

IN THE ARKANSAS SUPREME COURT

CASE NO. CA-04-00420

MICHAEL TESTON, APPELLANT

vs.

**ARKANSAS STATE BOARD OF
CHIROPRACTIC EXAMINERS, APPELLEE**

Appeal taken from

**PULASKI COUNTY CIRCUIT COURT
NO. CV – 03-502
HONORABLE TIMOTHY DAVIS FOX,
CIRCUIT JUDGE**

**AMICUS CURIAE BRIEF
IN SUPPORT OF APPELLEE**

**Henry M. Rubinstein, D.C., Esq., P.L.
8247 S.W. 124 Street
Miami, Florida 33156
Tel.: (305) 254-6378
Fax.: (305) 232-6481**

**Attorney of Amicus Curiae
International Chiropractors Association**

TABLE OF CONTENTS

I. Introductory
 Statement.....iv

II. Interests of Amicus
Curiae.....viii

III. Points on
Appeal.....xvi

IV. Table of
Authorities.....xvii

V. Abstract – Provided by Appellee.....
 xx

VI. Statement of the Case –
 Provided by
 Appellee.....xxi

VII.
Argument.....
.....1

A. Appellant was not exempt from provisions of the Chiropractic Practice Act.....2

B. The Chiropractic Board followed all Statutory Requirements.....10

C. The challenged statutes were not void for vagueness.....12

D. Substantial evidence supported the Chiropractic Board’s decision.....17

VIII. Conclusion.....21

IX. Certificate of Service.....22

INTRODUCTORY STATEMENT

Appellant seeks to reverse the Chiropractic Board's determination that he practiced chiropractic without a license, and to have his civil penalties vacated.

Appellant asks this court declare the Legislature's clear and unambiguous language to be unconstitutionally vague in order to

allow the Physical Therapy profession in Arkansas to perform legislatively prohibited Chiropractic services and to bypass the stringent licensing requirements that the Chiropractic Board has developed by legislative authority, to ensure that the public is safe and protected from untrained and unqualified practitioners of spinal mobilization, spinal manipulation, and spinal adjustments. Ark. Code Ann. §17-81-101, et.seq.

In support of Appellant's contention, he has manipulated his own Board to declare an easily recognizable chiropractic procedure to actually be a physical therapy treatment. (AB 25).

To agree with the Appellant would set a terrible precedent not only for the chiropractic profession, but what may be the profession of physical therapy, as well.

Appellant and his representative Board have failed to consider that many professions in this State may perform actions upon the spine that may resemble practices of other professions and that all of these licensed professionals have Practice Acts that overlap to a degree, with exclusionary language to a degree and with authority to self-define their practice techniques, to a degree. Ark. Code Ann. 17-

26-102 (b)(2)(2003); Ark. Code Ann. 17-102-102 (6)(B)(2003); Ark. Code Ann. 17-86-102(4)(A) & (G)(2003).

To allow professionals to perform techniques for which they are untrained and unqualified without prior competency examinations similar to the profession upon which they encroach would open a floodgate of professions, professing to be performing techniques allowed within their Practice Acts because they said so, and with this courts permission, should it not affirm the Chiropractic Board's determination of its own statutes. Ark. Code Ann. 17-81-206 (b)(11); Ark. Code Ann. 17-81-313(a); Ark. Code Ann. 17-81-303 (e)(1)..

Two citizens of this state, who had been under the care of a physical therapist and chiropractor at various times in their lives, both filed complaints that the Appellant Physical Therapist had performed spinal manipulations upon them, an act prohibited by not only the Chiropractic Practice Act, but the Physical Therapy Practice Act. Ark. Code Ann. 17-93-102 (6)(B)(i)(C). (AB 3,12).

The Chiropractic Board acting under legislative authority and in accordance with the Administrative Procedure Act afforded the Appellant substantive and procedural due process according to Ark.

Code Ann. § 25-15-212. (R 240, AD, 4). No evidence produced by the Appellant was prohibited from being presented. No witness of the Appellant was refused to testify. The Chiropractic Board spent seven hours encompassing hundreds of pages of transcripts before coming to its determination. Hardly what one would call a decision based upon less than substantial evidence or a decision made arbitrarily or capriciously.

The Appellant was afforded the opportunity for judicial review with this courts standards of review for all issues and the Chiropractic Board's determination was affirmed by the Circuit Court. Teston v. Arkansas State Board of Chiropractic Examiners, 2004 Ark. App. LEXIS 479 (2004). (R 1, 430-434, AD 61, 76-80).

