No. 03-15-00262-CV

In the Court of Appeals
Third District of Texas — Austin

TEXAS ASSOCIATION OF ACUPUNCTURE AND ORIENTAL MEDICINE,

Appellant,

v.

TEXAS BOARD OF CHIROPRACTICE EXAMINERS AND PATRICIA GILBERT, EXECUTIVE DIRECTOR IN HER OFFICIAL CAPACITY,

Appellees.

On Appeal from 201st District Court, Travis County, Texas
Cause No. D-1-GN-14-000355

ACUPUNCTURE ASSOCIATION'S REPLY IN SUPPORT OF MOTION FOR REHEARING

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REPLY ARGUMENT

The Chiropractic Board's response to the Acupuncture Association's motion for rehearing provides no cogent reason for the Court to deny rehearing. The Court should grant rehearing and render judgment for the Acupuncture Association because:

- The Court has determined it is inappropriate for the Chiropractic Board to use the definition of "acupuncture" in the Acupuncture Chapter to define the scope of chiropractic in the Chiropractic Chapter. Thus, there is no longer any foundation for concluding that the Chiropractic Chapter establishes a distinction between "incisive" and "nonincisive" needles.
- The Chiropractic Board's interpretation of its scope of practice statute as authorizing chiropractors to practice acupuncture is unreasonable as a matter of law.
- The Chiropractic Board does not contest that the Court should revise its opinion to remand both rules that permit chiropractors to practice acupuncture.

A.

Because the Court has properly concluded that it is improper to read the Acupuncture Chapter and Chiropractic Chapter *in pari materia*, there is no longer any basis for concluding that the Chiropractic Chapter provides for a distinction between "incisive" and "nonincisive" needles.

Despite the fact that the Court has concluded it is improper to read the Acupuncture Chapter and Chiropractic Chapter *in pari materia*, the Chiropractic Board continues to argue that "the Legislature's definition of the term 'acupuncture' [in the Acupuncture Chapter] indicates a legislative belief that

needles can be used nonincisively for purposes other than drawing blood for diagnostic testing" under the Chiropractic Chapter.[1] This argument is fundamentally flawed.

First, there is no logic in concluding that the Chiropractic Board may not import the Acupuncture Chapter's definition of acupuncture to determine the Chiropractic Chapter's scope of practice, but then permit that Board to do so, implicitly, by suggesting the Acupuncture Chapter's definition signals the possibility of a distinction between incisive and nonincisive needles in the Chiropractic Chapter. The doctrine of *in pari materia*, when it applies, is used to interpret two separate statutes together. *See* Opinion, p. 17. The Court correctly concluded—and the Chiropractic Board does not now challenge—that the Chiropractic Board cannot interpret the Acupuncture Chapter and Chiropractic Chapter *in pari materia* so as to "incorporate the Acupuncture Act's definition of 'acupuncture' into the Chiropractic Act." *Id.*, p. 18. If it is improper to interpret the chapters *in pari materia*, it is likewise inappropriate to conclude that needles are capable of being inserted in a nonincisive manner under the Chiropractic Chapter because of a definition in the Acupuncture Chapter.

[1] Chiropractic Board's Response, p. 2.

Second, the Legislature ***has*** supplied an unambiguous definition of "incisive" in the Chiropractic Chapter—and that definition leaves no room for an interpretation that draws a distinction between incisive and nonincisive needles. Even if the Legislature has somehow determined that acupuncture needles are capable of being inserted in a non-incisive manner under the Acupuncture Chapter—which the Acupuncture Association maintains is a fiction and physical impossibility[2]—the Legislature has drawn no such distinction in the Chiropractic Chapter. To the contrary, in the Chiropractic Chapter, the Legislature expressly prohibited use of any needles with just one exception—needles used for diagnostic blood draws. TEX. OCC. CODE § 201.002(3). The non-incisive description in the ***Acupuncture Chapter's*** definition of acupuncture does not apply to the Chiropractic Chapter, and to permit it to be used implicitly is unreasonable and contrary to the Chiropractic Chapter's plain language and the analysis underlying this Court's decision. *See R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future &*

