

Velva L. Price
District Clerk
Travis County
D-1-GN-14-000355
Adrian Rodriguez

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

TEXAS ASSOCIATION OF	§	IN THE DISTRICT COURT OF
ACUPUNCTURE AND ORIENTAL	§	
MEDICINE	§	
PLAINTIFF	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
TEXAS BOARD OF CHIROPRACTIC	§	
EXAMINERS	§	
DEFENDANT	§	201ST JUDICIAL DISTRICT

PLAINTIFF’S THIRD AMENDED PETITION FOR DECLARATORY RELIEF

TO THE HONORABLE JUDGE OF THE DISTRICT COURT:

Plaintiff Texas Association of Acupuncture and Oriental Medicine (“Acupuncture Association”) files this Third Amended Petition for Declaratory Relief against Defendant Texas Board of Chiropractic Examiners (“Chiropractic Board”), and as grounds for this lawsuit will show the following:

I. DISCOVERY CONTROL PLAN

1. Discovery is intended to be conducted under Level 2 of Texas Rule of Civil Procedure 190.4.

II. PARTIES AND SERVICE OF PROCESS

2. Plaintiff Acupuncture Association is the largest professional organization of licensed acupuncturists and practitioners of Oriental medicine in Texas. It files this suit through its attorney of record, Shelby O’Brien and the firm of Enoch Kever PLLC, 5918 W. Courtyard Drive, Suite 500, Austin, Texas 78730.

3. Defendant Texas Board of Chiropractic Examiners is sued. It has been served and has answered.

III. JURISDICTION

4. This suit is brought as a rule challenge under Texas Government Code, Section 2001.038. Thus, the Acupuncture Association may only bring suit in a Travis County district court. Additionally, Section 2001.038 waives the Chiropractic Board's immunity from suit.

5. The Acupuncture Association has standing to bring this suit. Under Texas Government Code, Section 2001.038, a plaintiff has standing to bring a declaratory judgment action if a rule interferes with or impairs a legal right or privilege of the plaintiff. Further, an association like the Acupuncture Association has standing if (1) its members would otherwise have standing to sue in their own right, (2) the interests the organization seeks to protect are germane to the organization's purpose, and (3) neither the claim asserted nor relief requested requires the participation of individual members in the lawsuit. Under each of these elements, the Acupuncture Association has standing to challenge the Chiropractic Board's acupuncture rules as being beyond the statutory scope of chiropractic and thus invalid. The Acupuncture Association's standing to bring this rule challenge has not been challenged.

IV. BACKGROUND

6. Texas Occupations Code, Chapter 201 governs the practice of chiropractic ("Chiropractic Chapter") and Chapter 205 governs the practice of acupuncture ("Acupuncture Chapter").

7. A chiropractor may only perform procedures that are within the statutory scope of the practice of chiropractic. *See* TEX. OCC. CODE § 201.002. All incisive and surgical procedures are expressly identified as outside the scope of chiropractic practice. *See id.* § 201.002(a)(3), (b)(2). The provision prohibiting incisive procedures identifies only one exception: "the use of a needle for the purpose of drawing blood for diagnostic testing." *Id.* § 201.002(a)(3).

8. The Chiropractic Chapter further limits the practice of chiropractic to diagnosing, analyzing, examining, or evaluating the biomechanical condition of the spine and musculoskeletal system, and performing nonsurgical, nonincisive procedures, including adjustment and manipulation, to improve the subluxation complex or the biomechanics of the musculoskeletal system. *Id.* § 201.002(b)(1)-(2).

9. Since the early 1990s, the Chiropractic Board has controversially asserted that acupuncture and other procedures involving needles, such as needle electromyography, are within the scope of the practice of chiropractic. The legislature responded to this controversy by enacting the current statutory language in the Chiropractic Chapter prohibiting chiropractors from making an incision into any tissue, cavity, or organ by any person or implement, except for the use of a needle for the purpose of drawing blood for diagnostic testing. Soon after, the attorney general issued an opinion declaring that acupuncture is outside the scope of the practice of chiropractic.

