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No. 73225-1-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

Anna Chester,

Appellant,

v.

Deep Roots Alderwood, LLC, a Washington company; and
Bonnie Gillson,

Respondents.

BRIEF OF APPELLANT

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FILED
COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON
2015 JUN 12 PM 2:54

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I. INTRODUCTION

On September 13, 2011, licensed tattoo artist Bonnie Gillson (“Gillson”), who was operating within a licensed tattoo shop named Deep Roots Alderwood, LLC (“Deep Roots”), applied a tattoo to Anna Chester. CP 67 & 503. Gillson had the choice of either sterile or non-sterile ink for the tattoo. CP 353, 359, 368, 385. However, she used non-sterile ink that was contaminated with bacteria. CP 210, 393-397.

Within a few weeks, Gillson infected about 21 other people with non-sterile ink from the same bottle of ink that she injected into Chester. CP 193-196. Gillson agrees that the ink she injected into Chester and her other clients was non-sterile and contaminated with harmful bacteria. CP 210. The bacteria that Gillson injected caused a disease process that destroyed Chester’s kidney function over the course of three to four months, resulting in End Stage Renal Disease. *See* CP 393-397, 253-255. Ms. Chester was then 21 years old. CP 253-255. Chester’s future now is either dialysis for life or a kidney replacement with associated ongoing medical care and medications. CP 253-255.

The contaminated ink was a black ink named “One” that Gillson had acquired from Kingpin Tattoo Supply, Inc. (“Kingpin”). CP 213, 67 & 503.

Chester filed suit against Gillson and Deep Roots, alleging claims of negligence and negligence per se.¹ The negligence per se claims were based upon violation of statutes and regulations governing tattoo artists and shops. *See* RCW 5.40.050(3) (providing that violation of any statute or regulation relating to “sterilization of needles and instruments used by persons engaged in the practice of . . . tattooing, or other precaution against the spread of disease, as required under RCW 70.54.350” constitutes negligence per se); RCW 70.54.330(3)-(4) (requiring licensed “tattoo artists” engaged in “tattooing” to use “nontoxic dyes or pigments” as a matter of definition); RCW 70.54.350 (requiring tattoo artists to comply with health and safety regulations adopted by the department of health); WAC 246-145-050(1) (requiring tattoo artists to “[u]se sterile instruments and aseptic techniques at all times during a procedure”); WAC 308-22-020 (requiring tattoo shops to comply with the same requirements as tattoo artists).

The superior court dismissed Chester’s claims against Gillson and Deep Roots on summary judgment. CP 5-14. In connection with these proceedings, the superior court also struck certain portions and limited consideration of other portions of a declaration of Warren Dinges, M.D.,

¹ Chester also alleged claims against Defendants Deep Roots Tattoo & Body Modification, Inc. and Katrina and Ryan Wickersham, which were dismissed and are not subject to appeal. Additionally, Chester has alleged product liability claims against Kingpin and Papillon Studio Supply and MFG, Inc., which are the unadjudicated portion of the case that remains with the superior court.

Ph.D. that Chester had submitted in opposition to the summary judgment motions. CP 15-23. Dr. Dinges is an infectious disease specialist who treated Chester. CP 393-397, 366-370. In his opinion, Gillson's use of non-sterile ink was contrary to well-known medical concepts of aseptic technique and use of sterile instruments. CP 366-370; *see infra* p. 9-12.

Chester now appeals the orders of dismissal entered in favor of Gillson and Deep Roots, along with the order striking portions and limiting consideration of other portions of Dr. Dinges's testimony. CP 1-3.

II. ASSIGNMENTS OF ERROR

1. The superior court erred by granting Bonnie Gillson's Motion for Summary Judgment. CP 10-14.

2. The superior court erred by granting Deep Roots Alderwood, LLC's Motion for Summary Judgment. CP 5-9.

3. The superior court erred by granting in part Gillson and Deep Roots Alderwood, LLC's Motion to Strike the Second Declaration of Warren Dinges, M.D., Ph.D. CP 15-23.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When a tattoo can be applied using sterile ink, is it negligent for a tattoo artist to use non-sterile ink?

2. Does a tattoo artist's use of non-sterile ink contaminated with disease-causing bacteria constitute negligence per se under one or more of the following statutes and regulations:

- a. WAC 246-145-050(1), which mandates the "[u]se [of] sterile instruments and aseptic techniques at all times during a procedure";
- b. The requirement to use "nontoxic dyes or pigments," which is incorporated into the definition of "tattooing" permitted by licensed "tattoo artists" under RCW 70.54.330(4)?

3. Does a tattoo shop have a nondelegable duty under WAC 308-22-020, to ensure compliance with RCW 246-145-050(1), regarding the "[u]se [of] sterile instruments and aseptic techniques at all times during a procedure," subjecting the shop to liability to the same extent as a tattoo artist?

4. Did the superior court improperly strike and limit consideration of the declaration of Dr. Dinges on summary judgment?

IV. STATEMENT OF THE CASE

A. Grounds advanced by Bonnie Gillson and Deep Roots Alderwood, LLC for summary judgment of dismissal of Anna Chester's claims against them.

Bonnie Gillson moved for summary judgment of dismissal with the arguments that (1) "there is no evidence to establish that Gillson knew

or should have known that the ink she purchased from Kingpin was contaminated,” CP 433. and (2) “Plaintiff also has failed to establish that Gillson, through any unsafe or unsterile acts or practices, tattooed plaintiff.” CP 433.

Deep Roots Alderwood, LLC moved for summary judgment of dismissal with the arguments that: (1) “Neither Gillson nor the moving parties had any reason to know the ink was contaminated”; (2) “Neither Gillson nor the moving parties had any duty to investigate the ink”; and (3) “There is no evidence of unsafe practices at Deep Roots Alderwood, or that its or Gillson’s practices caused the ink to become unsafe.” CP 482-484.

B. Facts relied upon by Chester in opposition to Gillson’s and Deep Roots Alderwood, LLC’s Motions for Summary Judgment.

1. Gillson injected Chester with tattoo ink that was non-sterile and contaminated with disease-causing bacteria that produced an infection. Both Gillson and Deep Roots Alderwood, LLC assumed this to be true for purposes of their summary judgment motions. CP 484, 433. Gillson’s assessment of everything she knows is that the One ink she inserted into Chester was non-sterile. CP 210.

2. Sterile tattoo ink was available to Gillson at the time of her purchase of the non-sterile ink, and when she tattooed Chester. Chester

hired an information technologies professional named Tim Raetzloff to use The Wayback Machine, found at <https://archive.org>., “to find and view archived webpages published on a website that no longer appear on the current version of the website.” CP 256-258. Chester asked Mr. Raetzloff to view and print archived pages of the following websites:

- a. <http://kingpintattoosupply.com/intenze.aspx>;
- b. <http://www.intenzetattooink.com/>;
- c. <http://www.intenzeproducts.com/about.php>; and
- d. <http://www.intenzeproducts.com/tech.php>.

Id. In May 2011, at the time that Gillson chose to buy non-sterile ink, Intenze ink was available which, according to a May 2011 statement on its website, is “formulated and sterilized so that the tattoo artist and client both receive the most positive tattoo possible.” CP 359.² In April 2011, Intenze was claiming that its ink was “tested and sterilized.” CP 353.³

² The dates of the webpages are indicated in the top-right portion of the page. *See* CP 256-258.

