

Supreme Court of Alabama affirms ruling in favor of physical therapist in spinal manipulation case

Over the past fifteen years, legislation has been introduced in multiple states that would restrict physical therapists from practicing and/or advertising spinal manipulation and limit such activity to chiropractors alone or chiropractors, osteopaths and medical doctors.¹ In addition, several state chiropractic boards have sought legal opinions from their respective state Attorney General's offices on whether physical therapists can legally perform spinal manipulation as part of their scope of practice.²

The lone state supreme court to consider this issue however, was, until recently, the Supreme Court of Arkansas. In Teston v. Arkansas State Bd of Chiropractic Examiners, the Supreme Court of Arkansas affirmed a decision by the Arkansas State Board of Chiropractic Examiners finding that Michael Teston, an Arkansas-licensed physical therapist, had engaged in the practice of chiropractic without a license as a result of his performing spinal manipulations on two patients, notwithstanding the fact that the Arkansas State Board of Physical Therapy reviewed the treatments administered by Teston and found them to be "within the scope of the practice of physical therapy."³ The Arkansas State Board of Physical Therapy, the American Physical Therapy Association, and the Federation of State Boards of Physical Therapy each had submitted amicus curiae briefs to the Supreme Court of Arkansas, urging it to overturn the decision of the Arkansas

¹See, e.g., 1999 Virginia Senate Bill 1141 (a bill to restrict the performance of spinal manipulation procedures to licensed doctors of osteopathy, chiropractic or medicine), and 1999 New York Senate Bill 06003 (a bill granting only licensed chiropractors and medical doctors the legal authority to perform spinal manipulation).

²See, e.g., Op. S.C. Att'y Gen. No. 4106 (Apr. 30, 2009); Op. N.H. Att'y Gen. (Feb. 23, 2009); Op. Neb. Att'y Gen. No. 09005 (Feb. 9, 2009); Op. Tenn. Att'y Gen. No. 07-55 (April 23, 2007); Op. Wisc. Att'y Gen. No. 01-01 (Jan. 30, 2001).

³206 S.W.3d 796 (Ark. 2005).

State Board of Chiropractic Examiners; however, their arguments were rejected and the Arkansas State Board of Chiropractic Examiners' decision fining Teston \$10,000 for two instances of practicing chiropractic was ultimately upheld.

On January 20, 2012, the Supreme Court of Alabama became the second state supreme court to consider a state chiropractic board's attempt to prohibit a licensed physical therapist from performing spinal manipulations. In contrast to the Teston case, however, the Supreme Court of Alabama rejected an attempt by the Alabama State Board of Chiropractic Examiners (hereinafter referred to as "the Chiropractic Board") to prevent Dr. James Dunning, DPT, an Alabama-licensed physical therapist, from advertising and performing spinal manipulations.⁴

The Chiropractic Board initiated the dispute with Dr. Dunning on February 5, 2008, when it sent Dr. Dunning a cease-and-desist letter in regards to a seminar Dr. Dunning was scheduled to teach in Mobile, AL, on February 22-23, 2008, entitled "High-Velocity Low-Amplitude Thrust Manipulation of the Cervical, Thoracic, Lumbar and SI Joints."⁵ The Chiropractic Board took the position that the spinal-manipulation techniques to be taught in this course were literally the practice of chiropractic and not within the scope of practice of a physical therapist, notwithstanding the fact that the Alabama State Board of Physical Therapy (hereinafter referred to as "the Physical Therapy Board") had already approved this seminar for continuing education credit for Alabama-licensed physical therapists. The Chiropractic Board further stated in the cease-and-desist letter to Dr. Dunning that "[i]f you intend on representing that physical therapists will be allowed to perform the above referenced

⁴Dunning v. Alabama State Board of Chiropractic Examiners, [No. 1090107, January 20, 2012], ___ So. 3d ___ (Ala. 2012) (table).

⁵The cease-and-desist letter, and all other documents referred to in this article can be found in the public record maintained by the Montgomery County Circuit Court Clerk's Office (case no. CV-09-900640), or the Supreme Court of Alabama Clerk's Office (appeal no. 1090107).

procedures and techniques in the state of Alabama, or that it is allowable as being within the scope of a physical therapist's practice, you will leave the Board with no choice but to initiate litigation. If the Board does not receive such assurance within seven (7) days from the date of this letter, the Board will proceed as described above."

In response to the cease-and-desist letter, Dr. Dunning retained an attorney and advised the Chiropractic Board via letter that the law allowed it to file a complaint with the Physical Therapy Board if it believed that he was acting outside the scope of his authority as a physical therapist.⁶ The Chiropractic Board did not respond to Dr. Dunning's letter and the Mobile seminar was taught as planned without any further challenge.

The Chiropractic Board apparently changed its strategy following the completion of the Mobile seminar and, rather than continue to address the issue of Dr. Dunning teaching spinal manipulation to others, elected to target Dr. Dunning's personal practice and advertising of spinal manipulation at his outpatient physical therapy clinic in Montgomery, AL. On September 9, 2008, the Chiropractic Board issued a letter of complaint to the Physical Therapy Board in response to an advertisement Dr. Dunning was running for his clinic in a local Montgomery magazine. In that letter, the Chiropractic Board stated that it was "troubled" by Dr. Dunning's assertion in the advertisement that he was able to perform "spinal manipulation" and by Dr. Dunning's use of the title "Dr." which, the Chiropractic Board alleged, could mislead consumers to believe that Dr. Dunning's office involved the practice of medicine. The Chiropractic Board accordingly asked the Physical Therapy Board to investigate these two issues and advise the Chiropractic Board if Dr. Dunning's advertisement was "acceptable."

