

NO. 35144-7

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

JOYCE M. TASKER,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH,

Respondent.

FILED
COURT OF APPEALS
DIVISION II
07 JAN 18 PM 2:03
STATE OF WASHINGTON
BY [Signature]
DEPUTY

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I. STATEMENT OF CASE

This appeal requests this court to overturn the Department of Health (DOH) Cease and Desist Order, Summary Judgment, and fine against Joyce Tasker for the unlicensed practice of medicine and veterinary on the following basis:

A. RCW 18.120.010 creates a safe haven for unregulated health care generally, and for Tasker's activities in particular.

B. Tasker's alleged activities constitute the practice of an unlicensed and unregulated health care profession fully in compliance with and contemplated by, RCW 18.120.010 (safe haven) and, as such, are not within the meaning or scope of RCW 18.71.011. DOH does not have jurisdiction over Tasker's health care practice.

C. Contrary to its allegation that Tasker's activities constitute a "potential" for harm and fraud, the Department (tacitly) acknowledges that Tasker is meeting the public's demand for her services; and that she is meeting the public's needs in a safe, effective and honest manner.

D. Contrary to its objections to unlicensed health care, the state itself hires unlicensed contractors to provide the very services that Tasker is providing.

E. The Department's actions against Tasker constitutes an unreasonable and draconian expansion of its regulatory activity, a reduction of public access to unlicensed health care and in violation of RCW 18.120.010.

F. This prosecution is not about the DOH's interest, but rather it is about its ideological attack on unregulated health care generally and RCW 18.120.010 in particular. As such it is not a legitimate use of DOH power.

G. The DOH tacitly acknowledges it cannot meet its own statutory requirements.

H. The Department's action constitutes a quasi-criminal proceeding entitling Tasker to the rule of lenity. The rule of lenity has been applied to punitive quasi-criminal cases. *One 1973 Rolls Royce, 43 F. 3d at 819.*

I. Tasker's due process requires clear and convincing proof. *Ongom v. State of Washington*

J . Tasker's due process rights require the Department to use as experts, witnesses
who are demonstrably expert and unbiased.

K. The DOH failed to show, an “overwhelming need” to prosecute Tasker and to limit public access to her activities. RCW 18.120.010

L. Tasker’s due process rights require the Department to prove by clear and convincing evidence potential for harm and fraud it is alleging. *Pearson v. Shalala*, No. 98-5043, 98—5084. 164 F. 3d 650, *Ongom v. State of Washington*, Supreme Court of Washington 12/14/06

M. Tasker is offering and performing new and emerging practices and services which require review pursuant to the procedures of RCW 18.120.010 before regulating those practices or services.

II. DISCUSSION

A. RCW 18.120.010 creates a safe haven for unregulated health care generally, and for Tasker’s activities in particular.

A plain reading of RCW 18.120.010 reveals both its permissive and its regulatory intent. It first establishes regulated health care as a subset of health care in general. It recognizes a) every person’s right to access an unregulated health care profession, and b) the public’s right to access an unregulated health care practices and services.

It does not require any particular level of expertise or qualifications that one must acquire to enter an unlicensed health care profession. It also does not create different classes of public who have access to unlicensed health care i.e. those who are seriously ill, those who are moderately ill, and those with mild discomfort (with only the latter entitled to access unlicensed care).

RCW 18.120.010 assumes that just as “all persons” are entitled to practice unlicensed health care, likewise “all persons”, are entitled to have access to unregulated health care. The statute anticipates that certain members of the public accessing unlicensed care will indeed have serious illnesses but will nonetheless choose an unlicensed and unregulated provider, practice or service.

B. Tasker’s activities constitute the practice of an unlicensed and unregulated health care profession fully in compliance with and contemplated by, RCW 18.120.010 and as such, are not within the meaning or scope of RCW 18.71.011.

RCW 18.120.010 refers variously to unregulated “professions”, “practices”, and “services” without any apparent distinction. Thus in specifically providing for unlicensed health care generally, RCW 18.120.010 *per se* anticipates that unregulated health care providers will use the broad range of commercial speech, and other tools normally used by any legitimate business, such as innovative practices and devices. In this way the statute plainly provides for

the unlicensed “practices”, “services” used by Tasker in the normal conduct of her unlicensed business (such as conducting Biofeedback/CEDS and recommending Over The Counter remedies). *Pearson v. Shalala, No. 98-5043, 98—5084. 164 F. 3d 650*

If the statute does not contemplate health care providers conducting a full range of health care activities, it would be hard to imagine what activities it would contemplate in conducting an approved profession.