³ In her reply brief, Gillson stated in a footnote: “. . . plaintiff’s own documentation shows that this [Intenze] brand tattoo ink had the most colonies of bacterial growth”, referencing an article appended to Dr. Warren Dinges’s Second Declaration from the Journal of the European Academy of Dermatology and Venerology.” CP 175. However, the authors of that study purchased the Intenze ink in February 2010, 15 months prior to Gillson’s purchase of the One ink. CP 376-383. The presence of the bacteria in the February 2010 Intenze, had Gillson known of it, would not permit her to then intentionally disregard as meaningless all manufacturer claims of sterility. Gillson also provided a citation to a 6/6/2014 Chief Health Officer Advisory Note of New South Wales, Australia, inclusive of a reference to an EU recall of a batch of Intenze ink. CP 165-167. However, the NSW Note provides that the EU recall of this particular batch was on the basis that it contained chemicals deemed hazardous, not due to the presence of bacteria.

Additionally, Anna Chester's treating infectious disease doctor, Warren Dinges, M.D., Ph.D. testified that the process of gamma irradiation would have been effective in destroying all microbial life within the One ink used in Chester's tattoo, and that gamma irradiation was well-established for years prior to 2011. CP 368. Dr. Dinges attached a Certificate of Processing by gamma irradiation for tattoo ink made by Intenze from December 2009. CP 385.

3. Gillson testified in a related case, that also involved allegations by a client of Gillson's of an infection from One ink, that she did nothing to inquire or to form a well-founded belief as to One ink's sterility or lack of bacterial contamination.

Q (By Mr. Baisch) What makes you believe that Kingpin wasn't the producer of One tattoo ink?

A It is my understanding that Kingpin is just a distributor and doesn't actually produce the ink. I could be wrong.

Q Do you know anything about the company that made the One tattoo ink?

A No.

Q Aside from having an MSDS sheet showing toxicity for the One tattoo ink, what else did you know about the One tattoo ink?

A As I said, I only knew that it came highly recommended and that it came from a company I believed to be safe.

Q From a distributor that you believed to be safe?

A Yes.

Q You knew nothing about the production?

A Yes.

Q You knew nothing about the company that you thought actually made the tattoo ink?

A I don't know how to answer that. I mean, I guess no. I don't know where they're located. I didn't know. Aside from believing that Kingpin works with safe products and having been comfortable with that, then no, I did not know more than that about the One ink.

Q And not to beat a dead horse, but you didn't know anything about the production of the One ink?

A No.

CP 233.

4. Nor did Gillson have information about the One ink that could allow her to conclude that the One ink was sterile.

Q And do you agree that the ink from Kingpin, the One Ink, did not come to you with a label that said sterile on it?

A Correct.

Q And do you agree that there was nothing in the -- in your knowledge about Kingpin Ink that would have allowed you to know that that ink was sterile?

A Yes. I suppose that's true.

Q That there was no way that you could know that it was sterile, right?

A Right.

CP 213.

5. The Wickershams, as owners and operators of Deep Roots Alderwood, LLC, made little or no effort to inform themselves about the ink used by their tattoo practitioners.

Ryan Wickersham testified:

A . . . I -- I'm not a tattoo artist. I don't know how to tattoo myself, so I would not feel comfortable giving them technical guidelines on how to produce their artwork.

CP 222. Similarly, Katrina Wickersham has no qualifications to perform tattoos or evaluate the work of a licensed tattooist. CP 237.

C. Summary of the superior court decision striking a portion of Dr. Dinges's Second Declaration as legal opinions, and considering a separate portion of his Second Declaration only as medical opinion.

Chester submitted two declarations of her treating infectious disease physician, Dr. Warren Dinges, in opposition to Gillson's and Deep Roots's Motions for Summary Judgment. CP 366-392, 393-97. Dr. Dinges's curriculum vitae is at CP 372-374.

Dr. Dinges provided the following testimony in his Second Declaration:

One of several requirements contained in the Washington Administrative Code regulations that I have reviewed and attached as Exhibit 4 to this declaration is that tattoo artists "Use sterile

instruments and aseptic techniques at all times during a procedure."

Aseptic technique is a concept well known to the medical community and is a goal in every setting where a patient is to have an expectantly sterile site exposed, such as an injection with something. My practice includes the administration of many inoculations and medications delivered intramuscularly, subcutaneously, and intradermally. When I am about to inject a patient I am prepared to "use sterile instruments and aseptic technique at all times during a procedure." What that means for me in part is that the substance that I intend to inject comes to my office in a sealed vial with a sterile stopper on it. The liquid is withdrawn by using a sterile syringe to pierce the stopper on the vial. Sometimes the vial contains a single-dose volume and sometimes a multi-dose volume. If multiple, each dose is withdrawn from the vial with a single use sterile syringe. Proper garb is worn and the patient's skin properly sterilized. If a patient of mine were to become infected through the process of my administering the injection, that would be more probably than not proof that, despite my best efforts, the technique I used was not in fact aseptic and/or the instruments were not sterile at all times during the procedure.

Regardless of the credentials of the person performing the injection, the requirement to "use sterile instruments ... at all times during a procedure" seems unambiguous to me. The only meaning that I can attach to that rule is that, 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.⁴

Ms. Chester's attorneys have told me that the tattoo artist testified that in her understanding the regulation words "sterile" and "aseptic technique" must not require the use of sterile ink because it is a requirement that could never be met. I understand the artist

⁴ The Superior Court struck this underlined paragraph of Dr. Dinges's Second Declaration as "legal opinions." CP 15-23; *see infra* p. 25-29.

to be saying that, assuming the ink was sterile as received from the manufacturer, as soon as ink is exposed to air (as in opening the cap on the bottle of ink and/or pouring some into a sterile single-use container), then the ink is no longer sterile because airborne bacteria get into the ink. The same contention could be made with regard to a tattooing needle that comes out of the autoclave. However, within the medical field, exposure to air by itself is specifically not considered to have rendered a sterile substance or instrument unsterile. This is not to say that prolonged exposure to air for days might not allow a small number of microorganisms to get into the exposed liquid, but the odds of enough airborne bacteria getting into the liquid that way are known to be infinitesimal compared to the odds that bacteria, through physical contact (needle into ink, then both ink and needle into the skin), will be acquired in sufficient numbers to produce an infection.

In my opinion the absolute minimum that is required for a tattoo artist (or any person intending to inject a substance into a person) to be able to claim the use of sterile instruments and aseptic technique at all times during the procedure is that the artist only use ink that is in fact sterile. In this case, the artist did not use ink that was in fact sterile because the black ink in Ms. Chester's tattoo was contaminated with bacteria. To ensure sterile instruments and aseptic technique throughout the procedure, the procedure has to start with sterile tattoo ink.⁵

CP 369-370. Deep Roots filed a Motion to Strike the entirety of Dr. Dinges's Second Declaration. Deep Roots argued: (1) "Dr. Dinges has no experience, education, knowledge, or training as to tattooing standards and procedures, and he is not a licensed tattoo artist." (2) "Dr. Dinges also makes impermissible legal conclusions regarding the application of Washington's body art law as it applies to tattoo artists." CP 180. The

⁵ The Superior Court considered this underlined paragraph "only as medical opinion." CP 15-23; *see infra* p. 29-30.

superior court granted, in part, the Motion to Strike. CP 15-23; *see also infra* p. 24-30.

