NO. 33245-4-III

**COURT OF APPEALS, DIVISION**
**OF THE STATE OF WASHINGTON**

RHONDA L. DUNCAN, d/b/a THE COMPASSIONATE KITCHEN,

Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Appellant.

# APPELLANT'S REPLY BRIEF

ROBERT W. FERGUSON
Attorney General

DAVID M. HANKINS, WSBA No. 19194
Senior Counsel
Revenue Division, OID No. 91027
P.O. Box 40123
Olympia, WA 98504-0123
(360) 753-5528

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## I. INTRODUCTION

Duncan concedes that marijuana cannot be prescribed by a doctor. Resp. Resp. Br. at 1. Nonetheless, she argues her marijuana sales fall within the sales tax exemption for prescription drugs in RCW 82.08.0281. This exemption requires a "prescription," a requirement that cannot be satisfied by the "medical authorizations" obtained for marijuana, a substance that neither federal nor state law allows to be prescribed. This conclusion is supported by the plain language of the prescription drug exemption, would avoid an absurd interpretation of the exemption, and is consistent with the exemption's legislative history. The Department of Revenue and the Board of Tax Appeals properly rejected Duncan's arguments to the contrary. The Superior Court erred in concluding that medical marijuana is dispensed pursuant to a prescription. This Court should reverse that decision and affirm the Board of Tax Appeals.

## II. ARGUMENT

### A. Marijuana Authorizations Are Not Prescriptions.

Having conceded that licensed practitioners do not issue prescriptions for the use of medical marijuana, Duncan argues that medical authorizations meet the definition of "prescriptions" under RCW 82.08.0281(4)(a). Resp. Br. at 6-7. Medical authorizations, the documents that individuals seeking access to medical marijuana under the

relevant prior statutory scheme, former RCW 69.51A.010(5)(a) (2007),[1] do not satisfy the plain language definition of "prescription" in the prescription drug exemption statute.

**1. An authorization does not qualify as an order, formula, or recipe.**

The prescription drug exemption in RCW 82.08.0281 provides that "sales of drugs for human use dispensed or to be dispensed to a patient, pursuant to a prescription" are exempt from the retail sales tax. Sales tax exemptions "must be narrowly construed." *Budget Rent-A-Car v. Dep't of Revenue*, 81 Wn.2d 171, 174, 500 P.2d 764 (1972). The term at issue is "prescription," which is defined as follows:

> (4)(a) "Prescription" means an order, formula, or recipe issued in any form of oral, written, electronic, or other means of transmission by a duly licensed practitioner authorized by the laws of this state to prescribe.

RCW 82.08.0281(4)(a).

The medical authorization does not meet the first condition that the authorization be "an order, formula or recipe." The authorization form states, in relevant part:

> I am a physician licensed in the State of Washington. I have diagnosed the above named patient as having a terminal or debilitating medical condition as defined in RCW 69.51A.010.

[1] The Legislature amended the statute to add that the authorization was to be made on tamper resistant paper and re-numbered it as RCW 69.51A.010(7). *See* Laws of 2010, ch. 284, § 2.

> I have advised the above named patient about the potential risks and benefits of the medical use of marijuana. I have assessed the above named patient's medical history and medical condition. It is my medical opinion that this patient may benefit from the medical use of marijuana . . . .

AR at 111, 113.

Nothing in the authorization constitutes an "order" that the patient consume marijuana, that a pharmacist or nurse administer marijuana, or that the patient be dispensed marijuana. And there is no formula or recipe indicated on the authorizations. Physicians are not advising patients, through the authorizations, as to the type of product, the manner in which to consume the project (i.e., edible or in a form that can be smoked), the quantity, or the dosage, each of which are elements of a prescription.

The Court should reject Duncan's arguments to the contrary. Even if the Court concluded that under certain circumstances, prescriptions could be "terse affairs," as Duncan argues, it would not follow that a physician's statement on a medical authorization that "the patient may benefit from use of marijuana for a serious health condition," constitutes an "order." Resp. Br. at 7. It is simply a statement about a potential benefit, not a directive. Nor is her argument consistent with the position of the Washington State Medical Association and the Washington State Medical Quality Assurance Commission, which explicitly states that

physicians are not issuing prescriptions with respect to medical marijuana. AR at 115-16.

