

IN THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI

STATE BOARD OF REGISTRATION)
FOR THE HEALING ARTS,)

Case No.: 08BA-CV01476

Plaintiff,)

DAVID MATTHEW WHITE, D.C.)
d/b/a ADVANCED PHYSICAL)
HEALTH, P.C.)

Defendant.)

**DEFENDANT'S REPLY TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Respectfully Submitted,

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material facts and Defendant is entitled to summary judgment as a matter of law.

II.

DEFENDANT'S ANSWERS TO PLAINTIFF'S STATEMENT OF UNCONTROVERTED FACTS

In response to defendant's statement of uncontroverted facts, plaintiff:

1. Admits Paragraph 1 as the true and correct copy of Joint Stipulation of Facts that was filed with the Court on September 19, 2008.
2. Defendant admits that 23 years ago Webster's Dictionary defined "chiropractic" as represented by Plaintiff, however, more germane to the case at bar would be the definition and scope of chiropractic outlined by a Missouri statute.¹
3. Defendant admits that 23 years ago Webster's defined "physiotherapy" as represented by Plaintiff, however, more germane to this litigation would be scientific definitions of the term "physiotherapy" as a "**physiologic and rehabilitative modality**".²

¹ See RSMo 331.010.1 which defines the "practice of chiropractic" as the "examination, diagnosis and treatment, of patients, by those methods **commonly taught at any chiropractic college, chiropractic program or university which has been accredited by the Counsel on Chiropractic Education, its successor entity or approved by the Board...**". (emphasis added),

² Physiotherapy is more properly defined as; "*therapy that uses physical agents, exercise and massage and other modalities*". See, Modern Language Association, "physiotherapy", Princeton University, 2009.

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FOR THE HEALING ARTS,]	
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Plaintiff,]	
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v.]	Case No.: 08BA-CV01476
]	
DAVID MATTHEW WHITE, D.C.]	
d/b/a ADVANCED PHYSICAL]	
HEALTH, P.C.]	
]	
Defendant.]	

III.

BREIF IN SUPPORT OF DEFENDANT'S REPLY TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

III-1. Plaintiff has not complied with Rule 74.04 by failing to provide specific references to the pleadings, discovery, exhibits or affidavits that refute Defendant's facts and legal arguments.

Summary Judgment is proper when there is no genuine issue of material facts and the Plaintiff is entitled to a judgment of law. *ITT Commercial Finance v. Mid-America Marine*, 854 S.W.2d 371, 376 (Mo. Banc 1993) Rule 74.04(c)(1) states that Motions for Summary Judgment shall,

".....summarily state the legal basis for the motion" A statement of uncontroverted material facts shall be attached to the motion. The statement shall state with particularity in separately numbered paragraphs each material fact as to which movant claims there is no genuine issue, with specific references to the pleadings, discovery, exhibits or affidavits that demonstrate the lack of a genuine issue as to such facts....."

Section 334.610 RSMo has a specific exception which permits duly licensed chiropractic physicians to advertise **"physiological and rehabilitative modalities"**. **Chiropractic physiotherapy is a physiologic and rehabilitative modality.** See, (Laney Nelson Aff.)(attached as Exhibit D to Defendant's Motion for Summary Judgment).

Plaintiff has not rebutted such affidavit and has provided no evidence to refute this admonition that specifically excludes chiropractic physicians from the application of 334.610.

Chapter 334 does not apply to “....**chiropractors licensed and fully practicing their professions within the provisions of Chapter 331, RSMo**”. See, § 334.155.2, RSMo. Dr. White is a licensed chiropractor in the state of Missouri. See, (Loree Kessler Aff ¶ 5.)(Executive Director of the Missouri Board of Chiropractic Examiners, attached to Defendant’s Motion for Summary Judgment as “Exhibit A”). As a chiropractic physician duly licensed by the state of Missouri, he is permitted to practice any methodology “**commonly taught at any chiropractic college or chiropractic program at a university which has been accredited by the Counsel on Chiropractic Education....or approved by the Board**.”³ See, §331.010.1 RSMo. (Emphasis added.). “**Chiropractic physiotherapy**” is a form of **physiologic and rehabilitative modality** commonly taught at both Logan and Cleveland Chiropractic Colleges as part of their curriculum for Doctor of Chiropractic. See, (Laney Nelson Aff ¶ 6.)(Attached as Exhibit B to Defendant’s Motion for Summary Judgment),(William Tuttle D.C. Aff ¶ 7.) (Attached as “Exhibit E” to Defendant’s Motion for Summary Judgment). The Missouri Board of Chiropractic Examiners has determined that the use of the term “**chiropractic physiotherapy**” is a **physiologic and rehabilitative modality** which falls within the scope of practice of chiropractic physicians licensed and practicing pursuant to § 331.010 RSMo. See, (Loree Kessler Aff ¶ 8), (Executive Director of the Missouri State Board of Examiners, attached as “Exhibit A” to Defendant’s Motion for Summary Judgment).

