Supreme Court No. 931887

Court of Appeals, Division I, No. 73225-1-I

SUPREME COURT OF THE STATE OF WASHINGTON

ANNA CHESTER,

Petitioner,

vs.

DEEP ROOTS ALDERWOOD, LCC, a Washington company; and BONNIE GILLSON,

Respondents.

BRIEF OF RESPONDENT BONNIE GILLSON

S. Karen Bamberger, WSBA #18478
Betts, Patterson & Mines
One Convention Place, Suite 1400
701 Pike Street
Seattle WA 98101-3927
Telephone: (206) 292-9988
Facsimile: (206) 343-7053
Attorney for Respondent Bonnie Gillson

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

FEDERAL CASES

TABLE OF AUTHORITIES

I. IDENTITY OF CHESTER

Respondent Bonnie Gillson ("Gillson") requests this Court to decline to accept discretionary review of the Court of Appeals decision.

II. STATEMENT OF THE CASE

Petitioner Anna Chester ("Chester") has no evidence that Gillson, an experienced tattoo artist, violated any regulations regarding the practice of tattooing when she applied a tattoo to Chester in September of 2011. Gillson followed the universal precautions that are required to be used by persons licensed in tattooing, none of which require the use of sterile ink. WAC 246-145-050.

Gillson was a licensed tattoo artist in Washington and had completed all of the necessary training. CP 200-201. When she tattooed Chester, she followed her standardized procedures, procedures with which Chester's expert has no quarrel. She ordered One tattoo ink from a reputable manufacturer, Kingpin[1], because she had used it without incident in the past. CP 450-451. Although Chester focuses on WAC 246-145-050(18), stating that "inks or pigments used must not be banned or restricted by the FDA and must not be mixed with improper ingredients", there is no evidence that the One ink had been banned or

---

[1] Kingpin remains a defendant in the underlying matter.

restricted by the FDA.[2] Indeed, Chester has included examples of warning letters sent to manufacturers (but not to tattoo artists) and significantly, there is no evidence that the FDA had ever sent such a letter to Kingpin.[3]

In tattooing Chester, Gillson followed her standardized process, including using presterilized, individually packaged and dated tattoo needles and sterilized her other tattoo instruments using a four-part sterilization process. CP 201, 211, 212. She also disinfected surfaces and Chester's skin by changing her gloves numerous times and using the requisite barriers. CP 209-212. In short, she did all that was required of her by the comprehensive regulatory scheme. WAC 246-145-050.

Moreover, Gillson had no way of knowing that the ink she had purchased was contaminated. On the contrary, she had been using this tattoo ink for about one and a half years prior to tattooing Chester with no reported problems. CP 450. Kingpin had not informed Gillson that any

---

[2] The clear intent is that the FDA must have taken some action to ban or restrict the ink or pigment *before* it was used, since the verbs occur in the past tense (ban*ned* or restrict*ed*).

[3] The existence of these letters proves the point that the FDA knows how to warn manufacturers when its products are found to be contaminated. (A-46 through A-59) Notably, none of these letters was issued to a manufacturer of tattoo ink (products instead were eye shadow, foot scrub, mouthwash and moisturizer) and it follows that no such letter was issued to Kingpin, the manufacturer of the One ink. There also is no evidence that warning letters to manufacturers are provided to or shared with buyers of the products at issue, such as Gillson.

customers had experienced reactions allegedly related to the One ink. CP 463.

There is no evidence that tattoo artists routinely did, or could have, checked to ensure that the ink they were using was, in fact, sterile. Similarly, there is no evidence that the standard of care for tattoo artists in Washington at the time that Chester was tattooed was to irradiate ink before it was used on patrons (nor is there any evidence that this is the standard now in Washington or elsewhere).