Chester replied that Dr. Dinges was qualified to opine regarding the elements of the standard of care for tattoo artists because those standards originated from within the medical field. Chester argued that the Legislature's directive in RCW 70.54.340 that the DOH consider the CDC's infection control standards evidenced a legislative intent that the DOH apply medical standards for sterility and aseptic technique to tattooists. CP 88-99.

V. STANDARD OF REVIEW

Under *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989), Gillson and Deep Roots, as the moving parties, have the burden of establishing that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law. The facts should be viewed in the light most favorable to Chester, as the non-moving party, and all reasonable inferences from the facts should be drawn in her favor. *Id.*

VI. ARGUMENT

A. Overview of statutes and regulations applicable to tattoo artists and tattoo shops.

The Legislature first addressed "tattooing" in 2001.

(4) "Tattooing" means the indelible mark, figure, or decorative design introduced by insertion of *nontoxic* dyes or pigments into or

under the subcutaneous portion of the skin upon the body of a live human being for cosmetic or figurative purposes.

RCW 70.54.330(4) (emphasis added). “[U]nless the context clearly appears otherwise,” the definition that artists use only nontoxic ink “shall apply throughout” three other sections. *Id.* Those three sections are: RCW 70.54.320 (declaring tattooing to be an invasive procedure that warrants regulation), 70.54.340 (the directive to the DOH to mandate precautions against the spread of disease by tattooists), and 70.54.350(1) (providing that every tattoo practitioner “shall comply” with DOH rules adopted under RCW 70.54.340). RCW 70.54.340 provides:

The secretary of health shall adopt by rule requirements, in accordance with nationally recognized professional standards, for precautions against the spread of disease, including the sterilization of needles and other instruments, including sharps and jewelry, employed by electrologists, persons engaged in the practice of body art, body piercing, and tattoo artists. The secretary shall consider the standard precautions for infection control, as recommended by the United States centers for disease control, and guidelines for infection control, as recommended by national industry standards in the adoption of these sterilization requirements.

Under RCW 70.54.340, the Department of Health adopted the following requirements:

“The following universal precautions must be used by persons licensed to practice . . . tattooing:

(1) Use sterile instruments and aseptic techniques at all times during a procedure.”

WAC 246-145-050(1). The term “aseptic technique” means:

“[A] procedure that prevents contamination of any object or person.”

WAC 246-145-010(2). The term “sterile” is undefined within the definitions section of 246-145. The term “sterilization” is defined as:

“(23) "Sterilization" means a process that destroys all forms of microbial life, including highly resistant bacterial spores.”

WAC 246-145-010(23).

B. The superior court erred in granting Gillson’s summary judgment motion because the use of non-sterile tattoo ink is negligent per se.

Negligence per se means negligent as a matter of law. *See, e.g., Kness v. Truck Trailer Equip. Co.*, 81 Wn.2d 251, 255, 501 P.2d 285, 288 (1972). In most cases, violations of statutes and regulations merely constitute evidence of negligence, and do not establish negligence as a matter of law. RCW 5.40.050. However, violations of certain statutes and regulations constitute negligence per se. RCW 5.40.050(1)-(4). In this way, the doctrine of negligence per se essentially substitutes a legislatively created standard of care for the common law standard of reasonableness. *See* 16 Wash. Prac., Tort Law & Practice § 2:42 (4th ed.).

Violations of statutes and regulations governing tattoo artists and shops constitute negligence per se. RCW 5.40.050(3) provides in pertinent part:

any breach of duty as provided by statute, ordinance, or administrative rule relating to . . . sterilization of needles and instruments used by persons engaged in the practice of . . . tattooing . . . or other precaution against the spread of disease, as required under RCW 70.54.350 . . . shall be considered negligence per se.

(Ellipses added.)⁶ This provision incorporates a number of different regulations regarding sterilization of tattoo instruments and other precautions against the spread of disease. These include WAC 246-145-050(1). As stated, WAC 246-145-050(1) mandates:

The following universal precautions must be used by persons licensed to practice body art, body piercing, and tattooing:

(1) Use sterile instruments and aseptic techniques at all times during a procedure.

(Formatting in original.) Also as stated, “Aseptic technique” is defined to mean “a procedure that prevents contamination of any object or person.” WAC 246-145-010(2).⁷

As explained by Dr. Dinges, use of non-sterile tattoo ink is incompatible with aseptic technique. This explanation is consistent with the plain meaning of the words used in the regulation. “Contamination” means “a process of contaminating” or “a state of being contaminated.” *Merriam-Webster Online*, s.v. “contamination” (available at www.m-w.com; viewed June 8, 2015). “Prevent” means “to stop (something) from

⁶ The full text of RCW 5.40.050 is reproduced in the Appendix.

⁷ The full text of WAC 246-145-010 and -050 are reproduced in the Appendix.

happening or existing.” *Id.*, s.v. “prevent”. A procedure cannot be considered aseptic or prevent contamination if it employs non-sterile products. As a result, Gillson violated the plain language of the regulation by using non-sterile tattoo ink on Chester, and she is subject to liability as a matter of law. The superior court’s grant of summary judgment in Gillson’s favor is erroneous and should be reversed.

Gillson argues that she did not violate WAC 246-145-050(1) because she did not know, nor should she have known, that the ink was contaminated. This argument presumes a knowledge requirement and should be rejected for several reasons. First, actual or constructive knowledge is not an express element of the regulation. Second, a knowledge requirement should not be implied because it would encourage tattoo artists to remain ignorant in order to avoid the prospect of liability. This would be at odds with the purpose of tort law to incentivize safe behavior. *See Mohr v. Grantham*, 172 Wn.2d 844, 852, 262 P.3d 490, 493 (2011) (regarding deterrence objectives of tort law). Third, imposing liability without regard for knowledge is consistent with the concept of prevention, which is an express part of the regulation. *See* WAC 246-145-010(2). The duty to prevent contamination would seem to entail an affirmative obligation to use sterile ink, or, where non-sterile ink is used,

to confirm that it is not contaminated before using it.⁸ Fourth, requiring knowledge as a prerequisite to liability would undermine the purpose of the regulation to protect the public health, safety and welfare. *See* RCW 70.54.320; WAC 246-145-001.⁹

C. Gillson’s violation of RCW 70.54.330(4) through her use of toxic ink is an independent basis for a jury finding of negligence per se.

RCW 70.54.330(4) requires that the ink used by licensed tattoo practitioners be nontoxic. As stated, RCW 5.40.050 provides that it is negligent per se for a tattoo artist to violate a duty “imposed by statute . . . relating to: (3) sterilization of needles and instruments used . . . in the practice of . . . tattooing.” RCW 70.54.330(4), that embeds the requirement of “nontoxic” ink into RCW 70.54.340 and RCW 70.54.350, is a statute

⁸ The duty to prevent contamination distinguishes this case from other negligence per se cases, where a justified lack of knowledge excuses conduct in violation of a statute. *See, e.g., Kaiser v. Suburban Transp. Sys.*, 65 Wn.2d 461, 466, 398 P.2d 14, 17, 401 P.2d 350 (1965) (holding a person who innocently takes a pill prescribed by a doctor cannot be negligent per se under statute prohibiting driving under the influence unless he has knowledge of the pill's harmful qualities). In such cases, the lack of knowledge is an affirmative defense on which the defendant should bear the burden of proof. *See State v. Dailey*, 174 Wn. App. 810, 300 P.3d 834 (2013) (DUI); *Baughn v. Malone*, 33 Wn. App. 592, 594-96, 656 P.2d 1118, 1119-20 (1983) (service of alcohol to minors); WPI 60.01.01.

