

2016

**Zen Healing Arts, LLC., D/B/a Beaches Bodyworks, Jeff Stucki,
and Leisa Metcalf Plaintiffs/Appellants vs. Utah State Department
of Commerce, Utah Division of Occupational Licensing, and John
Does I-X Defendant/Appellee**

Utah Court of Appeals

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STATE OF UTAH

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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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UTAH APPELLATE COURTS

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STATE OF UTAH

Case No. 20160241-CA

BRIEF OF APPELLANT

TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
CONSTITUTIONAL PROVISIONS CITED	
STATUTES CITED	iv
JURISDICTION	1
ISSUES PRESENTED FOR REVIEW	2
CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES AT ISSUE	4
STATEMENT OF CASE	4
Nature of the Case	4
Statement of Facts	6
SUMMARY OF ARGUMENTS	7
ARGUMENT	24
POINT IA	
THE MESSAGE RULE AT ISSUE IS NOT SUPPORTED BY SUBSTANTIAL FACTS..	24
POINT 1B	
THE JUDGMENT OF THE COURT BELOW IS INTERNALLY INCONSISTENT AND IS NOT IN ACCORD WITH THE FACTS OR THE LAW	29
POINT II	
THE MESSAGE RULE AT ISSUE IS ARBITRARY, CAPRICIOUS,	

STATE OF UTAH

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TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
CONSTITUTIONAL PROVISIONS CITED	
STATUTES CITED	iv
JURISDICTION	1
ISSUES PRESENTED FOR REVIEW	2
CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES AT ISSUE	4
STATEMENT OF CASE	4
Nature of the Case	4
Statement of Facts	6
SUMMARY OF ARGUMENTS	7
ARGUMENT	24
POINT IA	
THE MESSAGE RULE AT ISSUE IS NOT SUPPORTED BY SUBSTANTIAL FACTS..	24
POINT 1B	
THE JUDGMENT OF THE COURT BELOW IS INTERNALLY INCONSISTENT AND IS NOT IN ACCORD WITH THE FACTS OR THE LAW	29
POINT II	
THE MESSAGE RULE AT ISSUE IS ARBITRARY, CAPRICIOUS,	

AND IS OUTSIDE OF THE SCOPE OF THE STATUTE IT SEEKS TO
“CLARIFY”. 42

CONCLUSION 56

MAILING CERTIFICATE 57

ADDENDUM

(photocopies of actual documents)

A. Partial Summary Judgment

B. Clarification of Partial Summary Judgment

C. Findings of Fact and Conclusions of Law

D. Statutes and Rules

**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

TABLE OF AUTHORITIES CITED
CASE AUTHORITY

<u>Bushco v. Utah State Tax Commission</u> , 2009 UT 73, 225 P.3d 153 (Utah 2009)	2,3,4,43
<u>Clayton v. Steinagel</u> , 885 F.Supp.2d 1212 (D. Utah 2012) (D.Utah 2012)	53
<u>Cornwell v. Hamilton</u> , 80 F.Supp.2d 1101 (1999)	55
<u>Dorsey v. Department of Workforce Services</u> , 2012 UT App 364 (Utah App. 2012).	31
<u>Ferro v. Utah Dept. Of Commerce</u> , 828 P.2d 507(Utah App. 1992)	30
<u>Grand County v. Emery County</u> , 52 P.3d 1148, 202 UT 57 (2002)	30
<u>Grayned v. City of Rockford</u> , 408 U.S. 104(1972)	47
<u>Houston v. Hill</u> , 482 U.S. 451 (1987)	47
<u>Kolender v. Lawson</u> , 461 U.S. 352 (1983)	47
<u>Provo City v. Willden</u> , 768 P.2d 455 (Utah 1989).	43
<u>Orem City v. Wood</u> , Fourth Dist. Case No. 101200072	11,52
<u>Rocky Mountain Energy v. Tax Com'n</u> , 852 P.2d 284(Utah 1993).	31
<u>State v. Cash</u> , Third District Case No. 111402066	13
<u>State v. Hawker</u> , 2016 UT App. 123	43
<u>State v. J.M.S.(State ex rel. J.M.S.)</u> , 2011 UT 75, 280 P.3d, 410 (Utah 2011)	2,3,4
<u>State v. Kelso</u> , Second District Court Case No. 121701518	36,44
<u>State v. Mooney</u> , 2004 UT 49, 98 P. 3d 420 (Utah 2004)	48

<u>U.S. v. Apollo Energies</u> , 611 F.3d 679 (10 th Cir. 2010)	47
<u>Wasatch County v. Okelberry</u> , 2008 UT 10 (Utah 2008)	30

STATUTES

Utah Code Ann. § 58-1-106(1)(a)	7
Utah Code Ann. § 58-1-202	15,26
Utah Code Ann. § 58-1-203	15
Utah Code Ann § 58-1-501	4,9
Utah Code Ann § 58-1-502	4,9
Utah Code Ann. § 58-11a-102(34)(a)(ii)	44
Utah Code Ann. § 58-11a-102(34)(I)	45
Utah Code Ann. § 58-47b-102	4,5,7,39
Utah Code Ann. § 58-47b-201	4,15
Utah Code Ann § 58-47b-201(3)(a)	16
Utah Code Ann. § 58-47b-501	9
Utah Code Ann. § 58-47b-503	9
Utah Code Ann. § 63G-3-602	24,25,30
Utah Code Ann. § 78A-3-102(3)(I)	1

Utah Code Ann. § 78A-3-102(4)	1
Utah Code Ann. § 78B-6-401	30

RULES

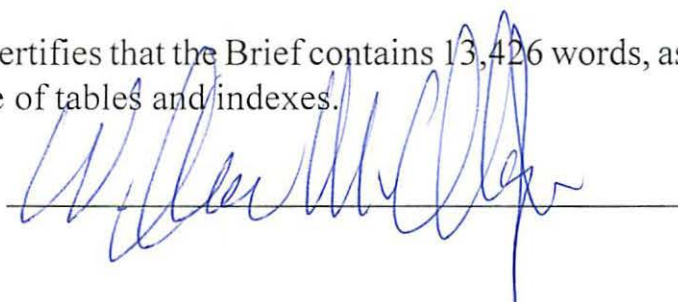
Massage Therapy Act 58-47b-106	18
Massage Therapy Practice Act Rule R156-47b	passim

CONSTITUTIONAL PROVISIONS CITED

United States Constitution Amendment I	4,47,48
United States Constitution Amendment XIV, Section 1.	4,53

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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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 Zen Healing Arts, L.L.C. 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 Zen Healing Arts, d/b/a Beaches Bodyworks, 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 Stucki 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 Orem City v. Wood, Case No. 101200072, 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 Roman and Metcalf:

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 State v. Cash, Third District Court, West Jordan Department, Case No. 111402066, 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 norepinephrine, 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 if 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 licensing 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 rendering the underlying statute vague as well.

ARGUMENT

POINT I

THE MESSAGE 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 Stucki filed written comments in opposition to the Rule, on or about January 17, 2012; and that Plaintiff Stucki 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.

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

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 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 statute, 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

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

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 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

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.

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 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, Alyssa Kelso, 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. 121701518, 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 field of massage therapy and to require 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 statute, 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 statute; 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 therapy.

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 MESSAGE 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 Provo City v. Willden, 768 P.2d 455 (Utah 1989) and Bushco v. Utah State Tax Commission, 2009 UT 73, 225 P.3d 153 (Utah 2009). See also the recent decision of this Court in State v. Hawker, 2016 UT App 123.⁴ While a massage is not directly speech, all parties agree

⁴ While the Court did not reach the constitutional issues, it rejected an expansive definition of “sexual activity” as

that the right of one person to touch another is most fundamental. R. 249-250. Many entertainers touch audience members as part 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.

outside the language of the statute.

