CAUSE NO. D-1-GN-14-000355

TEXAS ASSOCIATION OF ACUPUNCTURE AND ORIENTAL MEDICINE, Plaintiff	§	**IN THE DISTRICT COURT OF**
v.	§	**TRAVIS COUNTY, TEXAS**
TEXAS BOARD OF CHIROPRACTIC EXAMINERS AND YVETTE YARBROUGH, EXECUTIVE DIRECTOR, IN HER OFFICIAL CAPACITY Defendants	§	**201ST JUDICIAL DISTRICT**

BOARD'S REPLY TO ACUPUNCTURE ASSOCIATION'S RESPONSE TO DEFENDANTS' TRADITIONAL MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME the Texas Board of Chiropractic Examiners and Yvette Yarbrough, Executive Director (collectively, the "Board"), and file their Reply to Acupuncture Association's Response to Defendants' Traditional Motion for Summary Judgment ("TAAOM Response"), and would show the Court as follows.

SUMMARY OF ARGUMENT

Senate Bill 361 added the words "nonsurgical, nonincisive" to the definition of acupuncture in the Acupuncture Act. Tex. Occ. Code § 205.001(2). By doing so, the legislature modified the exemption for other health care professions from the application of the Acupuncture Act to clearly include chiropractors. Tex. Occ. Code § 205.003(a). Whether the bill is considered ambiguous or not, the effect of the amendment is to relieve chiropractors from the requirement to be licensed under the Acupuncture Act to practice

acupuncture. This intent on the part of the Legislature may be found in the language of the bill or in the legislative history. The particular language chosen by the Legislature serves no purpose other than to adopt and define the exemption of chiropractic from the Acupuncture Act. Any other interpretation renders the language meaningless. Once it is established that chiropractors are not subject to the Acupuncture Act, so long as they are within their scope of practice, it is within the authority of the Board to adopt the rules at issue here. The Board's rules are entitled to deference from the Court because the Board has expertise in this area and because the construction is reasonable.

Senate Bill 361, as interpreted by the Board, did not violate the Texas Constitution, either as containing more than one subject or as granting a preference to chiropractic as a school of medicine. The definition of and grant of an exemption from the Acupuncture Act for chiropractic is within the general subject of the bill. Chiropractic is not a school of medicine, and so long as chiropractors limit their practice of acupuncture to those procedures affecting the musculoskeletal system, they are within their scope of practice and are not practicing medicine in violation of the Medical Practice Act. Tex. Occ. Code § 151.001, *et seq*.

The Board's Motion for Summary Judgment should be granted and TAAOM's Motion for Summary Judgment should be denied.

ARGUMENT AND AUTHORITIES

I. THE RULES OF THE BOARD ARE VALID AND SHOULD BE UPHELD BY THE COURT.

A. The Plain Language Of Senate Bill 361 Creates An Exemption For Chiropractors From The Acupuncture Act.

The plain language of Senate Bill 361 creates an exemption for chiropractors from the application of the Acupuncture Act because there is no other reasonable interpretation of the meaning of the addition of "nonsurgical, nonincisive" to the definition of acupuncture in Texas Occupations Code § 201.001(2). TAAOM fails to address the purpose of the addition of "nonsurgical, noninvasive" to the definition of acupuncture in in the Acupuncture Act, other than to say that it only modifies the Acupuncture Act and not the Chiropractic Act. TAAOM contends the statute is clear on its face, yet it has been unable to articulate a reason that the Legislature needed to add "nonsurgical, nonincisive" to the definition of acupuncture. In fact, the only reason that the term was added, language lifted directly from the Chiropractic Act's definition of the practice of chiropractic and appearing no other place in the Texas Occupations Code (or any other Texas statute), was to allow chiropractors to practice acupuncture when it is performed within the scope of practice of chiropractic.

When TAAOM finally attempts to address the actual effect of this amendment to the Acupuncture Act, it contradicts the statute and denies the effect of the law.

> Second, in claiming the amendment would be surplusage because "acupuncturists could already use needles," the Board appears to recognize that **the legislature cannot realistically limit the practice of acupuncture to the use of "nonincisive" needles**. As Representative Janek observed during debate on SB 361, "a needle is a needle." Chiropractic Board's motion, Appendix 14, p. 18. **All needle-use is incisive**. Thus, if the addition of the term "nonincisive" did nothing to limit the practice of acupuncture, as argued by the Chiropractic Board, it similarly could not have effectively expanded the scope of chiropractic.