Finally, Duncan is incorrect in asserting that there "simply is no requirement that a prescription include specifics of dosage, frequency, etc." Resp. Br. at 7. Under both federal and state law, marijuana is a Schedule I controlled substance. 21 U.S.C. § 812(c)(10); RCW 69.50.204(c)(22). Healthcare practitioners must obtain a special registration from the federal government to be authorized to prescribe a controlled substance. 21 U.S.C. § 822(a). Prescriptions cannot be issued for a Schedule I, controlled substance, such as marijuana. But for all other controlled substances, Schedule II through V, licensed healthcare practitioners may issue prescriptions, but must do so according to stringent requirements. *See* 21 U.S.C. § 822(a); RCW 69.50.203(a)(2), (3); RCW 69.50.308; *see also Seeley v. State,* 132 Wn.2d 776, 783, 940 P.2d 604 (1997) ("Marijuana cannot be legally prescribed, nor can a prescription for marijuana be filled by a pharmacist in Washington . . . "). Federal law requires that such prescriptions contain the strength, dosage, quantity, and directions for use, as follows:

> (a) All prescriptions for controlled substances shall be dated as of, and signed on, the day when issued and shall bear the full name and address of the patient, the drug name, strength, dosage form, quantity prescribed, directions

> for use, and the name, address and registration number of the practitioner.

21 C.F.R § 1306.05(a) (2015).

None of these requirements can be found in an authorization. The authorization simply indicates that the patient has been diagnosed with a serious medical condition, that the licensed practitioner has discussed the risks and potential benefits of the use of marijuana for a medical use, and that the patient "may benefit" from using marijuana. This does not constitute an order, formula, or recipe, and thus is not a prescription.

**2. The phrase "to prescribe" cannot be read out of the statute.**

The authorization also fails to meet the remaining elements of the definition of prescription, which require that it be issued "by a duly licensed practitioner authorized by the laws of this state to prescribe." Resp. Br. at 7-8. Under Duncan's view, a duly licensed practitioner, authorized under the laws of this state to prescribe medications, could issue an order, formula, or recipe for any prohibited drug listed in the state's Schedule 1 list of controlled substances, RCW 69.50.204, and the sale would be exempt from sales tax. But because prescriptions cannot legally be written for marijuana, this reading would fail to ascribe any meaning to the phrase "to prescribe." RCW 82.08.0281 can only be read as extending a sales tax exemption when the person writing the

prescription is legally authorized to prescribe the thing being prescribed. When a term is generally understood to mean one thing, a court should not infer that it means something dramatically different unless that different meaning is clearly articulated. *Cf. Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 226-28, 11 P.3d 762 (2000) (a ballot title did not give proper notice of the contents of proposed law when it failed to disclose that the term meant something dramatically different than its ordinary meaning).

Duncan concedes that the Department's interpretation may be what the Legislature intended. Resp. Br. at 12. Duncan further concedes that, if RCW 82.08.0281 didn't define "prescription," and the term was given its generally-accepted meaning, the sale of medical marijuana would be taxable. Resp. Br. at 8-9. These concessions defeat her argument. *In re Schneider*, 173 Wn.2d 353, 363, 268 P.3d 215 (2011) (purpose of statutory construction is to discern legislative intent).

Duncan argues that under the canon of construction of the last antecedent rule, the language in the definition of prescription, "by a duly licensed practitioner authorized by the laws of this state to prescribe" "does not place any limitations upon the nature of the substance being prescribed." Resp. Br. at 13. Duncan argues that the words "to prescribe"

simply refer "not to the substance being prescribed but to the genus of the person doing the prescribing." Resp. Br. at 14.

The last antecedent rule states that qualifying or modifying words and phrases generally refer to the last antecedent in the absence of a comma before the qualifying phrase at issue. *State v. Bunker*, 169 Wn.2d 571, 578, 238 P.3d 487 (2010). It is applied when a modifier follows a series of terms in a statute, and the question is whether the modifier applies to the whole series or only to the last item in the series. *See id.* at 576-77 (quoting the statute at issue). But that isn't the kind of argument Duncan offers. The only point Duncan can squeeze from RCW 82.08.0281 by trying to apply the last antecedent maxim is that the phrase "authorized by the state to prescribe" applies to the phrase "duly licensed practitioner." Resp. Br. at 12. This tells us nothing, because the question of who can write a prescription is not in doubt. Duncan's misuse of the last antecedent maxim fails because the real issue is what can be prescribed, not who can prescribe the substance.