The Appellant would have this court disregard in the instant case each and every holding that the Physical Therapy Board relied upon in Williams, concerning agency discretion, standards of review, etc., to have this very same court uphold its determination against Williams. Williams v Arkansas State Board of Physical Therapy, 353 Ark. 778, 120 S.W. 32 581 (2003).

This court has no choice based upon the entire record and separation of powers, but to affirm the Chiropractic Boards decision and leave it to the legislative branch to decide whether it now wants to allow physical therapists to perform spinal mobilization, spinal manipulations and spinal adjustments.

Until such time, both Board's Acts involved here prohibit such techniques by a licensed Physical Therapist. If the Chiropractic Board's Act is unconstitutionally vague then equally so the Physical Therapy Act is unconstitutionally vague and ultimately all the Board's of professionals that have access to the human spine are unconstitutionally vague and thus all void and meaningless. Such a conclusion sought by the Appellant is thus absurd and cannot be entertained without resultant chaos.

INTEREST OF AMICUS CURIAE

This Amicus Brief is being filed to present this court with a perspective on the questions presented that no other party or Amicus is providing – that of the oldest voluntary Chiropractic Association, the International Chiropractors Association (ICA), incorporated in Washington, D.C.

The ICA represents thousands of practitioners, educators, students, and lay persons dedicated to the chiropractic profession. The ICA is one of two major organizations dedicated to the task of representing and promoting the interests of chiropractic, chiropractors, and the patients they serve, through advocacy, research, and education, in every state of this country.

The ICA, founded almost 100 years ago, has found itself in a constant battle with organized medicine and its branches, for whatever their ulterior motives, many of which have been cited and adjudicated in federal court in Wilk v. AMA, 671 F. Supp. 1465 (N.D. ILL.1987). In Wilk, the court found that the AMA (American Medical Association), its members, and other associated medically based organizations and Boards participated in a conspiracy against chiropractors in violation of the nation’s anti-trust laws. Id.

It is ironic that the chiropractic profession in general and in Arkansas in particular finds itself in a turf war over methods long held by organized medicine, of which Physical Therapy is a sub-category, to be quackery, unscientific, and crippling. Comment: Wilk v AMA: The Lingering Effects Of An Inadequate Injunction To Remedy Malignant Anti-Trust Violations Against The Chiropractic Profession – A Search For The Cure To Federal And State Executive, Legislative, And Judiciary Inaction To Continued Discrimination Of Chiropractic As Related Especially To Insurance, U. of Miami Bus. L. Rev., Vol. XI, No. 1 & 2, pg. 150 (Winter/Spring 2003).

Physical therapists as a sub-category of organized medicine have no opposition or qualms about wanting to perform manipulations and mobilizations to the spine while a sub-category of medicine and dressing up the wolf in sheeps clothing. However, Chiropractors to this day are still actively attacked by individual medical doctors for practicing manipulation as a form of healthcare. Id. at 144. "Dr. Stephen Barrett, M.D., a longtime anti-chiropractic advocate dating back to the AMA Committee on Quackery, is still spewing his hatred with impunity at Quackwatch on the net, in four

languages no less.” Id. at 144. “Time magazine recently ran an article titled ‘Back off, Chiropractors!’ with a subheading of ‘Recent research suggests some chiropractic techniques may be dangerous for patients.’” Id. at 145.

The ICA wants chiropractors who have endured decades of harassment to achieve and maintain the recognition they deserve for the benefits that they bestow upon the public that the physical therapists now want to claim as their own. The AMA having been unable to eliminate or contain chiropractic, now appears to be re-naming the chiropractic procedures as physical therapy techniques where the purpose for the treatments are not to restore health in general as with Chiropractic Theory, a competition to medicine, but rather to relieve symptoms and ambulatory function, a mainstay of medicine. This is also an injunction proof method of reducing chiropractic services to the public, by steering the public toward physical therapists. Id.

In the Wilk case, the AMA sought exemption from their anti-trust actions by citing the Noerr-Pennington Doctrine of exemption

from anti-trust to protect the public safety. Id. at 133. The AMA was unable to convince the court of this argument. Id. at 133.