The Washington regulations do state that a tattoo artist must "[u]se sterile instruments and aseptic techniques at all times during a procedure." WAC 246-145-050(1). Ink is not an instrument. Gillson used sterile instruments. There is no requirement that ink—unlike jewelry—be presterilized or be sterilized on-site prior to the procedure. WAC 246-145-050(20). Of the twenty-four universal precautions, only two mention ink and neither was violated by Gillson. WAC 246-145-050(15) requires a tattooist to use single-use pigment or ink containers for each client and WAC 246-145-050(18) provides that "[i]nks or pigments used must not be banned or restricted by the FDA and must not be mixed with improper ingredients."

The Court of Appeals correctly interpreted the regulations at issue and its decision does not create any conflict with other decisions by this

Court. On the contrary, its decision is consistent with legal precedent and this Court should decline review. RAP 13.4 is not implicated.

III. ARGUMENT

A. The Appellate Court's Decision Does Not Call Into Question the Applicability of Negligence Per Se Vis-à-Vis Private Causes of Action, an Unnecessary Consideration Post-Tort Reform Act of 1986 and Its Abolition of Negligence Per Se Except Under Very Limited Circumstances Not Present Here.

The Court of Appeals correctly found that the federal statute, 21 U.S.C. § 331, affirmatively did not provide for a private cause of action and therefore rejected a claim under the federal statute. *Chester v. Deep Roots Alderwood, LLC*, __Wn. App. ___, ___ P.3d ___, 2016 WL 1205200 (Ct. App. Div. I, April 4, 2016), at *4. In doing so, however, it did not thereby conclude that there could be no basis at all for imposing liability on Gillson on a negligence per se basis. Before addressing the federal statute, the appellate court had carefully and thoroughly considered the possibility of negligence per se under the state statute, RCW 70.54.350, and the comprehensive regulatory scheme, WAC 246-145-050, and correctly held that there was no basis for negligence per se under that statute or regulations, either. *Chester*, at *4.

As the Court of Appeals noted, it was not until oral argument and in supplemental authorities that Chester advanced the argument that Gillson was liable under federal law because she received what turned out

to be, unbeknownst to her, adulterated ink. *Chester*, at *4. Chester argued that simply because Gillson received contaminated ink, she violated the Federal Food, Drug and Cosmetic Act ("FDCA"), 21 U.S.C. § 331, and as such, should be held negligent per se. The appellate court correctly rejected this argument since by its very terms, the FDCA does not create a private right of action. 21 U.S.C. § 337. The appellate court also correctly rejected the application of this statute since the FDCA "does not impose penalties on retailers who deliver adulterated cosmetics in good faith." *Chester*, at *4 and 21 U.S.C. § 333(c).

Chester argues that this holding conflicts with the holding in *Mina v. Boise*, 104 Wn.2d 696, 710 P.2d 184 (1985). In *Mina*, however, the state statute at issue, RCW 46.61.050, did not affirmatively state that it provided no private cause of action. The *Mina* court went on to hold that absent a statute providing for a private cause of action, a person could still be held negligent per se for violating this statute. Significantly, *Mina* pre-dates the adoption of the Tort Reform Act of 1986 and its abolishment of negligence per se except in very limited situations. Therefore, it is not surprising that Chester has been unable to identify other reported decisions in Washington discussing negligence per se and private rights of action. (Petition for Review, at11.) With the virtual abolition of negligence per se, there is no need for such a discussion. If the statute is not listed under

RCW 5.40.050, whether or not a private cause of action is recognized is moot.

> As noted in the preamble of the Tort Reform Act of 1986:
>
> > Tort law in this state has generally been developed by the courts on a case-by-case basis. While this process has resulted in some significant changes in the law, including amelioration of the harshness of many common law doctrines, the legislature has periodically intervened in order to bring about needed reforms. The purpose of this chapter is to enact further reforms in order to create a more equitable distribution of the cost and risk of injury and increase the availability and affordability of insurance.

After the enactment of the Tort Reform Act, unless a statute is concerned with a very limited set of circumstances (electrical fire safety, use of smoke alarms, sterilization of needles and instruments used by persons engaged in the practice of body art, body piercing, tattooing or electrology or driving while under the influence of intoxicating liquor or drug), negligence per se no longer exists. RCW 5.40.050(1)-(4).

