. The statute requires the examination to be administered by the Board. Since no Board of Licensed Masseurs can be established, the legislature must modify the language to so allow a Board to be established to oversee licensing matters before any licenses can be issued.

Appellants present an excellent discussion of the power of the courts to amend, add or omit words to the language of ambiguous statutes. Relying heavily on cases from other jurisdictions, it is contended that if the Act is strictly followed, it will lead to an absurd result or one at variance with the intent of the legislature as a whole. It is the result which Appellants maintain creates the ambiguity in the statute. Unusual results, as here, are not per se - ambiguous. And as here, there is no ambiguity. Clear language creates a result that is hard to comprehend. If that is not what the Utah Legislature intended, then that body should make the necessary changes to obtain the correct result.

However, the cases cited by the Appellants are easily distinguished from the facts of the case now before the court. In each case, the courts were faced with ambiguities which existed in the language of the statutes themselves. Rather than distinguish each case cited by Appellants, one

case will illustrate the differences which exist between the case now before this Court and those cases cited by Appellants. In State v. Rawson, 312 P.2d 849 (Or. 1957) the Oregon Supreme Court was faced with determining which state agency controlled the mineral rights to land upon which volcanic ash was to be harvested. Identifying the issue of the case the court stated:

"The whole case depends upon whether the statute authorizing a lease by the land board applies to the property in question."

The Court continued, saying:

"It is apparent that the same land cannot be at the same time subject to the complete or exclusive control of two separate state agencies, nor can the funds expended and proceeds received come from or be placed in two mutually exclusive funds."

The issue in Rawson is completely different from the issue now before the court. There is no question as to whom the Act applies. There are no sections of the Act which are in conflict with each other. Masseurs can only be licensed by one board. No statute gives any other agency, commission or board the authority vested in the Board. Not only are the words clear and unambiguous, but the application of the Act is free from contradiction. Absent such ambiguity there is no room for construction. Every jurisdiction cited by Appellants embraces this doctrine. The Oregon Court in Monaco v. United States Fidelity & Guaranty Co., 550 P. 2d 422 (Or. 1976) stated:

"Whatever the legislative history of an act may indicate, it is for the legislature to translate its intent into operational language. This

court cannot correct clear and unambiguous language for the legislature so as to better serve what the court feels was or should have been the legislature's intent." [citing Lane County v. Hewtz Construction Co. et al, 228 Or. 152, 364 P. 2d 627 (1961); emphasis added]

The Supreme Court of North Dakota, in the case of Rausch v. Nelson, 134 N.W. 2d 519, 525 (ND. 1965) indicated that:

"Where the language of a statute is plain and unambiguous, the court can not indulge in speculation as to probable or possible qualifications which might have been in the mind of the legislature, but the statute must be given effect according to its plain and obvious meaning, and cannot be extended beyond it." [citing 59 C.J. pp. 955-957; City of Dickinson v. Thress, 69 N.D. 748, 290 N.W. 653 at 652]

It is contended by the Appellants that because it is impossible to set up the Board, following a strict interpretation of the statutes, an absurd result occurs and hence, there is ambiguity. However, it does not follow that impossibility or implementation of the Act is an absurd result. In the case of Hernandez v. Frothmiller, 204 P.2d 854, 68 Ariz 242 (1949), the Arizona Supreme Court said:

"We recognize the rule that, when giving the literal meaning to language of a statute results in an absurdity or impossibility, courts will under some circumstances alter, modify, or supply words in order to give effect to the plain intention of the lawmaker. This does not mean that when language has a plain meaning to which effect cannot legally be given, the court will try to guess what the lawmakers intended." (emphasis added).

It is further suggested by Appellants, that the failure to include a "grandfather" clause in the Act was merely an



oversight; that the intention of the legislature was to create a Board from the masseurs already practicing in the state. By asking this Court to superimpose its own section in the Act, grandfathering in members of the Board, Appellants are asking the Court to second-guess the legislature. In the case of Automobile Drivers and Demonstrators Union Local v. Department of Retirement Systems, 529 P.2d 379, 92 Wash. 2d 415, appeal dismissed, certiorari denied 100 S.Ct. 724, (1978), the Washington Supreme Court stated:

"This court cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or inadvertent omission".

Is it not equally probable that the Legislature was aware of its actions and intentionally failed to include a "grandfather" clause. Again, it is not the duty of this court to second-guess the Legislature.