The ICA now comes before this Honorable Court and asks that it uphold the Chiropractic Board's decision in the interest of public safety, because without the extensive training, differential diagnosis, and diagnostic capabilities including x-rays, that chiropractors possess, the manipulation, mobilization, or adjustment of the human spine can be dangerous when applied by those of lesser training and knowledge such as by physical therapists. No doubt, the physical therapists would not sit back and allow athletic trainers, acupuncturists, massage therapists, or cosmetologists to practice what the Physical Therapy Board terms physical therapy. The legislature, has recognized the desire of physical therapist's to include manipulation to their repertoire and have specifically addressed the issue by excluding physical therapist's from performing spinal mobilizations, while granting them general mobilization ability only, and defining mobilization to ensure no doubt exists between what is a mobilization and what is a manipulation. Ark. Code Ann. 17-93-102 (6)(B)(i)(C)(2003); Ark. Code Ann. 17-81-102 (7).

Many other professions work on spines without attempting to manipulate or adjust, as those listed above, and may appear to be performing spinal mobilizations, manipulations, or adjustments, but none of the above professions so boldly attempts to incorporate manipulation into their profession, or manipulate, nonetheless, but call it by a different name as do the physical therapists. Lisa Saladin, Presidents Message April 2004, SCAPTA Bulletin, American Physical Therapy Association South Carolina Chapter, Vol. 4, Issue 3, April 2004; See also, Michael Teston, DefendPhysicalTherapy.com , <http://www.defendphysicaltherapy.com/>. The fact that a physical therapist is licensed to touch a persons spine through mobilization, or that a massage therapist or masseuse may touch a spine by way of massage, or that a cosmetologist may touch a spine for massage or waxing, or that an acupuncturist might touch a spine by inserting needles or cupping, or that a respiratory therapist might touch a spine in order to percuss, does not preclude from a finding that any of these licensed professionals that come in contact with the spine have been found to have practiced chiropractic instead of the art for

which they have been licensed, should they purposely perform spinal mobilizations, spinal manipulations, or spinal adjustments.

Although physical therapist's are specifically written into the Chiropractic Practice Act as it having no bearing on the practice of Physical Therapy, the Chiropractic Act neither can preclude, although not specifically listed, massage therapists/masseuses, physical trainers, athletic trainers, acupuncturists, respiratory therapists, cosmetologists, etc., from practicing their art according to their Practice Acts. Ark. Code Ann. 17-81-303(d)(2).

If, in the course of their respective duties, one of the above listed professionals touches the spine and a spinal vertebrae is accidentally manipulated or adjusted, as a one time event, it is highly unlikely that anyone would complain and that if they did, that the Chiropractic Board would likely not discipline them. However, should any of the above professions purposely touch the spine with the intent of manipulation on a regular basis, then they too, would be considered in violation of the Chiropractic Practice Act and most likely their own Practice Acts, as they are untrained and unqualified and

have not met the requirements of Chiropractic licensure, and would be disciplined exactly as has the Appellant.

Physical therapist's although licensed in their respective fields are not licensed in Chiropractic nor qualified to be so licensed.

The Chiropractic Board in Arkansas, supported by the ICA, proposes to license or promote Chiropractic Care in an expert fashion proven by examination prior to licensure for the safety of the citizens of the State of Arkansas and this great country.

The ICA cannot sit idly by, while The Physical Therapy Board attempts to blur the line between physical therapy mobilization and chiropractic spinal mobilization, manipulation, or adjustment, and neither can the Arkansas Chiropractic Board when complaints arise that untrained and until recently skeptic allopathic professionals attempt to not only perform manipulations without properly attested training, but try to substitute their bootlegged brand of manipulation as mainstream and safe, while to this date declaring, condoning, and applauding the libel against Chiropractic manipulations.

The ICA cannot sit idly by while organized medicine incorporates chiropractic techniques into its branch of physical

therapy in hopes of making chiropractic moot in the eyes of insurance companies, federal programs, and the unsuspecting public. Comment: Wilk, at 144-145. It is no accident that organized medicine itself has not intervened in this dispute. As to do so would violate the Wilk court's injunction, and be an admission of the efficacy of chiropractic spinal mobilizations, manipulation, or adjustments.

It is, therefore, the ICA's position that this Honorable Court uphold the decision of the Chiropractic Board and leave it to the legislative branch to decide whether physical therapists may practice chiropractic, and in the meantime leave such decisions to the Chiropractic Board, as has the legislature.

POINTS ON APPEAL

- A. Appellant was not exempt from provisions of the Chiropractic Practice Act.
- B. The Chiropractic Board followed all Statutory Requirements.
- C. The challenged statutes were not void for vagueness.
- D. Substantial evidence supported the Chiropractic Board's decision.