It is undeniable that some of Tasker’s activities and practices overlap with regulated activities, even licensed activities, but this does not automatically prohibit them. In fact, the enabling statute assumes there will be overlapping activities, since it lumps all activities in with the broad category of “health care” generally. *Pearson v. Shalala, No. 98-5043, 98—5084. 164 F. 3d 650*

C. Contrary to its allegation that Tasker’s activities constitute a “potential” for harm and fraud, the Department (tacitly) acknowledges that Tasker is meeting the public’s demand for her services; and that she is meeting the public’s needs in a safe, effective and honest manner.

The Department has no evidence in the record of a single harmed or dissatisfied customer. In fact, the Department acknowledges and quotes,

without dispute, a number of testimonials from satisfied customers, some with serious illnesses. The Department does not claim that these customers were tricked or coerced in any way. ADR #1,856-1,857, RB #17

Thus the Department clearly acknowledges a “potential” for benefit to a reasonably intelligent public. This “potential” the Department does not quantify, it merely acknowledges it exists.

The DOH has no evidence in the record to support its claim that Tasker’s activities constitute a “potential” for harm and fraud.

The DOH here fails to show any evidence that is consistent with the “potential” for future harm it alleges, if Tasker were allowed to freely continue her activities.

Thus, the DOH’s two unquantified and generalized claims (one implied and the other directly stated) cannot co-exist side by side in this action, any more than even one unquantified claim. This contradiction must be resolved in favor of the Defendant Tasker.

D. Contrary to its objections to unlicensed care, the state itself hires unlicensed contractors to provide the very services that Tasker is providing.

The state's own Department of Labor & Industries (L&I) will pay for biofeedback treatment under rule WAC 296-21-280 by "medical doctors, osteopathic physicians, licensed psychologist, and other qualified providers". (emphasis added)

The Department summarily and for its own convenience, creates a *de facto* exemption for biofeedback devices not found in RCW 18.71.030. It matters not that Washington State Labor and Industries unlicensed biofeedback providers are "qualified". The DOH in this action argues that any and all unlicensed providers who fit the broad language of RCW 18.71.011 and who are not specifically exempted under RCW 18.71.030 are *per se* unqualified and are a danger to the public.

Hence, if the DOH's reasoning in this case is accepted by the court, then an investigation must commence immediately and a cease and desist order issued on the state's Department of Labor & Industries (L&I) and its various contractors who are conducting this illegal activity.

E. The Department's action constitutes an unreasonable and draconian expansion of its regulatory activity, and a reduction of public access to unlicensed health care, while not being in compliance with, RCW 18.120.010.

It is also undeniable, that, after saying “all individuals” should be permitted into a health profession (and by extension “all individuals” should have access to this care) the statute recognizes that some unregulated practitioners will pose a potential for harm to the public, even to the point of causing “easily recognizable” harm. However, RCW 18.120.010 does not immediately assign all such these practitioners to the Department, for regulatory enforcement.

It recognizes that any regulation will reduce the public’s access to unregulated health care. For that reason, the statute stipulates that common law remedies and criminal prohibitions will be the public’s first line of defense against dangerous or harmful health care practices and services.

RCW 18.120.010 requires the DOH to first prove its interest with evidence of “overwhelming need” to regulate the unlicensed health care profession. The need must be so obvious that a reasonable person would not disagree with the need (very similar to, if not identical with the criminal standard).

The DOH must prove that common law and criminal actions are not working to prevent harm to the public. It may only then proceed with regulation, and only at the least restrictive level to achieve its interest. For example, it must show that disclaimers would be insufficient to protect a reasonably intelligent public. *Pearson v. Shalala, No. 98-5043, 98—5084. 164 F. 3d 650*

The Department has in the past conducted a number of Sunrise reviews, either at the instigation of interest groups or on its own initiative. The reviews, as such, concern regulating previously unregulated professions. However the basis of all the reviews comes from RCW 18.120.010 and its concern for only the proven harm of the specific practices and services of the professions to be licensed. The reviews examine the level of regulation most appropriate to the intent of RCW 18.120.010. The different levels are, in the order of increasing regulation:

1. *Stricter civil actions and criminal prosecutions.*
2. *Inspection requirements.*
3. *Registration*
4. *Certification*
5. *Licensure.*

The “stricter civil actions” mentioned in 1. above refers only to those actions against unlicensed health care practitioners. These are the only methods of curtailing health care practices by unlicensed practitioners that actually or are highly likely to harm people. RCW 18.120.010 limits the power of the DOH to conduct a “pre-emptive strike” such as it is conducting against Tasker under RCW 18.71.011.