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 State v. Kelso, 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 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

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. Lotions might well be used for lubrication. Could the legislature rationally have made rubbing a person's arm a Class A misdemeanor?

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 for 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 unlicensed 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 Orem City v. Wood. 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

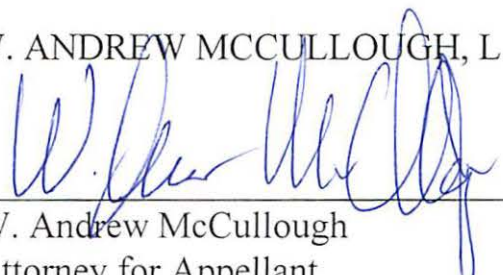
with that change.

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 12th day of September, 2016.

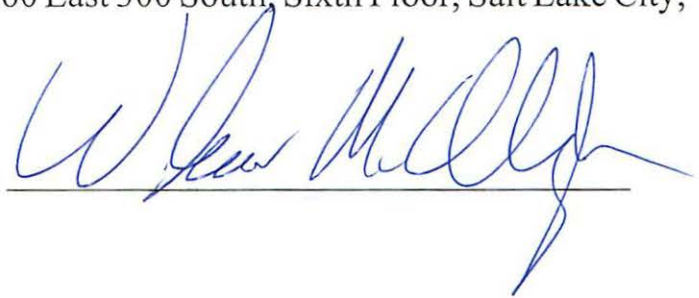
W. ANDREW MCCULLOUGH, L.L.C.



W. Andrew McCullough
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 12th 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.

A handwritten signature in blue ink, appearing to read "W. Glen M. Olson", is written over a horizontal line.

ADDENDUM A

DEC 02 2013

SALT LAKE COUNTY

By _____
Deputy 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 and PARTIAL
SUMMARY JUDGMENT**

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 were represented by W. Andrew McCullough. The Defendants were represented by Laurie L. Noda. 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 not 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. This constitutes the FINAL ORDER of the Court, no further Order is necessary.

Dated this 2nd day of December, 2013

BY THE COURT


L. A. DEVER
DISTRICT JUDGE

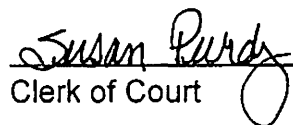


CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing ORDER and
PARTIAL SUMMARY JUDGMENT was mailed this 2 day of December, 2013,
to the following:

Andrew McCollough
Counsel for Plaintiffs
6885 South State Street, Ste 200
Midvale, UT 84047

Laurie B. Noda
Office of the Attorney General
160 East 300 South, 5th Floor
Salt Lake City, UT 84114-0872


Clerk of Court

ADDENDUM B

SEP 17 2014

SALT LAKE COUNTY

By _____

jl
Deputy 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.

**CLARIFICATION OF
ORDER and PARTIAL
SUMMARY JUDGMENT**

Case No. 120900860

Judge: L.A. DEVER

The above entitled matter was before this Court on Plaintiff's Motion for Partial Summary Judgment. The Court issued an Order and Partial Summary Judgment on December 2, 2013. It has been brought to the Court's attention that a clarification of a portion of a paragraph on page four is needed.

The paragraph on page four states as follows:


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.

The paragraph should read as follows:

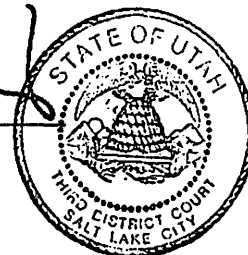
Plaintiffs' Motion for Summary Judgment concedes that the Division has the right to determine the parameters of operation of a massage therapist. The Division may, within the scope of the Act, define the range of activities that a therapist is allowed to do or is prohibited from doing. However, the Division may not define the scope of activities, including manipulation, of individuals that are not licensed massage therapists or holding themselves out, by word or act, as massage therapists. Id.

DATED this 17th day of September, 2014

BY THE COURT



L. A. DEVER
DISTRICT JUDGE

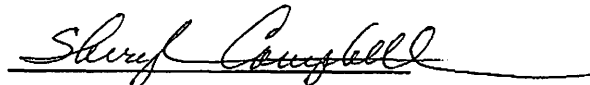


Certificate of Delivery

I hereby certify that a true and correct copy of the foregoing Clarification
was hand delivered on September 17, 2014, in open Court to the following:

Andrew McCollough
Counsel for Plaintiffs
6885 South State Street, Ste 200
Midvale, UT 84047

Laurie B. Noda
Office of the Attorney General
160 East 300 South, 5th Floor
Salt Lake City, UT 84114-0872


Clerk of Court


ADDENDUM C

THIRD DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
SALT LAKE DEPARTMENT

FILED DISTRICT COURT
Third Judicial District

NOV 13 2015

ZEN HEALING ARTS, L.L.C. d/b/a :
BEACHES BODYWORKS, JEFF :
STUCKI, and LEISA METCALF, :

SALT LAKE COUNTY
By  Deputy Clerk

Plaintiffs,

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

vs.

Case No. 120900860

UTAH STATE DEPARTMENT OF :
COMMERCE, UTAH DIVISION OF :
OCCUPATIONAL AND :
PROFESSIONAL LICENSING, :

Judge Barry G. Lawrence

Defendants.

This matter arises out of citations issued by the State of Utah, through its Division of Occupational and Professional Licensing (“DOPL”) against Plaintiffs, Leisa Metcalf and Jeff Stucki, for practicing massage therapy without a license. The citations were upheld before all relevant administrative tribunals, and Plaintiffs now seek *de novo* review before this Court. Plaintiffs ask the Court to i) dismiss the citations with prejudice and, ii) declare that a Rule (i.e., Message Therapy Practice Act Rule R156-47b) promulgated by DOPL in 2012 is unlawful and unconstitutional.¹

¹ The Amended Complaint also contains other arguments attacking the statute as unconstitutional as well. Plaintiffs did not pursue those arguments at trial; and, there were no arguments presented to the Court that the relevant licensing statutes went beyond the power of the legislature to regulate the area of massage therapy or, were

I. STATUTORY SCHEME REGARDING LICENSING OF MASSAGE THERAPISTS:

A. The Governing Statute

This case is governed by the Massage Therapy Practice Act (the “Act”). *See* Utah Code Ann. § 58-47b-101, *et. seq.* Utah Code Annotated Section 58-47b-301, requires a person to have a license in order to “charge or receive a fee or any consideration for providing a service that is within the practice of massage therapy.” *Id.* at Sec. 58-47b-301 (2)(c). Section 58-47b-102 defines the “practice of massage therapy” by setting out various actions or conduct, any one of which constitutes massage therapy. Notably, because the actions at issue here occurred in August, 2011, the 2011 version of that statute applies, even though some changes were made to the statute in 2012. The following reflects the 2012 version of Part 102, with the changes made from the 2011 version noted:

(6) “Practice of massage therapy” means: . . .

(b) the systematic manual or mechanical manipulation of the soft tissue of the body for the 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;
- (vi) achieving homeostasis; or {and}
- (vii) [~~recreational or~~] other purposes; . . .

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

otherwise constitutionally infirm. *See generally* Utah Code Ann. §58-47b-201 (describing in part, the duties of the Board of Massage Therapy).

Utah Code Ann. § 58-47b-102.² Also of note, Section 58-47b-304 enumerates various exemptions from the licensure requirement. That list includes various health care providers, athletic trainers, therapists, and persons performing gratuitous massages. *Id.*

The Act also created a Board of Massage Therapy (the “Board”), *see* Utah Code Ann. § 58-47b-201, which has rulemaking authority. Utah Code Ann. § 58-1-203(1)(c).

