No. 33245-4-III

COURT OF APPEALS
STATE OF WASHINGTON
(Div. III)

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

Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Appellant,

SUPERIOR COURT No. 14-2-04440-7
SPOKANE COUNTY
HONORABLE JUDGE CLARKE

RESPONSE BRIEF

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REPLY TO APPELLANT'S STATEMENT OF THE ISSUE

This appeal solely rests upon the statutory definition of the term "prescription" for purposes of taxation under RCW § 82.08.0281 (2010).[1] This statute exempts "prescriptions" from taxation and the statute provides an explicit, statutory definition for the term.

The Department of Revenue's statement of the issue is defective insofar as it imposes a requirement that is not set forth in RCW § 82.08.0281 and attempts to rewrite the legislative text. Ms. Duncan concedes that marijuana cannot be prescribed by a doctor — insofar as the term "prescription" is given its common use and insofar as Washington State cases employ the term in its common use — but Duncan responds that the common parlance meaning of "prescription" is not the issue before this Court.

Accordingly, and with respect, the Appellee suggests that the actual issue is a straightforward matter of legislative interpretation that would be fairly phrased as follows:

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[1] The parties acknowledge that the statute as currently written does not extend the term "prescription" to cover medical marijuana authorizations signed by licensed physicians. This appeal, however, deals with the statutory exemption language as it existed in 2009-10.

ISSUE: Given the specific definition of the term "prescription" in the 20010 version of the statute exempting prescriptions from sales tax, are sales of medical marijuana — supported by a written authorization signed a Washington State licensed physician stating that the patient would benefit from the use of marijuana — exempt under the statute?

The answer to this issue is found in the unambiguous text of the tax exemption statute and is dispositive.

Scope and Standard of Review. Ms. Duncan does not dispute the Department of Revenue's statements regarding the scope or standard of review. This appeal turns on a matter of statutory interpretation, the standard is *de novo. Ass'n of Wash. Spirits & Wine Distrib. v. Wash. State Liquor Control Bd.,* 182 Wn.2d 342, 350 (2015).

A. THE COURT DISCERNS LEGISLATIVE INTENT FROM THE PLAIN LANGUAGE ENACTED BY THE LEGISLATURE, CONSIDERING THE TEXT OF THE PROVISION IN QUESTION, THE CONTEXT OF THE STATUTE IN WHICH THE PROVISION IS FOUND, RELATED PROVISIONS, AMENDMENTS TO THE PROVISION, AND THE STATUTORY SCHEME AS A WHOLE.

Because statutory interpretation is at the heart of this case, it serves to review the rules governing how Washington State Courts determine a statute's meaning.

The starting point for interpreting a statute is the language of the statute itself: Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive. *Consumer Product Safety Commission et al. v. GTE Sylvania, Inc. et al.*, 447 U.S. 102, 108 (1980).

The Supreme Court has given clear direction in the proper role of statutory interpretation:

> [I]n interpreting a statute a court should always turn to one cardinal canon before all others. . . .[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. [Citations omitted]. When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."

Connecticut Nat'l Bk v. Germain, 503 U.S. 249, 254 (1992). *See also Densley v. Department of Retirement Systems*, 162 Wn.2d 210, 219 (2007). Courts should always begin with the text of the statute:

> As in all statutory construction cases, we begin with the language of the statute. The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.

Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002).

In Washington, the principles of statutory construction are well formulated:

> [The courts'] primary duty in interpreting any statute is to discern and implement the intent of the legislature. [Cite omitted]. Our starting point must always be "the statute's plain language and ordinary meaning." Id. When the plain language is unambiguous – that is, when the statutory language admits of only one meaning — the legislative intent is apparent, and we will not construe the statute otherwise. [Cite omitted]. Just as we "cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language . . . we may not delete language from an unambiguous statute.

State v. J.P., 149 Wn.2d 444, 448 (2003).

