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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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Anna Chester, Appellant,

v.

Deep Roots Alderwood, LLC, a Washington Company; and Bonnie  
Gillson, Respondents.

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BRIEF OF RESPONDENT  
BONNIE GILLSON

---

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## I. NATURE OF THE CASE

Respondent tattoo artist Bonnie Gillson (“Gillson”) tattooed Appellant Anna Chester (“Chester”) at Co-Respondent Deep Roots Alderwood, LLC’s (“Deep Roots”) tattoo parlor. Chester claims that she sustained injuries due to the tattoo ink being “impure, defective, and/contaminated” as sold by the product sellers and/or manufacturers Papillon Studio Supply (“Papillon”) and Kingpin Tattoo Supply (“Kingpin”) — before Gillson ever opened and used the ink. For purposes of this appeal, Gillson accepts as true that the tattoo ink was contaminated with microscopic bacteria in the manufacturing process.

Chester filed a product liability lawsuit against Kingpin. Later, Chester amended her complaint twice to assert product liability and negligence claims against Papillon, Gillson, Gillson’s husband, the tattoo parlor and its owners.

Gillson, her husband, and the Deep Roots members and entities moved for summary judgment dismissal on two bases. The trial court granted the motions, dismissing product liability claims because the moving parties were, undisputedly, not sellers or manufacturers of the ink in question, and dismissing negligence claims for Chester’s lack of evidence that the moving parties breached any applicable duties. The trial court rejected Chester’s arguments that Gillson failed to follow

sterilization regulations and that she should therefore be held negligent *per se*. The trial court disagreed with Chester's contention that Washington regulations required the use of "sterile" tattoo ink.

Chester appeals the dismissal as to Gillson and Deep Roots Alderwood, LLC.<sup>1</sup> Chester's claims against Papillon and Kingpin, the parties that she initially deemed responsible for her injuries, are still pending. That case has not been stayed and Chester continues to seek recovery from those parties in the underlying lawsuit.

Chester's appeal is based on a series of flawed arguments that the trial court correctly dismissed. Chester urges this Court to adopt an additional tattooing requirement – the use of "sterile" tattoo ink – that the legislature declined to include in the comprehensive tattooing regulations that went into effect in 2010<sup>2</sup> and to then hold Gillson negligent *per se* for her supposed violation of this uncodified regulation. The trial court declined to engage in such impermissible judicial legislation, as should this Court.

The trial court also correctly determined that Chester lacked evidence regarding the applicable standard of care for tattoo artists and

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<sup>1</sup> Chester has not appealed the trial court's dismissal of all claims against David Whitmore, Gillson's husband. CP 1-3.

<sup>2</sup> Tattooing regulations still do not require the use of "sterile" ink and there is no evidence that the Legislature is currently considering enacting such a regulation.

that Gillson breached any such standard of care. In doing so, the trial court properly limited the opinions of Chester's witness Dr. Dinges.

For the reasons set forth below and in the brief of Co-Respondent Deep Roots, this Court should affirm the trial court's grants of summary judgment and its evidentiary rulings regarding Dr. Dinges.

## II. COUNTERSTATEMENT OF THE CASE

### A. Gillson Is An Experienced, Licensed Tattoo Artist Who Was Educated In and Follows All Applicable Safety Procedures.

On September 13, 2011, licensed tattoo artist Gillson tattooed Chester with "One" brand tattoo ink she ordered from Kingpin. CP 200-02, 455, 449. The tattooing was done at the Deep Roots Alderwood tattoo parlor. CP 202, 455.

Gillson is an experienced tattoo artist who was first licensed in Oregon in 2008. CP 200-01. She has been licensed in Washington since 2010 and is "absolutely familiar" with Washington's tattoo regulations. CP 151, 208. To become a licensed tattoo artist in Washington, Gillson had to take a course in bloodborne pathogens and pass an associated test. CP 204. She had previously completed other training in bloodborne pathogens in order to obtain her Oregon license. CP 204.

In tattooing Chester, Gillson followed her standardized process which included using presterilized, individually packaged and dated tattoo

needles. CP 206, 212. She also sterilized her other tattoo instruments (e.g., metal tattoo tubes) using a four-part sterilization process that includes a hand scrub, an enzymatic soak, an ultra-sonic, another hand scrub, and then an autoclave process. CP 206, 211. Deep Roots had an autoclave machine on-site. CP 212. Weekly spore tests were done on the this autoclave machine to ensure that it was free of microorganisms. CP 228. Instruments are placed into packages, which are then sealed and put through the autoclave. CP 212. The sealed packet changes color to signify a successful autoclave process. CP 212. Liquids, such as tattoo ink, cannot be sterilized through an autoclave. CP 227.

Gillson also disinfected surfaces and the client's skin using appropriate substances, donned and changed gloves multiple times, used barriers such as dental bibs and draping sheets, among other steps to prepare for tattooing. CP 209-12.

**B. Gillson Used "Tattoo Ink" That She Had Used Before, Which She Had Purchased From an Established Seller of Tattoo Supplies.**

For Chester's tattoo, Gillson used "One" brand tattoo ink purchased from supplier and co-defendant Kingpin. CP 452. Kingpin is a large distributor of tattoo ink and supplies from which Gilson purchased various tattoo supplies. CP 215, CP 260-351. Gillson knew the ink was

tattoo ink, had the Material Data Safety Sheet for the ink, and knew Kingpin to be a reputable setter. CP 214, 217, 233.

Gillson had been using One brand tattoo ink for about a year and half prior to Chester's tattoo with no reported problems. CP 450-51. The ink had come highly recommended. CP 233. Gillson was unaware of any complaint, dangers, hazards, or bases for concern regarding One brand tattoo ink prior to tattooing Chester. CP 460. There is no evidence that Gillson or Deep Roots knew or should have known of any One brand tattoo ink reactions prior to Chester's tattoo. Prior to the issue with the bottle of One ink that is at issue in this case, Gillson had never had a customer contaminated with bacteria from tattoo ink, nor had she heard of it happening to anyone else. CP 234. Kingpin did not inform Gillson or Deep Roots of a "small number of Kingpin customer communications regarding alleged reactions by some of these customers' clients that was supposedly related to One ink." CP 463. Nor is there any evidence that such information was publicized by Kingpin in any way.

Gillson testified that she believed the ink was safe for tattoos because it was sold as tattoo ink: ink companies "are claiming that it is safe for use in tattoos. That is its – its intended purpose." CP 450. Some tattoo artists use other pigments that are not intended for use as tattoo ink, such as pigment used for automotive paint, but the ink Gillson chose was

specifically manufactured and marketed as tattoo ink.. CP 450. Gillson poured ink from the manufacturer's bottle into single-use ink cups. CP 205, 212.

**C. Washington Code Provisions Regarding Tattooists, Tattoo Ink and Dr. Dinges' (Mis) Interpretation of These Provisions.**

Washington code provides that tattooists use only "single-use pigment or ink containers for each client." WAC 246-145-050(15). Further, "inks or pigments must not be banned or restricted by the FDA and must not be mixed with improper ingredients." WAC 246-145-050(18). There is no evidence that the One ink used was banned or restricted by the FDA or that Gillson mixed it with improper ingredients. There is no evidence that the contamination of the One ink was caused by Gillson or Deep Roots.<sup>3</sup>

WAC 246-145-050(1) reads, "Use sterile instruments and aseptic techniques at all times during a procedure." Chester relies on the Declaration of Dr. Dinges, an infectious disease medical doctor with no

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<sup>3</sup> Michael H. Kinzer, M.D., MPH, Epidemic Intelligence Service Officer, at Seattle and King County Public Health conducted an investigation and found no evidence that the contamination was caused by Gillson or Deep Roots. CP 420. While the trial court granted Chester's motion to strike Dr. Kinzer's declaration as inadmissible legal conclusion, Chester's motion to strike did not dispute Dr. Kinzer's factual statement that he found no evidence of contamination caused by Gillson or Deep Roots. CP 420.

experience performing tattoos, or developing or following tattoo standards, polices, and procedures. The crux of his opinion is:

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.

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In my opinion the absolute minimum that is required for a tattoo artist 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.

CP 370. In essence, Dr. Dinges interprets Washington’s regulations to require sterile ink.

Dr. Dinges has no experience, education, or training for performing tattoos. Likewise, Dr. Dinges has not demonstrated any specialized knowledge or understanding of tattooing procedures and application, tattooing instruments, or the manufacturing, marketing, and sale of tattoo ink, that would allow him to make this decision. *See*

generally CP 366-370. Dr. Dinges does not discuss any of the other myriad of tattooing regulations, such as specific regulation discussing ink and their lack of a sterility component. Indeed, Dr. Dinges does not discuss any specifics of the tattooing procedure.<sup>4</sup>

Instead, Dr. Dinges makes improper comparisons to the medical field's system for sterility. For example, he states that what "[using] sterile instruments and aseptic techniques at all times during a procedures . . . 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." CP 369.

Dr. Dinges has not established (1) that any tattoo inks are manufactured, marketed, or sold like sterile medication (*i.e.*, in a sealed vial with a sterile stopper), (2) that tattooists use this procedure, or (3) that tattoo needles and instruments would effectively work with such a set-up.

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<sup>4</sup> Dr. Dinges' lack of understanding as to tattooing procedures is highlighted by his mentioning of a needle going through a sterilizing autoclave machine instead of being presterilized. CP 370. Compare WAC 246-145-050(2). This gaffe demonstrates not only his lack of understanding regarding the tattooing regulations, but also the tattooing procedure.

Additionally, Dr. Dinges discusses gamma irradiation treatment, asserting it would effectively sterilize tattoo ink before being shipped to artists and shops. CP 369. Although he states that he is “familiar with the use of gamma irradiation as a sterilizing treatment for medical devices”, he does not show that he is familiar with its use, prevalence, development, or effectiveness in the tattooing industry. CP 368. Instead, Dr. Dinges simply cites a single, purported Certificate of Processing for gamma treatment for one batch of “Intenze” brand tattoo ink. CP 368, 85.

**D. There Is No Evidence That Sterile Ink Was the Industry Standard for Tattoo Artists, that a Tattoo Artist Can Verify Sterility, or That a Tattoo Artist Can Sterilize Ink.**

Chester submits evidence that “Intenze” brand tattoo ink represented itself to be “sterile” ink on its website. CP 359. In May 2011, Intenze represented, “In *an unregulated industry*, we are the world’s *first and only ink company* taking the necessary measures to guarantee our consumers a safe and positive outcome.” *Id.* (Emphasis added.)

Chester has not submitted any evidence that a tattoo artist could do anything to ensure that ink – whether Intenze or some other brand – is “in fact” sterile. Indeed, in an article that Dr. Dinges relies upon, from the European Academy of Dermatology and Venereology (“EADV”) and published after Chester was tattooed) “3 of the 24 inks claiming sterility were, nevertheless, contaminated with bacteria”, including Intenze True

Black. CP 378, 382. In fact, of all of the inks (whether claiming sterility or not) tested in the subject article, Intenze<sup>5</sup> True Black had more bacterial colonies than any other ink tested.<sup>6</sup> *Id.*

The only evidence in this case is that sterility is something that cannot be seen. Nor can microscopic bacteria. There is no evidence Gillson could reasonably know if ink is “in fact” sterile, or if it is contaminated. CP 213. Unlike instruments that Gillson herself can sterilize via an autoclave, there is no evidence that Gillson could have done anything to sterilize or decontaminate ink.

Utterly missing from Chester’s discussion of sterile, or, more accurately stated, purportedly sterile tattoo ink<sup>7</sup> is any evidence that the industry standard was to purchase ink that was marketed as “sterile”, and

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<sup>5</sup> Not only are there no guarantees that Intenze ink is “in fact” sterile, as described in the EADV article, but there is no guarantee that Intenze ink was even safe or nontoxic. Per an Advisory Note from the Chief Health Officer of the Government of New South Wales in Australia dated June 6, 2014, the European Union recalled nine tattoo ink products, three of which were Intenze brand inks, because they contained a “chemical compound (phenylenediamines) and/or higher than permitted levels of trace metal contaminants.” CP 166-67.

<sup>6</sup> Chester argues that Intenze’s bacterial growth, as reported in the article cited by Dr. Dinges, should be disregarded because the ink was purchased in February 2010, about 15 months before Chester was tattooed. AB 6, n.3. However, the authors of the EADV article make it clear that Intenze was representing its ink as sterile at that time. CP 136. Furthermore, Chester relies upon gamma treatment for Intenze ink in December 2009 – 17 months before Chester was tattooed. CP 385. Chester cannot have it both ways.

<sup>7</sup> At some point. One brand ink was also advertised as “sterilized and laboratory tested.” CP 164. The gamma irradiation was apparently only a bio-burden reduction process, not sterilization. *Id.* Dr. Dinges does not discuss the types of gamma treatment.

that the failure to do so is below the standard of care. Likewise, there is no evidence that tattoo artists can and do sterilize ink themselves. All Chester has established is that there was one brand of ink purporting to be sterile (and the only such ink) was on the market in the United States at the time of Chester's tattoo.