10. In 1997, in the course of the Texas State Board of Acupuncture Examiners' ("Acupuncture Board") sunset review, the legislature amended the Acupuncture Chapter to redefine acupuncture as the "nonincisive, nonsurgical" insertion of acupuncture needles. The legislature did not amend the Chiropractic Chapter to allow chiropractors to practice acupuncture, despite attempts to do so during that legislative session and subsequent legislative sessions. Because of this change to the Acupuncture Chapter, however, the attorney general issued a new opinion. Reading the Acupuncture Chapter and Chiropractic Chapter *in pari materia*, the attorney general stated that chiropractors could practice acupuncture.

11. During the 2005 legislative session, the legislature enacted legislation requiring the Chiropractic Board to adopt rules clarifying which specific activities are included in the scope of the practice of chiropractic. The Chiropractic Board responded by promulgating rules authorizing chiropractors to perform acupuncture and needle electromyography.

12. The Texas Medical Association challenged rules allowing chiropractors to perform needle electromyography on grounds that it was an incisive procedure involving a needle and thus was outside the statutory scope of chiropractic. The district court agreed and invalidated the rules authorizing chiropractors to perform needle electromyography. The Austin Court of Appeals affirmed this portion of the district court’s judgment because evidence in the record indicated that some needles used for needle electromyography are incisive, as defined by Chiropractic Board rules. *See Tex. Bd. of Chiropractic Exam’rs v. Tex. Med. Ass’n*, 375 S.W.3d 464, 497 (Tex. App.—Austin 2012, pet. denied).

13. The Acupuncture Association filed this suit challenging the Chiropractic Board’s rules authorizing chiropractors to practice acupuncture and, more generally, use needles. The parties filed competing motions for summary judgment. This Court granted the Chiropractic Board’s motion and denied the Acupuncture Association’s competing motion.

14. The Acupuncture Association appealed. The Austin Court of Appeals reversed and remanded in part and affirmed in part. Specifically:

- The court of appeals concluded that the Chiropractic Board’s rules defining “incision” as a “cut or surgical wound” and providing that “needles may be used in the practice of chiropractic under standards set forth by the Board but may not be used for procedures that are incisive or surgical” are valid. *See* former 22 TEX. ADMIN. CODE §§ 78.13(a)(4), 78.13(b)(2) (renumbered 22 TEX. ADMIN. CODE §§ 78.1(a)(4), (b)(2)). Thus, the court affirmed this portion of the summary judgment.
- The court of appeals rejected the Chiropractic Board’s argument that because the Acupuncture Chapter defines acupuncture as the “nonsurgical, nonincisive insertion of an acupuncture needle,” acupuncture needles are nonincisive as a matter of law. The court reasoned that it is improper to read the Acupuncture Chapter and Chiropractic Chapter *in pari materia* so that a definition in the Acupuncture Chapter can inform the prohibition on incisive procedures in the Chiropractic Chapter.
- Because the court of appeals believed the record did not establish that either party was entitled to judgment as a matter of law on whether acupuncture is within the scope of the practice of chiropractic, the court reversed and remanded the Acupuncture Association’s challenge to the Chiropractic Board’s rules authorizing

chiropractors to practice acupuncture. *See* former 22 TEX. ADMIN. CODE § 78.13(e)(2)(C) (renumbered as 22 TEX. ADMIN. CODE § 78.1(e)(2)(C)); *id.* § 78.14 (repealed and adopted as new rule).

See Tex. Ass'n of Acupuncture & Oriental Med. v. Tex. Bd. of Chiropractic Exam'rs, 524 S.W.3d 734 (Tex. App.—Austin 2017, no pet.).

15. After the mandate issued, in July 2017, the parties filed a joint motion to abate this proceeding so that the Chiropractic Board could engage in a negotiated rulemaking proceeding that would potentially resolve the issues in this lawsuit. The case remained abated until late May 2019. During the abatement, the Chiropractic Board elected not to pursue a negotiated rulemaking and instead to hold informal stakeholder meetings.