In the case of Department of Labor and Industries v. Cook, 269 P.2d 962 (WA 1954) the Washington Supreme Court was faced with the problem of deciding whether or not it had the authority to alter a statute which when given a strict interpretation caused an illogical result. There was no ambiguity in the words of the statute. The statute in question allowed the Department a right to defend in superior courts those board decisions which were favorable to the Department, but denied the right to court action upon an adverse decision. Speaking of the lack of logic in this situation, the Court

stated:

"But, whether the seeming lack of logic in this situation is the product of inadvertence or intention, the fact remains that the act lacks such a provision. The court cannot read into a statute anything which it may conceive that the legislature has unintentionally left out."

It may be true that the failure to provide means to establish an initial Board is an illogical result. But, the logic of the statute is not the question before the Court. The Act and the sections within the Act which provide the guidelines for the creation of the Board are clear. There is but one interpretation that can be applied. The Division and the District Court have determined that the Board cannot be created. Absent ambiguity in the statute, this Court must follow suit. The problem presented by this case is best left to those who created it, the Legislature.

## II

THE COURTS DO NOT HAVE AUTHORITY TO AND  
SHOULD NOT LEGISLATE A CHANGE TO RECTIFY  
THE PROBLEMS FOUND WITHIN THE ACT.

As has been suggested, Appellants are urging this Court to create a "grandfather clause" to the Act by allowing certain individuals to be licensed without exam. In support of his position, counsel cited several cases which he declared support such action. However, as explained in Argument I, nowhere does Appellant cite authority to support the idea of modifying a clear and unambiguous statute. By

asking this Court to modify the Act, Appellants are asking the Court to cross the barriers of separation of powers and legislate a change in the Act. Such action is clearly beyond the powers granted the Court.

Article V, Section 1 of the Utah Constitution states:

The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted. (Emphasis added.)

The Utah Supreme Court, beginning with cases around the turn of the century have been quite consistent that it is not the position of the courts to legislate. The Court in Young v. Salt Lake City, 67 P. 1066 (Utah 1902) held:

The appellant contends that the statute under which this proceeding was taken is unconstitutional and void, and that it attempts to delegate power to the district court and commissioners to legislate, and that the power given is a legislative power, and that the court cannot be invested with it by the legislature, under the constitution. It is true that, under the constitution, powers belonging to one department of government cannot be exercised by others. Courts cannot legislate or make laws. (Emphasis added.)

Earlier, the court held in Kimball v. City of Grantsville, 57 P. 1 (Utah 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 led 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 a usurpation of power by one department of the government which the people absolutely vested in another.

Appellants suggest that the principle of "separation of powers" is not the issue in this case. It is suggested that creating exceptions to the Act would merely be an extension of the Court's proper function, (i.e., interpreting the statutory law promulgated by the other branch of government.) Again, Appellants fail to understand that they are asking the Court to do more than interpret the Act. Interpreting the Act leads one to the conclusion that the Board cannot be created. The Court interprets ambiguities found within statutes. Here, there are no ambiguities. How can the Court interpret the words of the statute as creating exceptions to the Act, which don't exist within the Act. The Courts have always embraced this principle. In Travelers Indemnity Company v. Kowalski, 43 Cal. Rptr. 843 (1965) the court stated:

"We recognize that the statute we are reviewing must be given a liberal interpretation. Nevertheless, . . . this "does not vitiate the elementary principle that the judicial function is simply to ascertain and declare what is in terms or in substance contained in the statute, not to insert what has been omitted, or omit what has been inserted." (emphasis added)

The Nebraska court stated in City of Grand Island v. County of Hall, 242 N.W. 2d 858, 196 Neb. 282 (1976) that:

"Where the language of a statute is plain and unambiguous, no interpretation is needed and the court is without authority to change the language." [citing State v. Gallegos, 193 Neb. 651, 228 N.W. 2d 615. Emphasis added.]

In Pedroli v. Missouri Pacific Railroad, 524 S.W.2d 882 (Mo. 1975), the Supreme Court of Missouri, referring to when it is and is not appropriate for the courts to amend a statute stated:

"When the language of a statute is unambiguous and conveys a plain and definite meaning, the courts have no business to look for or to impose another meaning [De Poortere v. Commercial Credit Corporation, 500 S.W. 2d 724, 727 (Mo. App. 1973)]. If a statute is unambiguous, a court should regard it as meaning what it says since the legislature is presumed to have intended exactly what it states directly." (Emphasis added.)