⁹ This interpretation is supported by the definition of “tattooing” in terms of using “nontoxic dyes or pigments.” RCW 70.54.330(4) (emphasis added).

that “relate[s] to” sterilization of instruments used . . . in tattooing . . . or other precautions against the spread of disease” through tattooing.¹⁰

Thus, a licensed tattooist cannot escape, through her professed ignorance, the duty to use only “nontoxic” ink. In other contexts the law recognizes legal duties that are independent of the knowledge of the actor. *Baughn v. Malone*, 33 Wn. App. 592, 594-96, 656 P.2d 1118, 1119-20 (1983) (service of alcohol to minors); *Goodell v. ITT-Federal Support Services, Inc.*, 89 Wn.2d 488, 573 P.2d 1292 (1978) (violation of statute that certain electrical equipment “shall be sufficiently insulated, or so guarded, located, or arranged as to protect any person from injury” was proven by the fact of injury alone to a faultless worker, and was negligence per se).

¹⁰ In a footnote in its reply brief, Deep Roots argues that ink that contained harmful bacteria might still be “nontoxic,” and suggested that, unlike harmful bacteria, under the statutes and rules, ink might become toxic through the “addition of poisonous chemicals.” CP 136. Chester provides the following citation to a Washington case where the court rejected the appellant-insurer’s argument that coverage under an accidental death policy was excluded because the death resulted from an infection. *Kane v. Order of United Commercial Travelers of Am.*, 3 Wn.2d 355, 362-63, 100 P.2d 1036, 1039 (1940) (“Appellee contends, correctly we think, that the ‘ordinary conception of the word ‘infection’ to a layman implies the invasion of bacteria from the air into an opening or abrasion on the surface of the skin or body causing toxic or blood poisoning.”).

D. The negligence per se statute does not provide for any affirmative defenses. Alternatively, if there are affirmative defenses, the record does not establish that Gillson should prevail upon any affirmative defense.

RCW 5.40.050 does not provide for any affirmative defenses. The same is true of the DOH rules discussed above.

However, if Gillson has an affirmative defense under her version of the facts, it is the defense provided in WPI 60.01.01.

The violation, if you find any, of a statute or administrative rule relating to sterilization of needles and instruments used in the practice of tattooing or other precaution against the spread of disease is negligence as a matter of law. Such negligence has the same effect as any other act of negligence. While such a violation is, generally speaking, negligence as a matter of law, it is not negligence if it is due to some cause beyond the violator's control that ordinary care could not have guarded against.

WPI 60.01.010 (emphasis added). Gillson had a choice to use sterile or non-sterile ink. *Supra* p. 5-8. Her liability for using non-sterile ink cannot be excused under this affirmative defense.

First and foremost, Gillson's use of non-sterile ink was not beyond her control. The objective evidence from Intenze's website is that sterile ink was available.

Second, the exercise of ordinary care by Gillson could have and would have guarded against her use of non-sterile ink. Gillson testified that, at the time she purchased the One ink, she had not determined whether Kingpin was the manufacturer or merely a distributor of the One

ink. CP 233. She also testified that she used One ink knowing that she did not know that it was sterile. CP 213.¹¹

Gillson testified that she assumed all inks were safe for their intended purpose by the mere fact that they were for sale. CP 216. However, that testimony is inconsistent with her affirmative defense, that “. . . if plaintiff sustained injuries as a result of using the product at issue, those injuries were the result of properties *necessarily associated with the product* that were unavoidable and for which defendant cannot be held responsible.” CP 522 (emphasis added).

By analogy, Chester refers the Court to a case involving the affirmative defense set forth in RCW 21.20.430(3) within the Washington State Securities Act, which provides that a director is liable for misrepresentation of material facts in the sale of stock:

[U]nless such person sustains the burden of proof that he or she did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.

¹¹ Gillson stated in her reply brief: “the undisputed fact is that at the time she purchased One ink from Kingpin, Kingpin was advertising One ink on its website as being ‘sterilized and laboratory tested.’” CP 175. Gillson cited to Kingpin’s response to Chester’s request for admission number 18 regarding a Food and Drug Administration inspection of Kingpin, and the inspector’s comment in his report that, during his inspection, he visited the Kingpin website and saw that Kingpin had advertised that the One ink was “sterilized and laboratory tested.” CP 162-164. However, the FDA’s inspection of Kingpin began on 3/15/12, CP 163-164, more than 10 months *after* Gillson acquired the One ink from Kingpin, CP 67, and more than six months *after* Chester’s tattoo. There is no evidence that at any time before Gillson tattooed Chester that anyone had described One ink as sterile.

The language of this affirmative defense is essentially the same as the defense in WPI 60.01.010. In *Hines v. Data Line Sys., Inc.*, 114 Wn.2d 127, 787 P.2d 8, 21-22 (1990), the Supreme Court of Washington held that where the sale of stock is concerned, a corporate director's passive, good faith lack of knowledge is not sufficient to establish the defense provided by RCW 21.20.430(3). The Supreme Court provided the following guidance as to what would be required under the "could not have known" standard:

By its plain words, the defense provision of the State Securities Act **requires affirmative action** on the part of a director who wishes to avail himself of this defense. In contrast, the Corporation Act sanctions a passive, good faith, lack of knowledge defense.

Defendants argue, notwithstanding the application of RCW 23A.08.343, the State Securities Act "reasonable care" defense does not impose upon directors a duty to investigate facts beyond their *actual* knowledge. **However the plain language of the affirmative defense provision requires something more than actual knowledge. The defense is available only if such person "did not know" and "could not have known" of the existence of the liability producing facts. Ignorance will be bliss only to the extent that the director can prove that even by the exercise of reasonable care he would have remained ignorant of the true state of affairs.** *Robertson v. White*, 635 F.Supp. 851, 865 (W.D.Ark.1986). The defendant, at a minimum, must apprise himself of facts reasonably within his grasp. The question presented is whether the outside directors in the exercise of reasonable care could have known of Peterson's remaining aneurysms, not whether they actually knew.

Hines, 114 Wn.2d at 144-146 (emphasis added). The corporate directors did not sustain their burden of proof on this affirmative defense. *Id.* Like the corporate directors' ignorance of material facts, Gillson's ignorance of

the availability of sterile ink is not bliss because it was within her control to know of the availability of sterile ink, and the record provides a reasonable inference that she did actually know that sterile ink was available.

E. Alternatively, the superior court erred in granting Gillson's summary judgment motion because the use of non-sterile tattoo ink constitutes simple negligence.