**E. Procedural History**

Chester amended her initial complaint to add Deep Roots and Gillson on February 14, 2014. CP 534-42. Chester asserted product liability and negligence claims against Deep Roots and Gillson. *Id.* Chester alleges that the One brand tattoo ink was "impure, defective, and/or contaminated" when delivered to Gillson in May 2011, months before Chester's tattoo. CP 503. Chester alleges product liability claims against Gillson and the Deep Roots entities, as well as negligence claims for

(a) failing to take steps that would allow them to reasonably conclude that the "One" ink was safe and/or uncontaminated and/or free of bacteria prior to its use in Plaintiffs [sic] tattoo; (b) using "One" after information regarding the risk of infection from "One" was or should have been known to them; and (c) through their unsafe and unsterile acts or practices in the providing of the tattoo to Plaintiff. CP 506.

On November 7, 2014, Deep Roots and Gillson moved for summary judgment for dismissal of the claims against them given the lack

of evidence of their liability.<sup>8</sup> CP 431-34, 473-85. Deep Roots did not move for summary judgment on the defense of its independent contractor relationship with Gillson. CP 135, 420, 477. Chester conceded that dismissal of her product liability claims was proper, but, in reliance upon Dr. Dinges, asserted that Gillson and Deep Roots violated Washington's statutory and regulatory scheme for the tattoo industry. CP 398-425.

On January 9, 2015, the Superior Court of Snohomish County, the Honorable Linda C. Krese presiding, granted Deep Roots' Motion for Summary Judgment, holding that Chester could not show the essential elements of negligence because there is no legislative, administrative, or common law duty to use sterile ink; Gillson complied with all statutory and regulatory requirements; and there is no evidence that Gillson knew or should have known that the ink was contaminated. CP 5-9. The trial court also struck one portion of Dr. Dinges' Declaration as a legal conclusion, and only considered another portion as being germane to the medical field.<sup>9</sup> CP 15-21.

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<sup>8</sup> By the time Deep Roots brought its Motion for Summary Judgment, additional defendants had been brought in to the suit, and they were also the subject of the Motion. CP 484-85. Chester does not appeal the Court's dismissal of the claims against Whitmore, Deep Roots Tattoo & Body Modification, Inc., Katrina Wickersham, and Ryan Wickersham. CP 2.

<sup>9</sup> The oral ruling was not commemorated in writing until a March 9, 2015 Order.

Chester appeals the dismissal as to Gillson and Deep Roots Alderwood, LLC. CP 1-23. Chester's claims against Kingpin and Papillon, the parties that she initially deemed responsible for her injuries, are still pending. That case has not been stayed and Chester continues to seek recovery from those parties in the underlying lawsuit.

### III. COUNTERSTATEMENT OF ISSUES

- A. Did the trial court properly dismiss plaintiff's negligence claims against Gillson because Chester failed to present evidence that Gillson was negligent *per se* pursuant to RCW 5.40.050(3)?
- B. Did the trial court properly dismiss plaintiff's negligence claims against Gillson for failure to establish the essential elements of common-law negligence?
- C. Should the trial court's dismissal of Washington Product Liability Act claims against Gillson's be affirmed when Chester conceded such claims at the trial court level and still does not dispute that the WPLA does not apply to Gillson?
- D. Did the trial court properly dismiss claims against Deep Roots Alderwood, LLC?
- E. Did the trial court properly strike portions of the declaration of Dr. Dinges as inadmissible legal opinion and properly limit other portions as medical opinion only?

### IV. STANDARD OF REVIEW

A court reviews a grant of summary judgment de novo, engaging in the same inquiry as the trial court. *Lallas v. Skagit County*, 167 Wn. 2d 861, 864, 225 P.3d 910 (2009); *Wilson v. Steinbach*, 98 Wn. 2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate if there are no

genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). *Tracfone Wireless, Inc. v. Dep't of Revenue*, 170 Wn.2d 273, 280-81, 242 P.3d 810 (2010). An order granting summary judgment can be affirmed on any basis supported by the record. *Redding v. Virginia Mason Med. Ctr.*, 75 Wn. App. 424, 426, 878 P.2d 483 (1994). The same de novo review standard applies to the order striking portions of Dr. Dinges declaration. *Folsom v. Burger King*, 135 Wn. 2d 658, 663, 958 P.2d 301 (1998) (de novo review standard applies to all trial court rulings made in conjunction with summary judgment motion).

## V. ARGUMENT

### A. The Trial Court Properly Dismissed Chester's Claims of Negligence *Per Se*.

At the trial court level, Chester's primary argument was that Gillson's use of contaminated ink constituted negligence *per se* under RCW 5.40.050. In making that argument, Chester urged the court to adopt regulations for tattoo artists that do not exist. The trial court properly declined the invitation to improperly legislate.

Chester's arguments to the trial court, and now to this Court, continue to focus on the legal fiction that a tattoo artist like Gillson should be held negligent *per se* every time anyone has an adverse outcome from a

tattooing procedure, regardless of how carefully the tattoo artist acted. To support this sweeping conclusion, Chester urges that Gillson be held strictly liable here for allegedly violating an unwritten requirement to use “sterile” ink, absent any evidence that she knew or should have known that the FDA-approved tattoo ink that she had purchased from a reputable manufacture was contaminated. The trial court rejected Chester’s arguments, refusing to hold Gilson negligent *per se* for violation of unwritten and unlegislated regulations. The court agreed with Gillson that there was no evidence that she failed to comply with existing tattooing regulations or that she otherwise breached any duty to Chester. This Court should affirm that decision.

**1. Gillson Complied With All Applicable Tattooing Regulations; There Is No Evidence to Support a Claim That She Was Negligent *Per Se* Pursuant to RCW 5.40.050(3).**

While Chester correctly points out that RCW 5.40.050<sup>10</sup> provides that violation of certain tattooing regulations can qualify as negligence *per*

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<sup>10</sup> RCW 5.40.050 reads in full as follows: “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

se, Gillson's actions here do not fall under the purview of RCW 5.40.050. As to tattooists, the statute provides that "any breach of a duty as provided by statute, ordinance, or administrative rule relating to . . . (3) sterilization of needles and instruments used by persons engaged in the practice of . . . tattooing . . . as required under RCW 70.54.350 . . . shall be considered negligence per se." RCW 5.40.050(3).

Here, there is no evidence that Chester has proffered that Gillson in any way failed to appropriately sterilize the needle or any other instrument she used in applying ink (that Chester asserts came contaminated) to Chester. Chester does not even allege such violations. RCW 5.40.050, by the plain meaning of its terms, applies only to Gillson's act in sterilizing the needle and her other instruments prior to use. Applying the ink to the needle is not part of this sterilization process. This step necessarily occurs after sterilization is complete. Chester concedes that the needle itself was *sterilized*; in fact, her entire argument hinges on the assumption that the needle was *sterilized*. For example, Chester relies on a statement from Dr. Cogen that "once the needle contacted ink that was not sterile the needle became contaminated." CP 417.

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while under the influence of intoxicating liquor or any drug, shall be considered negligence per se."

The evidence is that Chester complied with all applicable rules regarding sterilization of needles and instruments. It is uncontroverted that in tattooing Chester, Gillson followed her standardized process, which included the following steps and precautions:

- Using presterilized, individually packaged and dated tattoo needles. CP 206, 212.
- She also sterilized her other tattoo instruments (*e.g.*, metal tattoo tubes) using a four-part sterilization process that includes a hand scrub, an enzymatic soak, an ultra-sonic, another hand scrub, and then an autoclave process.  
CP 206, 211.
- She also disinfected surfaces and the client's skin using appropriate substances, donned and changed gloves multiple times, used barriers such as dental bibs and draping sheets, among other steps to prepare for tattooing.  
CP 209-12.

Chester's argument that once the needle made contact with contaminated ink the needle was no longer sterile does not detract from the reality that Gillson did what was statutorily required of her: She used a needle that was sterile. The sterilization process, therefore, was complete at the time she used the needle to begin applying the allegedly

contaminated ink. Accordingly, RCW 5.40.050(3) simply does not apply to Gillson's acts based on the undisputed facts in this case.

**a) There Is No Statutory Requirement or Other Rule That Mandates Use of "Sterile" Ink.**

It is evident that Chester cannot show that Gillson breached any duty as to "sterilization of needles or instruments" as required to invoke negligence *per se* under RCW 50.40.050. Perhaps recognizing the weakness in her argument, which was essentially that a tattoo artist should be held negligent *per se* any time there is an adverse tattooing outcome because there must have been some breach in a duty to sterilize, Chester now advances a more narrow argument: Gillson's use of "non-sterile tattoo ink is negligent *per se*." Appellant's Brief ("AB") 14. This argument also fails.

While Chester now contends that Washington law provides that all tattoo inks must be sterile, she fails to cite any statute, regulation or official guideline that contains such a requirement. Indeed, that is because there is no such requirement.

Simply put, there is no statutory requirement that mandates the use of "sterile" tattoo ink. Chester is attempting to write in law that does not exist. A requirement to use "sterile" ink is notably absent in the numerous regulations promulgated to police the tattooing industry. Similarly, there

is no requirement that a tattooist sterilize the ink purchased from a reputable manufacturer and that presumably, was sterile in the sealed container it was delivered in. For example, WAC 246-145-050 contains *twenty-four precautions* that persons licensed to practice body art, body piercing, and tattooing, must follow. Nowhere in this list is a requirement that the ink a tattoo artist uses must be sterile or that the tattooist sterilize it (although Gillson clearly believed that One ink was sterile and safe for its intended use). CP 217. In contrast, all jewelry is required to be obtained in presterilized packaging from the manufacturer or be sterilized on-site prior to the procedure. WAC 246-145-050(20).

Under Washington law, there are only two relevant provisions that discuss tattoo ink. One provision provides that a tattooist must 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.” WAC 246-145-050(15). The other regulation provides that “[i]nks or pigments used must not be banned or restricted by the FDA and must not be mixed with improper ingredients.” WAC 246-145-050(18). The uncontroverted evidence is that Gillson complied with all of these requirements.

Washington law does set forth regulations as to tattoo ink – and sterilization requirements are notably absent as to ink. If the Legislature had intended that the all tattoo ink be sterile or that a tattooist sterilize it<sup>11</sup>, it would have so required in the regulations. It has not done so.

**b) The FDA Does Not Require The Use of Sterile Ink for Tattooing.**

Washington law follows federal law on the issue – tattoo artists are not required to use “sterile” tattoo ink. Under the Federal Food, Drug, and Cosmetic Act, tattoo inks are considered to be cosmetics, and the pigments used in the inks are color additives requiring premarket approval. FDA, in turn, has unequivocally acknowledged that tattoo inks are not required to be sterile — “[n]o specific FDA regulatory requirement explicitly provides that tattoo inks must be sterile.”<sup>12</sup>

The FDA has also noted that the “practice of tattooing may be regulated by local jurisdictions. Such regulations generally have required blood-borne pathogens training and the use of hygienic practice during

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<sup>11</sup> There is no evidence that a tattooist can sterilize ink in the same manner that instruments can be sterilized. For example, a tattooist cannot sterilize ink in an autoclave. CP 227.

<sup>12</sup> Centers for Disease Control and Prevention. *Tattoo-Associated Nontuberculous Mycobacterial Skin Infections—Multiple States, 2011-2012*. (Morbidity and Mortality Weekly Report (MMWR). 61(33): 653-656 (Aug 24, 2012), available at [http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6133a3.htm?\\_cid=mm6133a3\\_x](http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6133a3.htm?_cid=mm6133a3_x). (Appendix A.)

tattooing.” That is precisely what Washington has done in enacting WAC 246-145-050, entitled “[s]tandard universal precautions for preventing the spread of disease in body art, body piercing, and tattooing.” WAC 246-145-050 lists twenty-four separate “universal precautions” that “must be used by persons licensed [in] . . . 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.

(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.

WAC 246-145-050.

With the exception of Chester's misguided argument relating to "aseptic technique", Chester has not—and cannot—identify a single provision of the WAC that Gillson violated. These precautions are noteworthy in that they distinguish between different levels of hygienic duties, *i.e.*, there are distinctions between "disinfect", "sanitize" and "sterilization."<sup>13</sup> The twenty-four precautions set forth in the WAC are also actions that are within a tattoo artist's ability to control, *e.g.*, a tattooist can sterilize an instrument, can wear gloves and wash hands, clean and disinfect work spaces between clients, cleanse a client's skin, use single-use disposable needles, use single-use stencils, and use ink not banned by the FDA. These precautions make sense because they all speak to actions that are within the tattooist's ability to control.

