A. TABLE OF CONTENTS

B. TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

CASES

STATUTES

REGULATIONS

RULES

C. CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS PRINCIPALLY RELIED UPON

STATUTES

AS 08.45 – Statutes specifically related to Naturopaths

AS 08.45.050
A person who practices naturopathy may not
(1) give, prescribe, or recommend in the practice
(A) a prescription drug;
(B) a controlled substance;
(C) a poison;
(2) engage in surgery;
(3) use the word "physician" in the person's title.

AS 08.45.100
The Department of Commerce, Community, and Economic Development shall adopt regulations to implement this chapter.

AS 08.45.200
In this chapter,
(1) "controlled substance" has the meaning given in AS 11.71.900 ;
(2) "department" means the Department of Commerce, Community, and Economic Development;
(3) "naturopathy" means the use of hydrotherapy, dietetics, electrotherapy, sanitation, suggestion, mechanical and manual manipulation for the stimulation of physiological and psychological action to establish a normal condition of mind and body; in this paragraph, "dietetics" includes herbal and homeopathic remedies.

AS 08.45.200(3)
(3) "naturopathy" means the use of hydrotherapy, dietetics, electrotherapy, sanitation, suggestion, mechanical and manual manipulation for the stimulation of physiological and psychological action to establish a normal condition of mind and body; in this paragraph, "dietetics" includes herbal and homeopathic remedies.

AS 11.71.900(4)
(4) "controlled substance" means a drug, substance, or immediate precursor included in the schedules set out in AS 11.71.140 - 11.71.190;

REGULATIONS

12 AAC 42.990 – Various Definitions

12 AAC 42.990(1)(B)

(1) "dietetics" includes the use of nutritional therapies, nutritional counseling, nutritional substances, vitamins, minerals, and supplements to promote health and to diagnose, treat, and prevent disease, illness, and conditions;

12 AAC 42.990(8)

(8) "prescription drug" includes a controlled substance or other medicine commonly requiring a written prescription from a physician licensed under AS 08.64; "prescription drug" does not include a device or herbal or homeopathic remedy or dietetic substance in a form that is not a controlled substance;

RULES

Alaska Rules of Appellate Procedure; Rule 202(a)

(a) An appeal may be taken to the supreme court from a final judgment entered by the superior court, in the circumstances specified in AS 22.05.010, or from a final decision entered by the Alaska Workers' Compensation Appeals Commission in the Circumstances specified in AS 23.30.129.

D. JURISDICTIONAL STATEMENT

The Supreme Court of Alaska has final appellate jurisdiction in all actions and proceedings. Constitution of Alaska, Article IV, section 2; AS 22.05.010.

An appeal may be taken from a final judgment of the superior court. Rule 202(a), Alaska Rules of Appellate Procedure. In this case, judgment was entered by the Honorable Catherine Easter, Superior Court Judge, on October 14, 2016.

E. LIST OF ALL PARTIES TO THE CASE

The appellant is the Alaska Association of Naturopathic Physicians, plaintiff in the court below. The appellee is the State of Alaska, Department of Commerce, Community & Economic Development, Division of Corporations, Business & Professional Licensing.

F. ISSUES PRESENTED FOR REVIEW

1. Whether the Superior Court (Honorable Catherine M. Easter, Judge) erred by granting the appellee Division's motion for summary judgment.

2. Whether the Superior Court erred by denying the appellant's cross-motion for summary judgment.

3. Whether the Superior Court erred in its construction of AS 08.45.050 and AS 08.45.200(3), in 1986.

4. Whether the Superior Court erred by considering so-called "legislative inaction" in the years after the enactment in 1986 of AS 08.45.050 and AS 8.45.200(3) as legislative history that weighs probatively on the intent of the Legislature in 1986.

5. Whether the Superior Court erred in holding that the Division's challenged regulations, which it adopted on January 9, 2014, at 12 AAC 42.990, are valid,

the statute and the statutory history notwithstanding.