> The Legislature has abolished the common law doctrine of negligence per se for cases filed on or after August 1, 1986. *See* RCW 5.40.050; Laws of 1986, ch. 305, § 910, p. 1367. Because the plaintiff filed this suit in 1988, the negligence per se doctrine does not apply. The practical effect of RCW 5.40.050 is: to eliminate what might be called the "strict liability" character of statutory violations under the old negligence per se doctrine, [and] to allow a jury to weigh the violation, along with other relevant factors, in reaching its ultimate determination of liability. *Doss v. ITT Rayonier, Inc.*, 60 Wn. App. 125, 129-30, 803 P.2d 4, *review denied*, 116 Wn.2d 1034 (1991).

Hansen v. Friend, 118 Wn.2d 476, 483, 824 P.2d 483 (1992).

Chester's argument that *Mina* can be read as calling into question whether there can be a negligence per se cause of action even if there is no private cause of action is wrong. Otherwise, if Chester is correct, then whenever there is a violation of a statute—whether or not it invokes any of the limited circumstances allowed for by RCW 5.40.050—a claim could exist if there is a private right of action provided for in the statute. That no longer is the law in Washington and is not the holding of the appellate court. The only confusion regarding *Mina* is on the part of Chester.

In *Art Metal-U.S.A., Inc. v. United States*, 753 F.2d 115 (D.C.Cir 1985), Art-Metal argued that the General Services Administration ("GSA") had violated certain federal procurement regulations, meaning that the GSA's actions were negligent per se under the Federal Tort Claims Act. The claims were dismissed because the district court concluded that Art-Metal's claims did not allege an established cause of action under District of Columbia law.

As the appellate court explained, violation of a federal statute may give rise to a claim under the FTCA, but only if there are analogous duties under local tort law. This principle has been upheld time and again. *See Sellfors v. United States*, 697 F.2d 1362, 1365-67 (11th Cir. 1983) (violation of federal regulation does not automatically invoke state law principles of negligence per se), cert. denied, 468 U.S. 1204, 104 S. Ct.

3571, 82 L.Ed. 2d 870 (1984); *Schindler v. United States*, 661 F.2d 552, 560 (6th Cir. 1981) ("Usually the federal regulatory statute is not the source of a private right of action."); *Blessing v. United States*, 447 F. Supp. 1160, 1186 n.37 (E.D.Pa. 1978) ("[P]laintiffs may not base their claims on alleged breaches of a duty arising solely out of a federal law when there is no corresponding duty under state law.")

As the *Art-Metal* court succinctly explained:

> Duties set forth in *federal law* do not, therefore, automatically create duties cognizable under local tort law. The pertinent inquiry is whether the duties set forth in the federal law are analogous to those imposed under *local tort law*."

Id. at 1158 (emphasis in original).

The Court of Appeals correctly found that there was no basis to impose liability under the federal law since there was no private cause of action recognized under the FDCA but also because it had previously considered and concluded that Gillson could not be held negligent per se for violating any local tort law under RCW 5.40.050. In other words, the appellate court did not base its entire analysis of negligence per se by simply acknowledging the proscription of private causes of action under the federal statute. It went to great lengths to examine the statutory and regulatory framework promulgated under Washington law relating to

tattooing and found as a matter of law that Gillson had not violated any of those state regulations. *Chester*, at *3.

There is, therefore, no uncertainty regarding the effect of a violation of a statute—whether or not it expressly disallows a private cause of action— based on the court of appeals' decision. The law in Washington remains clear that negligence per se has been abolished except under limited circumstances.

B. This Court Should Not Grant Review of the Decision Below Declining To Consider Opinions of Dr. Dinges, an Infectious Disease Doctor, Regarding Statutory Interpretation Since Washington Courts Have Long Held That an Expert Is Not Allowed To Comment on the Legal Meaning of Statutory Language.