The statute's remedy for the statute's prescription for DOH is not a Cease and Desist Order (based on the low and subjective "substantial" evidence standard; broad and ambiguous language, endless *per se* arguments, in-house hearings, and in-house summary judgments. The Department is required to conduct a transparent, empirical review or risk assessment of each particular service or practice which will quantify the DOH's alleged "potential" for harm.

The quantified potential must be shown to be proximal and significant, rather than remote and insignificant (as we could contend that it is). The DOH's empirical evidence must show the potential for fraud is significantly higher in Tasker's practices than for unregulated health care generally. These reviews would require public participation and the opportunity to question witnesses. Only in this way could the public "easily" recognize an "overwhelming" need.

Pearson v. Shalala, No. 98-5043, 98—5084. 164 F. 3d 650

The DOH has failed to prove with clear and convincing evidence its interest in regulating Tasker and her health care practices specifically, nor that its enforcement measure reasonably fits its mandate. In applying the broad statutory provisions of RCW 18.71.011 the DOH is similarly be obliged under RCW 18.120.010 to give it quantifiable content. i.e. clear and convincing evidence.

F. This prosecution is not about the DOH's interest; but rather it is about its ideological attack on unregulated health care generally and RCW 18.120.010 in particular. As such it is not a legitimate use of DOH's power.

The DOH claims that this particular case is about the legitimate “exercise of the state’s police power and is reasonably related to public health, safety, and welfare” by preventing the “inadequately trained and educated from practicing in an area where competency is lacking.” If practitioners of a specific unlicensed health care profession are causing harm to the public, RCW 18.120.010 sets out a procedure the DOH must use to regulate the activities. If actual harm is accruing to members of the public, RCW 18.120.010 contemplates the state will use civil sanctions or criminal proceedings to protect the public – not the provisions of RCW 18.71.011 (unauthorized practice of medicine).

However, the DOH’s conduct and its own words in this case show a more sinister reality. In the DOH’s own words,

“the reason for prohibiting unlicensed practice, as found by the Presiding Officer, is fear that an unlicensed practitioner will: (1) offer care that is harmful to the customer’s health because they lack expertise; (2) cause persons not to seek needed advice from qualified practitioners; and (3) defraud customers by providing them with worthless treatment in exchange for money.”

The Department failed to produce any evidence of the likelihood that these things “will” happen, or the frequency or severity of the harm caused upon a reasonably intelligent public. *Pearson v. Shalala*, No. 98-5043, 98—5084. 164 F. 3d 650 To pursue its ideological agenda (that all unlicensed health care practitioners are practicing medicine without a license), the DOH has opted for the ease and convenience of RCW 18.71.011 with its pre-emptive strike capabilities, its broad language, its endless *per se* argument opportunities, and until the Supreme Court’s *Ongom* decision, a low and subjective standard of proof. Pursuant to RCW 18.120.010 DOH has no jurisdiction over unlicensed health care practitioners except to regulate if there is easily recognizable harm.

G. The DOH tacitly acknowledges it cannot meet its own statutory requirements.

Tasker submits that the DOH understands the prescribed procedures for reviewing “potential harm” in RCW 18.120.010 (“Sunrise law” or risk assessment) and considers them to be too onerous. The DOH is unable to stop Tasker’s health care practices through a civil action or criminal proceedings because there are no victims and no harm has been shown to have occurred, and there was no complaint against Tasker other than from a competing regulated, licensed provider, using general, *per se* argumentation. In the licensing cases of, *Ongom v. State of Washington* and *Nguyen v. State of*

Washington victims actually existed, and actual harm was alleged. There was no question about the DOH's interest under RCW 18.71.011.