6. Whether the Superior Court erred by awarding the Division attorney fees against the plaintiff Association.

G. STATEMENT OF THE CASE

According to Superior Court Judge Catherine Easter, former Superior Court Judge Brian Shortell, in his 1986 opinion and decision in *Pettijohn v. State of Alaska,* "largely curtailed the practice of naturopathy".[1]

But Judge Easter, in the decision from which this appeal is taken, pointed out correctly that Judge Shortell "did note that the Alaska State Legislature could enact statutes to give naturopaths a statutory carve-out to continue their practice."[2]

Almost immediately, the Legislature did just that. It enacted AS 08.45.200(3) which defines "naturopathy" as "the use of dietetics" and defines "dietetics" as including "herbal and homeopathic remedies."[3] While AS 08.45 has undergone minor changes[4] since 1986, the statute's definition of "naturopathy" has remained unchanged since 1988[5]. Thus, even today, "naturopathy" by Alaska law still comprises, among other things, "dietetics (which) includes herbal and homeopathic remedies." The appellant Association's concern in this case is not with the statute. Rather, it is with *regulations* adopted by the appellee *28 years after the statute was enacted.*[6]

The 1986 statute provided, at AS 08.45.050, that naturopaths "may not (1) give, prescribe or recommend in the practice (A) a prescription drug; (B) a controlled

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[1] Exc. 10 (case number for *Pettijohn v. State of Alaska* is 3AN-84-00160CI).
[2] Exc. 10 at page 2; see footnote 8 in the opinion and decision of Judge Shortell (Exc. 1).
[3] AS 08.45.200(3), Session Laws of Alaska 1986, Ch. 56 (Exc. 2).
[4] Changes not germane to this appeal included Ch. 87, SLA 1992, secs. 1-2; Ch. 29, SLA 1995, sec. 8; Ch. 14, SLA 2005, secs. 8-9.
[5] **See** Session Laws of Alaska 1988, Ch.155. Exc. 3. That definition provides that "naturopathy" comprises, among other things, "...dietetics [which] includes herbal and homeopathic remedies."
[6] In this Brief, the appellant will be referred to as "the Association" and the appellee will be referred to as "the Division." As noted, the statute was adopted in 1986. The regulations to which the appellant and its members object was adopted in 2014, 28 years later.

substance; [or] (C) a poison." This language too has remained unchanged since 1986. The Association does not consider the statute to be focal here. Rather, its squawk and its members' squawk is with the Division's 2014 regulatory changes which reflect a severe new policy direction – but a new policy direction not made by the Legislature.

One amendment to the 1986 statute occurred in 1992. In that year, the Legislature enacted AS 08.45.100, which empowered the Department of Commerce and Economic Development (the former Division of Occupational Licensing ["DOL"]) to adopt regulations.[7]

In 1994, regulations were adopted.[8]

Two years later, on May 27, 1996, Division of Occupational Licensing Director Catherine Reardon, without promulgating a new regulation, wrote a letter to a naturopath in which she interpreted the statute, AS 08.45.050, as barring naturopaths from prescribing items "which are normally obtained through a pharmacy."[9] Ms. Reardon asserted that her interpretation was consistent with 12 AAC 42.990, adopted two years before.[10]

Director Reardon, in her letter of May 27, 1996, while asserting that she deemed that the 1994 regulation's definition of "prescription drug" to be consistent with her own

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[7] In 1999, the statute was changed, but only so as to recognize that the name of the former Department of Commerce and Economic Development was changed to Department of Community and Economic Development". Ch. 58, SLA 1999, sec. 88. Later, the name of the Department was changed again, to "the Department of Commerce, Community, and Economic Development". Ch. 47, SLA 2004, sec. 3. **See** the Revisor's notes to AS 08.45.200.
[8] 12 AAC 42.990.
[9] Exc. 5, which the appellee, in the court below, offered as Exhibit 35.
[10] Reardon Letter

"interpretation of the law", admitted that the regulation contained terminology which "may be confusing and need (*sic*) to be amended."[11] And, of course, the validity or invalidity of a regulation, traditionally, turns ultimately on whether the regulation is consistent with the enabling law, and not on whether it is consistent with a bureaucrat's interpretation of the law. **See** *Madison v. Alaska Department of Fish & Game*, 696 P2d 168, 173 (Alaska 1985), and cases cited therein.

Director Reardon's acknowledgement that the 1994 version of 12 AAC 42.990 may have been "confusing and [needed] to be amended" was later echoed by the superior court when, in the Order entered below, Judge Easter noted that

> ". . . the 1994 version of 12 AAC 42.990 could arguably be construed to permit naturopaths to prescribe certain dietetic substances. . .".[12]

Despite Director Reardon's assertion that the 1994 regulation "may be confusing", no regulatory change was made until 2014, eighteen years after her 1996 letter!