The decision below is not inconsistent with this Court's prior decisions that have considered the opinions of experts regarding technical terms. Dr. Dinges's opinions went beyond the definition of "aseptic technique" in the medical (and not tattooing) community. Instead, they were nothing but Dr. Dinges's statutory interpretation and essentially, amounted to the opinion that sterile ink is required to be used by a tattoo artist, although this requirement appears nowhere in any of the statutes or regulations promulgated for the tattooing industry.

In the cases cited by Chester, *State v. Nw Magnesite Co.*, 28 Wn.2d 1, 182 P.2d 643 (1947), and *Gorre v. City of Tacoma*, 184 Wn.2d 30, 357

P.3 625 (2015), the Court's consideration was limited to an expert's meaning of specific terms. For example, in *Nw Magnesite*, the court noted that expert testimony may be necessary when the meaning of words has not been defined by the legislature; the undefined terms were "transportation" and "treatment" in the context of a statute having to do with quarrying. *Nw Magnesite*, 28 Wn.2d at 57. Although the court considered expert testimony as to what these terms meant, it recognized that "[j]udges devote their entire life study to applying the principles of law to factual situations, and to the interpretation of statutes." *Id.*

Similarly, in *Gorre v. City of Tacoma*, 184 Wn.2d 30, 357 P.3d 625 (2015), the court considered expert testimony on the diagnosis of plaintiff's medical condition. However, the the opinion was devoted to engaging in analyzing the issue as a matter of statutory interpretation.

The Court of Appeals acted precisely in accordance with this precedent. First, unlike the terms at issue in *Nw Magnesite* that were undefined, one of the phrases that Dr. Dinges's elaborates on, "aseptic technique", is defined within the regulations, so no expert opinion is necessary. *See* WAC 246-145-010(2). Second, to the extent the term "sterile instruments" is not defined, the appellate court did just as the court in *Gorre* did, in allowing an expert, Dr. Dinges, to proffer a medical opinion. *Chester*, at *6. But Dr. Dinges did not merely explain what

"sterile instruments" meant from a medical perspective; he went beyond the medical definition to opine that "[t]he only meaning that I can attach to that rule is that if, if a tattoo artist inserts into a customer, by way of an instrument, understood to be a needle used to penetrate the surface of the skin, ink that is contaminated with bacteria, then clearly "sterile instruments" were not used at all times during the procedure because the instrument, meaning the instrument used to penetrate the customer's skin, was contaminated with bacteria." CP 370. In other words, Chester is attempting to use Dr. Dinges's opinion to legislate that only sterile ink can be used by tattoo artists when that requirement appears nowhere in the state regulations.

Third, the appellate court engaged in the same exercise as did the courts in *Nw Magnesite* and *Gorre*: Statutory interpretation. It correctly rejected Dr. Dinges's opinions since "[s]tatutory interpretation is a matter of law" and not subject to expert opinion. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). Further, "while expert testimony is admissible even if it embraces an ultimate issue to be decided by the trier of fact if it will assist the trier of fact to understand the evidence or determine a fact in issue, ER 702 and 704, experts are not to state opinions of law or mixed fact and law, such as whether X was negligent, Comment, ER 704; 5A K. Tegland, Wash. Prac., Evidence § 309, at 84 (2d ed. 1982); *Orion Corp.*

v. State, 103 Wn.2d 441, 461, 693 P.2d 1369 (1985). An affidavit is to be disregarded to the extent that it contains legal conclusions. *Orion Corp.*, at 461-62; *American Linen Supply Co. v. Nursing Home Bldg. Corp.*, 15 Wn. App. 757, 763, 551 P.2d 1038 (1976); *see* CR 56(e)." *Hiskey v. City of Seattle*, 44 Wn. App. 110, 720 P.2d 867 (1986).