These WAC provisions are consistent with the CDC's recommendations (published in 2012, after the events at issue here) that tattoo artists should "1) avoid using products not intended for use in tattooing; 2) avoid ink dilution before tattooing, and if dilution is needed,

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<sup>13</sup> These terms are defined in WAC 308-22-010. Each provides for a different level of cleaning, *e.g.*, "disinfect" means the "destruction of disease-causing microorganisms on inanimate objects or surfaces, thereby rendering these objects safe for use or handling; "sanitize" means "a procedure that reduces the level of microbial contamination so that the item or surface is considered safe"; and "sterilization" means "a process that destroys all forms of microbial life, including highly resistant bacterial spores."

use only sterile water; 3) avoid use of nonsterile water to rinse equipment (e.g., needles) during tattoo placement; and 4) follow aseptic techniques during tattooing (e.g., hand hygiene and use of disposable gloves).”<sup>14</sup>,<sup>15</sup> Again, while the CDC mentions sterilized water in its 2012 guidance, it does not reference that a tattooist must use sterilized ink. Rather, the FDA noted in 2012 that the safety of tattoo ink lies with the ink manufacturer, “[b]ecause tattoo inks are injected intradermally, CDC recommends that ink manufacturers be held to higher product safety standards, which should include production of sterile inks.”<sup>16</sup>

In sum, either at the time Chester was tattooed in 2011 or now, there is no duty under Washington or federal law that required Gillson to

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<sup>14</sup> Centers for Disease Control and Prevention. *Tattoo-Associated Nontuberculous Mycobacterial Skin Infections—Multiple States, 2011-2012*. (Morbidity and Mortality Weekly Report (MMWR), 61(33); 653-656 (Aug 24, 2012), available at [http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6133a3.htm?\\_cid=mm6133a3\\_x](http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6133a3.htm?_cid=mm6133a3_x). (Appendix A.)

<sup>15</sup> Notably, the CDC considers aseptic technique to refer to the acts of using good hand hygiene and use of disposable gloves, and not the use of sterile ink. Chester’s argument that aseptic technique means otherwise is simply wrong and not supported by any admissible evidence. Her only support for the contention that Gillson violated WAC 246-145-050(1) is Dr. Dinges’ inadmissible opinions, discussed *infra* at § IV.E.).

<sup>16</sup> Centers for Disease Control and Prevention. *Tattoo-Associated Nontuberculous Mycobacterial Skin Infections—Multiple States, 2011-2012*. (Morbidity and Mortality Weekly Report (MMWR), 61(33); 653-656 (Aug 24, 2012), available at [http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6133a3.htm?\\_cid=mm6133a3\\_x](http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6133a3.htm?_cid=mm6133a3_x). (Appendix A.)

have used “sterile” ink in tattooing Chester. If there is any duty to sterilize ink, that duty lies with the manufacturer.

**c) Chester Flouts the Rules of Statutory Interpretation in Urging the Court to Add An Unwritten Requirement To Use “Sterile” Tattoo Ink.**

Because there is no existing written requirement that provides a tattooist must use “sterile” tattoo ink, Chester asks this Court to write in such a requirement. The Court should reject Chester’s request to add the “sterile ink” requirement because to do so would constitute impermissible judicial legislation and contravene the rules of statutory interpretation.

The Washington Supreme Court has set forth the rules of statutory interpretation as follows:

“The court’s fundamental objective in construing a statute is to ascertain and carry out the legislature’s intent.” *Arborwood Idaho, LLC v. City of Kennewick*, 151 Wash.2d 359, 367, 89 P.3d 217 (2004). Statutory interpretation begins with the statute’s plain meaning. “Plain meaning” is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *State v. Engel*, 166 Wash.2d 572, 578, 210 P.3d 1007 (2009). While we look to the broader statutory context for guidance, we “must not add words where the legislature has chosen not to include them,” and we must “construe statutes such that all of the language is given effect.” *Rest. Dev., Inc. v. Canonwill, Inc.*, 150 Wash.2d 674, 682, 80 P.3d 598 (2003). If the statute is unambiguous after a review of the plain meaning, the court’s inquiry is at an end. *State v. Armendariz*, 160 Wash.2d 106, 110, 156 P.3d 201 (2007). But if the statute

is ambiguous, “this court may look to the legislative history of the statute and the circumstances surrounding its enactment to determine legislative intent.” *Rest. Dev.*, 150 Wash.2d at 682, 80 P.3d 598.

*Lake v. Woodcreek Homeowners Association*, 169 Wn.2d 516, 526-27, 243 P.3d 1283 (2010).

Moreover, “statutory interpretation is a question of law.” *Berger v. John Sonneland, M.D.*, 144 Wn.2d 91, 104, 26 P.3d 257 (2001). “Courts should assume the Legislature means exactly what it says. Plain words do not require construction. The courts do not engage in statutory interpretation of a statute that is unambiguous. If a statute is plain and unambiguous, its meaning must be derived from the wording of the statute itself.” *Id.* at 105 (citations omitted.)

RCW 5.40.050(3) applies to “sterilization of needles and instruments.” The statute speaks in terms of a verb, “sterilization.” According to Webster’s, sterilization is “[t]he act or process of sterilizing, or rendering sterile; also, the state of being sterile.” The Washington Administrative Code, promulgated to effectuate the enabling statute, RCW 18.300.005, also confirms that the term “sterilization” is a verb, since it “means *a process* that destroys all forms of microbial life, including highly resistant bacterial spores.” WAC 246-145-010(23). The statute goes on to provide that the verb “sterilization” applies to “needles

and instruments.” Further, one does not need a dictionary or legal citation to recognize that ink is neither a needle nor an instrument.

Because the plain language of the existing law does not require the use of “sterile” ink, the only way for “sterile” ink to become a requirement would be for this Court to substitute its judgment for that of lawmakers and write in such a requirement where lawmakers (and the FDA) have declined to do so.<sup>17</sup> Washington courts flatly decline to engage in such judicial legislation—the Washington Supreme Court has declared in no uncertain terms that its “duty is to effectuate the intent of the Legislature in enacting a statute [and] [i]f a statute is unambiguous . . . we are obliged to apply the language as the Legislature wrote it, rather than amend it by judicial construction. *Salts v. Estes*, 133 Wn.2d 160, 170, 943 P.2d 275, 280 (1997), citing *GESA Fed. Credit Union v. Mutual Life Ins. Co.*, 105 Wn.2d 248, 252, 713 P.2d 728 (1986). The Court further denounced judicial legislation in stating “[w]hat the Legislature has not seen fit to do – change the wording of the statute—we decline to do by judicial proclamation in the guise of liberal construction.” *Id.* at 162.

To add an unwritten requirement mandating the use of “sterile” ink or to substitute the term “sterile” for the existing language that ink must

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<sup>17</sup> Amendments to relevant provisions of the RCW were proposed in 2014 and such amendments do not mention any requirement for sterile ink. H.R. 2162. 63rd Legis. (2014). (Appendix B.)

not be “banned or restricted by the FDA”, would also be unfair and constitute a due process violation. This is yet another reason why courts do not engage in judicial legislation. As the *Salts* court wisely reasoned: “We must provide consistency and predictability to the law so the people of Washington may conform their behavior accordingly.” *Id.* It would be untenable to retroactively enact an unwritten requirement to use “sterile” ink and to then impose negligence *per se* based on violation of such a requirement.

**d) Similarly, Gillson cannot be held negligent *per se* for not using “nontoxic” ink.**

Based on similar flawed reasoning, Chester now argues, for the first time, that in tattooing Chester, Gillson violated a statutory requirement to use “non-toxic” ink. AB 17-18. As with the “sterile” ink argument that was dispensed with above, this argument is similarly flawed because there is also no such Washington statute. The so-called statute that imposes *per se* negligence on any tattoo artist who fails to use “nontoxic” ink exists only in Chester’s briefing – Chester has attempted to create a new statutory duty by spinning a statutory definition into a duty and then bootstrapping this so-called duty to another statute.

Chester notes that RCW 70.54.330 provides that the “definition” of “[t]attooing” to “mean the indelible mark, figure, or decorative design

introduced by insertion of nontoxic dyes or pigments into or under the subcutaneous portion of the skin. ...” Chester then extrapolates the word “nontoxic” from the definition of tattooing to create a duty to “use only nontoxic’ ink, which Chester then argues that all use of any ink that is not nontoxic is a *per se* violation under RCW 5.40.050 and that Gillson is therefore strictly liable. AB 17-18. Notably, “tattooing” is defined differently under WAC 246-145-010(25), which omits any reference to “nontoxic” ink: (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.<sup>18</sup>

Regardless of whether the definition of “tattooing” includes a reference to “nontoxic” ink, Chester’s attempt to conflate a definition with a duty should be rejected for the same reasons that Chester’s “sterile ink” argument fails.<sup>19</sup>

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<sup>18</sup> This definition of “tattooing” went into effect June 20, 2002. The former version of WAC 246-145-010(15) did include the word “nontoxic,” defining “tattooing as a “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.” The reference to “nontoxic” was omitted from the 2002 revision, which revision is still in effect.

<sup>19</sup> Chester’s argument is nonsensical. For the sake of argument, if Gillson had inserted ink that was not nontoxic into Chester, the use of such ink would simply mean that Gillson was not engaged in “tattooing” as Chester claims the term is defined by Washington law. It follows, therefore, that if Gillson used ink that was not nontoxic, she was not “tattooing” under Washington law, and

**e) Chester's Negligence *Per Se* Arguments Also Fail Because Gillson's Alleged Violation Was Due To a Cause Beyond Her Control That Ordinary Care Could Not Have Guarded Against.**

Chester strains to create a violation of tattooing laws on which to premise *per se* liability but then completely overlooks that even if a violation is found, negligence *per se* will not be imposed if the violation was "due to some cause beyond the violator's control that ordinary care could not have guarded against." WPI 60.01.01; *Mathis v. Ammons*, 84 Wn. App. 411, 928 P.2d 431 (1996) (court cannot find negligence as matter of law merely because statutory duty was violated without justification or excuse; rather, court must determine whether reasonable minds could differ on whether defendant used ordinary care).

Assuming *arguendo* that negligence *per se* applies in the first instance, Gillson's actions fall squarely into the affirmative defense referenced in WPI 60.01.01. There is no evidence that Gillson violated any of the tattooing precautions set forth in applicable WACs or other Washington regulations. To the contrary, the evidence is that Gillson exercised ordinary care, *inter alia*, in selecting and using a tattoo ink that

- was not banned or restricted by the FDA;

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she is therefore not subject to rules regarding "tattooing" and she certainly cannot be held negligent *per se* under RCW 5.40.050 for any breach of duty associated with "tattooing."

- was manufactured and marketed for use as tattoo ink;
- came “highly recommended” and that she had long used without incident;
- she purchased from a reputable commercial supply company; and,
- she properly dispensed into single-use cups when using.

Gillson met her duty of ordinary care, and it was beyond her control that the bottle of One tattoo ink she used happened to be “contaminated with disease-causing bacteria” in the manufacturing process, as Chester argues. Certainly, the contamination was beyond Gillson’s control and her exercise of ordinary care could not have guarded against ink that was “impure, defective or contaminated” with microscopic bacteria by the manufacturer, before such ink ever reached Gillson’s hands. Therefore, even if Gillson did violate an applicable rule, her exercise of ordinary care absolves her from negligence *per se*. See, e.g., WPI 60.01.01.

**f) Chester’s Negligence *Per Se* Arguments Also Fail Under Restatement (Second) of Torts § 286 (1965) and For Related Policy Reasons.**

Negligence *per se* fails here for yet another reason—“not every violation of an enactment or administrative rule relating to . . . improper sterilization of needles and related activities . . . will constitute negligence

per se. As a matter of law, the statute, ordinance, or administrative rule violated must still meet the test set forth in Restatement (Second) of Torts § 286 (1965) before a jury may be instructed concerning negligence *per se*.<sup>20</sup> WPI 60.01.01, *cmt.* More specifically,

[i]n determining whether the violation of a statute constitutes negligence *per se*, we must first, however, ascertain whether the underlying purpose of the statute pertains to the conduct at issue. If it is determined that the underlying purpose of the statute was violated, then we must decide whether, as a matter of policy, the statutory standard should apply in the instant case. In both of these inquiries, we are guided by the Restatement (Second) of Torts § 286 (1965).

*Christen v. Lee*, 113 Wn. 2d 479, 502, 780 P.2d 1307, 1318 (1989)

(citations omitted) (refusing to impose negligence *per se* for violation of statutes prohibiting serving alcohol to minors and prohibiting serving alcohol to obviously intoxicated persons when injury suffered was subsequent criminal assault; court reasoned that statutes were not intended to protect against hazard of subsequent criminal assault).