TABLE OF AUTHORITIES

CASES

Ark. Soil & Water Conservation Comm'n v. City of Bentonville,

351 Ark. 289, 92 S.W. 3d 47
(2002).....Arg. 1, 17

Ark. State Medical Bd. v. Shoen,

338 Ark. 762, 1 S.W. 3d 430
(1999)..... Arg. 1

Ark. Tobacco Control Board v. Sitton,

2004 Ark. LEXIS 284 (2004).....	Arg. 12 - 14
<u>Ford Motor Co. v. Ark. Motor Vehicle Comm’n,</u> 2004 Ark. Lexis 250 (2004).....	Arg. 1, 17
<u>Holloway v. Ark. State Bd. of Architects,</u> 79 Ark. App. 200, 86 S.W. 3d 391(2002) (affirmed in part and reversed in part by <u>Holloway v Arkansas</u> , 2003 Ark. Lexis 164 (2003).....	Arg. 1, 3 -5, 8, 17
<u>McQuay v. Ark. State Bd. of Architects,</u> 337 Ark. 339, 989 S.W. 3d 499 (1999).....	Arg. 1, 2, 17
<u>Monday v Canal Insurance Co.,</u> 348 Ark. 435, 73 S.W. 3d 594 (2002).....	Arg. 2, 3, 7, 11
<u>Nesterinko v. Ark. Bd. of Chiropractic Examiners,</u> 2003 Ark. App. Lexis 717 (2003).....	Arg. 1, 17
<u>Rosen v. State Architects Licensure Bd.,</u> 763 A. 2d 962, 2000 Pa. Comm W Lexis 685 (2000).....	Arg. 8
<u>Teston v. Ark. State Bd. of Chiropractic Examiners,</u> 2004 Ark. App. LEXIS 479 (2004).....	vi
<u>Williams v. Ark. State Bd. of Physical Therapy,</u> 353 Ark. 778, 120 S.W.3d 581 (2003).....	Arg. 17 – 21 & vii
<u>Wilk v. AMA,</u> 671 F. Supp. 1465, (N.D. Ill. 1987).....	viii

STATUTES/RULES

Ark. Code Ann. § 17-26-102

(2003).....v

Ark. Code Ann. § 17-80-114

(2003)..... Arg. 10 – 11

Ark. Code Ann § 17-81-101

(2003).....iv

Ark. Code Ann. § 17-81-102

(2003).....xi

Ark. Code Ann § 17-81-206

(2003).....v

Ark. Code Ann. §17-81-303

(2003).....Arg. 6-7

Ark. Code Ann § 17-81-313

(2003).....v

Ark. Code Ann. § 17-93-102

(2003)..... Arg. 5

Ark. Code Ann. § 17-93-301

(2003)..... Arg. 9

Ark. Code Ann. § 17-93-311

(2003)..... Arg. 10

Ark. Code Ann. §17-102-102

(2003).....v

Ark. Code Ann. § 17-86-102

(2003).....v

Ark. Code Ann § 25-15-212

(2003).....vi

MISCELLANEOUS

Henry M. Rubinstein, D.C., Comment: **Wilk v AMA: The Lingering Effects Of An Inadequate Injunction To Remedy Malignant Anti-Trust Violations Against The Chiropractic Profession – A Search For The Cure To Federal And State Executive, Legislative, And Judiciary Inaction To Continued Discrimination Of Chiropractic As Related Especially To Insurance,**

U. of Miami Bus. L. Rev., Vol. XI, No. 1 & 2, pg. 132, (Winter/Spring

2003).....viii, ix, x, xiv

Mark Friedman, **“Chiropractors, Therapists Keep Battling,”** Arkansas Business, September 8, 2003, and Michael Teston, **“Chiropractors declare ‘It’s time to take the gloves off’ in an attempt to limit the scope of physical therapy practices.”**

<http://www.defendphysicaltherapy.com/>.....

.....xii

Vince Lepak, P.T., M.P.H., C.W.S., **Principles of Joint Mobilization Lectures 1 & 2, Evaluations and Interventions I,** PHTH/OCTH. 7233- Spring

Syllabus, University of Oklahoma Sciences Center, Division of Rehabilitation Sciences (date unknown)..... Arg. 15 -16

Lisa Saladin, **Presidents Message April 2004**,

SCAPTA Bulletin, American Physical Therapy

Association South Carolina Chapter, Vol. 4,

Issue 3, April

2004.....

.....xii

ABSTRACT

PROVIDED BY APPELLEE OR APPELLANT

STATEMENT OF THE CASE

PROVIDED BY THE APPELLEE