TAAOM Response at 17 [Emphasis added].

Incredibly, TAAOM denies that the literal wording of the statute means what it says. Contrary to TAAOM's assertion, the Legislature has defined the insertion of an acupuncture needle as a "nonincisive" event. TAAOM's interpretation of the amendment to the definition of acupuncture does exactly what the Board contends: it renders it meaningless. This Court should avoid any construction that would render a provision meaningless. *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008). When the Legislature has defined a word, we must use that definition. Tex. Gov't Code § 311.011(b); *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625–26 (Tex. 2008). Whether TAAOM agrees or not, acupuncturists' use of needles is now "nonsurgical, nonincisive." TAAOM apparently argues that the addition of this provision to the definition produces an absurd result and must mean something other than what the words state. *Tex. Dep't of Protective and Regulatory Servs. v. Mega Child Care, Inc*., 145 S.W.3d 170, 177 (Tex. 2004) (noting that when statutory text is unambiguous, courts must adopt the interpretation supported by the statute's plain language unless that interpretation would lead to absurd results). Of course, if the plain language produces an absurd result, then the phrase must be ambiguous, which TAAOM strenuously denies, and be subject to interpretation through other means. TAAOM cannot have it both ways. It cannot contend that the language is unambiguous and should be accepted as written and also claim that it is meaningless.

The Legislature is presumed to know other related laws and act with reference to them. *See Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990). The Court must also presume that the Legislature selected statutory words, phrases, and expressions

deliberately and purposefully. *See Tex. Lottery Comm'n v. First St. Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010). To presume that the Legislature selected the words, "nonsurgical, nonincisive" without reference to the Chiropractic Act, the only other place those words appear in Texas Codes, defies logic.

The logical interpretation of this provision is the one advocated by the Board. The language "nonsurgical, nonincisive" was added to the definition of acupuncture in order to define acupuncture as a practice that was not excluded from the practice of chiropractic by Texas Occupations Code § 201.002(b)(2). This interpretation gives effect to the wording of the amendment with or without resort to rules of construction.

B. If Texas Occupations Code § 205.001(2) Is Ambiguous, the Legislative History Proves That the Intent Is to Allow Chiropractors to Practice Acupuncture.

The question of whether this statute is ambiguous is disputed by the parties. TAAOM alleges that the "unambiguous language" of the Acupuncture Act and the Chiropractic Act lead to the conclusion that chiropractors may not practice acupuncture unless licensed pursuant to the Acupuncture Act. TAAOM Response at 6. In support of this contention, they cite Justice Hecht's concurring opinion in *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 445 (Tex. 2009) (Hecht, J., concurring). [1] This is an interesting choice of authority for this proposition, because Justice Hecht goes on to dispute the majority's determination that the language at issue was, in fact, plain and clear:

> But that principle is undermined when it is invoked where it does not apply—that is, when the language of the text is not, in fact, plain. To find plain meaning where it is missing suggests at best that the investigation is insincere

1 "The Legislature does not speak through individuals—even its members—in committee hearings, in bill analyses and reports, in legislative debate, on in pre- and post-enactment commentary' it speaks through its enactments." TAAOM Response at 2.

> or incompetent, at worst that the search is rigged, that the outcome, whatever it is, will always come out to be "plain". Fidelity to plain meaning is important only if the word "plain" has itself a plain meaning.

Id. at 445. The opinion bemoans the increasing number of times the courts are called upon to construe statutory language, with the winning side declaring that the language plainly and clearly supports the court's result. Only rarely, the justice notes, do courts actually use "the a-word, as if it were a mark of shame" and declare a statute ambiguous. *Id*. at 446. He concludes, "[I]t is difficult to maintain that language is plain in the face of a substantial, legitimate dispute over its meaning." *Id*. Accordingly, in the face of this dispute over the meaning of this statute, it is difficult to argue that there is but a single interpretation possible of this statute.

If the Court considers the statute ambiguous, it must consider the various rules of statutory construction to determine the meaning of the law. Legislative history is one of the tools used to determine the meaning of the statute. The legislative history of this statute begins in 1995, two years before the actual language at issue was adopted.