The rule does not apply, because the modifier in question does not have more than one antecedent. *See Berrocal v. Fernandez*, 155 Wn.2d 585, 593, 121 P.3d 82 (2005) (The Court of Appeals misapplied the last antecedent rule in construing a statute, because the last antecedent rule is useful only where the modifier in question has more than one antecedent).

Further, the rule does not apply anyway if other factors counsel against its application. *Bunker*, 169 Wn.2d at 578. Context, related statutes, and avoiding absurd results are all reasons to avoid applying the rule: "We do not apply the rule if other factors, such as context and language in related statutes, indicate contrary legislative intent or if applying the rule would result in an absurd or nonsensical interpretation." *Id.* As the following sections demonstrate, this is the case here because Duncan's reliance on the last antecedent maxim impairs the statute's meaning. *See In re Smith*, 139 Wn.2d 199, 205, 986 P.2d 131 (1999) (quoting *In re Kurtzman's Estate*, 65 Wn.2d 260, 264, 396 P.2d 786 (1964)). Applying the last antecedent rule here as Duncan advocates would violate these principles. It would impair the statute's meaning by allowing a sales tax exemption for prescriptions that cannot legally be written.

### B. Construing Medical Authorizations As Prescriptions Would Lead To Absurd Results.

Construing the authorizations as "prescriptions" would not only violate the exemption's plain meaning, but would also lead to absurd results contrary to the Legislature's intent. Neither the prescription drug exemption nor the medical marijuana statutes can be read in a vacuum. The fact that the prescription drug exemption statute does not explicitly reference the controlled substance act does not mean the statutes must

operate independently. *Wells Fargo Bank, N.A. v. Dep't of Revenue*, 166 Wn. App. 342, 351, 271 P.3d 268 (2012) ("We give effect to all statutory language, considering statutory provisions in relation to each other and harmonizing them to ensure proper construction.") Prescriptions for controlled substances are subject to a myriad of requirements in RCW 69.50.308.

**1. Marijuana cannot be legally "prescribed."**

Duncan contends that "the definition is neutral on its face," so marijuana would qualify for the exemption from sales tax regardless of whether or not the drug sold was lawful. Resp. Br. at 5. But the exemption is not neutral on its face—it requires a prescription—which must be lawful, because a licensed practitioner cannot issue a prescription for an illegal drug. RCW 69.50.308(g). Under her theory, in order for the sales tax exemption to exclude the sale of illegal drugs, the Legislature would have had to add the word "legal" before "drugs." But such a reading would lead to unlikely, absurd, and strained interpretations of RCW 82.08.0281, which courts are to avoid. *G-P Gypsum Corp. v. Dep't of Revenue*, 169 Wn.2d 304, 313, 237 P.3d 256 (2010).

Both federal and state law classify marijuana as a Schedule I controlled substance. 21 U.S.C. § 812(c)(10); RCW 69.50.204(c)(22). As a Schedule I drug, marijuana cannot be prescribed. The Washington

Supreme Court recognized this in *Seeley v. State*, 132 Wn.2d 776, 940 P.2d 604 (1997). The Court upheld the Legislature's classification and held: "Marijuana cannot be legally prescribed, nor can a prescription for marijuana be filled by a pharmacist in Washington . . . ." *Id.* at 783. The sales tax exemption in RCW 82.08.0281 does not apply because there is no lawful prescription for marijuana. Indeed, as discussed above, Duncan concedes that doctors cannot prescribe marijuana. Nor can any other licensed practitioner. Because marijuana cannot be prescribed under state law, marijuana is not dispensed to patients "pursuant to a prescription" as required in RCW 82.08.0281, and thus, as the Board correctly concluded, the sale of medical marijuana does not qualify for the retail sales tax exemption. CP at 63. Any other reading would lead to absurd results contrary to the Legislature's intent.