B. Rule R156-47b

In 2012 – effective *after* the relevant dates herein – the Board promulgated a rule that defined the term “manipulation, as used in Subsection 58-47b-102(6)(b), [to] mean[] contact with movement, involving touching the clothed or unclothed body.” Utah Admin. Code R156-47b(10). That Rule was not in effect when the citations were issued to the Plaintiffs herein. Accordingly, it shall not be considered in determining whether the citations were properly given in this case. Nonetheless, Plaintiffs ask this Court to issue a declaratory judgment that the Rule exceeded the State’s authority. That legal argument will be addressed below.

II. FINDINGS OF FACT

A. Brief Summary of Evidence:

1. The State called three witnesses: Allyson Pettley, the Bureau Manager and former investigator for DOPL in their Massage Therapy division; Sharon Muir, the

² In other words, in 2012, the word “therapeutic” was added, the “and” was changed to an “or” and the word “recreational” was deleted. Subpart (vii) was added in 2011; the 2010 version of the statute did not contain a catch-all provision.

Chairman of the Board, and an expert³ on massage therapy; and Lieutenant Michael Cupello, who investigated Plaintiffs' facility in August 2011.

2. The Court found Ms. Pettley to be credible, although it was clear to the Court that she was heavily biased in favor of the State and was defensive of her actions. She was not a massage therapist, but has been involved in the enforcement of the massage therapy statute for years. Accordingly, while she was not qualified to act as an "expert" on the finer points of massage therapy, her testimony concerning her understanding of massage and the Act was probative and helpful.
3. The Court found Ms. Muir to be credible, yet she too was heavily biased as an advocate for 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 massage modality known as "effleurage."
4. Ms. Muir also testified that it is important to regulate the field of massage therapy, and to require licenses to practice it, in order to protect the integrity of the massage therapy profession. State's Exh. 4 at 2.

³ See *Green v. Louder*, 2001 UT 62, ¶ 24, 29 P.3d 638 ("The [q]ualification of a person as an expert witness ... is in the discretion of the trial court." (citation and quotations omitted)).

5. The Court notes, however, that while Ms. Muir's testimony concerning the history of Rule 156-47b was helpful, the Court disregards any legal opinions she gave regarding the governing statute and rule.
6. The Court found Lieutenant Cupello's testimony to be of little value. He investigated Plaintiffs' establishment, i.e., Beaches Bodyworks ("Beaches"), to determine whether Beaches was in violation of sexually oriented business (SOB) laws. In the course of that investigation, Beaches' employees consistently stated that they did not engage in "deep muscle massages." Lieutenant Cupello did not speak with either of the named Plaintiffs, i.e., Mr. Stucki and Ms. Metcalf. He did, however, observe that there were oils in each of the rooms of Beaches. Ultimately, Lieutenant Cupello did not issue any citations or file any charges.
7. The Defendants relied principally on Mr. Stucki and Ms. Metcalf, who testified about their business – which they described as a relaxation spa. The Court found them to be very credible.
8. In fact, both Mr. Stucki and Ms. Metcalf each candidly acknowledged facts that were against their legal interest. Ms. Metcalf acknowledged performing "light touch massage" on her clients' arms, legs and back, but not deep muscle massages. She also acknowledged using oils on her clients which were, likewise, applied lightly. She testified credibly that she in good faith believed that she was not engaging in "massage therapy," as defined by the Act.
9. Similarly, Mr. Stucki claimed to have had a good faith belief that his establishment's actions were consistent within the Act. Mr. Stucki testified about

the efforts he made to try to comply with his understanding of the Act, and his belief that the Act's definition of massage therapy did not include "light touching." Further, he candidly acknowledged that he did not realize that the use of oils was prohibited under the Act, stating that that had "slipped by him." After he was informed that the use of oils was a prohibited act under the Act, he ceased using them.⁴

10. Plaintiffs also called 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

⁴ Although both Mr. Stucki and Ms. Metcalf seemed to have had a good faith belief that they were not violating the Act, it appears to the Court that they did and, their good faith belief is not a defense under the statute. *See State v. Steele*, 2010 UT App 185, ¶ 30, 236 P.3d 161 ("It has long been recognized that ignorance or mistake of law provides no defense or excuse for a crime [and] a good faith or mistaken belief that one's conduct is legal does not relieve a person of criminal liability for engaging in proscribed conduct." (citation and quotations omitted)).

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. He never opined that the precise conduct of the Plaintiffs in this matter was *not* “massage” as that term is generally recognized, and thus never contradicted Ms. Muir’s testimony on that point.

13. The Court also received various exhibits of note. First, a screen shot of the Plaintiffs’ website, which disclaimed that they were conducting massages. (State’s Ex. 1). However, despite the disclaimer, the site contained a photograph of a couple who appeared to be engaged in a classic massage position, which brought into question the sincerity of the disclaimer. *Id.*
14. Plaintiffs also offered their Consent Form (“Form”) (Pls.’ Ex. 7), which all clients were required to sign. In the Form, Plaintiffs again disclaimed that they were performing massages and asked their clients to agree to the following: “I understand that the treatment is NOT a therapeutic massage or medical treatment as defined by Utah Massage Therapy act Utah code 58-47b[sic].” *Id.* The Court found that disclaimer to be self serving; and, the use of the modifier “therapeutic” did not capture all of the statutory purposes of massage. Accordingly, the Form

only slightly advanced Plaintiffs' position.

B. Underlying Facts Regarding Whether Plaintiffs Were Performing Massages:

15. The only material factual dispute in this matter is whether Plaintiffs' actions constituted "massage therapy" as defined by the Act. Based on the following facts, the Court finds and concludes that Plaintiffs' actions *did* constitute the "practice of massage therapy" pursuant to the Act:
16. Plaintiff, Mr. Stucki, operates a relaxation spa called Beaches Bodyworks in Salt Lake County. Beaches offers relaxation techniques for their clients including Reiki, aroma therapy, and "light touching."
17. Beaches' employees perform these services for a fee, which is split between the company and the employee performing said services.
18. In August 2011, DOPL received an anonymous call that Beaches was performing massage therapy without a license. DOPL investigated the allegations and concluded that two Beaches employees – Leisa Metcalf and Middony Roman⁵ - were performing massages without a license and issued them cease and desist orders. DOPL did not fine either Ms. Metcalf or Ms. Roman.
19. Ms. Metcalf was cited with "practicing massage without a license" during the period of June 27, 2011 (when she was hired by Beaches) through September 1, 2011, pursuant to Utah Code Annotated Section 58-1-501(1)(a). *See* (Pls.' Ex. 3). She discussed the citation afterwards with Ms. Pettley, who had investigated the

⁵ Ms. Roman was a named Plaintiff but abandoned her claim before trial. Accordingly, her claim is dismissed.

matter. Ms. Pettley testified that after she explained the Act and DOPL's definition of massage, Ms. Metcalf acknowledged that she had performed massages. Ms. Metcalf denies that she made such an admission. The Court does not find that any such admission, if made, would be helpful to decide whether Ms. Metcalf's actions actually constituted massage under the statute. She is not a massage therapist and therefore, would have relied on DOPL's understanding of what constitutes a massage under the Act. The Court is charged with determining whether a massage occurred based on the facts. Ms. Metcalf's belief, at the time of her meeting with Ms. Pettley, has low, if any, probative value.