In the attempts to define chiropractic in the 1995 legislative session, the Legislature discussed whether to use "invasive" or "incisive" in describing what limitation to place on chiropractors' use of needles. The less restrictive term "incisive" was chosen. Tex. Att'y Gen. Op. No. DM-472 (1998). In its attempt to dispute the effect of legislative history on this case, TAAOM, perhaps inadvertently, affirms the distinction between these two terms in its motion for summary judgment:

> Acupuncture is an **invasive** procedure in which acupuncturists use needles to penetrate skin. The scope of practice provision in the Chiropractic Chapter

> plainly states that chiropractors may not engage in **incisive**, surgical procedures, except for the use of needles for diagnostic blood draws.

TAAOM MSJ at 16-17 [emphasis added].

This is a distinction **with** a difference. The court's opinion in *Texas Board of Chiropractic Examiners* discusses the difference to significant effect. *Tex. Bd. of Chiropractic Exam'ers v. Tex. Med. Ass'n*, 375 S.W.3d 464, 479-81 (Tex. App.—Austin 2012, pet. denied). The Board does not allege, as TAAOM suggests, that the court made a decision on this issue, only that the discussion by the court was illustrative of the ambiguity of the term. In its confusion of the terms "invasive" and "incisive," TAAOM proves the point that this is ambiguous.

While it is possible to cherry-pick statements concerning the legislative history of S.B. 361 that make it sound as though the intent was not to allow chiropractors to practice acupuncture, the opening statement by Representative Gray was clear and concise as to what the purpose of the Senate amendment, the one that was ultimately restored to the bill in conference committee, was: "However, there are – there was a provision added in the Senate version which authorized chiropractors to engage in the practice of acupuncture." Board MSJ, Appendix 14 at 2. TAAOM has not provided any shred of evidence that the Legislature had some other intention in adding that language to the Act. Since TAAOM has not articulated a purpose for the amendment to the definition of acupuncture, the Court should accept the Board's conclusion, just as the Attorney General did in Opinion No. DM-471. The Legislature knowingly and intentionally created a specific amendment to the Acupuncture Act that allows chiropractors to practice acupuncture.

C. The Board's Rules Are Entitled to Deference.

Another rule of construction at issue in this case is whether the Board's rules evidencing their interpretation of the statute are entitled to any deference from the Court. Courts are required to defer to an administrative agency's construction of its own statutory authority where the statute in question is ambiguous and to the extent that the agency's interpretation is reasonable. *See R.R. Comm'n v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 624–25 (Tex. 2011). TAAOM challenges whether the Board's rules are entitled to deference.

One element in determining whether the Board's rule is entitled to deference is whether the Board has expertise in the area. The Board does have expertise in acupuncture, contrary to TAAOM's assertions. As cited in the Board's Motion for Summary Judgment, chiropractors in Texas have been engaged in the practice of acupuncture since 1972. Board's MSJ at 3. Chiropractic college is a four-year program leading to a doctorate degree, with significant overlap in the areas of training required of licensed acupuncturists. Tex. Occ. Code § 201.303. [2] While the Acupuncture Board may be primarily concerned with acupuncture, this does not mean, or even imply, that they are the sole board with knowledge of the practice of acupuncture. There is an overlap in the areas of practice and expertise between these two boards.

Texas courts recently dealt with a case of overlapping and seemingly conflicting authority between the Texas Board of Architectural Examiners and three engineers licensed

2 To the extent that TAAOM disputes the Board's expertise in this area, it creates a fact issue that would preclude summary judgment in favor of TAAOM, if this issue is relevant to the Board's ability to adopt rules on this subject.

by the Texas Board of Professional Engineers. *Rogers v. Tex. Bd. of Architectural Exam'ers*, 390 S.W.3d 377 (Tex. App.—Austin 2011, no pet.). The court held that the proper inquiry in determining whether an engineer was violating the Architectural Practices Act was whether the work performed was within the Engineering Practices Act. *Id*. at 387-88. Similarly, here the inquiry does not involve the Board of Acupuncture Examiners, and the Court should not inquire into whether the practices at issue are properly regulated by the Board of Acupuncture Examiners. The issue is solely whether the Board's rules properly allow chiropractors to practice acupuncture within the chiropractic scope of practice. The Board rule at issue here does include additional training in acupuncture in order for a chiropractor to practice acupuncture. Currently, chiropractors seeking to practice acupuncture must pass a rigorous examination to do so. 22 Tex. Admin. Code § 75.21. The sufficiency of that training is disputed by the parties. As noted in the Board's Response, the sufficiency of the training and the entire issue of safety to the public is a fact issue that cannot be resolved on summary judgment. Nevertheless, the Board contends that it has sufficient expertise in the area of health care and safety that the Court should defer to the Board's expertise.