[2] If acupuncture needles must be inserted by acupuncturists in a "nonincisive" manner, then acupuncture would not be allowed in this state, in contradiction of the remainder of the Acupuncture Chapter which expressly authorizes and regulates the practice of acupuncture. This is why the Texas Medical Board—the agency charged with adopting rules regulating the practice of acupuncture—has refused to include this absurd language in its definition of acupuncture. 22 TEX. ADMIN. CODE § 183.2(4). Though courts attempt to give meaning to statutory language, in this instance, it is simply impossible to give meaning to the term "nonincisive" in the Acupuncture Chapter. *See Kallinen v. City of Houston*, 462 S.W.3d 25, 28 (Tex. 2015); *Chickasaw Nation v. U.S.*, 534 U.S. 84, 94 (2001). There is no such thing as "incisive" and "nonincisive" acupuncture needles. In any event, the Court need not reach this issue because the Court is solely construing the *Chiropractic Chapter* and evaluating *Chiropractic Board* rules.

Clean Water, 336 S.W.3d 619, 625 (Tex. 2011); *see also Sw. Royalties, Inc. v. Hegar*, 500 S.W.3d 400, 405 (Tex. 2016) (courts must apply the definition most consistent with the context of a statutory scheme).

The Chiropractic Board's claim that the Court concluded in *TMA I*[3] that the term "incisive" is ambiguous is also false.[4] The Court said no such thing in *TMA I*, and thus it is untrue that the Acupuncture Association invites this Court to revisit its conclusion in that case. Instead, in *TMA I*, the Court did not reach the legal issue the Acupuncture Association raises here: whether the Chiropractic Chapter, as a matter of law, prohibits chiropractors from using needles for purposes other than diagnostic blood draws. And more specifically, the Court did not consider whether the Chiropractic Chapter authorizes chiropractors to practice the entirely separate profession of acupuncture, which is regulated by a separate regulatory board. It also bears repeating that there is simply no ambiguity in the Chiropractic Chapter. The only conceivable way to find ambiguity in the Chiropractic Chapter's definition of incisive is to look to the definition of acupuncture in the Acupuncture Chapter—and this is inappropriate because the doctrine of *in pari materia* does not apply.

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[3] *Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Ass'n*, 375 S.W.3d 464 (Tex. App.—Austin 2012, pet. denied) ("*TMA I*").

[4] Chiropractic Board's Response, p. 2.

Finally, contrary to the Chiropractic Board's assertion, evidence is not required to determine whether a person can use "nonincisive [means] to perform acupuncture."[5] The Acupuncture Association's argument is one of statutory construction. Evidence is not required to read the Chiropractic Chapter's plain terms, apply appropriate canons of statutory construction, and conclude that the Chiropractic Chapter does not authorize chiropractors to practice acupuncture. And evidence is not required to acknowledge that if the Chiropractic Chapter truly did provide a distinction between incisive and nonincisive needles, the result would be a morass in which there would be no practical way for practitioners and patients to know whether a chiropractor is using needles he is legally authorized to use. Indeed, the Chiropractic Board's contention that evidence (presumably including microscopic images of needles and expert testimony) is required to determine whether each particular needle is nonincisive establishes the absurdity of the Board's position.[6]

[5] *Id.*, p. 3.

[6] Presumably, under the Chiropractic Board's position, evidence will also be required to determine whether all other types of needles are incisive, not just acupuncture needles. Given the Chiropractic Board's history of attempting to stretch the scope of chiropractic far beyond what is statutorily allowed, future disputes involving needle use by chiropractors are likely forthcoming.

B.

The Chiropractic Board's interpretation of the chiropractic scope of practice statute is unreasonable as a matter of law.

The Court should also grant rehearing and consider, as a matter of law, whether the Chiropractic Board's interpretation of its scope of practice statute is unreasonable. Despite the Board's suggestion to the contrary, courts may make this inquiry without the necessity of evidence and fact-finding. *See Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d at 628-29 (analyzing whether the Railroad Commission's interpretation of "public interest" was reasonable).