Of course, Director Reardon's 1996 letter expressed her opinion as a regulator, but was not a duly adopted regulation *per se.*

Director Reardon's opinion notwithstanding, Alaska naturopaths – perhaps understanding the statute and the regulations, and certainly the practice of naturopathy better than she -- continued to use vitamins and minerals in their injectable form as dietetic substances, just as they had done for years under the unchanged statute.[13]

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[11] Exc. 5
[12] Exc. 10; Order, at page 3.
[13] Plaintiff's Complaint, note 13, sec. 9, cited in the Order at page 3, fn. 16.

But much later, in its regulatory revisions in 2014, the Division struck out language in the former 12 AAC 42.990 which had made clear, in conformance with the statute, that the prohibition against a naturopathic doctor's use of a prescription drug did not extend to

> "a device or herbal or homeopathic remedy or dietetic substance in a form that is not a controlled substance."

The 2014 amendments, challenged here by the Association, define "prescription drug", for the first time, to mean

> "a controlled substance or other medicine requiring a prescription from a physician licensed under AS 08.64 or from another health care professional authorized to issue prescriptions by the law of this state."

The challenged 2014 amendments delete the regulation's previous language which explained that naturopaths were <u>not</u> to be prohibited from using "a device or herbal or homeopathic remedy or dietetic substance in a form that is not a controlled substance."

As a result, naturopaths are now barred from using any substance which requires a prescription – whether or not the substance is a "drug" within the meaning of AS 08.45, and regardless of their professional practices in Alaska between 1986 and 2014.

The challenged 2014 regulations bar naturopaths from utilizing prescription substances, like injectable vitamins and minerals. The importance of this issue to the Association's members cannot be overstated or overlooked. To naturopaths and their patients, this is no trivial matter.

As Abby Laing, M. D., stated in her affidavit, submitted to the Superior Court, naturopathic remedies "have long included the use" -- and "with good effect" -- of

"vitamins and minerals to heal patients". Exc. 8, page 1, paragraph 2. Dr. Laing reported that because of the 2014 regulation changes, described in the Association's complaint, these remedies involving injectable vitamins and minerals to heal patients, are now "outside" the "legal scope" of her practice. *Id*. pages 2-3, paragraph 3.

So, Dr. Laing went on to say, many types of vitamins, such as vitamins B-12, C, and D, which "all require a prescription", if in an injectable form, cannot now be used. *Id*. page 2, paragraph 4. Dr. Laing explained, at page 2, paragraph 5 and 6 of her affidavit, that there are many people who cannot be treated and for whom "the oral delivery method" of getting some vitamins "is not suitable for all patients". *Id*., page 2, paragraphs 5 and 6.

Another naturopath, Dr. Cary Jasper, who was present in Juneau when the 1986 statute was adopted, provided an affidavit also. Exc. 9. In that affidavit, Dr. Jasper observed, *inter alia*, at page 3, paragraph 7:

> "From and after the enactment of CSSB 297, members of our profession reasonably relied on this statute for over a quarter of a century, and on the clarification offered by the regulations for almost two decades. Those regulations defined the authority granted in the statute for naturopathic doctors to use dietetic, herbal and homeopathic doctors to use dietetic, herbal and homeopathic remedies."

H. STANDARD OF REVIEW

In this case, the Association sued to challenge the action of an administrative agency, the defendant Division. The Superior Court granted the Division summary judgment. The case at bar presents a "question . . . of statutory interpretation – requiring

a determination of the legislature's intent", and so "the substitution of judgment standard of review is appropriate." *State, Department of Health & Social Services, Division of Public Assistance v. Gross*, 347 P.3d 116, 112 (Alaska 2015).

Furthermore, no deference is due to the Division for at least two reasons. First, the agency in its rule-making rejected the overwhelming commentary provided through public participation, and did so without explanation.[14] Second, the Division's expertise is in the regulation of business and corporations, not in the regulation of health care providers, and the interpretation of the statute did not implicate agency expertise or the determination of fundamental policies within the scope of the agency's statutory functions.[15] So, in that setting, the Supreme Court applies

> "the independent judgment standard, under which 'the court makes its own interpretation of the statute at issue. . . where the agency's specialized knowledge and experience would not be particularly probative on the meaning of the statute."