"If a statute is clear on its face, its meaning is to be derived from the language of the statute alone." *Cerrillo v. Esparza*, 158 Wn.2d 194, 201 (2006) (quoting *Kilian v. Atkinson*, 147 Wn.2d 16, 20 (2002)) (internal quotations omitted).

The statute here is clear on its face and unambiguous: it exempts from tax the sale of drugs (for humans) dispensed by prescription; then it defines prescription.

> (1) The tax levied by RCW 82.08.020 shall not apply to sales of drugs for human use dispensed or to be dispensed to patients, pursuant to a prescription.
>
> * * *
>
> (4) "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(1), (4)(a).[2]

This definition applies to the tax exemption for retail sales of medical-use drugs, it does not apply to the statues governing controlled substances nor, in 2009-10, was it cross referenced to RCW 69.50 nor in any way did it exclude marijuana from the medical-sales tax exemption rules. The definition is neutral on its face as to the item being prescribed. The tax exemption statute does not render an item lawful or unlawful to use or possess, it merely made the sale of the item untaxed for retail purposes.

The Department of Revenue disregards the statutory definition in -.0281(4) for the word "prescription" — in favor of the common parlance meaning of the term as appears in general use, caselaw dealing with matters other than tax exemptions, and various non-binding literature issued by the Department and other parties. This approach is wrong. The statute defines "prescription" and no legal justification can be cited that would permit a court to ignore a statute's definition. Duncan appreciates that the definition in the statute is broad, but its

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[2] As amended in 2014, sub-section (4) now contains a provision that exempts marijuana from the definition of a "drug" for the purpose of the tax exemption. This case, however, involves the 2009 version of the exemption statute in which there was no reference to marijuana.

breadth is not subject to revision. Prescription, for the purposes of the exemption statute, is not limited to the workaday notion. For the purpose of the tax exemption, it requires only the following:

- there must be an ORDER, FORMULA OR RECIPE.
- given by a DULY LICENSED PRACTITIONER
- who is, him or herself, AUTHORIZED UNDER THE LAWS OF THE STATE TO PRESCRIBE

The Department of Revenue's arguments that marijuana is non-prescribable are correct if we talking about what a pharmacist is permitted to do, or whether a physician can request marijuana from a pharmaceutical dispensary. But the issue here is not whether marijuana is legal or even prescribable in the general sense of that term. The issue is whether a marijuana authorization under RCW 69.51A is *taxable under RCW 82.08.0281*.

There are no references in the exemption statute to federal law, to the DEA, Schedules of controlled substances, or anything relating to the nature of the thing prescribed — other than that the writing constitute an order, formula or recipe.

As shown next, the three conditions required in RCW 82.08.0281(4)(a) (an order, etc., by a licensed practitioner, authorized to prescribe) are met.

The authorization given by physicians to medical marijuana patients explicitly states that in the physician's opinion the patient may benefit from use of marijuana for a serious health condition. This constitutes no less an "order" than the typical script that a doctor may fill out stating "[DRUG] as needed." The Department does contend, in an *ipse dixit* conclusion, that a physician's recommendation that marijuana may benefit the patient fails to meet the "order, formula, or recipe" standard. DOR Brief at 22-23. The assertion is without analysis or basis. Standard prescriptions can be terse affairs, and "[DRUG] PRN" or "as needed" suffices to meet the standard. The authorizating langauge under 69.15A is readily analogous. There simply is no requirement that a prescription include specifics of dosage, frequency, etc. Although the Department argues, at page 23 of its Brief, that "type of product, quantity, or dosage [are] all elements of a prescription", the statement is simply untrue. The elements of a prescription, so far as taxation goes, are set forth in -.0281(4) and the Department cannot alter this language by fiat.

The next two elements of the test are also met: Duncan's participating physicians were licensed and authorized to prescribe in Washington. There are no facts in this case to support a contrary finding

that Duncan dispensed medical marijuana to clients not holding current, valid, RCW 69.51A forms for medical marijuana. There are no facts to support a finding that the medical authorizations upon which Plaintiff dispensed medical marijuana were not issued by duly licensed practitioners authorizd to prescribe under Washington State laws. Indeed, had Plaintiff been dispensing to anyone who did not present the proper RCW 69.51A document signed by a duly licensed practitioner who held authorization to prescribe, the matter would be a serious *criminal* violation of RCW chapt. 51 and 21 U.S.C. 841.