As Judge Learned Hand famously stated in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947), the nature of a duty grounded in tort is derived from a risk-benefit analysis involving: (1) the probability of harm, (2) the gravity of the resulting harm, and (3) the burden of adequate precautions. *See also The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932) (“ . . . a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages.”); *Helling v. Carey*, 83 Wn. 2d 514, 519 P.2d 981 (1974) (applying similar analysis to determine that ophthalmologists have a duty to administer glaucoma tests to persons under age 40).

Under this type analysis, tattoo artists should have a duty to use sterile ink or to confirm that non-sterile ink is not in any way contaminated. The probability of harm is attested to by the Legislative findings supporting the regulation of tattoo artists, by Dr. Dinges's experience, and by the fact that 21 other people beside Chester were

harm by the ink Gillson used to apply their tattoos. The gravity of harm is evident in the serious injuries suffered by Chester. The burden of using sterile ink is nonexistent. Gillson can simply order sterile rather than non-sterile ink from her suppliers. Under these circumstances a duty to use sterile ink should be imposed, independent of the regulations governing tattoo artists.

F. Gillson’s argument regarding the Washington Product Liability Act.

Gillson argues that Chester’s reading of WAC 246-145-050(1) as putting duties on the tattoo practitioner cannot be correct because if it were:

[I]t means that Gillson, a tattoo artist, could be held liable as a matter of law for unknowingly using ink that was contaminated, whereas a showing would need to be made against the manufacturer that it did not act as a reasonably prudent manufacturer in making the ink. This interpretation is indefensible.

CP 173. RCW 7.72.030, titled “Liability of a manufacturer” provides:

(2) A product manufacturer is subject to strict liability to a claimant if the claimant's harm was proximately caused by the fact that the product was not reasonably safe in construction or not reasonably safe because it did not conform to the manufacturer's express warranty or to the implied warranties under Title 62A RCW.

(a) A product is not reasonably safe in construction if, when the product left the control of the manufacturer, the product deviated in some material way from the design specifications or performance standards of the manufacturer, or deviated in some material way from otherwise identical units of the same product line.

RCW 7.72.030 (emphasis added). Insofar as Gillson argues that defective product claims are ones of negligence, Gillson's statement of the law is incorrect. Manufacturers are strictly liable for the manufacturing of products that are not reasonably safe in construction. *Id.*

G. The superior court erred in concluding that Deep Roots Alderwood, LLC, was entitled to summary judgment dismissal because, under WAC 308-22, Deep Roots is a licensee that is required to comply with WAC 246-145-050.

Under WAC 308-22-010, the term "Licensee" means "a shop, business or individual licensed to practice body art, body piercing, or tattooing." WAC 308-22-020 provides: "Every licensee shall comply with the requirements established by the department of health under WAC 246-145-015, 246-145-050, and 246-145-060."

Under these regulations, Deep Roots as a licensee owed to Chester the duty to see to it that all of the requirements of Chapter 246-145 of the Washington Administrative Code were met, a duty it violated by harming Chester through Gillson's injection of unsterilized ink.¹²

¹² See *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 464, 788 P.2d 545, 550-51 (1990) ("A general contractor's supervisory authority is per se control over the workplace, and the duty is placed upon the general contractor as a matter of law. It is the general contractor's responsibility to furnish safety equipment or to contractually require subcontractors to furnish adequate safety equipment relevant to their responsibilities.").

H. The superior court erred in granting in part the Motion to Strike the Second Declaration of Dr. Warren Dinges because those portions of the declaration consist of admissible expert opinions on the elements of the standard of care and admissible conclusions of fact.

The same de novo standard of review applies to the superior court's rulings regarding Dr. Dinges's Second Declaration.¹³ All reasonable inferences of fact must be resolved against the Deep Roots Alderwood, LLC, and Gillson.¹⁴

Deep Roots moved to strike the entirety of Dr. Dinges's Second Declaration upon the contention that he was not qualified to make opinions that could apply to tattoo artists or tattoo shops. At the time of its Reply, it was Deep Roots' contention that whether Gillson used sterile instruments and aseptic technique were questions that only someone with a history as a tattoo artist and knowledge of the prevailing standard of care in the tattooing industry for performing tattoos would be qualified to answer.¹⁵ CP 183-184.

¹³ *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301, 305 (1998) ("The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion."); *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 494, 183 P.3d 283, 289 (2008) ("... [W]here the qualifications and opinions are part of a summary judgment proceeding, review is instead de novo.").

¹⁴ *Folsom*, 135 Wn.2d at 663. ("This standard of review [the de novo standard] is consistent with the requirement that evidence and inferences are viewed in favor of the nonmoving party, *Lamon*, 91 Wash.2d at 349, 588 P.2d 1346 (citing *Morris*, 83 Wash.2d at 494-95, 519 P.2d 7), and the standard of review is consistent with the requirement that the appellate court conduct the same inquiry as the trial court."); *Eng v. Klein*, 127 Wn. App. 171, 180, 110 P.3d 844 (2005).

¹⁵ In a footnote at CP 82, Deep Roots Alderwood, LLC, asks: "Is Dr. Dinges qualified to opine as to sterility and aseptic techniques in a dental practice? WAC 246-817-620. A veterinary practice? WAC 246-933-310, 340. Milk processing? RCW 15.36.012." *Id.* Chester does not concede that Dr. Dinges would necessarily be unqualified to opine, in

The attempt to bar physicians and scientists from the field of persons qualified to opine whether Gillson maintained aseptic technique and used sterile instruments is incompatible with the Legislative directive that the secretary of health “consider the standard precautions for infection control, as recommended by the United States centers for disease control” RCW 70.54.340. The meaning of “sterile” is the same across all occupations and circumstances. Like being pregnant, sterility throughout a procedure is either maintained or not. Correctly completing nine steps out of 10 is not sufficient if one step is unsterile. Dr. Dinges is qualified and permitted to opine as to the elements of standards of care because the Health Department’s regulations are based on precautions written by medical experts for use in healthcare settings. At a minimum, the fact that WAC 246-145-050(1) is derived from doctors and scientists associated with the CDC requires a reasonable inference that he is qualified to testify regarding the elements of the standard of care for tattoo artists as to the specific requirements of sterile instruments and aseptic technique.¹⁶

the case of a dentist or veterinarian who allegedly injected a patient with a contaminated product, whether sterile instruments were used and whether aseptic technique was maintained at all times during the procedure. This would especially be the case if the Legislature had taken the uncommon step of excepting from the abolition of negligence per se claims, violations of the safety regulations governing those procedures, and if the governing regulations were adopted under a legislative directive that the secretary of health consider the Centers for Disease Control’s precautions for infection control in healthcare settings, as is the case for the tattoo regulations.

¹⁶ For additional discussion of Dr. Dinges’s qualifications, see Chester’s brief in Opposition to the Motion to Strike. CP 88-99.

1. The portion of Dr. Dinges's Second Declaration that the superior court struck as "legal opinions."

The superior court struck page 4, lines 15-21 of Dr. Dinges's Second Declaration as "legal opinions", CP 18, quoted as follows.

Regardless of the credentials of the person performing the injection, the requirement to "use sterile instruments ... at all times during a procedure" seems unambiguous to me. The only meaning that I can attach to that rule is that, 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.