Marathon Oil Co. v. State of Alaska, Department of Natural Resources, 254 P.3d 1078, 1082 (Alaska 2011). **See also** *Madison v. Alaska Department of Fish & Game*, *supra.*

I. ARGUMENT

a. *The Amendments to 12 AAC 42.990 in 2014, to Which the Association Takes Exception, Took Effect 28 Years After the Enactment in 1986 of the Naturopathy Statute at AS 08.45.*

In 2014, 12 AAC 42.990 was amended.

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[14] **See** *Pacific Rivers Council v. U. S. Forest Service*, 668 F.3d 609 (9th Cir. 2012), finding that an agency's decision is arbitrary and capricious where it "runs counter to the evidence before the agency. 90% AGAINST THE PROPOSED REGULATIONS.

[15] **See** Exc. 10, Order of the Superior Court, at page 5, citing *Marathon Oil v. State of Alaska, Department of Natural Resources, 254 P.3d at 1082.*

First, the amendment redefined "dietetics", stating for the first time that dietetics do "not include the use of a prescription drug".

Second, the amendment broadened the definition of "prescription drug", so as to mean that a prescription drug is a

> "controlled substance or other medicine requiring a prescription from a physician licensed under AS 08.64 or from another heath care professional authorized to issue prescriptions by the law of this state."

Third, the amendment struck out the previous regulatory language which had stated that a "prescription drug", which naturopaths cannot use or administer, does not prohibit the use by naturopaths of any "dietetic" substance in a form that is not a "controlled substance." At bottom, the amendment has had the effect of bringing naturopaths' use of injectable dietetic substances to an end.

As appellant noted in its Memorandum in Support of (Cross) Motion for Summary Judgment[16], submitted to the superior court, the DOL's 2014 amendments to the regulations, enacted 18 years after Ms. Reardon's 1996 letter,

> "were adopted despite the failure or refusal of the Legislature to change the statute even after a request from the Department of Commerce; despite two decades of a consistent administrative practice and the regulatory environment; despite the absence of consumer complaints or public demand for regulatory changes; despite overwhelming opposition educed at the Division's public hearing; despite nearly three decades of professional practice; and despite the lack of scientific expertise within the defendant Division's own professional ranks."[17]

[16] Exc. 7.
[17] Exc. 5.

b. *The Superior Court Erred by Misconstruing the Statute Enacted in 1986 When It Upheld the 2014 Regulation.*

The appellee, at 12 AAC 42.990(1)(B), in 2014, defined "dietetics", a statutory term, by providing that "dietetics. . . does not include the use of a prescription drug. . .". While some vitamins and minerals are, in Alaska, "prescriptions", the word "drug" was not defined in AS 08.45 and is still not defined in 12 AAC 42.990, the regulation which is the subject of this action.

As previously noted, 12 AAC 42.990(8), as amended in 2014, deletes language which existed in 12 AAC 42.990(8) for more than 20 years, and which had explained that

> "'prescription drug' does not include a device or herbal or homeopathic remedy or *dietetic substance* in a form that in is not a controlled substance." (Italicization added here).

In deleting this quoted language, the Division went astray from the language of AS 08.45. Previously, the deleted language in 12 AAC 42.990 had explicitly explained that this term "prescription drug" was limited: naturopathic physicians and their patients were protected, because "a device or herbal or homeopathic remedy or dietetic substance in a form that is not a controlled substance" was available for use.

Logically, there are only two possibilities. Either the rule makers who promulgated the earlier version (1994) of 12 AAC 42.990—closer in time to the 1986 session of the Legislature -- correctly understood the 1986 statute, or the rule makers who wrote the 2014 version of 12 AAC 42.990, two decades later, correctly understood it. Both rule-making agencies could not have been right.

Of course, the Division may argue that the 2014 rule writers had the latitude to change the regulation in light of experience. But that argument, if made, would fail inasmuch as the record shows neither any clamor or outcry for a policy change by naturopathic patients or legislators, nor any evidence that naturopathic patients were harmed under the 1994 regulations.

As noted, *supra*, the explicit regulatory language approved in 1994, protected naturopathic physicians in their use or prescription of

> "a device or herbal or homeopathic remedy or dietetic substance in a form that is not a controlled substance"[18]

until the quoted language was deleted on January 9, 2014.

The January 9, 2014, amended regulations, purport to *broadly* eliminate the authority of naturopathic doctors to prescribe any prescription "substance", even though the statute, AS 08.45.050, *narrowly* prohibits naturopaths only from using, prescribing, or recommending "a prescription drug", a "controlled substance" (as defined in the criminal code at AS 11.71.900(4)), or "a poison."