In *State v. Clausing*, 147 Wn.2d 620, 56 P.3d 550 (2002), the issue was whether a defrocked doctor was guilty of delivering a legend drug. The court effectively instructed the jury that it was a crime to deliver a legend drug unless delivery was by a licensed practitioner even though the statute did not require delivery by a practitioner. The appellate court determined that the trial judge erroneously allowed the executive director of the Washington State Board of Pharmacy to answer the legal question of whether a prescription remains effective after the issuing physician loses his license. The executive director was allowed to testify that a physician's prescriptions were no longer valid after the revocation of the physician's license. The court of appeals agreed that such an opinion was clearly a legal opinion. As the court noted:

> For an expert to testify to the jury on the law usurps the role of the trial judge. *Ball v. Smith*, 87 Wash.2d 717, 722-23, 556 P.2d 936 (1976). "Each courtroom comes equipped with a 'legal expert,' called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards." *Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1213 (D.C.Cir.1997). A contrary

> rule would confuse the jury because "'each party would find an expert who would state the law in the light most favorable to its position.'" *Harvey Brown, Eight Gates for Expert Witnesses*, 36 HOUS. L.REV. 743, 771-72 (1999) (quoting *Askanase v. Fatjo*, 130 F.3d 657, 672-73 (5th Cir.1997)).

State v. Clausing, 147 Wn.2d 620, 628, 56 P.3d 550 (2002).

The appellate court's decision to strike the impermissible portions of Dr. Dinges's opinions does not conflict with legal precedent, but is consistent with prior case law. Dr. Dinges was providing his personal opinion of how regulations should be interpreted, even though there is no requirement in the regulations that sterile ink be used. The appellate court's decision upholding the exclusion of Dr. Dinge's opinions that went far afield from his explanation of technical terms comports with its prior decisions in limiting expert opinions to defining technical or medical terms and in not allowing experts to substitute their opinion of what they think the law should be with what the law is.

C. There Is No Substantial Question of Public Interest Posed that the Comprehensive Regulatory Framework Does Not Already Address; Alternatively, The Issue Is One Within the Legislature's Purview.

Chester is correct that there are concerns about blood-borne pathogens and infectious disease and that such concerns are of public interest. (Petition for Review, at 16.) However, the stated impetus for promulgating regulations concerning the tattoo industry was to address

concerns about "bloodborne pathogens including but not limited to, HIV, hepatitis B and hepatitis C." RCW 18.300.005; *see also* WAC 246-145-010(3). (A-10) The Legislature has chosen to focus not on products that may be contaminated, but on ensuring that microorganisms that are present in human blood are not transmitted from person to person through the use of needles or other tools. Presumably, this decision was made since the FDA regulates cosmetics, including tattoo ink. *See* 21 U.S.C.§ 321(i). The Legislature has adopted twenty-four "universal precautions" under the auspices of RCW 70.54.340, as well as additional regulations. *See* WAC 246-145-001, 010, 015, 020, 030, 040, 050 and 060. It has chosen to regulate the processes of individuals who apply tattoos, rather than on those who manufacture the instruments and inks that may be used during the tattooing process itself.

Chester concedes that the tattoo industry "apparently" does not call for the use of sterile ink (Petition for Review, at 16) and yet, calls for this Court to substitute Dr. Dinges's opinion for that of the Legislature and require the use of sterile ink. Chester's citation to *Helling v. Carey*, 83 Wn.2d 514, 519 P.2d 981 (1974), as a means to achieve this end is unavailing.

The Washington Supreme Court noted the *Helling* case to be "unique." *Id.* at 517. In *Helling*, opthalmology experts on both sides

agreed that the standard of care did not require administering a glaucoma test to patients under the age of forty. The court nevertheless held that because the test was simple and inexpensive, plaintiff's opthalmologist should have administered the test.

Here, Chester has taken the position that the industry standard should be for tattoo artists to not only buy ink that is advertised as being sterile, but also to test the ink to ensure its sterility before its use. There was no evidence introduced regarding how such steps could be performed, the difficulty of such testing, the reliability of such testing or the costs associated with such testing—all in stark contrast to the testimony put forth in *Helling* that the test was simple and inexpensive.