On November 28, 2008, Sonja Enfinger, then chair of the Physical Therapy Board, responded to the Chiropractic Board with a letter advising it of the Physical Therapy Board's

⁶Dr. Dunning was represented in all stages of this litigation by Rick Bearden with the law firm of Massey, Stotser & Nichols, P.C., in Birmingham, AL.

opinion that "it is permissible for Dr. Dunning to advertise in such a manner." The letter further stated that Dr. Dunning was a licensed physical therapist in good standing and that he did, in fact, hold a Doctorate of Physical Therapy. The Physical Therapy Board concluded by stating that "[a] licensee can have their name printed as 'Dr. Last Name, DPT' and they can be referred to verbally as 'Dr. Last Name.' They have earned the title, and the Board cannot prohibit them from using it."

Subsequently, the Chiropractic Board sought a formal advisory opinion from the Alabama Attorney General's office regarding Dr. Dunning's use of spinal manipulation and whether he was practicing chiropractic without a license by performing such procedures. At a later court hearing, however, it was revealed that the Chiropractic Board withdrew that request after it discovered that the advisory opinion was not going to be favorable to it:

"Court: Well, did y'all request an opinion from the Attorney General as the lawyer said?

"Board: Yes.

"Court: And then withdrew the thing?

"Board: Yes, sir.

"Court: Why did you withdraw it?

"Board: Well, because it wasn't going to be favorable."

Having found no success engaging directly with Dr. Dunning, before the Physical Therapy Board, or at the Attorney General's office, on May 27, 2009, the Chiropractic Board filed suit against Dr. Dunning in the Montgomery Circuit Court. The lawsuit alleged that "[b]y advertising or performing spinal manipulations for the relief of pain ... Dunning is either holding himself out as and/or is practicing chiropractic without a license." The Chiropractic Board further requested that the trial court (1) enter an order declaring "that spinal manipulations can only be performed by individuals licensed to practice chiropractic in this state"

and (2) issue a permanent injunction barring Dr. Dunning from advertising or performing spinal manipulations.

In his June 29, 2009, answer to the lawsuit, Dr. Dunning denied that he was practicing chiropractic. Moreover, on July 1, 2009, Dr. Dunning moved the trial court to enter a summary judgment in his favor arguing, among other things, that the Physical Therapy Board had already ruled that he was not practicing outside the scope of physical therapy by performing spinal manipulations and that the Chiropractic Board's attempt to obtain a court order barring all physical therapists from performing spinal manipulations by suing Dr. Dunning, instead of the Physical Therapy Board, was not authorized by law. Dr. Dunning supported his motion with an affidavit from Enfinger in which she confirmed that "it is the Board of Physical Therapy's interpretation of its practice act that neither the advertising of, nor the performance of 'spinal manipulation' violates the Physical Therapy Practice Act [§ 34-24-190, et seq., Ala. Code 1975]."

On August 25, 2009, the trial court held a hearing on Dr. Dunning's summary-judgment motion. At that hearing, the Chiropractic Board confirmed that it was seeking a ruling that would prohibit all physical therapists, not just Dr. Dunning, from engaging in spinal manipulation. At the conclusion of the hearing, the trial court observed that "it appears to me that the Board -- the Physical Therapy Board -- should be in this lawsuit because [the Chiropractic Board is] challenging their decision. Their decision, I mean, that's what y'all are challenging. It's Board against Board. Not so much Board against Dr. Dunning. It's Board against Board. That appears to me where this case should lie." On September 9, 2009, the trial court entered an order dismissing the case.

Again not satisfied with the response it had received, on October 20, 2009, the Chiropractic Board filed an appeal with the Supreme Court of Alabama, arguing that the trial court erred in dismissing the case. In his opposing brief, Dr. Dunning argued that the trial court properly dismissed the lawsuit because the Alabama Legislature had, by statute, empowered the Physical Therapy Board to interpret the Physical Therapy Act under which Dr. Dunning practices, and that the Chiropractic Board was essentially trying to avoid the established legal procedure for resolving disputes between

administrative boards by seeking a decision that would bind the Physical Therapy Board and all its members without actually suing the Physical Therapy Board. Moreover, Dr. Dunning argued, the underlying issue regarding the propriety of a physical therapist performing spinal manipulations, if reached, was easily resolved by examining the clear terms of the Physical Therapy Practice Act, which authorizes physical therapists to treat individuals by the use of "exercise, massage, heat, cold, water, radiant energy, electricity, or sound."⁷ One need long no further, Dr. Dunning argued, than the first definition of 'massage' in Merriam-Webster's dictionary to find that its plain and ordinary meaning is 'manipulation.'⁸ Inasmuch as the Chiropractic Board had repeatedly emphasized that the Physical Therapy Practice Act did not specifically include the term "spinal manipulation," Dr. Dunning noted that that term was likewise absent from the Chiropractic Practice Act.⁹

On January 20, 2012, after a 27-month wait, the Supreme Court of Alabama affirmed the trial court's ruling in favor of Dr. Dunning by a unanimous 9-0 vote without issuing a written opinion. The Chiropractic Board did not exercise its right to apply for a rehearing, thus bringing to an end its four-year campaign to intervene in Dr. Dunning's physical therapy practice. Dr. Dunning is the second physical therapist in the United States to be sued and taken to a state supreme court based on his practice of spinal manipulation; however, unlike Michael Teston in Arkansas, Dunning prevailed.

⁷§ 34-24-191(a)(1), Ala. Code 1975.

⁸Merriam Webster's Collegiate Dictionary, 763 (11th ed. 2003).

⁹§ 34-24-120, et seq., Ala. Code 1975.