Historically, between July, 1994, and January, 2014, naturopathic physicians operated under the statute which, according to 12 AAC 42.990(8), *excluded* from the definition of "prescription drug" – which they could not prescribe – any

> "device or herbal or homeopathic remedy or dietetic substance in a form that is not a controlled substance."[19]

[18] Exc. 4.
[19] **See** former 12 AAC 42.990(8), effective July 28, 1994 (Exc. 6).

Thus, until 2014, Alaska's naturopathic physicians could use vitamins and minerals in injectable forms because they were traditional and historic dietetic substances.

c. *The Superior Court Erred by Considering "Legislative Inaction Since 1988" as an Aid in Interpreting the Meaning of the Legislature's Enactment in 1986.*

The Superior Court's Order, at page seven, notes that the 1986 naturopathic statute was never modified, (except for a change in 1988), despite the introduction of numerous bills. Exc. 10, p. 7.

Generally,

> "[p]ost-enactment legislative history is disfavored because 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'"

Girdwood Mining Co. v. Comsult LLC, 329 P.3d 194 (Alaska 2014, at footnote 21.)

The underlying principle against using post-enactment legislative history as a guide to statutory construction is that such usage obviously violates the maxim against fallacious reasoning, to wit, the notion that something that is said or done – or not said or done -- after the passage of legislation explains the lawmakers' reasons for their enactment at an earlier time.

Here, to make the methodology even more attenuated, there is not even any post-enactment committee or floor debate, or record, or statements by ex-legislators or legislators to consider. But even if these materials existed, they "cannot be given consideration". *Alaska Public Employees Association v. State*, 525 P.2d 12, 16 (Alaska 1974), citing *Lyndon Transport, Inc. v. State*, 532 P.2d 700, 716 (Alaska 1975).

d. *The January, 2014, Regulations Were Not the Product of any Health Emergency, Patients' Requests, or Public Clamor for Change*

The regulations challenged by the Association were not the product of any health emergency, patients' requests, or any public clamor for change. To the contrary, almost all of the comments about the draft regulations were critical and negative – but the Division adopted those regulations anyway. Exc. 9.

Moreover, the Division is itself not a component of the State of Alaska Department of Health and Social Services. As far as appears, the Division employs no personnel with expertise in public policy questions concerning public health or the modes of health care delivery.

e. *The Division Is Expected to Argue that the Legislature Had Years to Amend AS 08.45, so as to Clarify Its Intention to Allow Naturopaths to Continue their Use of Injections of Prescription Items as Part of their Lawful Practice of injecting Dietetic Substances.*

The Division is expected to argue that if the Legislature had wanted to use plainer language authorizing the use of prescription items in injecting "dietetic substances", it had years to do so.

That argument, if made, should be recognized as a dead end for two reasons. First, at issue is what was intended by the Legislature in 1*986*, and, as noted *supra*, no acts or omissions for many years afterwards could be considered part of the legislative history from 1986.

Second, it may be fairly noted that the Division's anticipated argument would "cut both ways". The Division had 18 years, and so 18 regular legislative sessions, within which to persuade the legislature to codify the view expressed by Director Reardon in her

1996 letter, but the Legislature did nothing. Not a single legislator is shown to have requested that the Division adopt the 2014 regulations, *e.g.*, to cure a legislative mistake or oversight. (Besides, even if a legislator had made or sponsored such a request, and even if that hypothetical legislator had been the sponsor of prior legislation, he or she could not have been considered to represent the will of the Alaska State House or Alaska State Senate. As was observed by Justice Bolger and former Chief Justice Fabe, in their dissent in part in *Alaska Trustee LLC v. Bachmeier*, 332 P.3d 2, 22 (Alaska 2014):

> ". . . we should not assume that isolated assertions by a bill's sponsor accurately represent the intent of the entire legislature or the purpose of the bill",

citing *Kuretich, LLC v. Alaska, Tr. LLC*, 287 P.3d 87, 90 (Alaska 2012).

Naturopathic physicians, pursuant to both Alaska law and their education, training and experience, have historically used "dietetic remedies". As shown by the affidavit of Dr. Abby Laing, "dietetic remedies" include substances which require a prescription, such as injectable vitamins and minerals.[20] As 08.45.200(3) expressly specifies that "the use of dietetics" is an available remedy for naturopathic doctors to provide to their patients.

