

**IN THE COURT OF APPEALS FOR THE STATE OF
WASHINGTON - DIVISION TWO**

LINSKY, INC,

Appellant,
vs.

WASHINGTON STATE LIQUOR
CONTROL BOARD,

Respondent.

Thurston County Superior Court
No. 10-2-01426-5

CA No. 42389-8-II

**APPELLANT'S OPENING BRIEF
(REVISED)**

**Appeal from the judgment and order of the
Thurston County Superior Court;
Honorable Thomas McPhee, Judge.**

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I. NATURE OF THE CASE

This is an appeal from a superior court order denying a Declaratory Judgment to Appellant Linsky, Inc. in favor of Respondent WSLCB. The oral opinion was rendered on June 10, 2011; a final judgment was entered by the Honorable Thomas McPhee on June 20, 2011.

II. ASSIGNMENTS OF ERROR

A. The Trial Court Erred in Ruling The WSLCB's Broad Rule-Making Authority Allows it to Enact Rules Inconsistent with Laws Passed by the Legislature.

B. The Trial Court Erred In Upholding The Validity of WAC 314-16-150(2). WAC 314-16-150(2) is in Direct Conflict with RCW 66.44.200.

C. The Trial Court Erred in Ruling That the "Sale or Sell" Definition in RCW 66.44.010 Applies to Situations Where a Sale Cannot be Shown to Have Occurred.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Did the trial court err in finding that the WSLCB's broad rule-making authority allows it to make rules in excess of those passed by the State Legislature? (Assignments of Error 1 and 2.)

B. Did the trial court err in finding that the Board had the authority to shift responsibility for possession of alcohol from an apparently

intoxicated person to a liquor licensee without the Legislature's authorization in RCW 66.44.200? (Assignments of Error 1 and 2.)

C. Does the "sale and sell" language contained in RCW 66.04.010(38) apply to RCW 66.44.200 in such a manner as to apply to situations where no sale to an apparently intoxicated person can be shown to have taken place? (Assignment of Error 3.)

IV. STATEMENT OF THE CASE

This case is an appeal from a final judgment of the Thurston County Superior Court, Cause No. 10-2-01426-5, entered by the Honorable Thomas McPhee dated June 20, 2011, denying Appellant's Motion for Declaratory Judgment seeking to void WAC 314-16-150(2) as inconsistent with the Washington State Liquor Control Board's enabling statute. **Clerk's Papers 143 – 144.**

For reference, pleadings and documents referenced from the Clerks Papers of the Thurston County Superior Court are designated "CP," the Oral Ruling of Judge McPhee will be designated as "RP" for Report of Proceedings, and the documents contained in the January 28, 2011 Stipulation on Judicial Review (the Stipulated

Administrative Record contained at CP 14 - 71) will be designated as “AR”.

Appellant is Linsky, Inc., a corporation which operates and is the licensee of Stewart’s Place, a restaurant and lounge located at 709 First Street, in Snohomish, Washington. Stewart’s Place presently holds liquor license No. 367262. CP 90 – 94.

This is an appeal from a facial challenge to a rule of the Washington State Liquor Control Board (“WSLCB”); as such, the facts are not relevant to the issues, and an exhaustive summary of the background facts of the case are not warranted. For purpose of this appeal, it is sufficient that Plaintiff has been substantially prejudiced by the WSLCB’s enforcement of WAC 314-16-150, having received two Administrative Violation Notices (“AVNS”) for alleged violations of WAC 314-16-150(2), “No retail licensee shall permit any person apparently under the influence of liquor to physically possess liquor on the licensed premises.” The WSLCB is seeking suspension of the licensee’s liquor license for these AVNs. CP 90-94.

On June 29, 2010, Appellant filed a Complaint for Declaratory Judgment, seeking to facial determination of the validity of WAC 314-16-150(2), CP 4 - 8; after a brief hearing and oral argument, Appellant's Motion was denied in an oral ruling dated June 10, 2011 RP 1 -9, and a final order entered on June 20, 2011. CP 143 – 144. A timely appeal was taken therefrom.