Here, Chester's attempts to impose negligence *per se* fail under *Christen v. Lee*, as well as under the Restatement test. Even if Chester

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<sup>20</sup> Section 286 provides that for negligence *per se* to apply, the purpose of the legislative enactment or administrative regulation violated must be (1) to protect a class of persons which includes the one whose interest is invaded; (2) to protect the particular interest which is invaded; (3) to protect that interest against the kind of harm which has resulted; and, (4) to protect that interest against the particular hazard from which the harm results. Restatement (Second) of Torts § 286 (1965).

were to somehow establish a qualifying violation by Gillson, Chester has wholly failed to provide any evidence that any such alleged violation met the four-part test set forth by the Restatement. Likewise, Chester cannot show that laws regarding sterilization of needles and instruments were intended to protect against injuries from ink that was defectively manufactured and contaminated with microscopic bacteria (thereby contravening its fitness for use as tattoo ink, its intended purpose). The stated purpose for the sterilization violations referenced in RCW 5.40.050 is that “tattooing involve[s] invasive procedures with the use of needles which may present a risk of infecting a client with bloodborne pathogens if not properly sterilized.”<sup>21</sup> In other words, the purpose is to prevent the spread of bloodborne pathogens from improperly sterilized needles—these requirements were not intended to guard against the defectively manufactured ink, contaminated with microscopic bacteria. Bacteria in ink is not, by definition, a *bloodborne pathogen* – one substance is in ink, the other is in blood. Just as the laws violated in *Christen* were deemed not intended to protect against a subsequent criminal assault, here any violation of needle sterilization regulations were not intended to protect against defective ink contaminated by the manufacturer. As such,

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<sup>21</sup> S. 5391 (Sub.), § 1, 61st Legis. (2009) (enacted eff. July 1, 2010). (Appendix C.)

Chester's failure to meet the provisions of § 286 of the Restatement (Second) of Torts and related Washington case law is yet another basis to affirm the trial court's dismissal of claims against Gillson.

**g) Chester's Negligence *Per Se* Argument Fails for Want of Proximate Cause.**

Last but not least, the violation of a statute, ordinance, or administrative rule is actionable only if it was a proximate cause of the accident or injury in question. *Ward v. Zeugner*, 64 Wn.2d 570, 392 P.2d 811 (1964). Therefore, even if Chester could somehow establish that Gillson violated a statute, ordinance or rule that required her to use "sterile" ink, and she subsequently managed to clear the four hurdles of Section 286 of the Restatement, Chester would still have to show that Gillson's failure to use "sterile" ink proximately caused her injuries. Chester has not done so.

There is no evidence that Gillson's use of "non-sterile" as opposed to "sterile" ink proximately caused Chester's alleged injuries. Whether the One ink used here had been marketed as "sterile" is immaterial, given that Chester claims that the ink was improperly "contaminated with disease-causing bacteria" by the manufacturer. AB 5. Indeed, Chester's product liability claims against the ink manufacturer and distributor turn on allegations that the ink was "impure, defective, and/or contaminated"

(CP 503), and that as such, the ink was “not reasonably safe . . . in construction [and] . . . did not conform to Defendants’ express warranties or to the implied warranties.” CP 505. Certainly, even though the One ink was not marketed as “sterile,” the lack of such a label did not equate to the ink being “contaminated with disease-causing bacteria,” or mean that it was “impure, defective, and/or contaminated” and “not reasonably safe . . . in construction.” Conversely, even if the ink had been marketed as “sterile,” such a label would not guarantee the ink to, in fact, be sterile. “Sterile” ink could still be “impure, defective and/or contaminated.” The ink’s marketing as “sterile” is of no consequence when the ink was improperly contaminated in the manufacturing process, which is the whole basis of Chester’s claims against the manufacturer—the ink was not what it was claimed to be. Gillson submits that here, where Chester claims that the ink was improperly contaminated by the manufacturer and did not conform to the manufacturer’s warranties, that any label or claim of “sterile” would not have made any difference. In short, Chester’s negligence *per se* argument fails for the additional reason that she lacks the requisite causation evidence.

**B. Chester's Claim for Common Law Negligence Was Also Properly Dismissed Because Chester Failed to Establish The Essential Elements of Negligence.**

Chester's argument regarding common law (or to use Chester's term "simple") negligence is but a repeat of the argument that tattoo artists have a duty to use "sterile" ink or have a duty to "confirm that non-sterile ink is not in any way contaminated." These are the same arguments that were addressed, and dismissed, above.

To the extent that Chester is arguing that the standard of care for a tattoo artist requires the use of "sterile" ink, Chester has failed to provide admissible evidence to establish that standard, nor has Chester otherwise shown that Gillson failed to exercise the ordinary care expected of a reasonable tattoo artist. The trial court properly excluded Dr. Dinges' testimony on these issues, ruling that Dr. Dinges is not qualified to speak as to the standard of care of tattoo artists and correctly striking other portions of his declaration as impermissible legal conclusions. For example, RCW 70.54.340 references that the requirements the secretary of state is supposed to adopt are to be "in accordance with nationally recognized professional standards. . . employed by electrologists, persons engaged in the practice of body art, body piercing, and tattoo artists." See RCW 70.54.340. First, it is telling that Dr. Dinges, though a licensed medical practitioner, is not now nor has he ever been a tattoo artist.

Second, it is equally telling that Dr. Dinges does not once cite to the “nationally recognized professional standards” of tattoo artists, perhaps because there are none. If there are such standards, Chester has failed to identify them. See additional discussion as to why the trial court properly struck portions of Dr. Dinges’ declaration, *infra* at § V.E.

Moreover, just as Chester cannot satisfy the proximate cause requirement necessary for negligence *per se*, Chester cannot establish the causation element of common law negligence, either. Hence, even if the standard of care required the use of ink marketed as “sterile” (which it does not, otherwise countless tattoo artists would be acting negligently every day), Chester’s failure to provide evidence that “non-sterile” as opposed to “sterile” ink proximately caused her injuries is fatal to her common law negligence claim.

The trial court properly dismissed common law negligence claims for Chester’s failure to establish the essential elements of such.

**C. The Trial Court Also Properly Dismissed Washington Product Liability Act (WPLA) Claims Against Gillson Because Chester Conceded Those Claims.**

Chester conceded this issue at the trial court level — “[p]laintiff does not oppose dismissal of her claims under Washington’s Product Liability Act against Gillson” — and it is improper for her to raise the issue now on appeal. CP 400. It is therefore unclear why Chester raises

the WPLA before this Court. AB 23-24. It remains undisputed that Gillson is not a “manufacturer” or “product seller” under the WPLA since she provided a service, not a product, and that she therefore cannot be held liable under the WPLA. The trial court’s dismissal of WPLA claims against Gillson is improperly before this Court and, in any event, should be affirmed.

**D. The Trial Court’s Dismissal of Negligence and WPLA Claims Against Deep Roots Alderwood, LLC Should Be Affirmed Insofar As the Bases for Dismissal Are Consistent With the Arguments and Authority Set Forth By Gillson.**

Chester argues that co-respondent Deep Root, the tattoo parlor where Chester received her tattoo, is a “licensee” under WAC 308-22-010 and is therefore subject to the same requirements and regulations as tattoo artists. Accordingly, to the extent that Deep Roots has any liability based on the same law applicable to tattoo artists such as Gillson, Gillson submits that dismissal of Deep Roots was proper and should be affirmed for the same reasons set forth above that are applicable to Gillson.

**E. The Trial Court’s Order Striking Portions of Dr. Dinges’ Declaration Should Be Affirmed.**

The trial court properly limited Dr. Dinges’ testimony regarding the standard of care of tattoo artists and correctly struck other portions of his declaration as impermissible legal conclusions.

**1. The Trial Court Properly Refused to Consider Dr. Dinges' Opinions Given His Lack of Qualifications to Discuss Tattooing Standards.**

Dr. Dinges opines that sterile tattoo ink is required in Washington:

In my opinion the absolute minimum that is required for a tattoo artist 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.

CP 370. The trial court refused to consider the above opinion as establishing a standard of care for tattooists, instead only considering Dr. Dinges' commentary from a medical perspective.

Evidence submitted in support of and in opposition to a motion for summary judgment must comply with Washington's Civil Rules and evidentiary rules. *King County Fire Prot. Dist. No. 16 v. Hous. Auth.*, 123 Wn.2d 819, 825, 872 P.2d 516 (1994). Under CR 56(e), affidavits and declarations must be based on personal knowledge. Furthermore, affidavits and declarations "shall set forth such facts as would be admissible in evidence." *Id.*; see also *Lilly v. Lynch*, 88 Wn. App. 306, 320, 945 P.2d 727 (1997) (citing *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 787, 819 P.2d 370 (1991)) ("[t]he opinion of an expert that is

only a conclusion or that is based on assumptions does not satisfy the summary judgment standard.”).

Evidence Rule 702 states that “a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” However, “[a]n expert must stay within the area of his expertise.” *Queen City Farms, Inc. v. Central Nat. Ins. Co. of Omaha*, 126 Wn.2d 50, 102, 882 P.2d 703 (1994) (holding that trial court abused its discretion by admitting testimony of insurance underwriting practices expert where expert was not qualified to testify about insurance policies at issue); *see also State v. Farr-Lenzini*, 93 Wn. App. 453, 461, 970 P.2d 313 (1999) (superseded by statute on other grounds) (noting that “the expert testimony of an otherwise qualified witness is not admissible if the issue at hand lies outside the witness’ area of expertise”).

Chester claims that Dr. Dinges is qualified to testify as to the use of sterile ink because the Washington legislature instructed the Department to “consider” guidelines from the CDC, and, therefore, Dr. Dinges’ medical background is sufficient foundation for his opinions. The Legislature actually ordered that the Department’s rules “shall” be “in accordance with nationally recognized professional standards . . . employed by electrologists, persons engaged in the practice of body art,

body piercing, and tattoo artists.” RCW 70.54.340. In effect, the Legislature ordered the rules to be in accordance with nationally recognized professional *tattooing* standards, with only *consideration* from infection control precautions and guidelines from the CDC.<sup>22</sup> Clearly the Legislature intended the Department to employ industry standards for the body art industry.

Furthermore, medical procedures and the practice of medicine are specifically *excluded* from body art. Indeed, the very regulations that Chester relies upon specifically state, “[b]ody art does not include any health-related procedures performed by licensed health care practitioners under their scope of practice.” WAC 246-145-010(4); *see also* RCW 18.300.010(1) (“[b]ody art’ does not include any health-related procedures performed by licensed health care practitioners under their scope of practice”); RCW 26.28.085 (tattooing does not include “[m]edical procedures performed by a licensed physician”).

The trial court properly limited its consideration of Dr. Dinges’

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<sup>22</sup> By the plain language of the regulations, the Department only adopted “universal precautions” from the CDC. “‘Universal precautions’ is an approach to infection control as defined by the Center for Disease Control (CDC). According to the concept of universal precaution, 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.” WAC 245-145-010(26). Universal precautions, as adopted by the Department for body art are for the control of bloodborne pathogens, not the sterility of ink.

opinion that sterile ink is required. Dr. Dinges did not set forth a foundation that he has specialized knowledge, skill, experience, training, or education with respect to tattooing procedures and standards. That he has treated patients who developed infections after tattooing does not, without more, qualify him to opine as to the standard of care that pertain to tattoo artists. *See also Germain v. Pullman Baptist Church*, 96 Wn. App. 826, 838, 980 P.2d 809 (1999) (holding that trial court did not abuse discretion in striking affidavit of expert psychologist qualified in secular counseling because she was not qualified to evaluate pastoral counseling.)

An expert's affidavit "must affirmatively show that the affiant is competent to testify to the matters stated therein." *See Lilly*, 88 Wn. App. at 320 (holding that trial court did not abuse its discretion in striking portion of expert's affidavit where expert failed to explain how he was qualified to reach his conclusions). This has not occurred in this case – Dr. Dinges has not affirmatively shown how he is qualified to offer opinions about any requirements or standards for aseptic practices in body art, particularly the use of sterile inks in tattooing.<sup>23</sup>

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<sup>23</sup> Even within Dr. Dinges' declaration, there are examples of his lack of understanding of the tattoo procedure in Washington. Needles are presterilized, not sterilized by the artist in an autoclave. *See* CP 370; WAC 246-145-050(2). Dr. Dinges opines liquid should be withdrawn by a sterilized needle via a sterilized stopper. CP 369. He cannot explain how that practice could be compatible with a tattoo gun, or identify any tattooists who use such a procedure.

**2. The Trial Court Properly Struck Dr. Dinges' Legal Conclusions Regarding His Interpretation of WAC 146-145-050(1).**

The trial court also struck the following provision as a legal conclusion:

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.

CP 370. Dr. Dinges is clearly interpreting WAC 146-145-050(1) – he specifically testifies as to the meaning of the provision to him.

Chester misunderstands why Dr. Dinges’ opinion was stricken as a legal conclusion. It was not because Dr. Dinges opined as to an “ultimate issue” to be decided by a factfinder as was at issue in *Davis v. Baughm Indus. Contractors, Inc.*, 159 Wn.2d 413, 150 P.3d 545 (2007). Compare ER 704. Rather, it was because Dr. Dinges assigned meaning to the Department’s regulations to offer an opinion on the Department’s intent. Statutory interpretation is not for a factfinder. It is for the Court, and is a question of law. *Berger v. Sonneland*, 144 Wn.2d 91, 104, 26 P.3d 257

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Finally, while Dr. Dinges states that he is familiar with gamma irradiation for medical devices, there is no evidence that he is familiar with gamma irradiation for the tattoo industry. CP 368.