Even the Division itself, in 1994, promulgated a regulation, 12 AAC 42.990(8) which defined "prescription drug", which naturopathic doctors are not to administer or prescribe, in part as follows:

> "'Prescription drug' includes medicines commonly requiring a written prescription licensed under AS 08.64; **'prescription drug'**

[20] Exc. 8, Affidavit of Dr. Abby Laing, page 1, paragraph 2.

does not include a device or herbal or homeopathic remedy or dietetic substance in a form that is not a controlled substance".[21]

f. *The Superior Court Erred in Awarding the Division Attorney Fees.*

The Superior Court awarded the Division Attorney Fees.[22] The award of attorney fees was made despite the objection of the Association.[23]

The Association, as the sole plaintiff in the Superior Court, was pursuing an action which has many characteristics of a public interest law suit.

Four factors have been identified for determining whether a particular case qualifies as public interest litigation. Relevant factors are (1) whether the non-prevailing party was seeking to effectuate a strong public policy; (2) whether numerous people would benefit from the litigation; (3) whether only a private party could be expected to bring the action; and (4) whether the party lacked economic incentives to bring the suit in the absence of important public issues. *Sisters of Providence in Washington, Inc. v. Department of Health and Social Services*, 648 P.2d 970, 979-980 (Alaska 1982), cited in *Alaska State Federation of Labor v. State*, 713 P.2d 1208, 1212 (Alaska 1986).

Using the four-part test described here, the Supreme Court, in *Southeast Alaska Conservation Council v. State*, 665 P.2d 544, 552-554 (Alaska 1983) *reversed* a superior court's award of attorney fees to a timber contractor against a conservation group which had sued unsuccessfully to prevent what it regarded was an improper and illegal disposal of timber in the State. Here, as there, the plaintiff sought to effectuate a strong public

[21] **Bold** typeface added here.
[22] Exc. 12
[23] Exc. 11

policy. Here, as there, considering both the number of naturopathic physicians and the number of patients, numerous people stood to benefit from the lawsuit initiated by the plaintiff. Here, as there, only a private party might have been expected to bring the suit. Here, as there, the purported public interest litigant had no economic incentive in filing the action because the plaintiff Association treats no patients and has never provided any injectable vitamins or minerals.

The award of attorney fees against the Association is ironic, since some individual naturopathic doctors did seek to intervene in the case to challenge the Division's regulations, but the attorney general objected to having individual naturopaths before the court. Having successfully excluded individual naturopaths from being in the case, the Division should be deemed as being "hoist with its own petard."[24]

The award of attorney fees against the Association should be reversed. The case of *Citizens for the Preservation v. Sheffield*, 758 P.2d 624, 626 (Alaska 1988) is instructive. There, the Supreme Court majority opinion applied "the four-part public interest test. The plaintiff organization, like the Association here, sued for declaratory relief, not money damages. The Supreme Court noted that while some members of Citizens for the Preservation might have had significant economic interests to bring the action, "whether an entity is a public interest litigant cannot depend on the interests of a

[24] If individual naturopaths had been permitted to intervene, and if the Division had gotten the same result in the superior court, the Division would then have been able to more appropriately seek attorney fees from the individual plaintiffs-in-intervention. Having kept those individuals out of the case, it ill behooves the Division to seek attorney fees from the Association.

single member." *Id.* The Court held that the plaintiff entity was not susceptible to an award of attorney fees.

J. CONCLUSION

The superior court erred in granting summary judgment to the Division and denying summary judgment to the Association. The challenged regulations are inconsistent with the 1986 enactment and with approximately two decades of naturopathic and administrative practice which followed.

The superior court erred when it misconstrued the enactment, using legislative *inaction after* the 1986 enactment as *post hoc* legislative history to determine the intention of the Legislature in 1986. The superior court also erred in showing deference to the Division's interpretation of the statute, inasmuch as the Division's interpretation was not consistent over the years, and the Division was neither shown to have any expertise in health care questions nor to claim any such expertise, and because the Division's interpretation was not consonant with the overwhelming testimony educed at public hearings. The superior court erred also in awarding the Division attorney fees, for the reasons set forth above.

The judgment of the superior court should be *reversed*, and *vacated*, and the case should be *remanded* to the superior court for entry of judgment in favor of the Association, declaring and adjudging that the 2014 regulations are invalid and of no further force or effect.

DATED at Anchorage, Alaska, this 23rd day of February, 2017.

Respectfully submitted:

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