V. ARGUMENT

A. First Assignment of Error

The Trial Court Erred in Ruling The WSLCB's Broad Rule-Making Authority Allows it to Enact Rules Inconsistent with Laws Passed by the Legislature.

1. Standard of Review.

This is an appeal on from a final decision in a declaratory judgment action. The challenge was a facial challenge, with little to no reference to the facts of the case. As such, the decision is reviewed de novo, and the record is not viewed in a light favorable to either party. Brouillet v. Cowles Publishing Co., 114 Wn.2d 788, 794, 791 P.2d 526 (1990).

2. Argument.

a. The Washington State Liquor Board's Authority is Subordinate to That of the State Legislature.

The power an authority of an administrative agency is limited to that which is expressly granted by statute or necessarily implied therein. McGuire v. State, 58 Wn.App. 195, 198, 791 P.2d 929 (1990). A regulation is a nullity if it is inconsistent with a statute or the legislature's intent. Winans v. W.A.S., Inc., 52 Wn.App. 89, 93, 758 P.2d 503 (1988). Agencies are creatures of law and are required to promulgate regulations pursuant to the statute or statutes authorizing them. Hoffmann v. Regence Blue Shield, 140 Wn.2d 121, 125, 991 P.2d 77 (2000).

The validity of any rule may be determined upon petition for a declaratory judgment where it appears that the rule, or its threatened application interferes with or impairs the legal rights or privileges of the petitioner. RCW 34.05.570(2)(b)(1). A rule may be declared invalid if the rule either exceeds the statutory authority of the agency, or is arbitrary and capricious. RCW 34.05.570(2)(c).

WAC 314-16-150 has existed, in one form or another, since 1963. AR at p.7. In 1994, the WSLCB amended the statute to

make it an administrative violation for a licensee to allow an apparently intoxicated person to “physically possess” liquor on licensed premises. AR at p.12.

WAC 314-16-150 currently reads as follows:

§ 314-16-150. No sale of liquor to minors, intoxicated persons, etc

(1) No retail licensee shall give or otherwise supply liquor to any person under the age of twenty-one years, either for his/her own use or for the use of his/her parent or of any other person; or to any person apparently under the influence of liquor; nor shall any licensee or employee thereof permit any person under the said age or in said condition to consume liquor on his/her premises, or on any premises adjacent thereto and under his/her control.

(2) No retail licensee shall permit any person apparently under the influence of liquor to physically possess liquor on the licensed premises.

1) Title 66 Only Allows the Board to Enact a Regulation That is Consistent with RCW 66.44.200 and with its Legislative Intent.

Washington’s legislature *has* empowered the Liquor Control Board to make regulations. But the legislature imposed the same, substantial limitation on the Liquor Control Board’s power as it does on virtually every administrative agency. The Board can only enact regulations that carry out the provisions enacted by the legislature in

Title 66; additionally, the regulations must be consistent with the legislature's true intent:

For the purposes of carrying into effect the provisions of this title according to their true intent or of supplying any deficiency therein, the board may make such regulations not inconsistent with the spirit of this title as are deemed necessary or advisable.¹

The Board can only make regulations consistent with the legislature's act or the legislative intent. If an administrative agency enacts a regulation that does not carry out the provisions of the enabling statute or is contrary to the legislature's intent, the regulation is *ultra vires* and invalid. "A regulation is a nullity where it is inconsistent with a statute." Thus, if WAC 314-16-150 fails to carry out RCW 66.44.200, or any other statute of equal specificity, or if the regulation is inconsistent with the legislature's intent, the regulation is invalid.

2) A Regulation is Inconsistent with the Enabling Statute if it Imposes a Duty on a Class not Identified by the Legislature or Imposes a Duty Broader than one Authorized and Intended by the Legislature.

¹ RCW 66.08.030; see also RCW 66.98.070, which also empowers the Board to make regulations "carrying into effect the provisions of this act" but disapproving regulations "inconsistent with the spirit of this act."