20. Ms. Metcalf testified about the services she performed. She admitted performing "light touch" techniques to her clients' arms, legs, and back. She also admitted to applying oils to her clients' arms, legs, and back. She further testified that she was led to believe that "light touch" did not constitute massage, because she was only contacting the skin, and for there to be a massage, there needed to be more pressure so as to constitute a "deep muscle massage."
21. Mr. Stucki likewise received a citation, for hiring unlicensed massage therapists in violation of Section 58-1-501(1)(c). (Pls.' Ex. 2). In addition to a cease and desist order, he was fined \$800.
22. Mr. Stucki also met with DOPL officials to discuss the Act after he received the citation. Mr. Stucki seemed earnest in his desire to comply with the relevant governing statute. He claimed that he understood that "light touching of the skin" did not constitute a massage under the Act and that he trained his employees to

perform only light touch massages, as opposed to what he called “deep muscle massages.”

23. Mr. Stucki admitted that prior to the citation, his workers applied oils to their clients. But, once he was told by DOPL that oil rubs constitute massage, he stopped the practice. Mr. Stucki candidly admitted that he did not realize that the use of oils would constitute a massage and said that that had “slipped by him.” The Court found that to be persuasive evidence that Mr. Stucki violated the Act by encouraging his employees to perform oil rubs. Moreover, the fact that he told his employees to stop using oil after he learned that oil rubs constitute massage, does not retroactively excuse Beaches’ prior wrongful conduct.
24. Notably, the screen shot of Beaches’ website disclaimed massages, stating “Beaches is not an offer for message [sic] as defined by Utah law.” *See* (State’s Ex. 1). It also appears to advertise massages as “coming soon.” However, there is a photo on the page that appears to show a female massager straddling the upper back of a male. *Id.* The site also advertises the use of “non-scented oils.” *Id.*
25. Lieutenant Cupello saw oils in each of Beaches’ private rooms.
26. DOPL attempted to impugn Mr. Stucki because after he was issued the citation, he stated – apparently mistakenly – that he had five (5) massage therapists on his staff. After Defendants sought the names of the licensed massage therapists, Mr. Stucki acknowledged he did not have any on his staff. Mr. Stucki claims this was an honest mistake; that he had assumed he had licensed massage therapists on staff, but when he delved deeper, he discovered he did not. Defendants argue that

Mr. Stucki's actions support that he had made up the existence of massage therapists in an attempt to thwart the citation. The email chain between the parties makes clear that he made such a representation and that it was false. On this issue, the Court finds that Mr. Stucki's actions – whether intentional or not – provides the inference that he believed he needed to have licensed massage therapists on premises, perhaps because he knew or suspected that his employees were performing “massages.”

27. There was actually very little dispute about what really happened in this case. Ms. Metcalf provided “light touch” services for her clients, where she would lightly touch their skin or clothes. She conducting the “light touch” services all over her clients' bodies – on their arms, legs, and back. And, at time, she applied oils while she did so. The legal issue for this Court is whether those virtually undisputed facts constitute massage therapy under the Act.

C. Ms. Metcalf's Actions Constitute “Massage Therapy” Under Section 58-47b-102(6)(b):

28. Under Section 58-47b-102, various actions can constitute massage therapy. The Court finds and concludes that Ms. Metcalf's actions constitute massage therapy under both sub-sections (6)(b) and 6(f).
29. Subsection (6)(b) defines in part the “practice of massage therapy” and sets forth four independent requirements that have to be met. It states in relevant part that the “practice of massage therapy means . . . the [i] systematic [ii] manual or mechanical manipulation [iii] of the soft tissue of the body [iv] for the purpose of

[various enumerated purposes.]” Utah Code Ann. § 58-47b-102.

30. Systematic: The touching at issue was systematic as opposed to random or incidental. That is, Ms. Metcalf’s self-proclaimed technique involved light touching all over the client’s arms, legs and back, sometimes with oils. There is no serious argument that her conduct was not systematic.⁶
31. Manipulation: Much of the trial addressed whether “light touch” can constitute massage. Shannon Muir testified that light touching over the skin was a recognized modality of massage, known as “effleurage” or “feather touching.” Mr. Lowe, *see supra* 6-7, acknowledged that light touching “could” constitute massage.
32. Plaintiffs essentially ask this Court to draw a distinction between “light touch” and a touch involving deeper pressure. Under such a standard – where a certain pressure threshold would have to be shown – it would be difficult to define the parameters of massage and difficult to enforce.
33. On the other hand, Defendants’ position is that any touch and movement on the skin constitutes a massage, and that “light touch” falls within the parameters of a massage.⁷ *See Nelson v. Salt Lake Cnty.*, 905 P.2d 872, 875 (Utah 1995) (“In interpreting [statutory provisions] , [a] court is guided by the principle that a

⁶ “Systematic” is defined in part as being carried on using step-by-step procedures. *See Am. Heritage Dictionary*, 1823 (3d ed. 1996). It is also defined as “presented or formulated as a coherent body of ideas or principles”; “methodical in procedure or plan”; “marked by thoroughness and regularity.” <http://www.merriam-webster.com/dictionary/systematic> . Under any definition, Ms. Metcalf’s actions were systematic.

⁷ The Rule that was passed after the citations in this matter were issued define manipulation in that broad manner. *See Utah Admin. Code R156-47b., infra.*

statute is generally construed according to its plain language. [A court] presume[s] that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning. [A court] must be guided by the law as it is. . . . When language is clear and unambiguous, it must be held to mean what it expresses, and no room is left for construction. Only when [a court] find[s] ambiguity in the statute's plain language need [it] seek guidance from the legislative history and relevant policy considerations.” (citations and quotations omitted)).

34. Under the Act , DOPL is given deference to reasonably interpret the statute. *Wells Fargo Armored Serv. Corp. v. Pub. Serv. Comm'n of Utah*, 626 P.2d 450, 451 (Utah 1981) (“Of course it is always the ultimate responsibility of this Court to interpret the terms of a statute to effectuate legislative intent. Nevertheless, some deference is due interpretation of a statute placed on it by the administrative agency which has the responsibility for administering that statute.”)
35. The Act does not provide a definition for the term “massage.” *Compare* Utah Code Ann. §58-47b-102(6) (describing the “practice of massage therapy”).⁸
36. The Court concludes that the term “manipulation” includes not only a “deep pressure massage” but would also include a medium pressure massage, as well as, a “light touch” massage to the recipient. Such a conclusion: i) is supported by

⁸ The dictionary definitions of massage varies and are not very helpful. One dictionary defines it as “[t]he rubbing or kneading of parts of the body to aid circulation or relax the muscles.” *See Am. Heritage Dictionary*, 1106 (3d ed. 1996). Another defines it more broadly: “manipulation of tissues (as by rubbing, kneading, or tapping) with the hand or an instrument for therapeutic purposes.” <http://www.merriam-webster.com/dictionary/massage>. Notably, however, the Utah statute expressly applies to therapeutic and non-therapeutic purposes.

general standards in the massage field, which recognizes “light touch” as an established massage technique – i.e., effleurage; ii) fits within the definitions/descriptions provided within the Act; and iii) is supported by DOPL’s interpretation of the Act.

37. The Court further notes that the purpose of the statute – regulating massages for health and safety reasons– is certainly supported by the type of conduct described here, where contact is made – albeit lightly – all over one’s body.
38. To the Soft Tissue of the Body. The statute defines “soft tissue” as “muscles and related connective tissue.” Utah Code Ann. § 58-47b-102(7). Both massage therapy experts – Ms. Muir and Mr. Lowe – testified that the skin is a soft tissue. The Court found that to be extremely persuasive that in the field of massage, skin is deemed to be a “soft tissue.”
39. Accordingly, even though the contact here was only light contact to the skin – and did not amount to deeper contact with muscles – the contact was nonetheless covered by the Act. Indeed, the reference to “soft tissue” suggests that light touch to the skin, was contemplated to constitute massage therapy under the Act.
40. For a Prescribed Purpose. Sub-section (6) lists a variety of recognized purposes of massage therapy. The version of the Act in effect at the time, i.e., 2011, of the citation listed seven (7) distinct purposes, the last of which was for “recreational or other purposes.”
41. Notably, the 2011 version of the Act contained the word “and” between the enumerated purposes, while the 2012 amendment changed the word “and” to

“or.” Plaintiffs argue that the use of the word “and” was in the conjunctive form and therefore, to constitute massage it must be shown that Plaintiffs met *all* enumerated purposes.