(2001). The meaning of WAC 246-145-050(1) is for this Court, not Dr. Dinges, to interpret, and the trial court properly struck Dr. Dinges' testimony.

The trial court's evidentiary rulings regarding Dr. Dinges' declaration should be affirmed.

## VI. CONCLUSION

For the reasons set forth above, the Court should affirm Gillson's dismissal, as well as the evidentiary rulings regarding Dr. Dinges' declaration. There is no basis to hold Gillson liable for negligence *per se* or for common law negligence for failing to comply with a requirement that does not exist in the statutory framework.

RESPECTFULLY SUBMITTED this 27th day of July, 2015.

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**CERTIFICATE OF SERVICE**

I, Denise Mary Pope, 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 firm of Betts Patterson & Mines, One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on July 27, 2015, I caused to be served upon counsel of record via ABC Legal Messengers at the addresses indicated below, a true and correct copy of this BRIEF OF RESPONDENT BONNIE GILLSON

930 122 13 17 2015  
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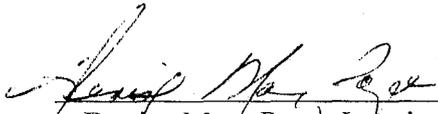
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I declare under penalty of perjury under the laws of the State of  
Washington that the foregoing is true and correct.

DATED this 28th day of July, 2015.

  
Denise Mary Pope, Legal  
Assistant

# Appendix A



Centers for Disease Control and Prevention

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**Morbidity and Mortality Weekly Report (MMWR)**

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## Tattoo-Associated Nontuberculous Mycobacterial Skin Infections — Multiple States, 2011–2012

*Weekly***August 24, 2012 / 61(33);653-656**

On August 22, this report was posted as an MMWR Early Release on the MMWR website (<http://www.cdc.gov/mmwr>).

Permanent tattoos have become increasingly common, with 21% of adults in the United States reporting having at least one tattoo (1). On rare occasions, outbreaks of nontuberculous mycobacterial (NTM) skin infections have been reported after tattooing (2,3). In January 2012, public health officials in New York received reports of *Mycobacterium chelonae* skin infections in 14 New York residents who received tattoos during September–December 2011. All infections were associated with use of the same nationally distributed, prediluted gray ink manufactured by company A. CDC disseminated an Epi-X public health alert to identify additional tattoo-associated NTM skin infections; previously identified cases were reported from three states (Washington, Iowa, and Colorado). Public health investigations by CDC, state and local health departments, and the Food and Drug Administration (FDA) found NTM contamination in tattoo inks used in two of five identified clusters. All infected persons were exposed to one of four different brands of ink. NTM contamination of inks can occur during the manufacturing process as a result of using contaminated ingredients or poor manufacturing practices, or when inks are diluted with nonsterile water by tattoo artists. No specific FDA regulatory requirement explicitly provides that tattoo inks must be sterile. However, CDC recommends that ink manufacturers ensure ink is sterile and that tattoo artists avoid contamination of ink through dilution with nonsterile water. Consumers also should be aware of the health risks associated with getting an intradermal tattoo.

On January 4, 2012, the Monroe County (New York) Department of Public Health began an outbreak investigation after receiving a report of a person with a persistent papular rash beginning 1 week after being tattooed by an artist in October 2011; *M. chelonae* was isolated from a skin biopsy. Since May 2011, the artist had been using company A prediluted gray ink. Using a list of customers provided by the artist, a total of 19 infections were identified, including 14 confirmed with *M. chelonae*.

All infected persons had been tattooed with company A prediluted gray ink. The tattoo artist said he had not diluted the ink before use, and a review of his practices did not reveal other potential sources of contamination. *M. chelonae* was isolated from tissue specimens, and from one opened and one unopened bottle of company A prediluted gray ink. Pulsed-field gel electrophoresis (PFGE) patterns of 11 available patient isolates and an unopened bottle of company A prediluted gray ink were indistinguishable; the *M. chelonae* isolate from the opened ink bottle showed ≥95% genetic relatedness to the other isolates. Water and environmental samples collected at the manufacturing company and tattoo parlor were negative for *M. chelonae*.

Company A prediluted gray ink was a nationally distributed product. To identify additional tattoo-related NTM infections not limited to exposure to any particular brand of ink, case finding was initiated February 15, 2012, through Epi-X using the following case definitions: 1) a *possible case* was defined as persistent inflammatory reaction (i.e., redness, swelling, or nodules) localized within the margins of a new tattoo on a person between May 1, 2011, and February 10, 2012; 2) a *probable case* was defined as a possible case with evidence of an NTM infection by histopathology or clinical response to treatment; 3) a *confirmed case* was defined as a possible case with NTM cultured from a wound or skin biopsy. The New York cluster included 14 confirmed and four probable cases, and one possible case. An investigation by Public Health – Seattle &

King County, Washington, identified five confirmed and 26 possible cases. Confirmed cases also were reported from Iowa (two) and Colorado (one) (Table). Among 22 confirmed cases, 63.6% involved men, and the median age of persons in the 22 cases was 33.5 years (range: 20–48 years).

Cases identified in Washington were associated with two clusters, and the initial two cases from patients with recent tattoos were reported by clinicians to local public health authorities. The first, Washington cluster 1, had three confirmed *Mycobacterium abscessus* cases and 24 possible cases in persons tattooed with black ink from company B. Water and environmental samples collected from company B did not grow NTM, but the company reported receiving complaints of unusually long-lasting skin reactions in clients tattooed with company B black ink from 35 customers in 19 states between August 2011 and March 2012. Customer identifiers were not available to CDC for follow-up. Two *M. abscessus* clinical isolates from Washington cluster 1 were indistinguishable by PFGE, but NTM was not recovered from samples of brand B ink. The second Washington cluster had two confirmed cases of *M. chelonae* and two possible cases associated with company C gray ink. One clinical isolate from Washington cluster 2 was available for testing. A sample from an opened bottle of company C gray ink grew *M. chelonae*, which was unrelated to the Washington cluster 2 clinical isolate and was unrelated to New York isolates, based on PFGE patterns. Reviews of tattoo practices at the parlors associated with the clusters did not reveal other potential sources of contamination.

The Iowa Department of Public Health reported two confirmed *M. chelonae* cases. Patients were tattooed with black ink from company C. PFGE testing showed that two clinical isolates from Iowa and the clinical isolate from Washington cluster 2 were indistinguishable from each other, but unrelated to New York isolates. Ink and environmental samples were not available for testing.

The Colorado Department of Public Health and Environment reported one confirmed case of *M. chelonae* infection. PFGE testing showed that this strain was unrelated to any of the clinical and ink isolates identified in other clusters. Artists at the Colorado tattoo parlor reported using distilled or reverse osmosis water to dilute company D black ink. Although used for tattooing, the ink was labeled as a drawing ink, and specified as not indicated for tattooing. The artist rinsed needles with distilled or reverse osmosis water when switching colors of ink on the same client. An unopened bottle of company D black drawing ink, reverse osmosis water samples, and environmental samples were tested, but NTM were not recovered.

In March and April 2012, FDA conducted inspections of company A and company B ink manufacturing sites. Ingredients used in the manufacture of tattoo inks at those sites included a wide range of pigments, carrier solutions, and diluents, including distilled water in some formulations. Samples of unopened ink bottles, ink ingredients, environmental samples, distilled water, and tap water were tested at CDC and did not yield NTM.

## Reported by

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## Editorial Note

This report describes cases of tattoo-associated NTM skin infections in four states. The use of ink contaminated before distribution or just before tattooing likely led to infections in each of the reported clusters. In the New York cluster, NTM isolates from clinical specimens, and unopened containers of company A prediluted gray ink were indistinguishable. In Washington cluster 2 and the Iowa cluster, intrinsic contamination of company C gray ink was indicated by indistinguishable *M. chelonae* clinical

isolates from infected tattoo lesions, with no other common exposure except the brand of ink used for tattooing. NTM isolates matching cases were not cultured from any other brand of ink; however, whether the ink samples tested were from the same batches of inks used in the cases could not be determined.

The frequency of NTM skin and soft tissue infections occurring subsequent to tattooing is not known, but these events have been reported previously, and dilution of inks with nonsterile water during tattooing was implicated (3–6). Tattoo-associated NTM infections can range from mild inflammation (e.g., rash, papules, or nodules) to severe abscesses requiring extensive and multiple surgical debridements. NTM infections are difficult to treat and can require a minimum of 4 months of treatment with a combination of two or more antibiotics. Physicians who encounter persistent papular rashes or nodules localized to newly tattooed areas should consider the possibility of an NTM infection.

Contamination of tattoo inks can occur during the manufacturing process and might persist if steps are not taken to eliminate harmful microbial contaminants in the finished product. A cross-sectional laboratory survey in 2010 of 58 unopened ink bottles from different manufacturers identified intrinsic contamination with a variety of organisms in 10% of these inks (7), but did not test for the presence of NTMs.

Many NTM species (e.g., *M. abscessus* and *M. chelonae*) are found in water, so the addition of nonsterile water to ink during its manufacture or at its point of use could lead to contamination with NTM (3–5), and potentially result in infections. In addition, a common misconception is that distilled and reverse osmosis water are sterile (8), leading to the mistaken assumption that these products are acceptable for diluting tattoo inks. Dilution of inks with nonsterile water or other ingredients at the point of use might lead to product contamination. Dilution of ink also will dilute preservatives, if present, and make them less effective.

Under the Federal Food, Drug, and Cosmetic Act, tattoo inks are considered to be cosmetics, and the pigments used in the inks are color additives requiring premarket approval (9). No specific FDA regulatory requirement explicitly provides that tattoo inks must be sterile. However, intradermal introduction of nonsterile substances, such as tattoo ink, can pose a health risk and is a public health concern.

The practice of tattooing may be regulated by local jurisdictions (9). Such regulations generally have required blood-borne pathogens training and the use of hygienic practice during tattooing. A few local jurisdictions, such as Los Angeles County (10), have issued requirements that sterile water be used in tattoo ink dilution.

The findings in this report are subject to at least the following limitation. Because on-site investigations took place months after cases were reported, potentially contaminated batches and ingredients, such as distilled water and pigments, were not available for testing. Similarly, water sources used for the manufacture of inks or for ink dilution when patients were tattooed were not available.

Because tattoo inks are injected intradermally, CDC recommends that ink manufacturers be held to higher product safety standards, which should include production of sterile inks. In addition, tattoo artists should 1) avoid using products not intended for use in tattooing; 2) avoid ink dilution before tattooing, and if dilution is needed, use only sterile water; 3) avoid use of nonsterile water to rinse equipment (e.g., needles) during tattoo placement; and 4) follow aseptic techniques during tattooing (e.g., hand hygiene and use of disposable gloves). To reduce their risk for infection, consumers should 1) use tattoo parlors registered by local jurisdictions; 2) request inks that are manufactured specifically for tattoos; 3) ensure that tattoo artists follow appropriate hygienic practices; 4) be aware of the potential for infection following tattooing, and seek medical advice if persistent skin problems occur; and 5) notify the tattoo artist and FDA's MedWatch program\* if they experience an adverse event.

## References

1. Braverman S. One in five U.S. adults now has a tattoo: yet over two in five without a tattoo say adults with tattoos are less attractive. New York, NY: Harris Interactive; 2012. Available at [http://www.harrisinteractive.com/vault/harris%20poll%2022%20-tattoos\\_2.23.12.pdf](http://www.harrisinteractive.com/vault/harris%20poll%2022%20-tattoos_2.23.12.pdf). Accessed February 23, 2012.
2. Drage LA, Ecker PM, Orenstein R, Phillips PK, Edson RS. An outbreak of *Mycobacterium chelonae* infections in tattoos. *J Am Acad Dermatol* 2010;62:501–6.