Regulations that impose duties or responsibilities not imposed in an enabling statute are inconsistent with the statute. Similarly, regulations are inconsistent with a statute or legislative intent when they impose a duty on a class of people not identified in the statute or impose a broader duty than the statute allows. The court compared a Department of Revenue regulation with the enabling statute in Lone Star Industries v. Dept of Revenue, 92, Wn.2d 630, 647 P.2d 1013 (1982). RCW 82.12.020 imposed a tax on personal property purchases. But the statute included an “ingredient or component” exemption: if the property was consumed and became an “ingredient or component” of new personal property for sale, the tax did not apply. The Department of Revenue made a “primary purpose” rule. Under the Department’s rule, the personal property was taxed unless its “primary purpose” was as an “ingredient or component.” The Washington State Supreme Court declared the “primary purpose” regulation invalid as inconsistent with the statute: “RCW 82.04.050 does not require that the tangible personal property so purchased be acquired primarily for the purpose of such consumption in order to avoid taxation as a ‘retail sale.’” Id. at 634.

Because the regulation imposed an additional condition not contained in the legislature's exemption, the regulation was invalid.

In Burton v. Lehman, 153 Wn.2d 416, 103 P.3d 1230 (2005), the Supreme Court struck down a Department of Corrections rule because it imposed a responsibility on inmates not found in the enabling statute. The enabling statute gave prison superintendents possession of all inmate personal property but provided that upon transfer or discharge, all "personal property in the possession of the superintendent belonging to such convicted persons shall be delivered to them." Id. at 420, *citing* RCW 72.02.045(3). The Department of Corrections, however, enacted a rule that required transferring inmates with more than two boxes of property to pay for shipment. The court held the rule to be invalid because it conflicted with the legislature's dictate that the superintendent "shall" deliver all property to a transferring inmate: "Nothing in the statute indicates that only some of an inmate's property shall be delivered, nor does it state that the property shall be delivered *at such convicted person's expense.*" Id. at 425 (emphasis added). The rule was invalid because the Department imposed a duty on a class of persons

upon whom the legislature had not imposed a duty.

In Duncan Crane Service v. State Department of Revenue, 44 Wn.App. 684, 688, 723 P.2d 480 (1986), Duncan, in the course of business, purchased cranes for the purpose of leasing them out to other businesses. Duncan did not pay either retail sales tax or use tax on his purchases, relying on an exemption for “a person who...purchases for the purpose of resale...without intervening use.” RCW 82.04.050(1)(a) (retail sales tax) and RCW 82.12.020 (use tax). According to the statutes, “resale” included subsequent lease to consumers without intervening use. Despite Duncan’s resale by lease of the cranes, an auditor of the Department assessed a deficiency for use tax against Duncan finding that Duncan was in fact a “user” of the cranes because it had provided the services of a crane operator to some of its lessees. In assessing the deficiency, the auditor relied upon WAC 458-20-178, which included in its definition of user, “a lessor who leases equipment with an operator.”

In analyzing whether the Department had authority to enforce the regulation, the Court read the exemption narrowly, construing

the statute in favor of imposing the tax. However, the Court found that the usual definition of a lease included a situation where a lessor provides an operator who is to work under control of the lessee. Because the legislature had not qualified its use of the word “lease,” the Court took the use tax statute to include all leases within its definition of resale. The Court found that by excluding a particular category of leases from the exemption, and thus imposing the tax on a broader category of lessors and in a broader set of situations than under the statute, the Department contravened the legislative intent. The Court concluded that “if a regulation taxes more broadly than does the statute it purports to implement, it is invalid.” 44 Wn. App. at 688, *citing Lone Star*, 97 Wn.2d at 634.