The superior court did not decide that Dr. Dinges was not qualified under ER 702 to provide this testimony; neither did it find that Dr. Dinges's testimony would not be helpful to the trier of fact.¹⁷ That Dr. Dinges's testimony includes legal terminology is not dispositive of the question whether Dr. Dinges's opinions are inadmissible legal opinions. In *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 420-21, 150 P.3d 545, 548 (2007), the Supreme Court of Washington reversed a trial court order striking portions of the declaration of the plaintiff's expert as inadmissible legal conclusions.

We also hold that the trial court erred in striking portions of the declaration of Davis's expert, Michael Black. Black's declaration stated that the damaged pipe created a "hazardous condition" and a

¹⁷ "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." ER 702.

“zone of danger.” Clerk's Papers at 692. The trial court struck these words, deeming them inadmissible legal conclusions because they are similar to one of the exceptions to the completion and acceptance doctrine, for conditions which are inherently or imminently dangerous.

Davis, 159 Wn.2d at 420. The Supreme Court explained:

Expert testimony must assist the trier of fact. Mere legal conclusions, such that an act was or was not “negligent” or a “proximate cause” of an injury is not likely to be helpful to the meaningful evaluation of the facts, as it runs the risk of substituting the expert's judgment for the fact finder's.

Id. The Supreme Court distinguished admissible expert opinions that establish the elements of negligence, from those that are only inadmissible legal conclusions:

. . . Washington law favors resolution of issues on the merits. It should not be fatal to a party's claim or defense that an expert used legal jargon, so long as an appropriate foundation for the conclusion can be gleaned from the testimony. Expert opinions that help establish the elements of negligence are admissible.

Id. The paragraph of Dr. Dinges's Second Declaration at page 4, lines 15-21 begins with a reference to the terms used in WAC 246-145-050(1), and includes a reference to Dr. Dinges's understanding of that rule. However, Dr. Dinges continues within that paragraph to say that if a tattoo artist injects a customer with contaminated ink, “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 369. The statement that the instrument was contaminated

with bacteria and unsterile is not a legal opinion, but is a statement of fact that Dr. Dinges is qualified to make. Furthermore, by way of the negligence per se statute, WAC 246-145-050(1) establishes a standard of care for tattoo artists. RCW 5.40.050. It is therefore inescapable that Dr. Dinges's testimony will refer to terms within statutes and regulations because the statutes and regulations establish the standard of care.

2. The portion of Dr. Dinges's Second Declaration that the superior court considered "only as medical opinion."

The superior court considered page 5, lines 7-12 of Dr. Dinges's Second Declaration "only as medical opinion", CP 18, quoted as follows.

In my opinion the absolute minimum that is required for a tattoo artist (or any person intending to inject a substance into a person) to be able to claim the use of sterile instruments and aseptic technique at all times during the procedure is that the artist only use ink that is in fact sterile. In this case, the artist did not use ink that was in fact sterile because the black ink in Ms. Chester's tattoo was contaminated with bacteria. To ensure sterile instruments and aseptic technique throughout the procedure, the procedure has to start with sterile tattoo ink.

However, Dr. Dinges's testimony is specifically directed to tattoo artists, and as stated above, helps to establish the elements of negligence which in cases of negligence per se, necessarily involves the use of legal terminology. Furthermore, Chester submits that the following statements within the above-quoted testimony are statements of fact that Dr. Dinges is qualified to make.

In this case, the artist did not use ink that was in fact sterile because the black ink in Ms. Chester's tattoo was contaminated with bacteria.

To ensure sterile instruments and aseptic technique throughout the procedure, the procedure has to start with sterile tattoo ink.

VII. CONCLUSION

Based on the foregoing, Anna Chester respectfully asks this Court for the following relief:

1. Reverse the superior court's summary judgment order of dismissal of Bonnie Gillson;
2. Reverse the superior court's summary judgment order of dismissal of Deep Roots Alderwood, LLC;
3. Reverse the superior court's order granting in part Bonnie Gillson and Deep Roots Alderwood, LLC's Motion to Strike the Second Declaration of Warren Dinges, M.D., Ph.D.

Submitted this 12th day of June, 2015.



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CERTIFICATE OF SERVICE

I, Bridget Donovan, 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 Offices of James S. Sorrels, 23607 Highway 99, Suite 3-A, Edmonds, WA 98026.
- 2) Prior to the end of business day on June 12, 2015, I served upon counsel of record via hand delivery at the addresses described below, the following documents:

- **Appellant's Brief; and**
- **Certificate of Service.**

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

DATED this 12th day of June, 2015



Bridget A. Donovan

APPENDIX

Appendix A

RCW 5.40.050

Breach of duty — Evidence of negligence — Negligence per se.

A breach of a duty imposed by statute, ordinance, or administrative rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence; however, any breach of duty as provided by statute, ordinance, or administrative rule relating to: (1) Electrical fire safety, (2) the use of smoke alarms, (3) sterilization of needles and instruments used by persons engaged in the practice of body art, body piercing, tattooing, or electrology, or other precaution against the spread of disease, as required under RCW 70.54.350, or (4) driving while under the influence of intoxicating liquor or any drug, shall be considered negligence per se.

[2009 c 412 § 20; 2001 c 194 § 5; 1986 c 305 § 901.]

Appendix B

RCW 70.54.320

Electrology and tattooing — Findings.

The legislature finds and declares that the practices of electrology and tattooing involve an invasive procedure with the use of needles and instruments which may be dangerous when improperly sterilized presenting a risk of infecting the client with blood-borne pathogens such as HIV and Hepatitis B. It is in the interests of the public health, safety, and welfare to establish requirements for the sterilization procedures in the commercial practices of electrology and tattooing in this state.

[2001 c 194 § 1.]

Appendix C

RCW 70.54.330

Electrology and tattooing — Definitions.

The definitions in this section apply throughout RCW 70.54.320, 70.54.340, and 70.54.350 unless the context clearly requires otherwise.

(1) "Electrologist" means a person who practices the business of electrology for a fee.

(2) "Electrology" means the process by which hair is permanently removed through the utilization of solid needle/probe electrode epilation, including thermolysis, being of shortwave, high frequency type, and including electrolysis, being of galvanic type, or a combination of both which is accomplished by a superimposed or sequential blend.

(3) "Tattoo artist" means a person who practices the business of tattooing for a fee.

(4) "Tattooing" means the indelible mark, figure, or decorative design introduced by insertion of nontoxic dyes or pigments into or under the subcutaneous portion of the skin upon the body of a live human being for cosmetic or figurative purposes.

[2001 c 194 § 2.]

Appendix D

RCW 70.54.340

Electrology, body art, body piercing, and tattooing — Rules, sterilization requirements.

The secretary of health shall adopt by rule requirements, in accordance with nationally recognized professional standards, for precautions against the spread of disease, including the sterilization of needles and other instruments, including sharps and jewelry, employed by electrologists, persons engaged in the practice of body art, body piercing, and tattoo artists. The secretary shall consider the standard precautions for infection control, as recommended by the United States centers for disease control, and guidelines for infection control, as recommended by national industry standards in the adoption of these sterilization requirements.

[2009 c 412 § 19; 2001 c 194 § 3.]

Appendix E

RCW 70.54.350

**Electrology and tattooing — Practitioners to comply with rules —
Penalty.**

(1) Any person who practices electrology or tattooing shall comply with the rules adopted by the department of health under *RCW 70.54.340.

(2) A violation of this section is a misdemeanor.