As the Acupuncture Association explained in its motion for rehearing, the Court should grant no deference to the Chiropractic Board's determination that chiropractors can practice acupuncture because acupuncture is not within the Board's expertise. *Rogers v. Tex. Bd. of Architectural Exam'rs*, 390 S.W.3d 377, 384 (Tex. App.—Austin 2011, no pet.). It is instead within the expertise of the Acupuncture Board. The Court should also grant no deference because the Chiropractic Board is exercising a power the Legislature has not granted it. *Liberty Mut. Ins. Co. v. Adcock*, 412 S.W.3d 492, 498 (Tex. 2013) (administrative deference does not apply when an agency exercises powers that the Legislature has not conferred upon it in "*clear and express language*") (emphasis in original). Thus, the Court should refuse to defer to the Chiropractic Board's conclusion that chiropractors can practice acupuncture, which is regulated by a separate regulatory

board, without adhering to the intensive education and training the Legislature has determined is required for the safe practice of the procedure. The Acupuncture Association does not ask the Court to determine the "wisdom" of permitting chiropractors to practice acupuncture.[7] The Association asks the Court to consider whether the Board's interpretation is reasonable in light of plain statutory language and basic principles of administrative law.[8]

C.

The Chiropractic Board does not contest that the Court should revise its opinion to remand both rules that permit chiropractors to practice acupuncture.

The Chiropractic Board agrees with the Acupuncture Association that the Association challenged Rule 78.13(e)(2)(C) (authorizing chiropractors to practice acupuncture) and Rule 78.14 (governing the requirements for the practice of acupuncture)—not Rule 78.13(c)(2)(C) (the laboratory examination rule). As such,

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[7] Chiropractic Board's Response, p. 4.

[8] The Chiropractic Board's contention that it did not rely on the definition of acupuncture in the Acupuncture Chapter as the basis for adopting rules authorizing chiropractors to practice acupuncture is false. The preamble to the Board's scope of practice rule expressly refers to the definition of "acupuncture" in the Acupuncture Chapter: "[T]the Legislature amended the Acupuncture Act to allow chiropractors to practice acupuncture, defining acupuncture as the non-incisive, non-surgical use of needles." *See* Texas Register Preamble to the Board's Scope of Practice Rule, available at http://texreg.sos.state.tx.us/public/regviewer$ext.RegPage?sl=T&app=2&p_dir=N&p_rloc=147748&p_tloc=-1&p_ploc=&pg=1&p_reg=200602847&z_chk=52497&z_contains=; *see also* http://texreg.sos.state.tx.us/public/regviewer$ext.RegPage?sl=T&app=2&p_dir=N&p_rloc=201038&p_tloc=-1&p_ploc=&pg=1&p_reg=200902378&z_chk=50205&z_contains= (referring to scope of practice rule).

at a minimum, the Court should grant rehearing and remand 22 Texas Administrative Code §§ 78.14 and 78.13(e)(2)(C)—rather than § 78.13(c)(2)(C).

PRAYER

Appellant Texas Association of Acupuncture and Oriental Medicine respectfully prays that this Court grant the Acupuncture Association's Motion for Rehearing and render judgment for it. Alternatively, the Association prays that the Court grant rehearing and clarify that the trial court erred in granting summary judgment in favor of the Chiropractic Board with respect to the Association's challenge to both 22 Texas Administrative Code §§ 78.14 and 78.13(e)(2)(C). The Association further requests any other relief the Court deems appropriate at law or equity.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Appellant certifies that this Reply in Support of Motion for Rehearing (when excluding the caption, signature, certificate of compliance and certificate of service) contains 1,733 words.

/s/ *Craig T. Enoch*
Craig T. Enoch

CERTIFICATE OF SERVICE

I hereby certify that, on January 10, 2017, the Acupuncture Association's Reply in Support of Motion for Rehearing was served via electronic service on the following:

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