This Court would be at odds with decades of case law acknowledging the separation of the legislative and judicial duties if it were to create a duty that a tattoo artist has to confirm that ink is sterile—essentially, enforcing an unwritten regulation. Further, it would be interfering with the comprehensive scheme already implemented by the Legislature governing the conduct of tattoo artists, such as Gillson. If the Legislature, in conjunction with the Department of Health, decides that such a requirement should be imposed, it is within its prerogative to enact such a regulation. This Court is not in the business of legislating what

standards of care should be for various industries; the Legislature is. The anomalous *Helling* decision is not controlling here.

IV. CONCLUSION

Gillson requests that this Court decline to accept review of the appellate court's decision. In the alternative, if review is accepted, Gillson requests that the Court of Appeals's decision be affirmed.

RESPECTFULLY SUBMITTED this 3rd day of June, 2016.

BETTS, PATTERSON & MINES, P.S.

By S Karen Bamberger
S. Karen Bamberger, WSBA #18478

Betts Patterson & Mines
One Convention Place, Suite 1400
701 Pike Street
Seattle WA 98101-3927
Telephone: (206) 292-9988
Facsimile: (206) 343-7053
Attorneys for Respondent Bonnie Gillson

CERTIFICATE OF SERVICE

I, Denise Wolfard, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts Patterson & Mines, One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on June 3, 2016, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Brief of Respondent Bonnie Gillson; and**
- **Certificate of Service.**

Counsel for Petitioner
James S. Sorrels
Dean F. Swanson
Law Offices of James S Sorrels
23607 Highway 99 Ste 3A
Edmonds, WA 98026-9272

☑ U.S. Mail
☐ Hand Delivery
☐ Facsimile
☐ Overnight
☑ E-mail

George M. Ahrend
Ahrend Law Firm, PLLC
100 E Broadway Ave
Moses Lake, WA 98837

Counsel for Co-Defendants Deep Roots Alderwood, Inc., Deep Roots Alderwood, LLC, Katrina Wickersham and Ryan Wickersham Andrea Holburn Bernarding Law Office of Andrea Holburn Bernarding 1730 Minor Ave Ste 1130 Seattle, WA 98101-1448	☑ U.S. Mail ☐ Hand Delivery ☐ Facsimile ☐ Overnight ☑ E-mail
Stacia R. Hofmann Attorney at Law PMB 210 10002 Aurora Avenue N. #36 Seattle, WA 98133	
Counsel for Co-Defendant Kingpin Tattoo Supply, Inc. Thomas H. Fain Edward J. Hynes Fain Anderson Vanderhoef Rosendahl O'Halloran Spillane, PLLC 701 5th Ave Ste 4650 Seattle WA 98104-7030	☑ U.S. Mail ☐ Hand Delivery ☐ Facsimile ☐ Overnight ☑ E-mail
Papillon Studio Supply and MFG, Inc. 118 Pearl Street Enfield, CT 06082	☑ U.S. Mail ☐ Hand Delivery ☐ Facsimile ☐ Overnight ☑ E-mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 3rd day of June, 2016.

Denise Wolfard

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, June 03, 2016 11:11 AM
To: 'Denise Wolfard'
Subject: RE: Chester v. Deep Roots Alderwood, LLC and Bonnie Gillson; Supreme Court No. 931887

Received 6/3/2016.

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Denise Wolfard [mailto:dwolfard@bpmlaw.com]
Sent: Friday, June 03, 2016 10:22 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Chester v. Deep Roots Alderwood, LLC and Bonnie Gillson; Supreme Court No. 931887

Please find attached for filing the Brief of Respondent Bonnie Gillson.

Denise Wolfard
Legal Assistant
Betts, Patterson & Mines, P.S.
One Convention Place
701 Pike Street, Suite 1400
Seattle, WA 98101-3927
D 206.268.8747 | F 206.343.7053
www.bpmlaw.com