[2001 c 194 § 4.]

Appendix F

WAC 246-145-001

Purpose and scope.

These rules establish standard universal precautions for preventing the spread of diseases by using sterilization procedures and infection control in the practices of electrology, body art, body piercing, and tattooing.

[Statutory Authority: RCW 70.54.340. WSR 10-12-057, § 246-145-001, filed 5/27/10, effective 7/1/10; WSR 02-11-109, § 246-145-001, filed 5/20/02, effective 6/20/02.]

Appendix G

WAC 246-145-010

Definitions.

For the purpose of these rules, the following words and phrases have the following meanings unless the context clearly indicates otherwise.

- (1) "Antiseptic" means an agent that destroys disease causing microorganisms on human skin or mucosa.
- (2) "Aseptic technique" means a procedure that prevents contamination of any object or person.
- (3) "Bloodborne pathogens" means microorganisms that are present in human blood and can cause disease in humans. These pathogens include, but are not limited to, Hepatitis B virus (HBV), Hepatitis C virus (HBC) and human immunodeficiency virus (HIV).
- (4) "Body art" means the practice of invasive cosmetic adornment including the use of branding and scarification. Body art also includes the intentional production of scars upon the body. Body art does not include any health-related procedures performed by licensed health care practitioners under their scope of practice.
- (5) "Body piercing" means the process of penetrating the skin or mucous membrane to insert an object, including jewelry, for cosmetic purposes. Body piercing also includes any scar tissue resulting from or relating to the piercing. Body piercing does not include the use of stud and clasp piercing systems to pierce the earlobe in accordance with the manufacturer's directions and applicable FDA requirements. Body piercing does not include any health-related procedures performed by licensed health care practitioners under their scope of practice, nor does anything in this act authorize a person registered to engage in the business of body piercing to implant or embed foreign objects into the human body or otherwise engage in the practice of medicine.
- (6) "Branding" means inducing a pattern of scar tissue by use of a heated material (usually metal) to the skin creating a serious burn which eventually results in a scar.
- (7) "Department" means the department of licensing.
- (8) "Disinfectant" means a substance or solution, registered with the United States Environmental Protection Agency (EPA) that kills or inactivates viruses and pathogenic microorganisms, but not necessarily their spores.

- (9) "Disinfect" or "disinfection" means the destruction of disease-causing microorganisms on inanimate objects or surfaces, thereby rendering these objects safe for use or handling.
- (10) "Electrologist" means a person who practices the business of electrology for a fee.
- (11) "Electrology" means the process of permanently removing hair by using solid needle or probe electrode epilation, including:
- (a) Thermolysis, being of shortwave, high frequency type;
 - (b) Electrolysis, being a galvanic type; or
 - (c) A combination of both which is accomplished by a superimposed or sequential blend.
- (12) "FDA" means United States Food and Drug Administration.
- (13) "Gloves" means single-use disposable medical grade gloves that are FDA approved.
- (14) "Hand sanitizer" means an alcohol-based sanitizer with a concentration of 60% to 95% ethanol or isopropanol.
- (15) "Jewelry" means any personal ornament inserted into a newly pierced area, which must be made of surgical implant-grade stainless steel, solid 14k or 18k white or yellow gold, niobium, titanium, or platinum, or a dense, low-porosity plastic, which is free of nicks, scratches, or irregular surfaces and has been properly sterilized prior to use.
- (16) "Licensee" means a shop, business or individual licensed to practice body art, body piercing or tattooing.
- (17) "Procedure(s)" means body art, body piercing, and tattooing procedures.
- (18) "Sanitize" means a procedure that reduces the level of microbial contamination so that the item or surface is considered safe.
- (19) "Scarification" means altering skin texture by cutting the skin and controlling the body's healing process in order to produce wounds, which result in permanently raised wheals or bumps known as keloids.
- (20) "Sharps" means any objects (sterile or contaminated) that may purposefully or accidentally cut or penetrate the skin or mucosa including, but not limited to, presterilized, single-use needles, scalpel blades, and razor blades.
- (21) "Sharps container" means a puncture-resistant, leak-proof container that can be closed for handling, storage, transportation, and disposal and that is labeled with the international biohazard symbol.

(22) "Single-use" means products, instruments or items that are intended for one-time use and are disposed of after each use including, but not limited to, cotton swabs or balls, tissue or paper products, paper or plastic cups, gauze and sanitary coverings, razors, needles, scalpel blades, stencils, ink cups and protective gloves.

(23) "Sterilization" means a process that destroys all forms of microbial life, including highly resistant bacterial spores.

(24) "Sterilizer" means an apparatus that is registered and listed with the FDA for destroying all forms of microbial life, including highly resistant bacterial spores.

(25) "Tattooing" means to pierce or puncture the human skin with a needle or other instrument for the purpose of implanting an indelible mark, or pigment into the skin.

(26) "Universal precautions" is an approach to infection control as defined by the Center for Disease Control (CDC). According to the concept of universal precautions, all human blood and certain body fluids are treated as if known to be infectious for human immunodeficiency virus (HIV), Hepatitis B virus (HBV) and other bloodborne pathogens.

[Statutory Authority: RCW 70.54.340. WSR 10-12-057, § 246-145-010, filed 5/27/10, effective 7/1/10; WSR 02-11-109, § 246-145-010, filed 5/20/02, effective 6/20/02.]

Appendix H

WAC 246-145-050

Standard universal precautions for preventing the spread of disease in body art, body piercing, and tattooing.

The following universal precautions must be used by persons licensed to practice body art, body piercing, and tattooing:

- (1) Use sterile instruments and aseptic techniques at all times during a procedure.
- (2) Use only presterilized single-use disposable needles for body piercing and tattooing on one client and then dispose of the needles immediately in a sharps container.
- (3) Wear a clean outer garment and prevent hair from coming into contact with the client. All necklaces, bracelets, or other personal items must be removed or covered by the outer garment or gloves to prevent the item coming in contact with the client.
- (4) Wash hands and wrists thoroughly in warm running water with soap for at least twenty seconds, scrub around and under fingernails, rinse completely and dry with a clean single-use towel or hand dryer. Handwashing must be done immediately before and after performing a procedure.
- (5) Inspect hands for small cuts, sores and abrasions. If present, use a Seal-skin product or bandage.
- (6) Licensees with weeping dermatitis or draining sores must avoid contact with clients and equipment until the weeping dermatitis or draining sores are healed.
- (7) Wear gloves during procedures and while assembling instruments. Licensees must wash hands immediately before single-use disposable gloves are put on and after gloves are removed.
- (8) Wear gloves to prepare the client's skin (washing and shaving) and then discard the gloves after completing the preparation. A new pair of gloves must be put on before continuing the procedure.
- (9) Remove gloves immediately, wash hands or use a hand sanitizer, and put on new gloves, when gloved hands break aseptic technique (e.g., touching eyes, nose or mouth, answering the phone, opening a door, or retrieving an item from the floor) during a procedure, or when gloves are torn or have small pinholes.