The second part of determining whether the Board's rules are entitled to deference is whether the interpretation is reasonable. The Board's interpretation is the only reasonable interpretation. The meaning of this provision is that acupuncture has been declared by the Legislature to be a "nonsurgical, nonincisive" procedure. It was then logical and legal for the Board to conclude that these procedures were within the scope of practice of chiropractic, when limited to the musculoskeletal system. Contrary to

TAAOM's Response, the weight of arguments is not measured in the number of pages devoted to them. TAAOM Response at 5 ("[T]he Chiropractic Board dedicates just two pages to the argument that . . . it has 'inherent authority' to adopt rules authorizing chiropractors to practice acupuncture. . . ."). Logic and precedent generally succeed, even if brief. TAAOM is unable to provide any reasonable alternative interpretation of the amendment to add "nonsurgical, nonincisive" to the definition of acupuncture. The Board's interpretation of this provision is sound. It should be adopted by the Court and the Board's Motion for Summary Judgment granted.

II. SENATE BILL 361 DID NOT VIOLATE THE ONE-SUBJECT RULE OF TEXAS CONSTITUTION ARTICLE III, SECTION 35(a).

TAAOM argues that, if S.B. 361 creates authority for chiropractors to practice acupuncture, it contains two subjects in violation of the one-subject rule of Texas Constitution, Art. III, § 35(a). This is not the case; neither is it the argument of the Board on this issue. The Board's actual position is that the effect of the amendment to Texas Occupations Code § 201.001(2) is to create an exemption for chiropractic from the Acupuncture Act. This argument is entirely consistent with the Board's argument on interpretation of this amendment to Texas Occupations Code § 205.001(2).

Part of the difficulty with this provision is the cryptic approach that the Legislature took to defining this exemption. In spite of the protestations of the courts that intent is always to be found in the words of the statute and that is the best evidence of intent, legislating is conducted by humans and is an imprecise art at best. The legislative history of this bill well-illustrates this fact. After attempting to directly amend the bill to place an

exemption in the Chiropractic Act and having that amendment struck on a point of order, the author of the bill had to go to a conference committee to have the language at issue placed in the bill. *See* Board's MSJ at 4-7. Consider if the amendment in S.B. 361 had added to the Acupuncture Act the following statement: "Chiropractors practicing within their scope of practice are exempt from the application of this chapter." Could TAAOM credibly make the same argument based on Art. III, § 35(a) concerning that language as they make against the amendment that actually was a part of S.B. 361? The Board submits that the answer is "No." Of course, this was not the amendment that was attached to S.B. 361, yet the effect of the actual amendment is exactly the same. By defining acupuncture as a procedure that is "nonsurgical, nonincisive," the Legislature modified the meaning of Texas Occupations Code § 205.003(a), the section that exempts other health care professions, not the Chiropractic Act, to clearly exempt chiropractic from the requirements of the Acupuncture Act. This is within the single subject of the Acupuncture Act, and does not violate Art. III, § 35(a) of the Texas Constitution.

TAAOM asks this Court to interpret Texas Constitution Art. III, § 35(a) narrowly, contrary to the case law on this provision. *See Robinson v. Hill*, 507 S.W.2d 521, 524-25 (Tex. 1974) ("Both the constitutional provision and the questioned statute are to be liberally construed in favor of constitutionality. The statute will not be held unconstitutional where its provisions relate, directly or indirectly, to the same general subject…."). A brief review of the cases on this provision illustrates that, even if the sole purpose of the amendment to S.B. 361 was to authorize chiropractors to practice acupuncture, it would not violate this

constitutional provision. An exception to the application of the Act relates directly to the subject of the Sunset act for the Acupuncture Board.

In *Ex Parte Jones*, the court considered a case where the defendant was convicted for the use of a tire deflation device to evade arrest. *Ex Parte Jones*, 440 S.W.3d 628, 632-34 (Tex. Crim. App. 2014). The original bill containing the provision made possession of such devices illegal, but did not mention the statute establishing offenses for evading arrest. *Id*. The court found no violation of the one-subject rule, because the overarching subject was "criminal offenses related to vehicles." *Id*. This case contains a lengthy list of citations to previous cases discussing the application of the one-subject rule, almost all of which upheld the validity of the statutes attacked. *Id*. at 633, n. 5.