42. While the Court agrees that *generally* the use of the term “and” connotes the conjunctive form, such a result here belies the remainder of the Act and would result in an absurd interpretation. See *Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 26, 267 P.3d 863 (“Generally, when interpreting statutes we seek to avoid interpretations which render some part of a provision nonsensical or absurd. Thus, when statutory language . . . presents the court with two alternative readings, we prefer the reading that avoids absurd results. In defining the parameters of what constitutes an absurd result, we have noted that such a result must be so absurd that the legislative body which authored the legislation could not have intended it.” (citations and quotations omitted)).
43. It is clear from a reading of the Act that the intended use of “and” – in this context – was to be in the *disjunctive*.
44. The Act sets forth various “purposes” of massage. Utah Code Ann. §58-47b-102(6)(b). It includes, for example, the purpose of “promoting the health and well-being of a client,” to “relieve pain”, or for a “recreational or other purpose.” *Id.* The purposes are inconsistent with one another thereby making compliance with *all* purposes – which would be required if “and” was used in the conjunctive – impossible. A massage given for purely therapeutic or health

reasons need not also be given for recreational reasons to fall under the Act.

Compare id. at Sec. 58-47b-102(6)(d)-(h).

45. Moreover, the last enumerated purpose includes the phrase “other purposes.” *Id.* at Sec. 58-47b-102(6)(b)(vii). That language clearly reflects an intent to require any purpose; not *all* purposes mentioned in the Act need be shown.
46. In fact, Plaintiffs’ position would require not only the six (6) enumerated purposes be met, but every *other purpose* which would conceivably meet the definition of the “practice of massage therapy.” *Id.* at Sec. 58-47b-102(6). Obviously, the statutory language intended to convey that *any* purpose, not *all* purposes, needed to be shown to constitute massage therapy. *See Marion Energy, Inc.*, 2011 UT 50 at ¶ 26.
47. In this matter, the purpose of the services rendered by Plaintiffs, as stated by Mr. Stucki and Ms. Metcalf, was for relaxation and/or recreation. As described above, either relaxation or recreation is a recognized “purpose” under the Act.⁹
48. Based upon the foregoing, all of the requirements under Part 102(6)(b) have been met. The Court finds and concludes that the conduct undertaken by Ms. Metcalf constituted massage therapy as defined in Section 58-47b-102(6)(b).

C. Ms. Metcalf’s Actions Constitute “Massage Therapy” Under Section 58-47b-102(6)(f):

49. Under sub-section (6)(f), “oil rubs” constitute massage therapy. Notably, that

⁹ Note that the Plaintiff argues that an “other purpose” must include “other acts of the same general kind, class, character or nature as those enumerated beforehand,” relying on *State v A.T.*, 2001 UT 82, ¶ 13. However, it appears to the Court that relaxation *is* of a similar nature to pain relief, and “relaxing muscles.” Plaintiff failed to persuade the Court that a recreational or relaxation purpose would be inconsistent with the intent of the rest of the statute.

section is not predicated on “manipulation;” it simply requires “oil rubs.”

50. Rub is not a defined term, and its dictionary definition is a broad one – “the application of friction with pressure.” See <http://www.merriam-webster.com/dictionary/rubs>.
51. The Court concludes that applying oil to the skin by “gliding” it along the skin, as Ms. Metcalf has testified, constitutes an oil rub.
52. It is undisputed that during the relevant period, the employees/service providers of Beaches engaged in the practice of applying oil over their clients’ bodies. The Court finds and concludes that pursuant to the relevant section, this conduct constituted “oil rubs” and thus constituted the “practice of massage therapy.”
53. The Court concludes that Mr. Stucki directed his employees to cease and desist from applying oils after the citation was issued. However, this action by Mr. Stucki does not excuse or otherwise negate, the prior conduct of his employees in engaging in the practice of massage therapy – without a license.

D. Miscellaneous Factors and Arguments:

54. In addition to the requirements of sub-section 102(6), to constitute massage therapy requiring a license, there needs to be a fee or other consideration for the services rendered. See Utah Code Ann. § 58-47b-301. It is undisputed that Plaintiffs charged and received payments for their services.
55. The Court further finds that the conduct herein was not performed by health care providers, therapists, athletic trainers, etc., and that the services rendered were not done gratuitously. Accordingly, Plaintiffs’ services/conduct do not fall within any

of the exemptions provided in either Section 58-47b-304 or 58-1-307; nor, do Plaintiffs argue that any of those exemptions apply.

56. Plaintiffs argued that DOPL's interpretation of the Act was overly broad and sought to improperly criminalize contact that could amount to slight brushing of the arm. That argument, however, was belied by the facts before the Court. The contact at issue here was neither incidental nor minimal. Ms. Metcalf touched her clients' arms, legs, and back, and, applied oil to those same parts of the body. This case did not involve a slight brushing of the arm, and so the Court need not speculate about whether those facts would constitute massage therapy. *State v. Green*, 2004 UT 76, ¶ 45, 99 P.3d 820 (stating that a court will not evaluate claims "according to hypothetical situations not before the court."); *BV Lending, LLC v. Jordanelle Special Serv. Dist.*, 2015 UT App 117, ¶ 20, 350 P.3d 636 ("A court can only grant relief for those issues properly before it.")
57. Plaintiffs rely on *Clayton v. Steinagel*, 885 F. Supp. 2d 1212 (D. Utah 2012), in support of their argument(s). In that matter, the court held that "Utah's cosmetology/barbering licensing scheme is so disconnected from the practice of African hairbraiding much less from whatever minimal threats to public health and safety are connected to braiding, that to premise [plaintiff's] right to earn a living by braiding hair on that scheme is wholly irrational and a violation of her constitutionally protected rights." *Id.* at 1215-16. Here, however, DOPL is not trying to regulate a field other than massage therapy. It is regulating massage therapy, regardless of who performs it.

58. Plaintiff also relied on a 2010 state district court case, *Orem City v. Wood*, case number 101200072, heard before the Honorable Thomas Low in the Fourth District. There, the court dismissed similar charges that were brought against an escort service. Judge Low ruled in favor of the escort service on the basis that Orem City could not show the statutory purpose required by Section 58-47b-102(6)(b). However, that matter was decided under the 2010 version of the version of the statute which only recognized “therapeutic” purposes for massages. That is, the 2010 version of part 102 did not include the catch-all “recreational or other purposes” language contained in the 2011 version, which applies here. Since then, the legislature has made clear that recreational purposes *are* covered by the Act. *See* 2011 version of the Act.
59. Again, it is not this Court’s role to second guess the legislature. *See e.g. Cook v. Bell*, 2014 UT 46, ¶ 41, 344 P.3d 634 (“[T]he courts are in no position to second-guess the legislature’s judgments as to the weight of competing considerations, or the reasonableness of the legislature’s judgments.”); *Corwell v. Corwell*, 2008 UT App 49, ¶ 12, 179 P.3d 821 (“When the legislature has spoken clearly on an issue, we are not free to second-guess its wisdom on grounds of policy.” (citation omitted)).
60. Finally, Plaintiffs argue that the Act is unduly harsh because a violation of the Act may lead to a criminal charge of a Class A Misdemeanor – though no such charges were brought in this case – while lewd sexual conduct might only be charged as a Class B Misdemeanor.