In an obvious reference to Tasker's use of Biofeedback/CEDS, the DOH claims the intent of RCW 18.130.190 is "to assure the public of the adequacy of professional competence and conduct in the healing arts." RB #2 However, the full statutory provision reads as follows:

"It is the intent of the legislature to strengthen and consolidate disciplinary and licensure procedures for the licensed health and health-related professions and businesses by providing a uniform disciplinary act with standardized procedures for the licensure of health care professionals and the enforcement of laws the purpose of which is to assure the public of the adequacy of professional competence and conduct in the healing arts." (Emphasis added)

In other words, RCW 18.130.190 only refers to strengthening and consolidating procedures for licensed professions and businesses. It does not refer to health care practitioners generally, nor to practitioners who are regulated on a level below that of licensing.

H. The Department's action constitutes a quasi-criminal proceeding entitling Tasker to the rule of lenity. The rule of lenity has been applied to punitive quasi-criminal cases and should be addressed in this case. *One 1973 Rolls Royce, 43 F. 3d at 819.*

I. Tasker's due process rights require clear and convincing proof of a statutory violation which can result in the loss of her right to practice her profession.

To ensure Due Process this court must use the appropriate standard of Review. This is a DOH initiated prosecution and a quasi-criminal matter. Since unlicensed practitioners are specifically provided for by statute, Tasker has the same interest as a licensed medical practitioner. She is also at personal risk of losing her livelihood, sustaining serious damage to her reputation, and paying a monetary fine. She is therefore entitled to the "clear and convincing" standard established in *Nguyen* and affirmed and expanded in *Ongom*.

The Department also attempts to sway this court in its footnote that EDT has been "thoroughly discredited" and that "numerous regulatory actions have been taken against EDT practitioners". These regulatory actions involved the same low, subjective "substantial evidence" standard and relied on unqualified "expert" witnesses (see below).

J. Tasker's due process requires the Department to use as experts, witnesses who are demonstrably expert and unbiased. They must have the minimum expertise as required by the Washington State Medical Society or the American Medical Association.

From the beginning of this prosecution Tasker has been the victim of what the Washington Supreme Court in *Ongom* characterized as a low and very subjective standard of review. For example, the DOH claims its witnesses, Dr. Harriett Hall, MD, is “expert” solely on the Department’s bare statement that she is an “expert”:

“Dr. Hall is a well-qualified retired physician who since retirement has developed expertise in the scientific basis for alternative health care.”

Dr. Hall does not meet nor does she or the Department claim that she meets, the minimum expert medical witness standards of either the Washington State Medical Society, or the American Medical Association that demand demonstrated expertise and impartiality. Dr. Hall has also had a long association with and is currently a board member of, Quackwatch, an organization whose objective is to eradicate all forms of unlicensed or unconventional health care, especially that which is not drug based.

Dr. Hall may serve as a prosecution witness or consultant. But she does not meet the expert medical witness standards of the Washington State Medical Society or the American Medical Association. Dr. Crider similarly documented no expertise. *IN THE SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES NATIONAL COUNCIL AGAINST HEALTH FRAUD, INC., Plaintiff v. KING BIO PHARMACEUTICALS, INC.; FRANK J. KING, JR.; and DOES 1-50, Defendants CASE NO. BC 245271*

K. The DOH must show but has failed to show, an “overwhelming need” to prosecute Tasker and to limit public access to her activities.

Is Ms. Tasker reasonably doing what RCW 18.120.010 contemplates her doing, namely, providing an unlicensed health care to the public. Or is Tasker performing a service that is so dangerous that the DOH has an “overwhelming” need to prosecute her.

“Overwhelming need” could be demonstrated to a reasonably intelligent public by numerous successful civil suits involving negligence or numerous successful criminal prosecutions. It could then justify Sunrise hearings and legislation. “Overwhelming” need as demanded by RCW 18.120.010 is based on statistically sound empirical data and not generalized assumptions.

A reasonable reading of RCW 18.120.010, is that, in the absence of “overwhelming” need, to protect the interest of the public, it not only prohibits new regulatory bills and regulations, but also regulatory prosecutions such as this.

To hold otherwise would render RCW 18.120.010 meaningless.

L. Tasker’s due process requires the Department to quantify the “potential” for harm or fraud that it is alleges.

The Department may investigate and issue cease and desist orders under RCW 18.130.190(1) and (2). But it can only do so if,

- a. the Department can shown that the specific unlicensed practice or service complained of, is specifically included in the scope of practice of licensed Medicine,
- b. or the specific practice has already passed Sunrise review, or
- c. the “potential” of a specific practice to harm or mislead it has alleged, has been quantified, or is quantifiable with empirical data; that the potential is not “remote” but “proximal”; and that the actual harm itself is so unavoidable and so severe as to be unacceptable to a reasonably intelligent public.