**2. The Legislature did not intend to allow marijuana prescriptions.**

The primary purpose of the marijuana authorization was to avoid criminal and civil liability for the possession and use of marijuana. RCW 69.51A.040. The health care authorization provided an affirmative defense to the crime of possession of marijuana, because the statute did not make it lawful to possess marijuana. *See State v. Reis,* 183 Wn.2d

197, 351 P.3d 127 (2015) (examining the 2011 amendments to RCW 69.51A and stating that, "medical use of marijuana is not lawful . . .").

In fact, every state that permits medical marijuana uses a process other than prescriptions, such as the "authorization" in Washington. *See* Frequently Asked Questions, How Many States Allow Medical Marijuana, State-by-state medical marijuana laws: How to remove the threat of arrest (2013), http://: www.mpp.org (last visited November 17, 2015). This is not mere semantics. Rather, states are aware of the significant potential consequences for healthcare providers who would prescribe a Schedule I controlled substance in violation of federal law. To that end, states, including Washington, have endorsed a more vague statement that a patient "may benefit" from the use of medical marijuana, as opposed to a prescription, which orders a pharmacist to provide medication if the patient seeks it. Legislative intent thus supports the conclusion that the authorization for medical marijuana is not equivalent to a prescription.

### C. The 2015 Amendments Exempting Medical Marijuana From The Sales Tax Demonstrate That Such Sales Were Previously Taxable.

Duncan fails to address the Department's argument about the importance of the subsequent changes to the medical marijuana law in 2015. Resp. Br. at. 1, n.1. To the extent she addresses the argument, she states that the amendments support her interpretation. Resp. Br. at 11.

Again, Duncan is wrong. Subsequent legislative enactments further support the conclusion that the marijuana sales at issue in this case are not exempt as prescription drug sales.

The Legislature changed the landscape for medical marijuana sales in 2015. Starting July 1, 2016, medical marijuana can be sold exempt from the retail sales tax. Laws of 2015, 2d Spec. Sess., ch. 4, § 207(1)(a), §1605.[2] However, the Legislature made a point of distinguishing the medical marijuana authorization from a prescription for standard medications: "[I]t is also imperative to distinguish that the authorization for medical use of marijuana is different from a valid prescription provided by a doctor to a patient." Laws of 2015, 2d Spec. Sess., ch.4, § 101(b) (intent section). If, as Duncan argues, such sales were already exempt from tax, the Legislature would have had no need to create a new law explicitly exempting those sales. *See John H. Sellen Constr. Co. v. Dep't of Revenue,* 87 Wn.2d 878, 883, 558 P.2d 1342 (1976) ("[T]he legislature does not engage in unnecessary or meaningless acts, and we presume some significant purpose or objective in every legislative enactment.").

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[2] *See,* Final B. Rep., on Second Engrossed Second Substitute H.B. 2136, 64th Leg., 2nd Spec. Sess., at 7 (Wash. 2015) ("A sales and use tax exemption for qualifying patients is allowed for patients with a medical cannabis authorization card.")

But instead, the Legislature established a detailed and complex scheme under which marijuana sold pursuant to medical authorization may be exempt from sales tax (but not the marijuana excise tax), but only with certain conditions. The purchaser must apply for and be granted access to a state registry, to assure that he or she has the requisite authorization. And marijuana sellers wishing to sell sales tax exempt medical marijuana must apply for and be granted special licenses from the Department of Licensing. And lastly, those purchasing medical marijuana must pay the marijuana excise tax, which is substantially more than the sales tax.[3] Again, even in this new scheme, the Legislature made clear that these authorizations are not prescriptions: "An authorization is not a prescription as defined in RCW 69.50.101." Laws of 2015, ch. 70, § 17 (amending RCW 69.51A.010(7) and adding subsection (c)). These safeguards demonstrate that when the Legislature chose to exempt certain sales of marijuana from sales tax, it did so expressly, and with carefully designed conditions.

Therefore, until July 1, 2016, the effective date of the new law, sales of medical marijuana were not and are not exempt from the retail

[3] *See* Final B. Rep. on Second Engrossed Second Substitute H.B. 2136, 64th Leg., 2nd Spec. Sess., at 7 (Wash. 2015). (The tax is imposed on the buyer and "The rate is changed to 37 percent and applies to the final retail price of marijuana products subject to the tax. This tax is in addition to state retail sales and use tax. . .").

sales tax. The Board correctly interpreted and applied the law to Duncan's 2009 sales of medical marijuana.