61. First of all, the Plaintiffs here were not criminally charged with a crime for performing massage. They were issued ~~case~~^{cease} and desist orders and fined for a licensure violation.
62. Second, Plaintiffs' argument misconstrues the bases of the Act. The Act does not treat the act of massage more harshly than illegal lewd sexual acts. That is, there is no penalty for performing massage on another person. There is, however a penalty for practicing massage therapy *for a fee without a license*.¹⁰
63. Plaintiffs' disagreement with the statutory scheme licensing massage therapy should be addressed with the legislature. The basis of the Act is to regulate the massage therapy industry. The purpose is to protect people, *see* (Lowe Report, Pls.' Ex. 5), and also to protect the integrity of the massage industry. *See* (Muir Report, States' Ex. 4). The citation(s) issued by DOPL are consistent with the language and purpose of the Act.

E. Arguments Concerning Rule R156-47b:

64. In 2012, after the events of this case, the Board passed a rule that defined "manipulation" as "contact with movement, involving touching the clothed or unclothed body." Utah Admin. Code, R156-47b. This Rule was not in place when the citations were given and therefore it would be inappropriate for the

¹⁰ Moreover, it is not this Court's role to challenge the wisdom of penalizing people more for a licensure violation as compared to certain lewd acts. That, too, is an issue for the legislature. *State v. Kinsey*, 797 P.2d 424, 430 (Utah Ct. App. 1990) ("[R]eviewing courts should grant substantial deference to the broad authority given legislatures to determine the types of punishments for crimes[.]"(citation omitted)).

Court to rely on the Rule in this case. Notwithstanding, Plaintiffs ask the Court to rule on the Rule's validity and have filed a separate claim for declaratory relief as to the Rule.

65. The Court has stated its concern that addressing the Rule would constitute an advisory opinion because it came about after the citations were issued. Plaintiffs nonetheless urge the Court to address the issue because Plaintiffs, and those similarly situated, are harmed by the Act and, because it is likely that this issue will recur for Plaintiffs.
66. Given Plaintiffs' arguments regarding the Rule, the Court concludes that it has jurisdiction to address the issue as a separate and independent claim apart from the Court's *de novo* review of the DOPL Citations. *See Miller v. Weaver*, 2003 UT 12, ¶ 15, 66 P.3d 592 ("While the power of Utah's judiciary is not constitutionally restricted to 'cases' and 'controversies,' we still require four threshold elements to be satisfied before we may proceed with a declaratory judgment action: (1) a justiciable controversy, (2) parties whose interests are adverse, (3) a legally protectible interest residing with the party seeking relief, and (4) issues ripe for judicial determination. Stated another way, [a] justiciable controversy authorizing entry of a declaratory judgment is one wherein the plaintiff is possessed of a protectible interest at law or in equity and the right to a judgment, and the judgment, when pronounced, must be such as would give specific relief." (citations and quotations omitted)).

67. Given that Plaintiff's actions have been deemed to constitute massage therapy, and the likelihood – at least according to Plaintiff's counsel – that this issue will recur, the Court will address Plaintiff's claim.
68. The Board has the statutory authority to promulgate rules that effectuate the regulation of massage therapy. *See* Utah Code Ann. §§58-47B-201, 58-1-201 *et. seq.*
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 R156 ("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 Reiki – which involves contact but no manipulation of the skin i.e., channeling energy for alleged healing/curative 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.
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 statute, the Court concludes that the Rule did not have that affect.
71. For example, DOPL could not pass a rule that would have the affect 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.
73. Here, however, the Rule is simply *clarifying* the statute; it is not expanding its reach to persons who would not ordinarily be covered by the Act. The Rule makes clear that any movement with contact – including light touch massage, which is a recognized modality of massage called “effleurage” – constitutes manipulation. *See* Utah Admin. Code R156-47b (10)¹¹. The Rule did not cause DOPL to widen their regulatory web outside of the realm of massage therapy.
74. Mr. Lowe testified that the purpose of massage legislation is to “protect public safety.” In his Report, (*see* Pls.’ Ex. 5), he states that the reasons for regulating the field is to protect clients from physical and psychological harm. *Id.* He posits that because the term “massage” has been associated with sexually-oriented businesses, and because authorities may wish to strongly regulate SOBs, they may

¹¹Provides, “ ‘Manipulation’, as *used in Subsection 58-47b-102(6)(b)*, means contact with movement, involving touching the clothed or unclothed body.” (emphasis added).

be tempted to broaden the reach of their regulations to catch SOB operators in their net. Plaintiffs' counsel made this argument a centerpiece of their presentation. However, that position is completely unsupported by the evidence in this case.

75. Ms. Muir testified that the reason the Rule was passed was to make sure that Reiki - an energy transfer activity that does not involve any manipulation of the skin - was *not* included in the definition.
76. Ms. Muir also testified that regulations (i.e., licensure requirements) are necessary to protect the integrity of the massage industry. Inferentially, she meant that the massage industry did not want to be affiliated with the SOB industry. In other words, the massage industry would like to distinguish itself from the SOB industry; not to acquire the power to regulate SOBs.
77. Also, Ms. Pettley testified credibly that she had never cited an SOB, and had no interest in doing so. DOPL has no authority to regulate SOBs; other authorities such as local cities or police departments have that role. It defies logic that DOPL would seek to increase its case load by trying to regulate another field, for example the SOB field, particularly when that field is already within the authority of law enforcement.
78. There was no evidence to support Plaintiffs' claim that DOPL was seeking to expand its authority into the area of SOB's.
79. In fact, here, the police separately investigated Beaches for SOB violations. At the same time, Ms. Pettley was interested in assessing whether there was a

violation of the Act and to make certain that the Plaintiffs were educated on that issue.

80. There was no evidence that Ms. Pettley went beyond DOPL's reach in this matter, or had any interest in doing so. And, the fact that she spent time with Ms. Metcalf and Mr. Stucki to make sure they understood the Act belies Plaintiffs' arguments that Ms. Pettley's actions were borne out of a desire to expand the reach of her authority to regulate SOB's.
81. More importantly, "manipulation" defined in the manner described above, does not create a de facto regulation of SOBs on its face, as Plaintiffs suggest. *See* Utah Admin. Code R156-47b (10). Moreover, Plaintiffs' argument – that such a broad definition of a massage will "swallow the rule" – belies the statutory scheme, which makes clear that manipulation alone does not constitute massage.
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 provisions. The Court does not declare that Rule to be invalid based on any of the legal arguments presented by Plaintiffs.

II. CONCLUSIONS OF LAW

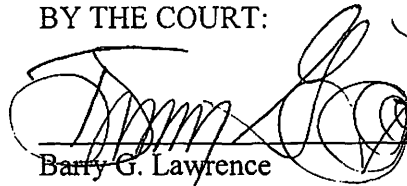
1. The Court concludes that Ms. Metcalf engaged in conduct that constitutes the “practice of massage therapy” under Utah Code Annotated Section 58-47b-102, and that she received a fee for her services, and did so without a license. Accordingly, she was in violation of the Massage Therapy Act, Utah Code Ann. § 58-1-501(a), and so, DOPL was properly authorized to issue a cease and desist order to her pursuant to Section 58-1-502(2)(b)(ii). Accordingly, the cease and desist order was valid and Ms. Metcalf’s claims challenging DOPL’s issuance of the cease and desist order are hereby dismissed.
2. Based on Ms. Metcalf’s conduct, and the similar conduct by other Beaches employees of which Mr. Stucki was aware – especially concerning the use of oils – Mr. Stucki employed persons who were performing massage therapy without a license in violation of the Massage Therapy Act. Accordingly, his actions were in violation of the Act. Utah Code Ann. § 58-1-501(c). Therefore, DOPL was properly authorized to issue a cease and desist order to him pursuant to Section 58-1-502(2)(b)(ii), and to issue a fine of not greater than \$1,000 pursuant to Section 58-1-502(2)(j)(i). Thus, the cease and desist order and the \$800 fine upheld were valid and Mr. Stucki’s claims challenging DOPL’s issuance of the cease and desist order and imposition of the fine, are hereby dismissed.
3. Plaintiff Middonay Roman abandoned her claims prior to trial; accordingly, those

claims are hereby dismissed.