The purpose of Rule 74.04 is to provide specific bases or basis to counsel, the trial court and the appellate court to show that a party is entitled to summary judgment as a matter of law. See, *Finley v. St. John’s Mercy Medical Center*, 903 S.W.2d 670, 672 (Mo. App. E.D. 1995). In the case at bar, Plaintiff’s Motion for Summary Judgment provides no basis by affidavit or otherwise that show how it is entitled to judgment as a matter of law. See, *Hanna v. Darr*, 154 S.W. 3d 2 (Mo. App E.D. 2004)(stating “failure to comply with particularity of requirements of Rule 74.04 and failure to give specific

³ “Board” referenced in 331.010 means the State Board of Chiropractic Examiners. See, Section 331.020 RSMo.

references to supporting documentation improper for impedes proper appellate review.”). Here Plaintiff has provided no facts via affidavit or otherwise to provide any basis to deny Defendant summary judgment as a matter of law.

III-2. Chiropractic physiotherapy is not physical therapy but is a physiologic and rehabilitative modality whose use is expressly permitted for chiropractic physicians duly licensed pursuant to Chapter 331.

The core of Plaintiff’s argument appears to rest upon the false assumption that “**chiropractic physiotherapy**” is “**physical therapy**”.⁴ It is not. “**Chiropractic physiotherapy**” is a form of “**physiologic and rehabilitative modality**”. See, (Laney Nelson Aff ¶ 6)(Attached as “Exhibit B” to Defendant’s Motion for Summary Judgment)(William Tuttle, D.C. Aff ¶7.)(Attached as “Exhibit E” to Defendant’s Motion for Summary Judgment). The advertisement of **physiologic and rehabilitative modalities** by chiropractic physicians is expressly permitted under Missouri law. See, 334.610 RSMo.

Chiropractic physiotherapy is a physiologic and rehabilitative modality which is commonly taught at accredited chiropractic colleges. See, (Laney Nelson Aff ¶ 6)(Attached as “Exhibit B” to Defendant’s Motion for Summary Judgment)(William Tuttle, D.C. Aff ¶7.)(Attached as “Exhibit E” to Defendant’s Motion for Summary Judgment). In order to graduate from an accredited chiropractic college all chiropractic physicians in the state of Missouri must complete national board exams which are administered by the National Board of Chiropractic Examiners which covers the practice of chiropractic physiotherapy. See, *National Board of Chiropractic Physiotherapy study guide; key review questions and answers*; Leonardi, Patrick, 2005.

(a) ***The Clear Intent of Legislature in § 334.610 Was To Exclude Chiropractic Practices from Prosecution Under The Statute.***

⁴ On Page 5 of Plaintiff’s Motion for Summary Judgment, he states “in the current case the Defendant’s use of the word “**chiropractic physical therapy**” shows he is holding himself out as a physical therapist. This is inaccurate as nowhere in the pleadings, affidavits or otherwise does Defendant ever refer to the term “**chiropractic physical therapy**”.

The goal of statutory analysis is to ascertain the intent of the legislature, as expressed in the words of the statute. *American Healthcare Management, Inc. v. Director of Revenue*, 984 S.W.2d 496, 498 (Mo. Banc 1999) (citing *Hyde Park Housing Partnership v. Director of Revenue*, 850 S.W.2d 82, 84 (Mo. Banc 1993)). Plaintiff's motion for summary judgment ignores this basic tenet of statutory construction. In fact, the Plaintiff does not mention the fact that §334.610 does not limit the ability of Missouri chiropractors to practice under §331. *See* 334.610 RSMo.(reading "**nothing in sections 334.500 to 334.620 shall prohibit** any person licensed in this state under chapter 331 RSMo. (Defining **Chiropractic Practice**), from carrying out the practice for which the person is duly licensed, or from **advertising the use of physiologic and rehabilitative modalities...**")(emphasis added). Therefore, as long as the practice of **chiropractic physiotherapy** is allowed under §331, there is no issue of genuine fact for the plaintiff to bring a claim against the defendant. §331.010.1 RSMo. (defining chiropractic practice as "the science and the art of examination, diagnosis, adjustment, manipulation and treatment ... by those methods commonly taught in any chiropractic college ... approved by the Council of Chiropractic Education.).

The Plaintiff's motion is weakened further because **chiropractic physiotherapy** is commonly taught in leading chiropractic colleges and has been for years. *See*, (Laney Nelson Aff ¶ 6)(Attached as "Exhibit B" to Defendant's Motion for Summary Judgment)(William Tuttle, D.C. Aff ¶7.)(Attached as "Exhibit E" to Defendant's Motion for Summary Judgment).). In fact, there are even boards for the practice of chiropractic physiotherapy that are administered by the National Board of Chiropractic Examiners. *See, National Boards of Chiropractic Physiotherapy Study Guide: Key Review Questions and Answers*; Leonardi, Patrick, Pub 2005. (known as the best selling study guide for Physiotherapy National Chiropractic Board Exam).