3) *WAC 314-16-150 Imposes Duties Inconsistent with the Plain Language of RCW 66.44.200.*

WAC 314-16-150, which predates and does not recognize RCW 66.44.200², imposes a wide-ranging duty on licensees: licensees cannot “permit any person apparently under the influence

² In fact, WAC 314-16-150 was amended shortly after the passage of RCW 66.44.200; the changes were minor housekeeping changes, and did not acknowledge even the existence of RCW 66.44.200, much less cite its authority.

of liquor to physically possess liquor on the licensed premises.” But the regulation certainly cannot be construed as one that carries out any provision of RCW 66.44.200. In fact, WAC 314-16-150 substantially expands the duty imposed by the legislature on licensees in RCW 66.44.200(1) and entirely changes the class of persons to whom the RCW 66.44.200(2) applies.

RCW 66.44.100(1) prohibits licensees from selling liquor to a person apparently under the influence.

RCW 66.44.200(2)(a) prohibits apparently intoxicated persons from purchasing or consuming liquor.

RCW 66.44.200(2)(b) imposes a fine of \$500 or less for violating subsection 2(a).

RCW 66.44.200(2)(c) eliminates intoxication as a defense for violating subsection 2(a).

RCW 66.44.200(2)(d) requires licensees to post signs telling their patrons about (2)(a).

RCW 66.44.200(3) states that violations of subsection (1) and (2) are “separate actions” even if they arise out of the same incident.

RCW 66.44.200(2) does not impose a duty on a licensee to prevent an apparently intoxicated person from possessing or consuming. Nor do any other the forty-two other statutes cited as authority for WAC 314-16-150. The only place a licensee’s duty vis-à-vis an apparently intoxicated person is explicitly spelled out is

in RCW 66.44.200(1); the duty is limited to not selling liquor to an intoxicated person. Thus, WAC 314-16-150 imposes a substantial duty on licensees that could have, but was *not* approved by the legislature.

The inconsistency between WAC 314-16-150 and RCW 66.44.200 is apparent from reading RCW 66.44.200 in its entirety. The legislature certainly did not intend that RCW 66.44.200(2)(a) would apply to licensees; if it had, it would not have eliminated intoxication as a defense because intoxication can only apply to a natural person, not a corporation. In RCW 66.44.200(2)(d), the legislature imposed a specific duty on licensees, the duty to post signs informing the public of the legislature's imposition of personal liability for buying or consuming while intoxicated. The legislature established a \$500 civil fine as the penalty for violating subsection (2) because it is an "infraction." Finally, the legislature specifically declared that a licensee's violation of subsection (1) [do not sell] is a "separate action" from an individual's violation of subsection (2) [do not buy or consume]. WAC 314-16-150 is inconsistent with RCW 66.44.200 because the regulation imposes a duty on licensees that

the statute does not. The regulation's imposition of a duty to prevent possession on a different class (licensees) than the class identified by the legislature (individuals) does not carry out the intent of the statute, is contrary to the statute, and is *ultra vires*.

Further, the duty imposed by the rule contradicts a long standing principle of liquor law: a licensee does not have a duty to remove an intoxicated person from the premises. It would be against public policy to require licensees to remove intoxicated persons from the premises because it would likely increase drunk driving. What is more, the duty imposed by the rule is impractical. Bars serve liquor and virgin drinks in a variety of glassware, frequently using the same glass. The licensee cannot easily determine from the glassware whether an intoxicated person has a virgin drink or an alcoholic drink. It is extremely difficult for a licensee to prevent an intoxicated person who has been refused service from picking up someone else's drink or persuading a friend to buy him one more. The legislature drew the line at prohibiting sales by the licensee to an apparently intoxicated person, not requiring the licensee to prevent an intoxicated person from possessing or consuming alcohol.

The legislature chose to put the last moral imperative on the *individual*.

4) WAC 314-16-150 Is Inconsistent With Legislative Intent, Which Was To Impose Personal Responsibility On People Drinking Liquor.