3. Kluger N, Muller C, Gral N. Atypical mycobacteria infection following tattooing: review of an outbreak in 8 patients in a French tattoo parlor. *Arch Dermatol* 2008;144:941–2.
4. Lollis BD, Kent RS. Cluster of nontuberculous mycobacteria skin infections from tattoos. US Air Force School of Aerospace Medicine: San Antonio, Texas; 2010. Available at [http://airforcemedicine.afms.mil/idc/groups/public/documents/afms/ctb\\_139146.pdf](http://airforcemedicine.afms.mil/idc/groups/public/documents/afms/ctb_139146.pdf). Accessed August 16, 2012.
5. Binić, I, Janković A, Ljubenović M, Gligorijević J, Jančić S, Janković D. *Mycobacterium chelonae* infection due to black tattoo ink dilution. *Am J Clin Dermatol* 2011;12:404–6.
6. Rodriguez-Blanco I, Fernández LC, Suárez-Peñaranda JM, Pérez del Molino ML, Esteban J, Almagro M. *Mycobacterium chelonae* infection associated with tattoos. *Acta Derm Venereol* 2011;91:61–2.
7. Høgsberg T, Saunte DM, Frimodt-Møller N, Serup J. Microbial status and product labelling of 58 original tattoo inks. *J Eur Acad Dermatol Venereol* 2011;doi:10.1111/j.1468-3083.2011.04359.x.
8. Wallace RJ Jr, Brown BA, Griffith DE. Nosocomial outbreaks/pseudo-outbreaks caused by nontuberculous mycobacteria. *Annu Rev Microbiol* 1998;52:453–90.
9. Food and Drug Administration. Tattoos & permanent makeup. Silver Spring, MD: US Department of Health and Human Services, Food and Drug Administration; 2010. Available at <http://www.fda.gov/cosmetics/productandingredientsafety/productinformation/ucm108530.htm>. Accessed August 7, 2012.
10. County of Los Angeles. Los Angeles County Code: department regulations—body art. Baldwin Park, CA: County of Los Angeles, Department of Public Health; 1999. Available at <http://admin.publichealth.lacounty.gov/eh/docs/balacregulations.pdf>. Accessed August 17, 2012.

\* Additional information available at <http://www.fda.gov/safety/medwatch/howtoreport/default.htm>.

What is already known on this topic?

Outbreaks of tattoo-associated nontuberculous mycobacterial (NTM) skin infections are reported infrequently. Dilution of tattoo inks with nonsterile water during tattooing has been implicated as a potential source of infection.

What is added by this report?

Investigations of 22 cases of tattoo-associated NTM skin infections in four states that occurred during 2011–2012 found contamination of ink with NTM before use. NTM contamination can occur during the manufacturing process as a result of using contaminated ingredients or as a result of dilution with nonsterile water by the tattoo artist before use.

What are the implications for public health practice?

This report highlights the risk for tattoo-associated NTM skin infections resulting from use of contaminated inks or nonsterile water for ink dilution. To prevent infection, CDC recommends that only sterile ink products and sterile water should be used and appropriate hygienic practices should be followed when tattooing.

**TABLE. Characteristics of nontuberculous mycobacteria (NTM) tattoo-associated skin infection clusters — multiple states, 2011–2012**

State	No. of cases			<i>Mycobacterium</i> species identified	Tattoo ink supplier and type		Note
	Confirmed	Probable	Possible		Company	Ink	
New York	14	4	1	<i>M. chelonae</i>	A	Prediluted gray	Clinical and company A ink isolates indistinguishable

Washington 3	0	24	<i>M. abscessus</i>	B	Black	No NTM isolated from company B ink
Washington 2	0	2	<i>M. chelonae</i>	C	Gray	Clinical and company C ink isolates unrelated
Iowa 2	0	0	<i>M. chelonae</i>	C	Black	Available clinical isolates from Iowa cluster and Washington cluster 2 were indistinguishable
Colorado 1	0	0	<i>M. chelonae</i>	D	Black	Clinical isolate was unrelated to New York or Washington isolates, no NTM isolated from ink

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Page last reviewed: August 24, 2012

Page last updated: August 24, 2012

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## Appendix B

BILL REQ. #: H-2883.2

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 HOUSE BILL 2162
 

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State of Washington

63rd Legislature

2014 Regular Session

By Representatives Ryu, Kirby, and Moscoso

Prefiled 01/07/14. Read first time 01/13/14. Referred to Committee on Business &amp; Financial Services.

AN ACT Relating to body art, body piercing, tattooing, and permanent cosmetics; amending RCW 18.300.010, 18.300.020, 18.300.030, 18.300.050, 18.300.060, 18.300.070, 18.300.090, 18.300.130, 18.300.080, and 28C.10.030; and adding new sections to chapter 18.300 RCW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

**Sec. 1** RCW 18.300.010 and 2009 c 412 s 2 are each amended to read as follows:

The definitions in this section apply throughout this chapter and RCW 5.40.050 and 70.54.340 unless the context clearly requires otherwise.

(1) "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.

(2) "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 United States food and drug administration 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 ~~((chapter 412, Laws of 2009))~~ this chapter 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.

(3) "Director" means the director of the department of licensing or his or her designee.

(4) "Individual license" means a body art, body piercing, ~~((or))~~ tattoo, or permanent cosmetics practitioner license issued under this chapter.

(5) "Internship training program" means a training program provided by an individual licensed in good standing under this chapter who has seven consecutive years of documented experience in the profession of body art, body piercing, tattooing, or permanent cosmetics.

~~((6))~~ (6) "Location license" means a license issued under this chapter for a shop or business.

~~((6))~~ (7) "Permanent cosmetics" means a cosmetic technique that includes tattoos as a means of producing designs that resemble makeup, such as eyelining and other permanent enhancing colors to the skin of the face, lips, eyelids, and eyebrows. It is also used to restore or enhance the skin of the body after surgery.

(8) "Shop or business" means a body art, body piercing, ~~((or))~~ tattooing, or permanent cosmetics shop or business.

~~((7))~~ (9) "Tattoo artist" means a person who pierces or punctures the human skin with a needle or other instrument for the purpose of implanting an indelible mark, or pigment, into the skin for a fee.

~~((8))~~ (10) "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.

**Sec. 2** RCW 18.300.020 and 2009 c 412 s 3 are each amended to read as follows:

In addition to any other duties imposed by law, including RCW 18.235.030 and 18.235.040, the director has the following powers and duties:

- (1) To set all license, examination, and renewal fees in accordance with RCW 43.24.086;
- (2) To adopt rules necessary to implement this chapter;
- (3) To prepare and administer or approve the preparation and administration of licensing;
- (4) To establish minimum safety and sanitation standards for practitioners of body art, body piercing, or tattooing as determined by the department of health;
- (5) To maintain the official department record of applicants and licensees;
- (6) To set license expiration dates and renewal periods for all licenses consistent with this chapter;
- (7) To ensure that all informational notices produced and mailed by the department regarding statutory and regulatory changes affecting any particular class of licensees are mailed to each licensee in good standing in the affected class whose mailing address on record with the department has not resulted in mail being returned as undeliverable for any reason; ~~((and))~~
- (8) To make information available to the department of revenue to assist in collecting taxes from persons and businesses required to be licensed under this chapter; and
- (9) To establish advisory committees and ad hoc advisory committees to advise the director on testing procedures, professional standards, disciplinary activities, or any other matters deemed necessary. Advisory committee or ad hoc advisory committee members must include representatives of the professional tattoo industry, permanent cosmetics industry, and body piercing industry. Advisory committee or ad hoc advisory committee members may receive reimbursement for travel expenses while engaged in official business as provided by RCW 43.03.050 and 43.03.060.

**Sec. 3** RCW 18.300.030 and 2009 c 412 s 4 are each amended to read as follows:

- (1) It is unlawful for any person to engage in a practice listed in subsection (2) of this section unless the person has a license in good standing as required by this chapter. A license issued under this chapter is considered to be "in good standing" except when:
  - (a) The license has expired ~~((or has been canceled))~~ and has not been renewed in accordance with RCW 18.300.050;
  - (b) The license has been denied, revoked, or suspended under RCW 18.300.110 or 18.300.130, and has not been reinstated; or
  - (c) The license is held by a person who has not fully complied with an order of the director issued under RCW 18.300.110 requiring the licensee to pay restitution or a fine, or to acquire additional training.
- (2) The director may take action under RCW 18.235.150 and 18.235.160 against any person who does any of the following without first obtaining, and maintaining in good standing, the license required by this chapter:
  - (a) Engages in the practice of body art, body piercing, ~~((or))~~ tattooing, or permanent cosmetics; or
  - (b) Operates a shop or business.

**Sec. 4** RCW 18.300.050 and 2009 c 412 s 6 are each amended to read as follows:

- (1) The director shall issue the appropriate license to any applicant who meets the requirements as outlined in this chapter. The director has the authority to set appropriate licensing fees for body art, body piercing, ~~((and))~~ tattooing, and permanent cosmetics shops and businesses and body art, body piercing, ~~((and))~~ tattooing, and permanent cosmetics individual practitioners. Licensing fees for individual practitioners must be set in an amount less than licensing fees for shops and businesses.

(2) Failure to renew a license by its expiration date subjects the holder to a penalty fee and payment of each year's renewal fee, at the current rate.

~~(3) ((A person whose license has not been renewed within one year after its expiration date must have his or her license canceled and must be required to submit an application, pay the license fee, meet current licensing requirements, and pass any applicable examination or examinations, in addition to the other requirements of this chapter, before the license may be reinstated.~~

~~(4)) An applicant for an individual license must meet the following requirements:~~

~~(a) Be at least eighteen years of age;~~

~~(b) Provide proof of:~~

~~(i) Completion of an internship training program. The internship training program must consist of training in the profession of body art, body piercing, tattooing, or permanent cosmetics that is completed in accordance with rules adopted by the director; or~~

~~(ii) One year documented experience, providing body art, body piercing, tattooing services, or permanent cosmetics in another state, territory, or possession of the United States, or foreign country within the last three years;~~

~~(c) Hold a current certification of blood-borne pathogen training; and~~

~~(d) Pay the appropriate license fee.~~

~~(4) The director may issue a guest artist license to a nonresident of Washington state who intends to engage in the practice of body art, body piercing, tattooing, or permanent cosmetics in this state. Guest artists must meet the requirements of subsection (3) of this section or provide proof of licensure in any state, territory, or possession of the United States, or foreign country. A license in any jurisdiction other than this state must be current and in good standing. Guest artists must practice in accordance with rules adopted by the director and are subject to this chapter. Guest artist licenses may be issued for a period of up to thirty days. The director may adopt rules relating to renewal or reissuance of guest artist licenses.~~

~~(5) Nothing in this section authorizes a person whose license has expired to engage in a practice prohibited under RCW 18.300.030 until the license is renewed or reinstated.~~

~~((5)) (6) Upon request and payment of an additional fee to be established by rule by the director, the director shall issue a duplicate license to an applicant.~~

**Sec. 5** RCW 18.300.060 and 2009 c 412 s 7 are each amended to read as follows:

(1) Subject to subsection (2) of this section, licenses issued under this chapter expire as follows:

(a) A body art, body piercing, ~~((or))~~ tattooing, or permanent cosmetics shop or business location license expires one year from issuance or when the insurance required by RCW 18.300.070(1)(g) expires, whichever occurs first; and

(b) Body art, body piercing, ~~((or))~~ tattooing, or permanent cosmetics practitioner individual licenses expire one year from issuance.

(2) The director may provide for expiration dates other than those set forth in subsection (1) of this section for the purpose of establishing staggered renewal periods.

**Sec. 6** RCW 18.300.070 and 2009 c 412 s 8 are each amended to read as follows:

(1) A body art, body piercing, ~~((or))~~ tattooing, or permanent cosmetics shop or business shall meet the following minimum requirements:

(a) Maintain an outside entrance separate from any rooms used for sleeping or residential purposes;

(b) Provide and maintain for the use of its customers adequate toilet facilities located within or adjacent to the shop or business;

(c) Any room used wholly or in part as a shop or business may not be used for residential purposes, except that toilet facilities may be used for both residential and business purposes;

(d) Meet the zoning requirements of the county, city, or town, as appropriate;

(e) Provide for safe storage and labeling of equipment and substances used in the practices under this chapter;

(f) Meet all applicable local and state fire codes; and

(g) Certify that the shop or business is covered by a public liability insurance policy in an amount not less than one hundred thousand dollars for combined bodily injury and property damage liability.

(2) The director may by rule determine other requirements that are necessary for safety and sanitation of shops or businesses. The director may consult with the state board of health and the department of labor and industries in establishing minimum shop and business safety requirements.

(3) Upon receipt of a written complaint that a shop or business has violated any provisions of this chapter, chapter 18.235 RCW, or the rules adopted under either chapter, or at least once every two years for an existing shop or business, the director or the director's designee shall inspect each shop or business. If the director determines that any shop or business is not in compliance with this chapter, the director shall send written notice to the shop or business. A shop or business which fails to correct the conditions to the satisfaction of the director within a reasonable time is, upon due notice, subject to the penalties imposed by the director under RCW 18.235.110. The director may enter any shop or business during business hours for the purpose of inspection. The director may contract with health authorities of local governments to conduct the inspections under this subsection.

(4) A shop or business shall obtain a certificate of registration from the department of revenue.

(5) Shop or business location licenses issued by the ~~((department))~~ director must be posted in the shop or business's reception area.

(6) Body art, body piercing, ~~((and))~~ tattooing, and permanent cosmetics practitioner individual licenses issued by the department must be posted at the licensed person's work station.

**Sec. 7** RCW 18.300.090 and 2009 c 412 s 10 are each amended to read as follows:

It is a violation of this chapter for any person to engage in the commercial practice of body art, body piercing, ~~((or))~~ tattooing, or permanent cosmetics except in a licensed shop or business with the appropriate individual body art, body piercing, ~~((or))~~ tattooing, or permanent cosmetics license.