The Plaintiff's interpretation would place a limit on chiropractic practice when the legislature took the time to deliberately state that the statute shall not place such a limit on chiropractic practices. The Plaintiff's interpretation would eviscerate the words and meaning given to the statute by the Missouri General Assembly.

- (b). ***Chiropractic Physiotherapy is a Term of Art and Should Not be Defined by a Plain and Ordinary Meaning Standard, Further the Term is Not Present In The Statute***

The Plaintiff's Motion states the Defendant called himself a "Chiropractic Physical Therapist". This is not true. Such a statement does not exist anywhere in the record. The Plaintiff's motion continues to define the term "**chiropractic physiotherapy**" as if the phrase exists in the statute, but lacks definition. Plain and ordinary meaning statutory analysis is only used for words present in the statutory language, but the legislature never included the term chiropractic physiotherapy. Therefore, Plaintiff cannot extrapolate the 'plain and ordinary meaning' of physiotherapy when such a word is not used in the statute that it seeks to enforce.

If the Court did apply a plain and ordinary meaning to the word physiotherapy it should be defined as: "therapy that uses physical agents: exercise and massage and other modalities". Modern Language Association, "physiotherapy", *Princeton University*, (2009).available at <http://dictionary.reference.com/browse/physiotherapy>. This definition is superior to the one offered by the Plaintiff because it actually defines the word and it is a current definition instead of a definition from the late 1980's. More importantly, it shows that physiotherapy is the use of rehabilitative modalities. The language in §334.610 is purposeful in allowing the advertisement of rehabilitative modalities by chiropractors. See 334.610 RSMo. (reading "**nothing in sections 334.500 to 334.620 shall prohibit** any person licensed in this state under chapter 331 RSMo. (Defining **Chiropractic Practice**), from carrying out the practice for which the person is duly licensed, or from **advertising the use of physiologic and rehabilitative modalities...**")(emphasis added).

The fact that the term **chiropractic physiotherapy** is used throughout the chiropractic profession also shows that it is a term of art and therefore not entitled to plain and ordinary meaning analysis at all. Plaintiff's motion cites *Curry v. Ozarks Electric Corporation*, which is a workers compensation case that came down to a definition of "authorized". 39 S.W.3d 494, 496 (Mo. 2001). This case is distinguishable because at question was the ordinary word, "authorized", which was in the statute but not defined in the statute and therefore entitled to a lay person's interpretation. *Id.* The term "**chiropractic physiotherapy**" however is much more complicated and a person with "average, intelligence, knowledge and experience" would not have the expertise to

correctly define it. *See Bailey v. Federated Mut. Ins. Co.*, 152 S.W.3d 355, 357 (Mo. App. 2004). The Court should defer to the experts who define “**chiropractic physiotherapy**” as a commonly taught and practiced chiropractic rehabilitative modality. *See*, (Laney Nelson Aff ¶ 6)(Attached as “Exhibit B” to Defendant’s Motion for Summary Judgment)(William Tuttle, D.C. Aff ¶7.)(Attached as “Exhibit E” to Defendant’s Motion for Summary Judgment).. The Plaintiff offers no affidavits from medical professionals or any expert to attest that the term ‘**chiropractic physiotherapy**’ is not a rehabilitative modality. Because Plaintiff cannot provide any rebuttal evidence to refute Defendant’s affidavits attesting to ‘**chiropractic physiotherapy**’ as a **physiologic and rehabilitative modality** taught by chiropractic colleges and commonly practiced by chiropractic physicians its Motion for Summary Judgment must fail.

In order for the Plaintiff to meet the standard for summary judgment its motion would have had to show 1) That chiropractic physiotherapy is physical therapy 2) That the term chiropractic physiotherapy is directly barred by the statute 3) That the legislature intended to limit the practice of chiropractic physiotherapy even when it strictly said that the statute should not be seen as a limit on chiropractic practice.

IV. CONCLUSION

Chiropractic physiotherapy is not physical therapy. Plaintiff has provided no pleadings, discovery, exhibits or affidavits to suggest otherwise.

Physiotherapy is a physiologic and rehabilitative modality the advertisement of which is expressly permitted by a duly licensed chiropractic physician under Missouri law. Consequently, since Plaintiff has offered no references to pleadings, discovery, exhibits or affidavits that suggest otherwise, Defendant is entitled to summary judgment as a matter of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a true and correct copy of the above and foregoing was sent via First Class U.S. Mail, postage prepaid on this 20th day of February, 2009, to:

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