With regard to any of Tasker’s practices and services that conditions a to c above, have been proved or could reasonably be proved. She put the DOH to the strict proof of them; under the “clear and convincing” evidence standard, and with “experts” who could survive pretrial examinations of their competence, their credibility and their objectivity.

Anything less than the above is a denial of Tasker’s Due Process rights. It would allow the Department’s activities, wherein it is the investigator, hearer and judge, to devolve to the level of a Star Chamber pursuing the Department’s own stated ideological objectives; and for the DOH’s in-house enforcement hearings to fall into disrepute. It would also deprive Tasker of her right to

sufficient information from the Department to enable her to fully defend against the charges.

M. Tasker is offering and performing new and emerging practices and services which require review.

It is all the more important then, that the Department perform a Sunrise Review or an empirical assessment, on the specific practices and services performed by Tasker prior to claiming its interest in regulating them. It has not demonstrated its interest in any way.

VETERINARY MEDICINE

The DOH claims that Tasker is engaged in the Unlicensed Practice of Veterinary Medicine.

Veterinary Medicine is a subset of health care, and health care professions generally. RCW 18.92.010(1) also contains broad terms subject to unlimited *per se* arguments. RCW 18.120.010 also limits the DOH's interest in regulating or prosecuting these unlicensed practices and services. As such, the DOH has all of the same problems in its prosecution of Ms. Tasker as discussed earlier. To repeat the same arguments here would be redundant.

BIOFEEDBACK/CEDS

The most untoward consequences of DOH's statutory interpretation may well be its effect on biofeedback. Biofeedback and its use by non-physicians is well recognized in WAC 296-21-280 and in the private sector.

Erroneously, the DOH hinges its opinion of the effectiveness of biofeedback with L&I payments to service providers.... as if to try to fool this court into believing that biofeedback is only safe and/or effective if L&I picks up the bill. The WAC simply states that biofeedback can be used by non-physicians and physicians to treat disease but if reimbursement is sought then the practitioner must demonstrate they have been certified by the Biofeedback Certification Institute of America (BCIA). Tasker has never sought payment from L&I and therefore the DOH's position is irrelevant to the issues in this case.

The WAC verifies that non-physicians can use biofeedback and that L&I has deemed biofeedback safe and effective for a list of conditions that it continues to expand. Certification is a pre-requisite to payment NOT use. An important inherent fact in the WAC is the requirement that a licensed physician must also be BCIA certified in order for L&I to reimburse. It logically follows then that biofeedback is not requirement for medical training or licensing (AKA the practice of medicine and not included in 18.71.011). CP #579-582, 600-602, 703-705

Despite the general acceptance of biofeedback devices and their un-regulated use by the public, corporations, teachers, medical professionals, other licensed and unlicensed professionals and Washington State Department of Labor and Industries for the treatment of biomedical conditions by physicians and non-physicians, the DOH argues against the use of this safe, non-prescriptive modality. RB #27, ADR 1,239-1243, CP 600-60

The state's Department of Labor & Industries (L&I) will pay for biofeedback treatment under rule WAC 296-21-280 by "medical doctors, osteopathic physicians, licensed psychologist, and other qualified providers". Clearly "other qualified providers" can be unlicensed health care practitioners with BCIA certification. The DOH summarily and for its own convenience, creates a *de facto* exemption not found in RCW 18.71.030.

CLIENT TESTIMONIALS AND DECLARATIONS

Testimonials of personal perceptions and experiences are allowed by the FDA and the DOH agrees that "Of course, unlicensed persons legally may talk or write about medical theory they want". RB #11 Unlicensed speech regarding medical theory applies to Tasker and her clients. *Pearson v. Shalala, No. 98-5043, 98—5084. 164 F. 3d 650* This Court cannot rely on hearsay notes of a DOH employee in lieu of bona fide sworn declarations of "A" and "B". The DOH conceals from the court that declarations of "A"

and “B” (AKA Marlene Jacques and Nina Collier) made sworn, signed declarations that were provided to the DOH in 12/05. These affidavits are part of the case record. ADR #1,856-1,857, RB #17, These declarations tell the truth and are the only records of “A” and “B” that are evidentiary.