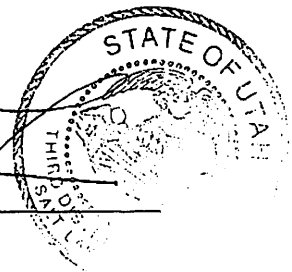
4. The Rule promulgated by DOPL defining “manipulation” as any “touch plus contact” is a valid exercise of DOPL’s rulemaking authority and is upheld.
5. All of Plaintiff’s claims are to be dismissed with prejudice. All parties are to pay their costs and fees incurred in this matter.
6. Defendants are to prepare a final order and to comply with the requirements of Utah Rules of Civil Procedure, Rule 7(j)(2).

So ORDERED this 13th day of November, 2015.

BY THE COURT:



Barry G. Lawrence
District Court Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 120900860 by the method and on the date specified.

EMAIL: W ANDREW MCCULLOUGH wandrew48@ymail.com

EMAIL: LAURIE L NODA lnoda@utah.gov

11/13/2015

/s/ DENICE RICHARDS

Date: _____

Deputy Court Clerk

ADDENDUM D

OCCUPATIONS AND PROFESSIONS AMENDMENTS

2011 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Michael T. Morley

Senate Sponsor: J. Stuart Adams

LONG TITLE

General Description:

This bill amends provisions of Title 58, Occupations and Professions, regarding the administration and enforcement of licensing laws and related provisions.

Highlighted Provisions:

This bill:

- provides that members of licensing boards can continue to serve for a limited time period after their terms have expired until their successors are appointed and qualified;
- provides for notification by an applicant or licensee to the Division of Occupational and Professional Licensing regarding name and address changes;
- provides the division with fine and citation authority for the unlicensed practice of a profession or the hiring of unlicensed individuals;
- clarifies licensure by endorsement provisions for professional engineers, professional structural engineers, and professional land surveyors;
- modifies the qualifications for licensure as an advanced practice registered nurse;
- modifies the definition of practice of massage therapy for purposes of the Massage Practice Therapy Act;
- modifies continuing education requirement provisions for licensed elevator mechanics and elevator contract licensees;
- makes technical changes to vocational rehabilitation counselor licensing provisions;
- modifies the term of license provisions; and
- makes certain technical changes.

EXHIBIT A

(B) if the person is not licensed under this chapter, the division may not issue a license to the person under this chapter.

(b) If a person has been charged with a felony other than a violent felony, as defined in Subsection 76-3-203.5(1)(c), and, as a result, the person has been convicted, entered a plea of guilty or nolo contendere, or entered a plea of guilty or nolo contendere held in abeyance pending the successful completion of probation:

(i) if the person is licensed under this chapter, the division shall determine whether the felony disqualifies the person for licensure under this chapter and act upon the license, as required, in accordance with Section 58-1-401; and

(ii) if the person is not licensed under this chapter, the person may not file an application for licensure under this chapter any sooner than five years after having completed the conditions of the sentence or plea agreement.

Section 9. Section 58-47b-102 is amended to read:

58-47b-102. Definitions.

In addition to the definitions in Section 58-1-102, as used in this chapter:

(1) "Board" means the Board of Massage Therapy created in Section 58-47b-201.

(2) "Breast" means the female mammary gland and does not include the muscles, connective tissue, or other soft tissue of the upper chest.

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

(4) "Massage apprentice" means an individual licensed under this chapter as a massage apprentice to work under the direct supervision of a licensed massage therapist.

(5) "Massage therapist" means an individual licensed under this chapter as a massage therapist.

(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

674 the [therapeutic] purpose of:

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

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

677 (iii) relaxing and lengthening muscles;

678 (iv) relieving pain;

679 (v) restoring metabolic balance; [and]

680 (vi) achieving homeostasis; and

681 (vii) recreational or other purposes;

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

683 Subsection (6);

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

685 (e) range of motion or movements without spinal adjustment as set forth in Section

686 58-73-102;

687 (f) oil rubs, heat lamps, salt glows, hot and cold packs, or tub, shower, steam, and

688 cabinet baths;

689 (g) manual traction and stretching exercise;

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

691 (i) counseling, education, and other advisory services to reduce the incidence and

692 severity of physical disability, movement dysfunction, and pain;

693 (j) similar or related activities and modality techniques; and

694 (k) the practice described in this Subsection (6) on an animal to the extent permitted

695 by:

696 (i) Subsection 58-28-307(12);

697 (ii) the provisions of this chapter; and

698 (iii) division rule.

699 (7) "Soft tissue" means the muscles and related connective tissue.

700 (8) "Unlawful conduct" is as defined in Sections 58-1-501 and 58-47b-501.

701 (9) "Unprofessional conduct" is as defined in Sections 58-1-501 and 58-47b-502 and as

702 may be further defined by division rule.

703 Section 10. Section 58-55-302.7 is amended to read:

704 **58-55-302.7. Continuing education requirements for electricians, elevator**
705 **mechanics, and plumbers.**

706 (1) As used in this section:

707 (a) "Licensed electrician" means an individual licensed under this chapter as an
708 apprentice electrician, journeyman electrician, master electrician, residential journeyman
709 electrician, or residential master electrician.

710 (b) "Licensed elevator mechanic" means an individual licensed under this chapter as an
711 elevator mechanic.

712 ~~[(b)]~~ (c) "Licensed plumber" means an individual licensed under this chapter as an
713 apprentice plumber, journeyman plumber, master plumber, residential journeyman plumber, or
714 residential master plumber.

715 (2) Beginning December 1, 2010, during each two-year renewal cycle established by
716 rule under Subsection 58-55-303(1):

717 (a) a licensed electrician shall complete 16 hours of continuing education under the
718 continuing education program established under this section; ~~[and]~~

719 (b) a licensed plumber shall complete 12 hours of continuing education under the
720 continuing education program established under this section~~[-]; and~~

721 (c) a licensed elevator mechanic shall complete eight hours of continuing education
722 under the continuing education program established under this section.

723 (3) The commission shall, with the concurrence of the division, establish by rule:

724 (a) a continuing education program for licensed electricians; ~~[and]~~

725 (b) a continuing education program for licensed elevator mechanics; and

726 ~~[(b)]~~ (c) a continuing education program for licensed plumbers.

727 (4) The division may contract with a person to establish and maintain a continuing
728 education registry to include:

729 (a) an online application for a continuing education course provider to apply to the

MASSAGE THERAPY ACT AMENDMENTS

2012 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Tim M. Cosgrove

Senate Sponsor: Aaron Osmond

LONG TITLE

General Description:

This bill modifies a definition in the Massage Therapy Practice Act.

Highlighted Provisions:

This bill:

- modifies the definition of "practice of massage therapy" to include providing, offering, or advertising a paid service using the term massage, regardless of whether the service includes physical contact; and
- makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

58-47b-102, as last amended by Laws of Utah 2011, Chapter 367

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **58-47b-102** is amended to read:

58-47b-102. Definitions.