Similarly, in *Texas Alcoholic Beverage Comm'n v. Silver City Club*, the court considered a provision prohibiting the issuance or renewal of a private club alcoholic beverage permit in a dry area if the club is a sexually oriented business. 315 S.W.3d 643, 646 (Tex. App.—Dallas 2010, pet. denied). The provision was part of a bill containing 33 substantive articles, and none of the other articles addressed alcoholic beverages or sexually-oriented businesses. *Id*. The court determined that the bill did not violate the one-subject rule, because it relates to "the reorganization of, efficiency in, and other reform measures applying to governmental entities and certain regulatory practices." *Id*. at 648. [3]

Accordingly, given that a direct or indirect connection in the subject matter of the bill is adequate to establish a connection in the subject matter of the bill, the fact that both

3 While this case references the title of the Act as relevant to the determination of the single subject, and that approach has been criticized, the breadth of the subject matter encompassed in the single subject is illustrative of the latitude which courts have given the interpretation of this amendment.

the amendment and the original bill relate to who is allowed to practice acupuncture in the state will be adequate to satisfy the requirements of the constitution. Senate Bill 361 does not violate Texas Constitution Art. III, § 35(a).

III. SENATE BILL 361 DID NOT CREATE A PREFERENCE FOR CHIROPRACTIC IN VIOLATION OF TEXAS CONSTITUTION ARTICLE XVI, SECTION 31.

TAAOM alleges that allowing chiropractors to practice acupuncture will render chiropractic to be a "school of medicine" within the meaning of Texas Constitution Art. XVI, § 31, because "Acupuncture treats the entire body." TAAOM Response at 13. Yet, while licensed acupuncturists may treat the entire body, neither the Chiropractic Act nor the Board's rules would allow a chiropractor to treat the entire body. Specifically, the Board's rule on acupuncture limits the use of acupuncture to the musculoskeletal system and the statutory scope of practice:

> (a) Acupuncture, and the related practices of acupressure and meridian therapy, includes methods for diagnosing and treating a patient by stimulating specific points **on or within the musculoskeletal system** by various means, including, but not limited to, manipulation, heat, cold, pressure, vibration, ultrasound, light electrocurrent, and short-needle insertion for the purpose of obtaining a biopositive reflex response by nerve stimulation. **All therapeutic modalities provided by Doctors of Chiropractic in Texas must comply with the chiropractic scope of practice as defined by the Texas Occupations Code § 201.002**.

22 Tex. Admin. Code § 75.21(a) [emphasis added].

Just as in the *Texas Board of Chiropractic Examiners v. Texas Medical Association* case, which found that chiropractors may diagnose conditions as long as it relates to the biomechanical condition of the musculoskeletal system, the rules of the Board limit the use of acupuncture by chiropractors to the musculoskeletal system. 375 S.W.3d 464, 494 (Tex.

App.—Austin 2012, pet. denied). Thus, the use of acupuncture by chiropractors is not for treatment of the entire body. It is appropriately limited to the musculoskeletal system and is within the statutory scope of practice. It does not constitute the unauthorized practice of medicine, and does not invoke the limitations on preferences given to a "school of medicine" in Art. XVI, § 31. The Texas Supreme Court's determination that chiropractic is not a school of medicine, because it does not allow treatment of the whole body still applies to the practice of acupuncture by chiropractors. *Schlichting v. Tex. St. Bd. of Med. Exam'ers*, 158 Tex 279, 289, 310 S.W.2d 557, 564 (1958). Accordingly, chiropractors may perform acupuncture solely within their statutory scope of practice.

PRAYER

WHEREFORE, for these reasons, the Board and Ms. Yarbrough respectfully request that the court grant the Board's Motion for Summary Judgment, deny TAAOM's Motion for Summary Judgment, and enter a final judgment that Plaintiff takes nothing; assess costs and attorneys' fees against Plaintiff; and award the Board and Ms. Yarbrough all other and further relief to which they may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant's Reply to Acupuncture Association's Response to Defendants' Traditional Motion for Summary Judgment was sent as described below on this the 5th day of December, 2014, to the following:

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