The exemption statute contains no limitation upon what constitutes an authorized substance, and there is no canon permitting the interpreter to rewrite the statute to force it to reach the Department's result. The Department's procrustean result is incompatible with a fair reading of the statute's text.

B. WORDS DEFINED BY STATUTE MUST BE GIVEN THEIR MEANING AS PROVIDED WITHIN THE TEXT, NOT FROM OUTSIDE SOURCES.

To be fair, Respondent agrees that if there were no definition section (2010) and if the term prescription was therefore given its general meaning, then doctors in Washington providing their patients with medical marijuana authorizations are not "prescribing" and the

sale of the marijuana would be taxable. Furthermore, Duncan is mindful that the Department of Revenue administers the tax statutes and WACS, and in the normal course the Department's interpretation would be be accorded substantial weight. *See Department of Revenue v. Nord Northwest Corp.*, 164 Wn. App. 215, 223, 264 P.3d 259 (2011). Here, however, the Legislature passed RCW § 82.08.0281(4) and gave a precise definition to the term "prescription." This definition precludes the Department, regardless of its expertise, from deciding what the term prescription means. When specific definitions are included, courts must take note and follow the given definition:

> Because the terms are defined within the statute, we need not look outside the statute to determine their meaning. *State v. Smith,* 117 Wn.2d 263, 271, 814 P.2d 652 (1991) ("'Words are given the meaning provided by the statute or, in the absence of specific definition, their ordinary meaning.'" (quoting *State v. Standifer,* 110 Wn.2d 90, 92, 750 P.2d 258 (1988)).

State v. Reis, at 205.

Statutory interpretation does not admit of spontaneous or discretionary editing. Neither the Department of Revenue nor a court can amend, elide, or abrogate a statute's plain langauge. The United States Supreme Court discussed the plain meaning rule in *Caminetti v. United States*, warning "the duty of interpretation does not arise, and

the rules which are to aid doubtful meanings need no discussion." 242 U.S. 470 (1917).

Are courts bound to follow language that judges feel was not the legislature's true intent and purpose? Not if the result is absurd. But here, given the intent of the medical marijuana statute to provide medical authorization for patients of physicians who believe that marijuana use may be beneficial, the exemption for medical marijuana is fully in line with the intent and purposes of the exemption statute: Drugs provided for human use for patients with "prescriptions" issued by authorized Washington State physicians are tax exempt. This exemption relieves the consumer needing medicine from the retail tax burden for his or her "prescription."

And where, as here, the results are not patently absurd, the courts are not entitled to substitute their values or reasoning in place of the legislature's. "It is not this court's job to remove words from statutes or to create judicial fixes, *even if we think the legislature would approve*. Statutes that frustrate the purpose of others, though perhaps unintentionally, are "purely a legislative problem." *State ex ref. Hagan v. Chinook Hotel, Inc.,* 65 Wn.2d 573, 578 (1965) cited favorably in *State v. Reis,* 183 Wn.2d at 214. "[Courts] do not have the

power to read into a statute that which we may believe the legislature has omitted, be it an intentional or an inadvertent omission.... [I]t would be a clear judicial usurpation of legislative power for us to correct that legislative oversight. *State v. Martin,* 94 Wash.2d 1, 8 (1980) (citations omitted).

C. THE LOWER COURT DID NOT ERROR IN ITS INTERPRETATION OF "PRESCRIPTION" UNDER RCW § 82.08.0281 (2010) AND RESPONDENT IS ENTITLED TO THAT EXEMPTION.

The Court in *State v. J.P.* cited with approval the following language regarding the weight of statutory definitions: "application of the statutory definitions to the terms of art in a statute is essential to discerning the plain meaning of the statute." *Id.* In this case the lower court correctly began its analysis with a close grammatical reading of the statute and its text, including the unique and broad definition of "prescription."