In addition to the definitions in Section 58-1-102, as used in this chapter:

- (1) "Board" means the Board of Massage Therapy created in Section 58-47b-201.
- (2) "Breast" means the female mammary gland and does not include the muscles.

EXHIBIT D

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connective tissue, or other soft tissue of the upper chest.

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

(4) "Massage apprentice" means an individual licensed under this chapter as a massage apprentice to work under the direct supervision of a licensed massage therapist.

(5) "Massage therapist" means an individual licensed under this chapter as a massage therapist.

(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 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;

(vi) achieving homeostasis; ~~and~~ or

(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 the soft tissue of the body;

(e) range of motion or movements without spinal adjustment as set forth in Section 58-73-102;

(f) oil rubs, heat lamps, 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;

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- 58 (i) counseling, education, and other advisory services to reduce the incidence and
59 severity of physical disability, movement dysfunction, and pain;
60 (j) similar or related activities and modality techniques; ~~and~~
61 (k) the practice described in this Subsection (6) on an animal to the extent permitted
62 by:
63 (i) Subsection 58-28-307(12);
64 (ii) the provisions of this chapter; and
65 (iii) division rule[-]; or
66 (l) providing, offering, or advertising a paid service using the term massage or a
67 derivative of the word massage, regardless of whether the service includes physical contact.
68 (7) "Soft tissue" means the muscles and related connective tissue.
69 (8) "Unlawful conduct" is as defined in Sections 58-1-501 and 58-47b-501.
70 (9) "Unprofessional conduct" is as defined in Sections 58-1-501 and 58-47b-502 and as
71 may be further defined by division rule.

58-47b-102 Definitions.

In addition to the definitions in Section 58-1-102, as used in this chapter:

- (1) "Board" means the Board of Massage Therapy created in Section 58-47b-201.
- (2) "Breast" means the female mammary gland and does not include the muscles, connective tissue, or other soft tissue of the upper chest.
- (3) "Homeostasis" means maintaining, stabilizing, or returning to equilibrium the muscular system.
- (4) "Massage apprentice" means an individual licensed under this chapter as a massage apprentice to work under the direct supervision of a licensed massage therapist.
- (5) "Massage therapist" means an individual licensed under this chapter as a massage therapist.
- (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 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;
 - (vi) achieving homeostasis; or
 - (vii) 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 the soft tissue of the body;
 - (e) range of motion or movements without spinal adjustment as set forth in Section 58-73-102;
 - (f) oil rubs, heat lamps, 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;
 - (j) similar or related activities and modality techniques;
 - (k) the practice described in this Subsection (6) on an animal to the extent permitted by:
 - (i) Subsection 58-28-307(12);
 - (ii) the provisions of this chapter; and
 - (iii) division rule; or
 - (l) providing, offering, or advertising a paid service using the term massage or a derivative of the word massage, regardless of whether the service includes physical contact.
- (7) "Soft tissue" means the muscles and related connective tissue.
- (8) "Unlawful conduct" is as defined in Sections 58-1-501 and 58-47b-501.
- (9) "Unprofessional conduct" is as defined in Sections 58-1-501 and 58-47b-502 and as may be further defined by division rule.

Amended by Chapter 34, 2012 General Session

58-47b-201 Board.

- (1) There is created the Board of Massage Therapy consisting of:
 - (a) four massage therapists; and
 - (b) one member of the general public.
- (2) The board shall be appointed and serve in accordance with Section 58-1-201.
- (3) The duties and responsibilities of the board are in accordance with Sections 58-1-202 and 58-1-203. In addition, the board shall designate one of its members on a permanent or rotating basis to:
 - (a) assist the division in reviewing complaints concerning the unlawful or unprofessional conduct of a licensee; and
 - (b) advise the division in its investigation of these complaints.
- (4) A board member who has, under Subsection (3), reviewed a complaint or advised in its investigation may be disqualified from participating with the board when the board serves as a presiding officer in an adjudicative proceeding concerning the complaint.

Amended by Chapter 159, 1998 General Session

58-47b-501 Unlawful conduct.

"Unlawful conduct" includes:

- (1) practicing, engaging in, or attempting to practice or engage in massage therapy without holding a current license as a massage therapist or a massage apprentice under this chapter;
- (2) advertising or representing himself as practicing massage therapy when not licensed to do so; and
- (3) massaging, touching, or applying any instrument or device by a licensee in the course of practicing or engaging in massage therapy to:
 - (a) genitals or anus; and
 - (b) breasts of a female patron, except when a female patron requests breast massage, as may be further defined by division rule, and signs a written consent form, which must also include the signature of a parent or legal guardian if the patron is a minor, authorizing the procedure and outlining the reason for it before the procedure is performed.

Amended by Chapter 309, 2000 General Session

58-47b-503 Penalties.

- (1) Except as provided in Subsection (2), any individual who commits an act of unlawful conduct under Section 58-47b-501 is guilty of a class A misdemeanor.
- (2) Sexual conduct that violates Section 58-47b-501 and Title 76, Utah Criminal Code, shall be subject to the applicable penalties in Title 76, Utah Criminal Code.

Amended by Chapter 309, 2000 General Session

R156. Commerce, Occupational and Professional Licensing.

R156-47b. Massage Therapy Practice Act Rule.

R156-47b-102. Definitions.

In addition to the definitions in Title 58, Chapters 1 and 47b, as used in Title 58, Chapters 1 and 47b, or this rule:

(1) "Accrediting agency" means an organization, association or commission nationally recognized by the United States Department of Education as a reliable authority in assessing the quality of education or training provided by the school or institution.

(2) "Clinic" means performing the techniques and skills learned as a student under the curriculum of a registered school or an accredited school on the public, while in a supervised student setting.

(3) "Direct supervision" as used in Subsection 58-47b-302(3)(e) means that the apprentice supervisor, acting within the scope of the supervising licensee's license, is in the facility where massage is being performed and directs the work of an apprentice pursuant to this chapter under Subsection R156-1-102a(4)(a) while the apprentice is engaged in performing massage.

(4) "Distance learning" means the acquisition of knowledge and skills through information and instruction encompassing all technologies and other forms of learning at a distance, outside a school of massage meeting the standards in Section R156-47b-302 including internet, audio/visual recordings, mail or other correspondence.

(5) "FSMTB" means the Federation of State Massage Therapy Boards.

(6) "Hands on instruction" means direct experience with or application of the education or training in either a school of massage therapy or apprenticeship.

(7) "Lymphatic massage" means a method using light pressure applied by the hands to the skin in specific maneuvers to promote drainage of the lymphatic fluid from the tissue.

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

(9) "Massage client services" means practicing the techniques and skills learned as an apprentice on the public in training under direct supervision.

(~~9~~)10) "NCBTMB" means the National Certification Board for Therapeutic Massage and Bodywork.

(~~10~~)11) "Recognized school" means a school located in a state other than Utah, whose students, upon graduation, are recognized as having completed the educational requirements for licensure in that jurisdiction.

(~~11~~)12) "Unprofessional conduct" as defined in Title 58, Chapters 1 and 47b, is further defined, in accordance with Subsection 58-1-203(1)(e) in Section R156-47b-502.

KEY: licensing, massage therapy, massage therapist, massage
apprentice

Date of Enactment or Last Substantive Amendment: [~~August 23,~~
~~2011~~] 2012

Notice of Continuation: December 6, 2010

Authorizing, Implemented, or Interpreted Law: 58-1-106(1)(a); 58-1-
202(1)(a); 58-47b-101