**Sec. 8** RCW 18.300.130 and 2009 c 412 s 14 are each amended to read as follows:

The ~~((department))~~ director shall immediately suspend the license of a person who has been certified under RCW ~~((74.20A.320))~~ 74.20A.324 by the department of social and health services as a person who is not in compliance with a support order. If the person has continued to meet all other requirements for reinstatement during the suspension, reissuance of the license is automatic upon the ~~((department's))~~ director's receipt of a release issued by the department of social and health services stating that the licensee is in compliance with the order.

**NEW SECTION. Sec. 9** A new section is added to chapter 18.300 RCW to read as follows:

(1) An initial examination for licensure under this chapter shall be conducted at such times and places as the director determines appropriate. Examinations must consist of tests designed to reasonably measure the applicant's knowledge of safe and sanitary practices. Examinations may also include the applicant's knowledge of this chapter and rules adopted pursuant to this chapter.

(2) The director shall establish the minimum passing score for all examinations and requirements. The director may allow an independent person to conduct the examinations at the expense of the applicants.

(3) The director must take steps to ensure that after completion of the required course or internship training program, applicants may promptly take the examination and receive the results of the examination.

**Sec. 10** RCW 18.300.080 and 2009 c 412 s 9 are each amended to read as follows:

(1) The director shall prepare and provide to all licensed shops or businesses a notice to consumers. At a minimum, the notice must state that body art, body piercing, ~~((and))~~ tattooing, and permanent cosmetics shops or businesses are required to be licensed, that shops or businesses are required to maintain minimum safety and sanitation standards, that customer complaints regarding shops or businesses may be reported to the ~~((department))~~ director, and a telephone number and address where

complaints may be made.

(2) An approved internship training program shop must post a notice to consumers in the reception area of the shop stating that services may be provided by an intern. At a minimum, the notice must state: "This shop is a participant in a state-approved internship training program. Interns in this program are in training and have not yet received a license."

NEW SECTION. Sec. 11 A new section is added to chapter 18.300 RCW to read as follows:

The director shall suspend the license of any person who has been certified by a lending agency and reported to the director for nonpayment or default on a federally or state-guaranteed educational loan or service-conditional scholarship. Prior to the suspension, the director must provide the person an opportunity for a brief adjudicative proceeding under RCW 34.05.485 through 34.05.494 and issue a finding of nonpayment or default on a federally or state-guaranteed educational loan or service-conditional scholarship. The person's license may not be reissued until the person provides the director a written release issued by the lending agency stating that the person is making payments on the loan in accordance with a repayment agreement approved by the lending agency. If the person has continued to meet all other requirements for licensure during the suspension, reinstatement is automatic upon receipt of the notice and payment of any reinstatement fee the director may impose.

**Sec. 12** RCW 28C.10.030 and 2012 c 229 s 576 are each amended to read as follows:

This chapter does not apply to:

- (1) Bona fide trade, business, professional, or fraternal organizations sponsoring educational programs primarily for that organization's membership or offered by that organization on a no-fee basis;
- (2) Entities offering education that is exclusively avocational or recreational;
- (3) Education not requiring payment of money or other consideration if this education is not advertised or promoted as leading toward educational credentials;
- (4) Entities that are established, operated, and governed by this state or its political subdivisions under this title or Title 28A((;)) or 28B((; or 28C)) RCW;
- (5) Degree-granting programs in compliance with the rules of the student achievement council;
- (6) Any other entity to the extent that it has been exempted from some or all of the provisions of this chapter under RCW 28C.10.100;
- (7) Entities not otherwise exempt that are of a religious character, but only as to those educational programs exclusively devoted to religious or theological objectives and represented accurately in institutional catalogs or other official publications;
- (8) Entities offering only courses certified by the federal aviation administration;
- (9) Barber and cosmetology schools licensed under chapter 18.16 RCW;
- (10) Internship training programs approved by the director of the department of licensing for professions licensed under chapter 18.300 RCW;
- (11) Entities which only offer courses approved to meet the continuing education requirements for licensure under chapter 18.04, 18.79, or 48.17 RCW; and
- ~~((11))~~ (12) Entities not otherwise exempt offering only workshops or seminars lasting no longer than three calendar days.

--- END ---

# Appendix C

CERTIFICATION OF ENROLLMENT

**SUBSTITUTE SENATE BILL 5391**

Chapter 412, Laws of 2009

61st Legislature  
2009 Regular Session

BODY ART, BODY PIERCING, TATTOOING--REGULATION

EFFECTIVE DATE: 07/26/09 - Except sections 1 through 21, which become effective 07/01/10.

Passed by the Senate April 22, 2009  
YEAS 45 NAYS 2

BRAD OWEN

**President of the Senate**

Passed by the House April 13, 2009  
YEAS 95 NAYS 2

FRANK CHOPP

**Speaker of the House of Representatives**

Approved May 7, 2009, 3:08 p.m.

CHRISTINE GREGOIRE

**Governor of the State of Washington**

CERTIFICATE

I, Thomas Hoemann, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SUBSTITUTE SENATE BILL 5391** as passed by the Senate and the House of Representatives on the dates hereon set forth.

THOMAS HOEMANN

**Secretary**

FILED

May 8, 2009

**Secretary of State  
State of Washington**

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SUBSTITUTE SENATE BILL 5391

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AS AMENDED BY THE HOUSE

Passed Legislature - 2009 Regular Session.

**State of Washington**                      **61st Legislature**                      **2009 Regular Session**

**By** Senate Health & Long-Term Care (originally sponsored by Senators Kastama, Haugen, Fairley, Roach, and Pflug)

READ FIRST TIME 02/24/09.

1            AN ACT Relating to regulating body art, body piercing, and  
2 tattooing practitioners, shops, and businesses; amending RCW 70.54.340,  
3 5.40.050, 43.24.150, and 18.235.020; adding a new chapter to Title 18  
4 RCW; creating a new section; prescribing penalties; and providing an  
5 effective date.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

7            NEW SECTION.    **Sec. 1.** The legislature finds and declares that the  
8 practices of body piercing, tattooing, and other forms of body art  
9 involve an invasive procedure with the use of needles, sharps,  
10 instruments, and jewelry. These practices may be dangerous when  
11 improper sterilization techniques are used, presenting a risk of  
12 infecting the client with bloodborne pathogens including, but not  
13 limited to, HIV, hepatitis B, and hepatitis C. It is in the interests  
14 of the public health, safety, and welfare to establish requirements in  
15 the commercial practice of these activities in this state.

16            NEW SECTION.    **Sec. 2.** The definitions in this section apply  
17 throughout this chapter and RCW 5.40.050 and 70.54.340 unless the  
18 context clearly requires otherwise.

1 (1) "Body art" means the practice of invasive cosmetic adornment  
2 including the use of branding and scarification. "Body art" also  
3 includes the intentional production of scars upon the body. "Body art"  
4 does not include any health-related procedures performed by licensed  
5 health care practitioners under their scope of practice.

6 (2) "Body piercing" means the process of penetrating the skin or  
7 mucous membrane to insert an object, including jewelry, for cosmetic  
8 purposes. "Body piercing" also includes any scar tissue resulting from  
9 or relating to the piercing. "Body piercing" does not include the use  
10 of stud and clasp piercing systems to pierce the earlobe in accordance  
11 with the manufacturer's directions and applicable United States food  
12 and drug administration requirements. "Body piercing" does not include  
13 any health-related procedures performed by licensed health care  
14 practitioners under their scope of practice, nor does anything in this  
15 act authorize a person registered to engage in the business of body  
16 piercing to implant or embed foreign objects into the human body or  
17 otherwise engage in the practice of medicine.

18 (3) "Director" means the director of the department of licensing.

19 (4) "Individual license" means a body art, body piercing, or tattoo  
20 practitioner license issued under this chapter.

21 (5) "Location license" means a license issued under this chapter  
22 for a shop or business.

23 (6) "Shop or business" means a body art, body piercing, or  
24 tattooing shop or business.

25 (7) "Tattoo artist" means a person who pierces or punctures the  
26 human skin with a needle or other instrument for the purpose of  
27 implanting an indelible mark, or pigment, into the skin for a fee.

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

31 NEW SECTION. **Sec. 3.** In addition to any other duties imposed by  
32 law, including RCW 18.235.030 and 18.235.040, the director has the  
33 following powers and duties:

34 (1) To set all license, examination, and renewal fees in accordance  
35 with RCW 43.24.086;

36 (2) To adopt rules necessary to implement this chapter;

1 (3) To prepare and administer or approve the preparation and  
2 administration of licensing;

3 (4) To establish minimum safety and sanitation standards for  
4 practitioners of body art, body piercing, or tattooing as determined by  
5 the department of health;

6 (5) To maintain the official department record of applicants and  
7 licensees;

8 (6) To set license expiration dates and renewal periods for all  
9 licenses consistent with this chapter;

10 (7) To ensure that all informational notices produced and mailed by  
11 the department regarding statutory and regulatory changes affecting any  
12 particular class of licensees are mailed to each licensee in good  
13 standing in the affected class whose mailing address on record with the  
14 department has not resulted in mail being returned as undeliverable for  
15 any reason; and

16 (8) To make information available to the department of revenue to  
17 assist in collecting taxes from persons and businesses required to be  
18 licensed under this chapter.

19 NEW SECTION. **Sec. 4.** (1) It is unlawful for any person to engage  
20 in a practice listed in subsection (2) of this section unless the  
21 person has a license in good standing as required by this chapter. A  
22 license issued under this chapter is considered to be "in good  
23 standing" except when:

24 (a) The license has expired or has been canceled and has not been  
25 renewed in accordance with section 6 of this act;

26 (b) The license has been denied, revoked, or suspended under  
27 section 12 or 14 of this act, and has not been reinstated; or

28 (c) The license is held by a person who has not fully complied with  
29 an order of the director issued under section 12 of this act requiring  
30 the licensee to pay restitution or a fine, or to acquire additional  
31 training.

32 (2) The director may take action under RCW 18.235.150 and  
33 18.235.160 against any person who does any of the following without  
34 first obtaining, and maintaining in good standing, the license required  
35 by this chapter:

36 (a) Engages in the practice of body art, body piercing, or  
37 tattooing; or

1 (b) Operates a shop or business.

2 NEW SECTION. **Sec. 5.** Upon completion of an application approved  
3 by the department and payment of the proper fee, the director shall  
4 issue the appropriate location license to any person who completes an  
5 application approved by the department, provides certification of  
6 insurance, and provides payment of the proper fee.

7 NEW SECTION. **Sec. 6.** (1) The director shall issue the appropriate  
8 license to any applicant who meets the requirements as outlined in this  
9 chapter. The director has the authority to set appropriate licensing  
10 fees for body art, body piercing, and tattooing shops and businesses  
11 and body art, body piercing, and tattooing individual practitioners.  
12 Licensing fees for individual practitioners must be set in an amount  
13 less than licensing fees for shops and businesses.

14 (2) Failure to renew a license by its expiration date subjects the  
15 holder to a penalty fee and payment of each year's renewal fee, at the  
16 current rate.

17 (3) A person whose license has not been renewed within one year  
18 after its expiration date must have his or her license canceled and  
19 must be required to submit an application, pay the license fee, meet  
20 current licensing requirements, and pass any applicable examination or  
21 examinations, in addition to the other requirements of this chapter,  
22 before the license may be reinstated.

23 (4) Nothing in this section authorizes a person whose license has  
24 expired to engage in a practice prohibited under section 4 of this act  
25 until the license is renewed or reinstated.

26 (5) Upon request and payment of an additional fee to be established  
27 by rule by the director, the director shall issue a duplicate license  
28 to an applicant.

29 NEW SECTION. **Sec. 7.** (1) Subject to subsection (2) of this  
30 section, licenses issued under this chapter expire as follows:

31 (a) A body art, body piercing, or tattooing shop or business  
32 location license expires one year from issuance or when the insurance  
33 required by section 8(1)(g) of this act expires, whichever occurs  
34 first; and

1 (b) Body art, body piercing, or tattooing practitioner individual  
2 licenses expire one year from issuance.

3 (2) The director may provide for expiration dates other than those  
4 set forth in subsection (1) of this section for the purpose of  
5 establishing staggered renewal periods.

6 NEW SECTION. **Sec. 8.** (1) A body art, body piercing, or tattooing  
7 shop or business shall meet the following minimum requirements:

8 (a) Maintain an outside entrance separate from any rooms used for  
9 sleeping or residential purposes;

10 (b) Provide and maintain for the use of its customers adequate  
11 toilet facilities located within or adjacent to the shop or business;

12 (c) Any room used wholly or in part as a shop or business may not  
13 be used for residential purposes, except that toilet facilities may be  
14 used for both residential and business purposes;

15 (d) Meet the zoning requirements of the county, city, or town, as  
16 appropriate;

17 (e) Provide for safe storage and labeling of equipment and  
18 substances used in the practices under this chapter;

19 (f) Meet all applicable local and state fire codes; and

20 (g) Certify that the shop or business is covered by a public  
21 liability insurance policy in an amount not less than one hundred  
22 thousand dollars for combined bodily injury and property damage  
23 liability.