The DOH complains Tasker does not use the word “biofeedback” on her Internet site but offers no statute to support this complaint . RB #25 Tasker uses disclaimers, a legitimate notice to a reasonably intelligent public. *Pearson v. Shalala, No. 98-5043, 98—5084. 164 F. 3d 650*

FREE SPEECH

“But the States may not place an absolute prohibition on...potentially misleading information...if the information also may be presented in a way that it is not deceptive.” “....when the government chooses a policy of suppression over disclosure—at least where there is no showing that disclosure would suffice to cure misleadingness—government disregards a “far less restrictive” means.” “.....disclaimers are preferable to outright suppression.”
Pearson v. Shalala, No. 98-5043, 98—5084. 164 F. 3d 650

THE 5TH AMENDMENT

This court is purposefully misled by the DOH when DOH tells this court as it has other courts that “Ms. Tasker simply ignored the ALJ’s discovery order and never produced the requested discovery material.” RB #17 Tasker exercised her constitutional right under the 5th Amendment. On the other hand, the record is replete with evidence that the state failed to respond to timely requests for discovery production from Tasker and refused to provide even public records to Tasker during the discovery period. ADR# 1,330-1,333

LEGISLATIVE HISTORY OF UNLICENSED PRACTICE

This Court must consider what DOH does not consider that is the long-term legislative record. DOH argues that RCW18.120.010 predates RCW 18.130.190. In truth RCW 18.120.010 enacted in 1983 was re-enacted in 2005. It postdates and predates RCW 18.130.190. The fact is that the legislative history demonstrates a long-term commitment of the legislature to permit un-licensed health care as long as there is no evidence of an “overwhelming need” for regulation. ADR #1,424-1,432, CP 632-635

TRIBAL JURISDICTION

The Washington State Supreme Court in *Wright v. Colville Tribal Enter. Corp* (12/7/2006) upholds the fact that the Tribal government is the law of the land on Tribal land and off Tribal land. The decision upholds that Tribal entities are sovereign and cannot be subject to Washington law (orders) even within the State of Washington. Colville Tribal Code authorizes all Tribal government entities (including Tribal law enforcement) and other tribal entities. Tribal entities have sole and sovereign power on and off Tribal land.

Each reservation in the state constitutes a bordering jurisdiction for state agencies. If the State cannot exert its' authority against Tribal casinos such as the Fife Casino OB #23-25 that stands on Washington State land nor against Tribal corporation actions on Washington State soil how can the State of Washington argue it can extend its' civil jurisdiction onto the soil of a sovereign Tribal Nation? DOH offers this Court old Tribal sovereignty case law it knows to be stale. RB # 34

LENITY

“The DOH cannot claim that lenity only applies to criminal cases. RB #35

The main function of lenity is to protect citizens from unfair application of ambiguous punitive statutes.” *United States v. Thompson/Center Arms Co.*, 504 U.S. 505,525 (1992) Therefore, where a statute is punitive in nature lenity requires that any grievous ambiguity in the statute be resolved in favor of Tasker. RCW 18.71.011 is grievous in its’ ambiguity, inconsistent with the legislative record on intent and incompatible with RCW18.120.010 which contains clear legislative intent. The rule of lenity has been applied to punitive quasi-criminal cases. *One 1973 Rolls Royce*, 43 F. 3d at 819. If RCW 18.71.011 is found to actually apply to Tasker, the rule of lenity should also be applied.

STATUTORY INTERPRETATION

This Court, Division II, has spoken in published cases on statutory construction. The court’s purpose is to ascertain and carry out legislative intent. . 108 Wn. App. 759, *STATE v. HALSTEN*, 93 Wn. App. 110, *STATE v. VAN WOERDEN* The court first looks to the statute to determine intent. Unambiguous legislative intent is contained in RCW18.120.010

Licensing Agencies License Professions Not Activities. Many activities performed by licensed persons can be performed by unlicensed persons. (a good example is bookkeepers and licensed accounts) Licensing laws do not create monopolies for professions or activities. *Carpenter's Estate, 196 Mich.561 (1917)*. Many professions are authorized to operate in the same, related, or similar fields with **definitional overlap**. *Pearson v. Shalala, No. 98-5043, 98—5084. 164 F. 3d 650*

The harmonization of statutes is also important to the Court. OB # 14,16-17. The only way to harmonize 18.71 and 18.92 with 18.120.010 and its intent together with WAC 296-21-290 is to go to the legislative intent recorded during the enactment of 18.71.011 OB # 18.