16. Ultimately, in November 2018, the Chiropractic Board repealed Rule 78.14 authorizing chiropractors to practice acupuncture and adopted a new, substantively different rule, also numbered Rule 78.14. Unfortunately, the Acupuncture Association believes the Chiropractic Board did not negotiate in good faith. New Rule 78.14 continues to authorize chiropractors to practice acupuncture in violation of the Chiropractic Chapter, the Acupuncture Chapter, and the Medical Practice Act. *See* 43 TEX. REG. 7763 (Nov. 30, 2018). The Chiropractic Board lacked statutory authority to adopt this new rule.

17. The Chiropractic Board also renumbered its scope of practice rule, which includes the provision previously numbered as Rule 78.13(e)(2)(C) that was remanded by the court of appeals, to become Rule 78.1. New Rule 78.1(e)(2)(C) states that acupuncture is within the scope of the practice of chiropractic. Like Rule 78.14, Rule 78.1(e)(2)(C) is also invalid.

V. CAUSE OF ACTION

Request for Declaratory Relief under Texas Government Code, Section 2001.038

18. The preceding paragraphs are incorporated here by reference.

19. The Acupuncture Association brings this suit for declaratory judgment under Texas Government Code, Section 2001.038.

20. The Acupuncture Association seeks a declaration that 22 Texas Administrative Code § 78.1(e)(2)(C) (including acupuncture in the chiropractic scope of practice), and § 78.14 (governing the practice of acupuncture by chiropractors) are invalid because (1) the Chiropractic Board lacked statutory authority to adopt these rules as they unlawfully authorize chiropractors to perform acupuncture in violation of the Chiropractic Chapter; (2) the rules unlawfully authorize chiropractors to engage in the practice of acupuncture in violation of the Acupuncture Chapter; and (3) the rules unlawfully authorize chiropractors to engage in the unauthorized practice of medicine in violation of the Medical Practice Act.

21. Under the Chiropractic Chapter, acupuncture is an incisive procedure that chiropractors are statutorily prohibited from performing. Additionally, Rule 78.14 defines acupuncture as “inserting acupuncture needles or solid filiform needles for the purpose of obtaining a bio-positive reflect response by nerve stimulation.” Chiropractors are statutorily prohibited from performing procedures on any body systems beyond the musculoskeletal system and may not engage in “nerve stimulation.” Acupuncture inherently involves the stimulation of the nervous system.

22. Rule 78.14 also constitutes a threat to public health and safety, is anticompetitive, and is misleading to the public.

23. The Chiropractic Board’s rules authorizing chiropractors to engage in the practice of acupuncture should be declared invalid.

PRAYER

Plaintiff Texas Association of Acupuncture and Oriental Medicine prays that on final hearing, the Court grant the following relief:

- (1) A declaratory judgment under Texas Government Code, Section 2001.038 that 22 Texas Administrative Code §§ 78.1(e)(2)(C) and 78.14 are invalid; and
- (2) Any further relief to which Plaintiff may be justly entitled, at law or in equity.

Respectfully submitted,

By: /s/ Shelby O'Brien

Shelby L. O'Brien (SBN 24037203)
sobrien@enochkever.com
Craig T. Enoch (SBN 00000026)
cenoch@enochkever.com
Melissa A. Lorber (SBN 24032969)
mlorber@enochkever.com
ENOCH KEVER PLLC
5918 W. Courtyard Drive, Suite 500
Austin, Texas 78730
512.615.1200 / 512.615.1198 (fax)

**ATTORNEYS FOR PLAINTIFF
TEXAS ASSOCIATION OF ACUPUNCTURE
AND ORIENTAL MEDICINE**

CERTIFICATE OF SERVICE

I hereby certify that, on September 4, 2019, a true and correct copy of the above and foregoing has been served by electronic filing service on the following:

Karen Watkins
Assistant Attorney General
Administrative Law Division
P.O. Box 12548
Austin, Texas 78711
Karen.Watkins@oag.texas.gov

 /s/ Shelby O'Brien
Shelby O'Brien