24 (2) The director may by rule determine other requirements that are  
25 necessary for safety and sanitation of shops or businesses. The  
26 director may consult with the state board of health and the department  
27 of labor and industries in establishing minimum shop and business  
28 safety requirements.

29 (3) Upon receipt of a written complaint that a shop or business has  
30 violated any provisions of this chapter, chapter 18.235 RCW, or the  
31 rules adopted under either chapter, or at least once every two years  
32 for an existing shop or business, the director or the director's  
33 designee shall inspect each shop or business. If the director  
34 determines that any shop or business is not in compliance with this  
35 chapter, the director shall send written notice to the shop or  
36 business. A shop or business which fails to correct the conditions to  
37 the satisfaction of the director within a reasonable time is, upon due

1 notice, subject to the penalties imposed by the director under RCW  
2 18.235.110. The director may enter any shop or business during  
3 business hours for the purpose of inspection. The director may  
4 contract with health authorities of local governments to conduct the  
5 inspections under this subsection.

6 (4) A shop or business shall obtain a certificate of registration  
7 from the department of revenue.

8 (5) Shop or business location licenses issued by the department  
9 must be posted in the shop or business's reception area.

10 (6) Body art, body piercing, and tattooing practitioner individual  
11 licenses issued by the department must be posted at the licensed  
12 person's work station.

13 NEW SECTION. **Sec. 9.** The director shall prepare and provide to  
14 all licensed shops or businesses a notice to consumers. At a minimum,  
15 the notice must state that body art, body piercing, and tattooing shops  
16 or businesses are required to be licensed, that shops or businesses are  
17 required to maintain minimum safety and sanitation standards, that  
18 customer complaints regarding shops or businesses may be reported to  
19 the department, and a telephone number and address where complaints may  
20 be made.

21 NEW SECTION. **Sec. 10.** It is a violation of this chapter for any  
22 person to engage in the commercial practice of body art, body piercing,  
23 or tattooing except in a licensed shop or business with the appropriate  
24 individual body art, body piercing, or tattooing license.

25 NEW SECTION. **Sec. 11.** In addition to the unprofessional conduct  
26 described in RCW 18.235.130, the director may take disciplinary action  
27 against any applicant or licensee under this chapter if the licensee or  
28 applicant:

29 (1) Has been found to have violated any provisions of chapter 19.86  
30 RCW;

31 (2) Has engaged in a practice prohibited under section 4 of this  
32 act without first obtaining, and maintaining in good standing, the  
33 license required by this chapter;

34 (3) Has failed to display licenses required in this chapter; or

1 (4) Has violated any provision of this chapter or any rule adopted  
2 under it.

3 NEW SECTION. **Sec. 12.** If, following a hearing, the director finds  
4 that any person or an applicant or licensee has violated any provision  
5 of this chapter or any rule adopted under it, the director may impose  
6 one or more of the following penalties:

7 (1) Denial of a license or renewal;

8 (2) Revocation or suspension of a license;

9 (3) A fine of not more than five hundred dollars per violation;

10 (4) Issuance of a reprimand or letter of censure;

11 (5) Placement of the licensee on probation for a fixed period of  
12 time;

13 (6) Restriction of the licensee's authorized scope of practice;

14 (7) Requiring the licensee to make restitution or a refund as  
15 determined by the director to any individual injured by the violation;  
16 or

17 (8) Requiring the licensee to obtain additional training or  
18 instruction.

19 NEW SECTION. **Sec. 13.** Any person aggrieved by the refusal of the  
20 director to issue any license provided for in this chapter, or to renew  
21 the same, or by the revocation or suspension of any license issued  
22 under this chapter or by the application of any penalty under section  
23 12 of this act has the right to appeal the decision of the director to  
24 the superior court of the county in which the person maintains his or  
25 her place of business. The appeal must be filed within thirty days of  
26 the director's decision.

27 NEW SECTION. **Sec. 14.** The department shall immediately suspend  
28 the license of a person who has been certified under RCW 74.20A.320 by  
29 the department of social and health services as a person who is not in  
30 compliance with a support order. If the person has continued to meet  
31 all other requirements for reinstatement during the suspension,  
32 reissuance of the license is automatic upon the department's receipt of  
33 a release issued by the department of social and health services  
34 stating that the licensee is in compliance with the order.

1        NEW SECTION.    **Sec. 15.** The legislature finds that the practices  
2 covered by this chapter are matters vitally affecting the public  
3 interest for the purpose of applying the consumer protection act,  
4 chapter 19.86 RCW. A violation of this chapter is not reasonable in  
5 relation to the development and preservation of business and is an  
6 unfair or deceptive act in trade or commerce and an unfair method of  
7 competition for the purpose of applying the consumer protection act,  
8 chapter 19.86 RCW.

9        NEW SECTION.    **Sec. 16.** The uniform regulation of business and  
10 professions act, chapter 18.235 RCW, governs unlicensed practice, the  
11 issuance and denial of licenses, and the discipline of licensees under  
12 this chapter.

13        NEW SECTION.    **Sec. 17.** This act shall be known and may be cited as  
14 the "Washington body art, body piercing, and tattooing act."

15        NEW SECTION.    **Sec. 18.** If any provision of this act or its  
16 application to any person or circumstance is held invalid, the  
17 remainder of the act or the application of the provision to other  
18 persons or circumstances is not affected.

19        **Sec. 19.** RCW 70.54.340 and 2001 c 194 s 3 are each amended to read  
20 as follows:

21        The secretary of health shall adopt by rule requirements, in  
22 accordance with nationally recognized professional standards, for  
23 precautions against the spread of disease, including the sterilization  
24 of needles and other instruments, including sharps and jewelry,  
25 employed by electrologists, persons engaged in the practice of body  
26 art, body piercing, and tattoo artists (~~in accordance with nationally~~  
27 ~~recognized professional standards~~). The secretary shall consider the  
28 (~~universal~~) standard precautions for infection control, as  
29 recommended by the United States centers for disease control, and  
30 guidelines for infection control, as recommended by (~~the national~~  
31 ~~environmental health association and the alliance of professional~~  
32 ~~tattooists,~~) national industry standards in the adoption of these  
33 sterilization requirements.

1           **Sec. 20.** RCW 5.40.050 and 2001 c 194 s 5 are each amended to read  
2 as follows:

3           A breach of a duty imposed by statute, ordinance, or administrative  
4 rule shall not be considered negligence per se, but may be considered  
5 by the trier of fact as evidence of negligence; however, any breach of  
6 duty as provided by statute, ordinance, or administrative rule relating  
7 to: (1) Electrical fire safety, (2) the use of smoke alarms, (3)  
8 sterilization of needles and instruments used by persons engaged in the  
9 practice of body art, body piercing, tattooing, or electrology, or  
10 other precaution against the spread of disease, as required under RCW  
11 70.54.350, or (4) driving while under the influence of intoxicating  
12 liquor or any drug, shall be considered negligence per se.

13           **Sec. 21.** RCW 43.24.150 and 2008 c 119 s 22 are each amended to  
14 read as follows:

15           (1) The business and professions account is created in the state  
16 treasury. All receipts from business or professional licenses,  
17 registrations, certifications, renewals, examinations, or civil  
18 penalties assessed and collected by the department from the following  
19 chapters must be deposited into the account:

- 20           (a) Chapter 18.11 RCW, auctioneers;  
21           (b) Chapter 18.16 RCW, cosmetologists, barbers, and manicurists;  
22           (c) Chapter 18.96 RCW, landscape architects;  
23           (d) Chapter 18.145 RCW, court reporters;  
24           (e) Chapter 18.165 RCW, private investigators;  
25           (f) Chapter 18.170 RCW, security guards;  
26           (g) Chapter 18.185 RCW, bail bond agents;  
27           (h) Chapter 18.280 RCW, home inspectors;  
28           (i) Chapter 19.16 RCW, collection agencies;  
29           (j) Chapter 19.31 RCW, employment agencies;  
30           (k) Chapter 19.105 RCW, camping resorts;  
31           (l) Chapter 19.138 RCW, sellers of travel;  
32           (m) Chapter 42.44 RCW, notaries public; ~~((and))~~  
33           (n) Chapter 64.36 RCW, timeshares; and  
34           (o) Chapter 18.-- RCW (the new chapter created in section 24 of  
35 this act).

36           Moneys in the account may be spent only after appropriation.  
37 Expenditures from the account may be used only for expenses incurred in

1 carrying out these business and professions licensing activities of the  
2 department. Any residue in the account shall be accumulated and shall  
3 not revert to the general fund at the end of the biennium.

4 (2) The director shall biennially prepare a budget request based on  
5 the anticipated costs of administering the business and professions  
6 licensing activities listed in subsection (1) of this section, which  
7 shall include the estimated income from these business and professions  
8 fees.

9 **Sec. 22.** RCW 18.235.020 and 2008 c 119 s 21 are each amended to  
10 read as follows:

11 (1) This chapter applies only to the director and the boards and  
12 commissions having jurisdiction in relation to the businesses and  
13 professions licensed under the chapters specified in this section.  
14 This chapter does not apply to any business or profession not licensed  
15 under the chapters specified in this section.

16 (2) (a) The director has authority under this chapter in relation to  
17 the following businesses and professions:

- 18 (i) Auctioneers under chapter 18.11 RCW;  
19 (ii) Bail bond agents and bail bond recovery agents under chapter  
20 18.185 RCW;  
21 (iii) Camping resorts' operators and salespersons under chapter  
22 19.105 RCW;  
23 (iv) Commercial telephone solicitors under chapter 19.158 RCW;  
24 (v) Cosmetologists, barbers, manicurists, and estheticians under  
25 chapter 18.16 RCW;  
26 (vi) Court reporters under chapter 18.145 RCW;  
27 (vii) Driver training schools and instructors under chapter 46.82  
28 RCW;  
29 (viii) Employment agencies under chapter 19.31 RCW;  
30 (ix) For hire vehicle operators under chapter 46.72 RCW;  
31 (x) Limousines under chapter 46.72A RCW;  
32 (xi) Notaries public under chapter 42.44 RCW;  
33 (xii) Private investigators under chapter 18.165 RCW;  
34 (xiii) Professional boxing, martial arts, and wrestling under  
35 chapter 67.08 RCW;  
36 (xiv) Real estate appraisers under chapter 18.140 RCW;

1 (xv) Real estate brokers and salespersons under chapters 18.85 and  
2 18.86 RCW;  
3 (xvi) Security guards under chapter 18.170 RCW;  
4 (xvii) Sellers of travel under chapter 19.138 RCW;  
5 (xviii) Timeshares and timeshare salespersons under chapter 64.36  
6 RCW;  
7 (xix) Whitewater river outfitters under chapter 79A.60 RCW; and  
8 (xx) Home inspectors under chapter 18.280 RCW; and  
9 (xxi) Body artists, body piercers, and tattoo artists, and body  
10 art, body piercing, and tattooing shops and businesses, under chapter  
11 18.-- RCW (the new chapter created in section 24 of this act).

12 (b) The boards and commissions having authority under this chapter  
13 are as follows:

14 (i) The state board of registration for architects established in  
15 chapter 18.08 RCW;

16 (ii) The cemetery board established in chapter 68.05 RCW;

17 (iii) The Washington state collection agency board established in  
18 chapter 19.16 RCW;

19 (iv) The state board of registration for professional engineers and  
20 land surveyors established in chapter 18.43 RCW governing licenses  
21 issued under chapters 18.43 and 18.210 RCW;

22 (v) The state board of funeral directors and embalmers established  
23 in chapter 18.39 RCW;

24 (vi) The state board of registration for landscape architects  
25 established in chapter 18.96 RCW; and

26 (vii) The state geologist licensing board established in chapter  
27 18.220 RCW.

28 (3) In addition to the authority to discipline license holders, the  
29 disciplinary authority may grant or deny licenses based on the  
30 conditions and criteria established in this chapter and the chapters  
31 specified in subsection (2) of this section. This chapter also governs  
32 any investigation, hearing, or proceeding relating to denial of  
33 licensure or issuance of a license conditioned on the applicant's  
34 compliance with an order entered under RCW 18.235.110 by the  
35 disciplinary authority.

36 NEW SECTION. **Sec. 23.** The director of licensing and the

1 department of health, beginning on the effective date of this section,  
2 may take such steps as are necessary to ensure that this act is  
3 implemented July 1, 2010.

4 NEW SECTION. **Sec. 24.** Sections 1 through 18 of this act  
5 constitute a new chapter in Title 18 RCW.

6 NEW SECTION. **Sec. 25.** Sections 1 through 21 of this act take  
7 effect July 1, 2010.

Passed by the Senate April 22, 2009.

Passed by the House April 13, 2009.

Approved by the Governor May 7, 2009.

Filed in Office of Secretary of State May 8, 2009.