The Department, however, initially focusses on statutory amendments made years later. DOR Brief at 12-20. These amendments point out Duncan's argument quite nicely: without the amending language, a grammatical fair-reading of the statute as it existed in 2009-10 excludes medical marijuana from taxation.

The Department then attempts to make the plain grammar of the statute into a contorted result. At page 28 of its Brief, the Department argues that the definition of prescription[3] requires that the item being prescribed be itself authorized for dispensing. This interpretation may be what was intended, but one cannot tell that from the text itself. The text, read grammatically and naturally, takes the clause ("authorized by the laws of the state to prescribe") and naturally modifies the adjacent antecedent: the physician must be a practitioner who is authorized to prescribe. This is a well-established canon of interpretation: "Last Antecedent Canon." See A. Scalia & B. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, wherein Justice Scalia notes that the canon is more correctly termed the "nearest-reasonable-referent canon." Whatever its name, the canon is found throughout the common law. See *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). See also, *In re Sanders*, 551 F.3d 397, 399 (6th Cir, 2008) (as a matter of grammar "[w]hen a word such as a pronoun points back to an antecedent or some other referent, the true referent should generally be the closest appropriate

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[3] (4) "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*. (Emphasis added). RCW 82.08.0281(4).

word." Bryan A. Garner, *Garner's Modern American Usage* 523-24 (2003); *see also* 2A Norman J. Singer & J.D. Shambie Singer, *SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION* § 47:33 (7th ed.2007). Consistent with this principle, the courts ordinarily assume that "a limiting clause or phrase ... modif[ies] only the noun or phrase that it immediately follows.") The rule is not absolute, but the interpreter's political disagreement with the results of a fair reading does not permit a rewriting of the statute to meet the interpreter's preferences. The text must be the authoritative guide because a statute's "purpose is to be gathered only from the text itself, consistently with the other aspects of its context." See Scalia, READING LAW, *introduction.* In effect, the Department reads subsection .0281(4)(a) as if the text were as follows: "by a duly licensed practitioner prescribing an authorized substance." If the legislature meant that the substance being prescribed must be "authorized by the law of this state to prescribe" it frankly makes no sense as written.

A fair reading notes that the statute does not place any limitations upon the nature of the substance being prescribed. The only limitations on the nature of the thing being prescribed is the requirement that it be "an order, formula or recipe." Similarly, the physical form of the order,

formula, or recipe does not matter. The term "authorized" — upon which the Department hangs the "legislative intent" portion of its argument — refers not to the substance being prescribed but to the genus of the person doing the prescribing. That is, "*by a duly licensed practitioner authorized by the laws of this state to prescribe*."

CONCLUSION

The Department's interpretation of RCW 82.08.0281(4)(a) is an ungrammatical and strained reading of the text. The results may comport with policy favored by the Department, but the authorizing language of the statute does not permit the Department to re-write an unambiguous text in order to force the statutory language to meet immediate political or administrative needs. The statutory text is the guide: here, the text is sufficiently plain to be understood without resort to free-ranging revision. The text mandates three conditions for a tangible item to be exempt from sales tax, and the dispensing of medical marijuana, under the regime created by RCW 69.51A, is well within the three necessary elements to qualify for sales tax exemption. Respondent's health care authorization is: (1) undeniably an "order, formula, or recipe" for medicinal marijuana use (2) given by a "duly

licensed practitioner" (3) who was "authorized" by the State of Washington "to prescribe" medications to patients. Because the Department's result is misaligned with a fair reading of § .0281, this Court should find in favor of the Duncan.

DATED THIS 28th day of September, 2015.

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CERTIFICATE OF SERVICE

I, Danette Lanet, certify that on the 28th day of September, 2015, I caused the foregoing *REPLY BRIEF*, to be served via emailon the following:

David M. Hankins

DATED this 28th day of September, 2015.

Danette Lanet