The Senate. SSB 5582 started as Senate Bill 5582 in 1997. AR at p.13. Senate Bill 5582 prohibited an intoxicated person from purchasing or consuming liquor on a licensed premises: “No person who is under the influence of liquor to the extent that he or she is intoxicated may purchase or consume liquor on any premises licensed by the board.” AR at pp.15-16. “A violation of this subsection is a misdemeanor punishable by a fine of not more than five hundred dollars.” *Id.* Although the bill passed, the governor vetoed it, concerned that a handicapped or geriatric person might be mistakenly believed to be intoxicated.

B. Second Assignment of Error.

The Trial Court Erred In Upholding The Validity of WAC 314-16-150(2). WAC 314-16-150(2) is in Direct Conflict with RCW 66.44.200.

1. Standard of Review.

The decision in a facial declaratory judgment action decision is reviewed de novo, and the record is not viewed in a light favorable to either party. Brouillet, 114 Wn.2d 788 at 794.

2. Argument.

a) **The Legislature has Superseded the Board's Regulations.**

Although state statute *never* authorized the WSLCB to penalize a licensee for an apparently intoxicated person's on-premises possession or consumption, in June, 1998 the Washington State Legislature amended RCW 66.44.200 to state as follows:

§ 66.44.200. Sales to persons apparently under the influence of liquor - Purchases or consumption by persons apparently under the influence of liquor on licensed premises - Penalty - Notice - Separation of actions

(1) No person³ shall sell any liquor to any person apparently under the influence of liquor.

(2)(a) No person who is apparently under the influence of liquor may purchase or consume liquor on any premises licensed by the board.

(b) A violation of this subsection is an infraction punishable by a fine of not more than five hundred dollars.

(c) A defendant's intoxication may not be used as a defense in an action under this subsection.

³ "Person" for purposes of Title 66, is defined as "an individual, copartnership, association, or corporation." RCW 66.04.010(32).

(d) Until July 1, 2000, every establishment licensed under RCW 66.24.330 or 66.24.420 shall conspicuously post in the establishment notice of the prohibition against the purchase or consumption of liquor under this subsection.

(3) An administrative action for violation of subsection (1) of this section and an infraction issued for violation of subsection (2) of this section arising out of the same incident are separate actions and the outcome of one shall not determine the outcome of the other.

The amendments made clear what had even before the Board's 1994 revision, always been the case: under RCW 66.44.200(2) an intoxicated person is prohibited from purchasing or consuming liquor on a licensee's premises. RCW 66.44.200(1) only prohibits a licensee or its employees from *selling* liquor to any person under the influence of liquor. While the Liquor Control Board had urged the legislature not to pass the bill, testifying that it "shifts the responsibility from liquor licensees to the intoxicated person." See AR at pp. 25, 27 (summary of testimony of Carter Mitchell, WSLCB against passage of bill), the legislature intended to keep "responsibility on the people who are actually buying liquor. . . ." AR at p.42 (2/10/98 Senate Floor Debate, Comments of Sen. Roach).

WAC 314-16-150, predating RCW 66.44.200's amendments, penalized licensees for apparently intoxicated persons' actions in either consuming or physically possessing liquor on premises subject to the licensee's control. After adoption of RCW 66.44.200, the Board's regulation imposed a duty on licensees inconsistent with the legislature's subsequent act and intent and therefore it should be ruled invalid.

1) *RCW 66.44.200 is Unambiguous.*

A court interprets a statute so as to give effect to the legislature's intent in creating the statute. If the statute is unambiguous, its meaning is to be derived from the language of the statute alone. Cherry v. Municipality of Metro Seattle, 116 Wash.2d 794, 799, 808 P.2d 746 (1991).

Here, RCW 66.44.200 clearly and unambiguously provides that the "person" of a licensee, be it individual, copartnership, association, or corporation, is subject to administrative violation for the *sale* of liquor to an apparently intoxicated person. RCW 66.44.200(1) & (3). Responsibility for purchase and consumption

lie with the apparently intoxicated person his/herself, RCW 66.44.200(2)(a), and subjects that person to a civil penalty of no less than \$500 dollars. RCW 66.44.200(2)(b).