Once the courts step beyond ascertaining and declaring what is in terms or in substance contained in the statute, it ceases its interpretation function and begins to usurp the power of the legislature. This Court, in Kimball, supra said: "In such case the legislature alone can afford a remedy. The judicial department cannot arrogate to itself power not within its province." Even as late as State v. Gallion, 572 P.2d 683 (Utah 1977) this Court was standing by that basic premise. With the problems within the Act itself, the Legislature has many options to solve them. The decision of which option to choose should be left to it.

In Anderson v. I. M. Jameson Corporation, et al, 59 P.2d

962, (CA 1936) the California Supreme Court explained that absent the ambiguity in the statute the courts must refrain from correcting the statute even if the consequence would be to defeat the object of the Act. The Court stated:

"It is probably safe to assume that the Legislature had in mind [a certain proviso] but the difficulty is that they have not expressed this intent in the language used. This court has no power to rewrite the Section so as to make it conform to a presumed intention which is not expressed. This court is limited to interpreting the Section, and such interpretation must be based on the language used. . . . 'It is a cardinal rule with the construction of Sections that the intent of the legislators should be followed, but this is subject to the imperative and paramount rule that the court cannot depart from the meaning of language which is free from ambiguity, although the consequence would be to defeat the object of the Act.'" [citing Seaboard Acceptance Corp. v. Shay, 214 Cal. 361, 5 P. 2d 882]

Even though the sustaining of the summary judgment order would result in continued delay in the formation of the Board, the Court is without authority to depart from the clear and unambiguous language of the statute. The Court cannot arrogate to itself power not within its province. Interpretation of the Act leads to only one conclusion. Implementation of the Act is not possible at the present time. Further legislative action is needed.

### III.

#### THE APPELLANTS' CONTINUED OPERATION AS A LEGITIMATE BUSINESS IS NOT IN JEOPARDY.

In their brief, Appellants maintain that the Act

pre-empts local regulation of the massage business. Reference is made to ordinances passed by Salt Lake County and South Salt Lake which Appellants contend unduly restrict their business practice. In both instances, the ordinances exempt from licensure those masseurs who are licensed by the state. If this Court amends the Act, Appellants will no longer be subject to restrictions which they feel jeopardize the continued operation of their business.

Appellants fail to realize that the exemption granted by the ordinances for those licensed by the state simply indicates the intention of the local governing bodies to regulate their business in the event that the state fails to do so. Furthermore, the Act does not pre-empt local regulation. It merely provides a system for state licensure and regulation. There is no provision in the Act which prohibits counties or cities from creating their own regulatory schemes relative to the operation of massage business within their respective jurisdictions. Licensing requirements along with procedures for handling disciplinary proceedings is not blanket authority to exclusive jurisdiction. Although, under the Act, all masseurs in the state must be licensed, nothing prohibits the introduction of ordinances which further define the legitimate practice of massage in a given jurisdiction. Several professions which are licensed by the State are likewise controlled by specific ordinances which govern the operations of the professions within a given jurisdiction.



Even if the Act did pre-empt local regulation, it is of no significance to the issue now before the Court. The only issue before the Court is whether or not the courts have the authority to amend an unambiguous Act in order to allow its implementation. The ordinances of which Appellants complain have been duly enacted and fall within the parameters of the Court's decisions in 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). They do not prohibit the operation of Appellant's legitimate business but merely restrict the manner in which it may be carried out.

Absent the establishment of the Board the Act can have no practical effect. Appellants do not run the risk of being put out of business or of being criminally prosecuted because of the Act. The only result of the Court's decision affirming Judge Taylor's order will be to leave the solution of the problem to those who created it in the first place, the Utah Legislature.

#### CONCLUSION

The language of the statute is clear. The Legislature requires all to pass an examination. The only waiver relates to the educational training required for those having five or more years of experience.

The Legislature did not "grandfather" any indivi-

duals, and requires that a Board of "licensed" technicians act as the Board. This doesn't create ambiguity, but creates a non-implementable statute that must be amended by the Legislature, not the Courts.

As such, this Court is urged to sustain the decision of the District Court.

Dated this 5<sup>th</sup> day of May, 1982.

  
STEPHEN G. SCHWENDIMAN  
Assistant Attorney General

#### MAILING CERTIFICATE

I hereby certify that I mailed two copies of the foregoing brief to W. Andrew McCullough, Attorney at Law, 930 South State Street, Suite 20, Orem, Utah 84057, this 5<sup>th</sup> day of May, 1982.

  
Eileen Thompson