A court may not rewrite an unambiguous statute to suit its own notions of what constitutes good public policy or to support an agency position only the legislature can rewrite legislation. *STATE v. HALSTEN 108 Wn. App. 759,*

For the DOH to assert that Tasker committed *per se* violations of RCW18.71.011 would render RCW18.120.010 superfluous and would lead to absurd results and statutory conflict. The broad and ambiguous language of RCW18.71.011 leads the DOH to claim the statute can apply to any unlicensed

health care practitioner who treats a client Inherently 18.71.011 is vague and ambiguous and leads to agency error and abuse.

A statute is ambiguous if: (1) it "is reasonably susceptible of different conclusions or interpretations." *Coastal Barge Corp.v. Coastal Zone Indus. Control Bd.*, Del. Supr., 492 A.2d 1242,1246 (1985); or (2) a literal interpretation of the words would lead to an unreasonable or absurd result that could not have been intended. *DiStefano v. Watson*, Del. Supr., 566 A2d. 1,4 (1989). The Supreme Court reiterated the above in *Jackson v. Multi-Purpose Criminal Justice Facility*, Del. Supr., 700 A.2d 1203, 1205 (1997).

When the words in RCW18.71.011 are administered with the broad interpretations advanced by DOH absurd results include the following possible interpretations:

“A **person**” might mean a friend, lab technician, M.D.,store clerk as a few examples.

The word “**prescribe**” might mean a friend offering aspirin to another for a headache or a store clerk suggesting a product for a customer complaining of a headache, infection, arthritis, or a diagnostic kit for testing symptoms on oneself or others.

The phrase “**severs or penetrates** ” might mean removing a splinter from another person’s finger.

The phrase “**treating any human disease**” might mean putting hydrogen peroxide on someone’s infected cut or recommending or providing any OTC remedy to someone else

The phrase “**severing tissues**” might mean removing someone’s splinter or piercing ears or extracting a bee stinger, opening up a blister for a friend

And, the word “**advice**” may mean suggesting someone rest while they have a cold or taking one or more of a multitude of over-the-counter products to help alleviate another person’s symptoms or disease state.

The words within the text of RCW18.71.011 refer specifically to medicine as practiced by physicians (“doctor of medicine”, “physician”, “surgeon”, “m.d.”, “prescribes drugs”). The words within the text of RCW18.120.010 refer specifically to: “unregulated healthcare”, “any person”, “health professions not licensed”.

All ambiguity is alleviated when one reads the intent of the legislature in the 1975 transcript of the recorded legislative remarks during the enactment of RCW 18.71.011 and applies the legislative intent contained within RCW 18.120.010 OB #18

No statute can be plainer on its face or clearer in its intent than RCW18.120.010. Plain and unambiguous statutory language does not require judicial construction. ADR #736-743

This court must apply “Noscitur A Sociis, Ejusdem Generis. *STATE v. VAN WOERDEN* 93 Wn. App. See also *State v. Williams*, 62 Wn. App. 336, 338, 813 P.2d 1293 (1991). The court’s purpose in construing a statute is to ascertain and give effect to the intent and purpose of the Legislature.

DOH gives RCW18.71.011 a broad meaning that extends beyond the purpose for which it was called into play while undermining legislative authority set out in RCW 18.120.010.

Without the limitations of RCW 18.120.010, the application of RCW 18.71.011 would have few if any boundaries and could lead to regulating many practices that the legislature could not have intended, such as elementary teachers instructing students on health and hygiene or a pilates instructor advising a client to hold in her stomach to avoid lower back pain.

While Tasker holds that RCW 18.71.011 by itself is “overbroad” the real issue before this court is the meaning and application of RCW 18.120.010 and whether it sets any limits at all on the Department’s regulatory actions. If it has any application, then *per se* certain practices and services that are “clearly” intended to be regulated by the state become much less clear.

U.S. v. CENTURY CLINIC, INC.

DOH Century Clinic citation is irrelevant to *Tasker*.