### D. Even If The Rules of Statutory Construction Were Applicable, The Board Correctly Construed RCW 82.08.0281.

Duncan agrees that RCW 82.08.0281 is unambiguous and plain on its face. Resp. Br. at 4. Nevertheless, she argues this Court should apply the rule of construction of the last antecedent rule to rule in her favor. Resp. Br. at 12. Only ambiguous statutes require judicial construction; otherwise the court gives effect to the plain meaning. *Agrilink Foods, Inc. v. Dep't of Revenue*, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005). Duncan misconstrues the tax exemption and advocates for a broad reading of the statute. Because it creates an exemption from the sales tax, the prescription drug exemption "must be narrowly construed." *See, e.g., Budget Rent-A-Car*, 81 Wn.2d at 174. And ambiguous tax exemption statutes are construed against the taxpayer. *Sacred Heart Med. Ctr. v. Dep't of Revenue*, 88 Wn. App. 632, 637, 946 P.2d 409 (1997) (quoting *Group Health Co-op. of Puget Sound, Inc. v. Washington State Tax Comm'n*, 72 Wn.2d 422, 429, 433 P.2d 201 (1967)). Further, a tax applies unless the legislature has expressed a clear intent to provide an exemption, and the exemption may not be created by implication. *TracFone Wireless, Inc. v. Dep't of Revenue*, 170 Wn.2d 273, 297, 242 P.3d 810 (2010).

In 2009, the Legislature had not expressed a clear intent to provide an exemption. In 2015, it expressly made medical marijuana exempt from the imposition of the sales tax. RCW 82.08.0281 is not ambiguous, and so this Court can properly apply its plain meaning. But even if the statute were ambiguous, the legislative history confirms what the plain language of the statute already makes clear. RCW 82.08.0281 does not exempt sales of medical marijuana from the sales taxes.

The source of the definition of "prescription" the Legislature added to RCW 82.08.0281 was derived from the Streamlined Sales and Use Tax Agreement adopted into law in 2003. Laws of 2003, ch. 168, § 403. In 2004, the Legislature amended that definition by adding the words "to prescribe" to the end, so that the definition read:

> Prescription: means an order, formula, or recipe issued in any form of oral, written, electronic, or other means of transmission by a duly licensed practitioner authorized by the laws of this state to prescribe.

Laws of 2004, ch. 153, § 108. The final bill report for the 2004 amendment explained the purpose of this amendment as to clarify that "[a] prescription for items or drugs that are exempt must be prescribed by a person whose license authorizes him or her to prescribe the item or drugs." Final Bill Report on S.B. 6515, at 2, 58th Leg. Reg. Sess. (Wash. 2004).

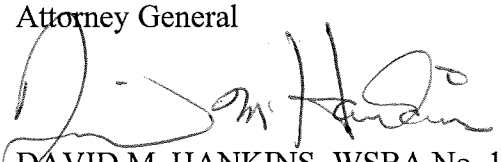
This legislative clarification supports the Board's conclusion that "by its plain language, the statutory definition of 'prescription' requires that the practitioner be authorized to prescribe the drugs or devices referenced in the order." CP at 62-63. Because marijuana cannot be prescribed pursuant to federal or state law, there is no exemption from sales tax for the sale of medical marijuana.

## III. CONCLUSION

Duncan concedes that marijuana cannot be prescribed by a doctor. Because duly licensed practitioners may not prescribe marijuana, marijuana is not dispensed to patients "pursuant to a prescription" as required in RCW 82.08.0281, and thus the sale of medical marijuana does not qualify for the retail sales tax exemption. This Court should affirm the decision of the Board of Tax Appeals.

RESPECTFULLY SUBMITTED this 20th day of November, 2015.

ROBERT W. FERGUSON
Attorney General



DAVID M. HANKINS, WSBA No. 19194
Senior Counsel
Attorneys for Appellant
State of Washington,
Department of Revenue

**PROOF OF SERVICE**

I certify that I served a copy of this document, via electronic mail, per agreement, on the following:

Jeffry Finer
LAW OFFICES OF JEFFRY K. FINER
35 W. Main St., Ste 300
Spokane, WA 99201
jeffry@finer-bering.com
danette@finer-bering.com

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

DATED this 20th day of November, 2015, at Tumwater, WA.

Julie Johnson, Legal Assistant