Statutes should be interpreted and construed so that no portion is rendered meaningless or superfluous. Whatcom County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). Should the Board attempt to argue that RCW 66.44.200 did not alter a licensee's duties under WAC 314-16-150, but simply added penalties for apparently intoxicated persons who purchased or consumed liquor, it would render RCW 66.44.200(1) surplusage. By legislatively enacting that subsection, the legislature codified the duties of a liquor licensee: don't sell any liquor to any person apparently under the influence of liquor. Had the legislature wished to adopt the Board's position, it could have amended subsection to read: *No person shall sell any liquor to any person apparently under the influence of liquor, nor allow any such person to possess or consume liquor on the licensed premises.* It did not. Where a statute specifically lists the things upon which it operates, there is a presumption that the legislating body intended all omissions, i.e., the

rule of *expressio unius est exclusio alterius* applies. In re Personal Restraint of Hopkins, 137 Wash.2d 897, 901, 976 P.2d 616 (1999). Under this rule, the presumption is that RCW 66.44.200 does not provide a sanction in situations where a liquor licensee does not sell to an apparently intoxicated person who nonetheless manages to possess or consume alcohol while on a licensed premises.

Again, this is borne out by the legislative history of RCW 66.44.200. In 1998, the Senate Committee on Law & Justice approved Substitute Senate Bill 5582 in place of SB 5582. AR at p.13. Although the text of SB 5582 and SSB 5582 had substantial similarities, the titles are different. Senate Bill 5582 was “an act relating to liquor sales to persons apparently under the influence of liquor.” AR at p.15, SSB 5582 was changed to “an act relating to *liquor purchases by persons apparently under the influence of liquor.*” AR at p.17. Substitute Senate Bill 5582 also changed the penalty for violating the new statute from a misdemeanor to an infraction: “A violation of this subsection is an infraction punishable by a fine of not more than five hundred dollars.” AR at p.18. When the Senate Committee on Law & Justice reported on the

substitute senate bill in March 1997, it gave the following background:

It is a misdemeanor to sell alcohol to an apparently intoxicated person. However, it is not a crime for the intoxicated person to purchase or consume liquor on any premises licensed by the Liquor Control Board.

AR at pp. 24-25. The committee described the bill as one “prohibiting the purchase of liquor by intoxicated persons” and the penalty as an “infraction.” The Washington State Licensed Beverage Association and the Washington Public Employees association testified in favor of the bill: “This bill will send a message to those who purchase liquor.” The Liquor Control Board recognized the effect of the proposed bill and testified against it: “This bill shifts responsibility from liquor licensees to the intoxicated person.” Id. at p.25.

On the senate floor, Senator Roach opined that SSB 5582 “puts some responsibility on the people who are actually buying liquor.” **AR at p.42, ll. 15-21.** Senator Fairly concurred: “And I

agree that this does put some responsibility on the person who is intoxicated.” *Id.* at ll. 24-25. SSB 5582 passed 36-13. AR at p.13.

The House. In its report, the House Committee on Law & Justice described the statutory backdrop. Although state law prohibited the sale of liquor to an apparently intoxicated person, the law included no provision prohibiting the purchase by the individual:

Although it is a crime for a person to *sell* liquor to a person who is under the influence, it is not a crime for the person who is under the influence to *buy* liquor. It has been the declared statutory policy of the state since 1972 that “alcoholics and intoxicated persons may not be subject to criminal prosecution solely because of their consumption of alcoholic beverages.

AR at p.23.

The House’s committee summarized SSB 5582 as follows: “It is a civil infraction for a person apparently under the influence of liquor to purchase or consume liquor on a licensed premises. The maximum penalty for the infraction is a fine of \$500.” *Id.* The House committee also substituted “apparently under the influence”

for the senate's complex definition of "intoxicated." During a public hearing on SSB 5582, Representative Sterk stated his understanding of the bill: "I like the intent of the bill because I think it does give responsibility to the person that's drinking, but I have real questions about the enforceability of it and who's going to enforce it. I think it's going to – I think it's going to end up being a law on the books that doesn't get enforced." AR at p.35, ll. 4-7. Representative Constantine's comments similarly reflected his understanding that the bill was directed only at the person doing the drinking:

The other issue is whether uh, we want to criminalize intoxication in the absence of some, uh, threat to public safety like driving while intoxicated and, uh, or – or make a civil infraction out of it. And the example that was given to me by one legislator, uh, was, uh, a person who contracts with a limousine to drive them to a party at the Space Needle on New Year's Eve and has their, uh, champagne and as they order another glass of champagne are suddenly exposing themselves to, uh, \$500 plus the additional penalties Representative Robertson referred to, even though they're going to then get in the limousine and be driven home, uh, causing no apparent problems to society other than the possibility they will be less efficient the following day.

AR at p.37, ll. 10-18.

In enacting SSB 5582, the legislature could have, but refused to increase the duties of licensees to monitor inebriated patrons. The legislature enacted SSB 5582 to do precisely the opposite: impose a civil infraction fine on an apparently intoxicated person who purchased or consumed liquor on a licensed premises. Even though the Liquor Control Board understood the legislature's intent, adheres to a rule that ignores the statute and attempts to shift responsibility from the purchaser back to the licensee. Liability for a licensee cannot be premised on the Liquor Control Board's continued adherence to a regulation that clearly had been supplanted by, and conflicts with, the enabling statute.

C. Third Assignment of Error.

The Trial Court Erred in Ruling That the "Sale or Sell" Definition in RCW 66.44.010 Applies to Situations Where a Sale Cannot be Shown to Have Occurred.

1. Standard of Review.

The decision in a facial declaratory judgment action decision is reviewed de novo, and the record is not viewed in a light favorable to either party. Brouillet, 114 Wn.2d 788 at 794.

2. Argument.

The trial court erred in stretching the definition of “sale”⁴ to impute liability to a Licensee for the mere possession of alcohol by an apparently intoxicated person while on the Licensee’s premises. RCW 66.44.200(1) states “No person shall *sell* any liquor to any person apparently under the influence of liquor.” The next section, 66.44.200(2)(a) provides “No person who is apparently under the influence of liquor may *purchase* or consume liquor on any premises licensed by the Board, and that “a violation of this subsection is punishable by a fine of not more than five hundred dollars.” The third section provides “an administrative action for violation of subsection (1) of this section and an infraction issued for violation of subsection (2) of this section arising out of the same incident are separate actions and the outcome of one shall not determine the outcome of the other.”

⁴ RCW 66.04.010(38) "Sale" and "sell" include exchange, barter, and traffic; and also include the selling or supplying or distributing, by any means whatsoever, of liquor, or of any liquid known or described as beer or by any name whatever commonly used to describe malt or brewed liquor or of wine, by any person to any person; and also include a sale or selling within the state to a foreign consignee or his agent in the state. "Sale" and "sell" shall not include the giving, at no charge, of a reasonable amount of liquor by a person not licensed by the board to a person not licensed by the board, for personal use only. . . .

Clearly, the state legislature intended “purchase” and “sale” to involve contractual privity between the person “selling” and the person “purchasing” apparently under the influence, for both sale and purchase give rise to separate actions. Both require a legal transaction. Additionally, though, an apparently intoxicated person also commits an infraction for *consumption*, which implicitly acknowledges that there are potential means of obtaining liquor outside of the avenue of sale and purchase.

A sale of property contemplates a consideration, or price, a seller, a purchaser, and a delivery of the thing sold. For a list of cases defining the words "sale" and "sell," in conformity with the definition just given, see 38 Words & Phrases (Perm. ed.) pp. 99, 562. In Spokane v. Baughman, 54 Wash. 315, 320, 103 Pac. 14 (1909), the question arose as to whether the serving of intoxicating liquors by a social club to its members at a price fixed by the club and charged to the account of the members constituted a sale within the meaning of an ordinance regulating the sale of such liquors. In answer to that question, the Washington State Supreme Court said:

A sale has been defined by Kent as an agreement by which one of two contracting parties, called the seller, gives a thing and passes the title, in exchange for a certain price in current money, to the other party, who is called the buyer or purchaser, who on his part agrees to pay such price. It is defined in a more condensed statement by Blackstone as a transmutation of property from one man to another in consideration of some price or recompense in value. These definitions have been received by the courts, and many other definitions have been given of the word 'sale,' but the essential idea in all of them is that of an agreement or meeting of minds by which a title passes from one and vests in another. When the liquor is bought through the regularly constituted agent of the corporation, it undoubtedly belongs to the corporation, the title as well as the possession being in the corporation, and it remains there until it is transferred to the buyer for a consideration. Then it becomes the property of the purchaser. and is at his absolute disposal. He can drink it himself, give it to his guest, or throw it away; the corporation has no further interest in it. In other words, it has been paid for, and the transaction, it seems to us, involves all the elements of a sale.

Id. at 320. *See also John E. Boyer, et al v. State of Washington*, 19 Wn.2d 134, 141, 142 P.2d 250 (1943).

The trial court parsed the phrase “by any means whatsoever” in RCW 66.04.010(38)’s definition of “sell” to impute liability on a licensee for any conceivable situation in which alcohol is present in a licensee’s establishment and in the hands of an apparently intoxicated person, whether it has been sold, snuck in, or stolen, whether or not there is privity, or even notice to the Licensee itself.

In construing a statute, "a reading that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results." State v. Delgado, 148 Wn.2d, 723, 733, 63 P.3d 792 (2003) (Madsen, J., dissenting) (citing, among other cases, State v. Vela, 100 Wn.2d 636, 641, 673 P.2d 185 (1983)). A rational reading of the phrase "by any means whatsoever" in the context of RCW 66.04.010(38) would mean any means by which title of liquor would be transferred from a licensee to another licensee, manufacturer, broker, distributor, wholesaler, or end user, whether by cash transaction, barter, letter of credit, or other means of exchange. An absurd reading would be to say that the Licensee "sells" to an apparently intoxicated person who grabs an alcoholic beverage from a friend, from a stranger, off a random table, or sneaks a bottle into the premises inside a coat.

IV. CONCLUSION

The legislative history and the plain words used in RCW 66.44.200(2) demonstrate that Washington's legislature sought to foster personal accountability on the part of individuals who drink

alcohol. Except for a requirement that they post signs, the legislature did not increase the responsibilities of liquor *licensees*. But the Liquor Control Board relies on a rule that imposes a duty on licensees considered by the legislature, but not enunciated in the statute. Because the rule is superseded by a more specific statute provision, and because its prior statutory authority does not grant the Board the powers it claims, the Board's rule should be deemed a nullity. Plaintiff respectfully request that the Court issue a declaratory ruling permanently enjoining enforcement of WAC 314-16-150.

DATED this 3rd day of January, 2012.



David R. Osgood, WSBA #26004
Law Office of David Osgood, P.S.
Attorney for Appellant Linsky,
Inc.

CERTIFICATE OF SERVICE

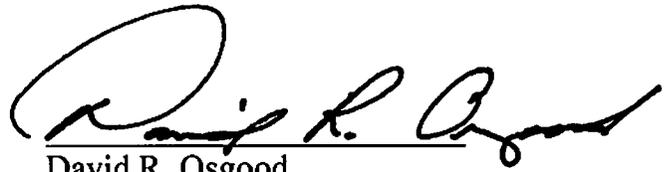
DAVID R. OSGOOD, does declare, under penalty of perjury under the Laws of the State of Washington and the United States, that on January 3, 2012, I served upon Mr. Gordon Karg, Assistant Attorney

General for the State of Washington, counsel for Respondent
WASHINGTON STATE LIQUOR CONTROL BOARD a copy of

APPELLANT'S OPENING BRIEF, REVISED

by electronic copy and U.S. Mail, postage pre-paid.

DATED at SEATTLE, WASHINGTON this 3rd day of January,
2012.



David R. Osgood