- (10) If a licensee sustains a needle stick, they shall resume the procedure with clean and sterile equipment after rewashing hands and putting on new gloves.
- (11) Change gloves after contact with each client.
- (12) Clean and disinfect chairs, tables, work spaces, counters, and general use equipment in the procedure area between each client. Follow manufacturers' instructions for proper use of disinfecting (or detergent) products.
- (13) Use appropriate barrier films to cover all items gloved hands would normally come into contact with during a procedure. These items include, but are not limited to, machine heads, clip cords, spray bottles, seat adjustment controls, power control dials or buttons and work lamps.
- (14) Use single-use stencils. Petroleum jellies, soaps and other products used in the application of stencils must be dispensed and applied using aseptic technique and in a manner to prevent contamination of the original container and its contents. The applicator must be single-use.
- (15) Use only single-use pigment or ink containers for each client. Pigments and ink shall be dispensed from containers in a manner to prevent contamination to the unused portion. Individual containers of ink or pigment must be discarded after use.
- (16) Use single-use razors during procedures and dispose of them in a sharps container.
- (17) In the event of blood flow, use products that are single-use to control or check the blood flow or absorb the blood. Used products must be disposed of immediately in appropriate covered container. The use of styptic pens or alum solids to control blood flow is prohibited.
- (18) Inks or pigments must not be banned or restricted by the FDA and must not be mixed with improper ingredients. Information indicating the source of all inks and pigments shall be available to the department upon request.
- (19) Use single-use marking instruments or instruments sanitized by design, such as alcohol based ink pens, on intact skin that has been treated with an antiseptic solution. Any marking instrument that comes in contact with mucous membranes or broken skin shall be single-use.
- (20) All jewelry, as defined in WAC 246-145-010, must be obtained in presterilized packaging from the manufacturer or be sterilized on-site prior to the procedure.
- (21) Cleanse the client's skin before and after a procedure by washing the skin with a FDA registered antiseptic solution applied with a clean, single-use product. A sanitary covering must be placed over the procedure site when appropriate.

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(22) Wearing new gloves open each package containing a sterile instrument in the presence of the client and handle each instrument in a manner to prevent contamination of the instrument.

(23) Prevent needlestick injuries by not recapping needles or breaking needles by hand and by not otherwise manipulating contaminated needles by hand.

(24) Disposal of sharps containers must comply with the local solid waste program through the licensee's local county health department.

[Statutory Authority: RCW 70.54.340. WSR 10-12-057, § 246-145-050, filed 5/27/10, effective 7/1/10.]

Appendix I

WAC 308-22-010

Definitions.

For purposes of these rules, the following words and phrases have the following meanings unless the context clearly indicates otherwise.

"Antiseptic" means an agent that destroys disease-causing microorganisms on human skin or mucosa.

"Aseptic technique" means a procedure that prevents contamination of any object or person.

"Bloodborne pathogens" means microorganisms that are present in human blood and can cause disease in humans. These pathogens include, but are not limited to, hepatitis B virus (HBV), hepatitis C virus (HCV), and human immunodeficiency virus (HIV).

"Branding" means inducing a pattern of scar tissue by application of a heated material (usually metal) to the skin creating a serious burn which eventually results in a scar.

"Cleaning area" means an area, physically separated from all work stations or waiting areas, where contaminated tools or equipment are sanitized and disinfected.

"Department" means the department of licensing.

"Disinfect" or "disinfection" means the destruction of disease-causing microorganisms on inanimate objects or surfaces, thereby rendering these objects safe for use or handling.

"Disinfectant" means a substance or solution, registered with the United States Environmental Protection Agency (EPA) that kills or inactivates viruses and pathogenic microorganisms, but not necessarily their spores.

"Event license" is a temporary location license to hold a body art, body piercing, or tattooing convention or event in the state of Washington. Event license holders must meet the same requirements for a location license as defined under RCW 18.300.010.

"FDA" means United States Food and Drug Administration.

"Gloves" mean single-use disposable medical grade gloves that are FDA approved.

"Hand sanitizer" means an alcohol-based sanitizer with a concentration of sixty percent to ninety-five percent ethanol or isopropanol.

"Jewelry" means any personal ornament inserted into a newly pierced area, which must be made of surgical implant-grade stainless steel, solid

14k or 18k white or yellow gold, niobium, titanium, or platinum, or a dense, low-porosity plastic, which is free of nicks, scratches, or irregular surfaces and has been properly sterilized prior to use.

"Licensee" means a shop, business or individual licensed to practice body art, body piercing, or tattooing.

"Mobile unit" is a location license under this chapter where the practice of body art, body piercing, or tattooing is conducted in a mobile structure. Mobile units must conform to the health and safety standards as defined under chapter 18.300 RCW.

"Mucous membranes" line various body cavities that are exposed to the external environment and internal organs. They are at several places continuous with skin at the: Nostrils, lips, ears, genital area, and anus. The sticky, thick fluid secreted by the mucous membranes and glands is termed mucus. The term mucous membrane refers to where they are found in the body and not every mucous membrane secretes mucus.

"Permanent cosmetics" includes the application of permanent eyeliner, eyebrows, lip liner, full lip color, and repigmentation using tattooing techniques of placing pigment under the skin. It is a form of tattooing.

"Procedure" means a body art, body piercing, and tattooing procedure.

"Procedure area" means any surface of an inanimate object that contacts the client's skin during a procedure and all surfaces where instruments and supplies are placed during a procedure.

"Sanitize" means a procedure that reduces the level of microbial contamination so that the item or surface is considered safe.

"Scarification" means altering skin texture by cutting the skin and controlling the body's healing process in order to produce wounds, which result in permanently raised wheals or bumps known as keloids.

"Sharps" means any objects (sterile or contaminated) that may purposefully or accidentally cut or penetrate the skin or mucous membrane including, but not limited to, presterilized, single-use needles, scalpel blades, and razor blades.

"Sharps container" means a puncture-resistant, leak-proof container that can be closed for handling, storage, transportation, and disposal and that is labeled with the international biohazard symbol.

"Single use" means products, instruments or items that are intended for one-time use and are disposed of after each use including, but not limited to, cotton swabs or balls, tissue or paper products, paper or plastic cups, gauze and sanitary coverings, razors, needles, scalpel blades, stencils, ink cups, and protective gloves.

"Sterilization" means a process that destroys all forms of microbial life, including highly resistant bacterial spores.

"Sterilizer" means an apparatus that is registered and listed with the FDA for destroying all forms of microbial life, including highly resistant bacterial spores.

"Universal precautions" is an approach to infection control as defined by the Center for Disease Control (CDC). According to the concept of universal precautions, all human blood and certain body fluids are treated as if known to be infectious for human immunodeficiency virus (HIV), hepatitis B virus (HBV) and other bloodborne pathogens.

"Work stations" means the area or room used for the purpose of performing body art, body piercing, or tattooing procedures.

[Statutory Authority: RCW 43.24.086, 43.24.023, chapter 18.300 RCW, and 2009 c 412. WSR 10-14-074, § 308-22-010, filed 7/1/10, effective 7/1/10.]

Appendix J

WAC 308-22-020

Standard universal precautions for preventing the spread of diseases by using sterilization procedures and infection control in body art, body piercing, and tattooing.

Every licensee shall comply with the requirements established by the department of health under WAC 246-145-015, 246-145-050, and 246-145-060.

[Statutory Authority: RCW 43.24.086, 43.24.023, chapter 18.300 RCW, and 2009 c 412. WSR 10-14-074, § 308-22-020, filed 7/1/10, effective 7/1/10.]