“The relevant provisions of the Consent Decree prohibit Petitioners from using electro-acupuncture screening devices, such as the EAV Dermatron and

*including specifically by name the LISTEN System device, “unless and until: (emphasis added) (1) there is in effect an approved application for premarket approval (PMA), pursuant to 21 U.S.C. § 360e, or an approved application for an investigational device exemption *1131 (IDE), pursuant to 21 U.S.C. § 360j(g), that authorizes the defendants' use of such product(s); and (2) other FDA approval of such products as required by the Act and implementing regulations has been obtained.” (Consent Decree, Adm. R. Vol. VIIEx. J. atp. 2).”*

”An IDE permits an untested and unapproved device to be utilized for investigational purposes only. (emphasis added) FDA regulations require that the investigational study be implemented specifically as described in an FDA approved application or pursuant to an Investigational Relations Board (“IRB”) approval that strictly follows IDE regulations. (See 21 C.F.R. Part 812). The purpose of an IDE is to protect the health and safety of human subjects exposed to unapproved medical devices. The IDE application calls for thorough and detailed information regarding the proposed investigatory study. The application process aids the FDA in ensuring that safety standards are maintained without unduly hampering the discovery and development of useful medical devices. If a device is used in any manner not specifically documented in the IDE, the device is not used with FDA approval. Because of the health risks involved in testing unapproved devices, FDA's regulations are explicit and approved testing, pursuant to an IDE, is monitored carefully. (See 21

C.F.R. § 812.46).” United States District Court, D. Nevada. UNITED STATES of America, v. CENTURY CLINIC, INC., et al .No. CV-N-93-194-ECR (RAM). March 23, 1998.

The Century Clinic case is simply a contractual case in which the Century Clinic violated an agreement on the use of an unapproved medical device similar to Tasker’s approved device for other than investigational purposes. ADR # 1,858 Tasker’s device is approved by the FDA. OB #11-12

PREVIOUS CITATIONS NOTED BELOW

Griffith v. Department of Motor Vehicles: See ADR #1,819-1,820 and 1,858

Wutzke: See OB #12,21,24 CR #85

People v. Rogers: See ADR 1,397

U.S. v. Century Clinic: See ADR # 1,858

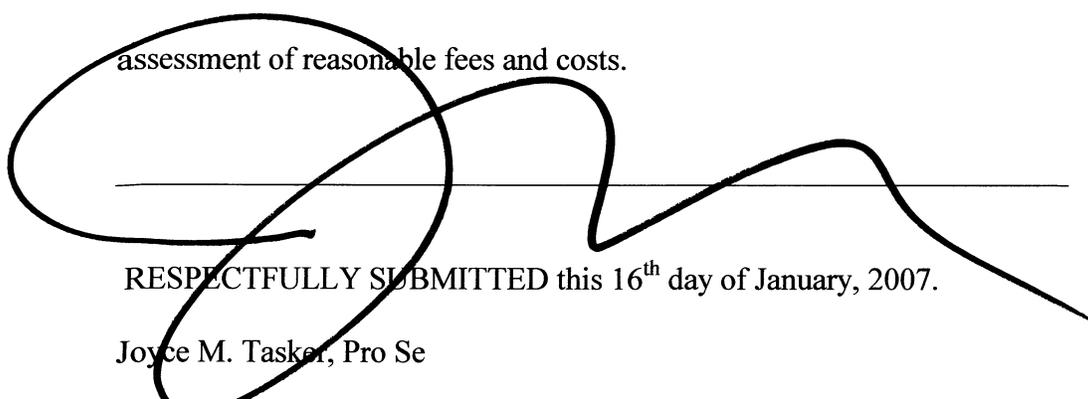
Kline v. Washington State: The DOH argues *Kline*. ***Kline is not a published case. Div I did not consider lenity, RCW.18.120.010, WAC 296.21.280, nor did it have Ongom to consider.*** See OB #10

Hornell Brewing Co. v. Rosebud Sioux Tribal Court: See OB #25

CONCLUSION

This court must consider the true interest of government agencies, the courts and the legislature. In doing so this court must apply the law according to legislative intent while ensuring it protects the rights of consumers and practitioners. In other words this court must protect both the rights of citizens and practitioners. This case is a matter of law.

The Court should vacate the judgment in its entirety and award Tasker reasonable fees for her time and costs or in the alternative remand for assessment of reasonable fees and costs.



RESPECTFULLY SUBMITTED this 16th day of January, 2007.

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