

**IN THE SUPERIOR COURT OF PENNSYLVANIA**

STATE FARM MUTUAL  
AUTOMOBILE INSURANCE  
COMPANY, et. al.

2953 EDA 2017

vs.

Delaware County Docket No.  
2005-010716

ROBERT J. CAVOTO, et. al.  
Appellant

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**AMICUS CURIAE, THE PENNSYLVANIA CHIROPRACTIC  
ASSOCIATION'S, BRIEF IN SUPPORT OF APPELLANT  
ROBERT J. CAVOTO, ET. AL.**

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Appeal from the July 7, 2017 Decision of The Honorable G.  
Michael Green, Delaware County Court of Common Pleas, Docket  
Number 2005-010716, prohibiting delegation of Therapeutic  
Exercise by Doctors of Chiropractic to unlicensed support staff

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## **TABLE OF CITATIONS**

### **Cases:**

State Farm Mutual Automobile Ins. Co. v. All-Care Chiropractic, 2004 WL 1446033 (Dalzell, J., E.D. Pa.)

State Farm Mutual Automobile Insurance Company, et al. v. Robert J. Cavoto, Jr. et al., 2011 PA Super 250, (November 21, 2011)

State Farm Mutual Automobile Insurance Company, et al. v. Robert J. Cavoto, Jr. et al., No. 2005-010716 (CCP – Delaware County)

Wiley v. State Farm Fire & Casualty Co., 995 F.2d 457, 459 (3<sup>rd</sup> Cir 1993)

### **Statutes and Regulations:**

63 Pa.C.S. § 625.601

63 Pa.C.S. § 625.102

63 Pa.C.S. § 625.522

49 Pa. Code § 5.62

Ohio Administrative Code 4734-8-02

16 CCR § 312

22 TAC § 77.5

Wis. Admin. Code. CHIR § 10.02 (2014)

Wis. Admin. Code. CHIR § 10.05 (2014)

### **Miscellaneous:**

Current Procedural Terminology (CPT) Copyright 1995-2018, American Medical Association (2018)

AMA CPT Assistant, Summer 1995 pages 5-9 “Significant Revisions: Physical Medicine and Rehabilitation”

## **STATEMENT OF INTEREST**

Amicus Curiae, Pennsylvania Chiropractic Association (PCA), is a non-profit corporation whose membership includes approximately 900 licensed Pennsylvania Doctors of Chiropractic. The PCA was formed for the following stated reasons:

[t]o effect an organization of licensed practitioners of the Chiropractic health care profession; to protect and perpetuate in ways not contrary to law, the philosophy, science, and art of Chiropractic as a separate and distinct primary health care discipline; to further plans for the proper licensing of practitioners; to perpetuate the role of Doctor of Chiropractic Physician (hereinafter referred to as Doctor of Chiropractic or Chiropractor) at all levels within the health care delivery system; to maintain high professional standards of practice and conduct among its members; to further regulatory measures for the practice of the Chiropractic health care profession; to conduct research work and experiments with the view of advancing the profession; to gather and disseminate reliable information on the exactness of its science, the truth of its philosophy, and the benefits to be derived from the applications of its art; to advance educational requirements for Chiropractors to the end that those practicing Chiropractic health care shall be eminently qualified by broad experience, technical knowledge and personal efficiency to uphold the dignity and honor of the profession; to establish a code of high ethics for the regulation of the professional conduct of its members; to effect closer cooperation among Chiropractors; to

promote and protect the social, intellectual and professional welfare of its members in particular and of all members of the profession in general; to hold meetings of its members and print and publish professional literature on the Chiropractic art and science; to bring about a better understanding of the principles of Chiropractic and the benefits to be derived from their application; to familiarize the general public with Chiropractic health care as a means of removing the cause of human ailments and to secure the rights of Chiropractors and their patients; to promote the philosophy, art and science of Chiropractic; and to generally promote and maintain the welfare and interests of its members.

This issue presented in this case is whether the Pennsylvania Chiropractic Practice Act (Act) prohibits a licensed chiropractor from utilizing the assistance of unlicensed supportive personnel to perform Therapeutic Exercise under the direct, on-premises supervision of a licensed chiropractor. In other words the issue to be decided hinges on whether exercises that fall under the category of Therapeutic Exercise are comprised of tasks that do not require formal education or training in the practice of chiropractic or the knowledge and skill of a licensed chiropractor.

**STATEMENT OF THE QUESTION INVOLVED**

WHETHER THIS HONORABLE COURT SHOULD REVERSE THE TRIAL COURT DECISION PROHIBITING CHIROPRACTORS FROM DELEGATING THERAPEUTIC EXERCISE TO UNLICENSED SUPPORT STAFF.

Suggested answer: YES

## **SUMMARY OF ARGUMENT**

The purpose of this Brief of Amicus Curiae, Pennsylvania Chiropractic Association, is focused entirely on the trial court's decision that prohibits Pennsylvania Doctors of Chiropractic from delegating Therapeutic Exercise to unlicensed support staff.

The relevant section of the Pennsylvania Chiropractic Practice Act (the "Act") states:

### **Supportive Personnel**

Nothing in this act shall prohibit a licensed chiropractor from utilizing the assistance of unlicensed supportive personnel performing under the direct on-premises supervision of a licensed chiropractor, provided that a chiropractor may not delegate any activity or duty to such unlicensed individuals which requires formal education or training in the practice of chiropractic or the knowledge and skill of a licensed chiropractor.

63 Pa.C.S. § 625.601. The Act clearly requires licensed chiropractors to personally perform all procedures, activities and tasks that require formal education or training in the practice of chiropractic or the knowledge and skill of a licensed chiropractor including, but not limited to, spinal manipulations, patient examinations and evaluations, and prescribing a plan of care. However, the Act also permits a DC to delegate non-specialized

tasks to unlicensed supportive personnel so long as the DC provides direct, on-premises supervision. Examples of non-specialized tasks include performance of X-rays and the application of Passive Modalities. Contrary to the trial court's determination, non-specialized tasks also include observation and assistance of the performance of Therapeutic Exercise.



## **ARGUMENT**

The trial court erred as a matter of law when it determined that the Pennsylvania Chiropractic Practice Act (the "Act") prohibits Pennsylvania Doctors of Chiropractic (hereinafter "DC" or "DCs") from delegating Therapeutic Exercise to unlicensed supportive personnel when the DC has his/her adjunctive procedure certification; the DC is providing direct, on-premises supervision; and when the delegated task or activity does not require the knowledge and skill of a DC or formal education and training in the practice of chiropractic.

The scope of practice for DCs in Pennsylvania includes procedures, actions, and processes that a DC is permitted to undertake in keeping with the terms of his or her chiropractic licensure. The Act, 63 Pa.C.S. § 625.102 et. seq., defines the scope of practice for DCs in Pennsylvania as follows:

systems of locating misaligned or displaced vertebrae of the human spine and other articulations; the examination preparatory to the adjustment or manipulation of such misaligned or displaced vertebrae and other articulations; the furnishing of necessary patient care for the restoration and maintenance of health; and the

use of board-approved scientific instruments of analysis, including **X-ray**. (*emphasis added*).

The term shall also include diagnosis, provided that such diagnosis is necessary to determine the nature and appropriateness of chiropractic treatment.

The use of **adjunctive procedures** in treating misaligned or dislocated vertebrae or articulations and related conditions of the nervous system, provided that, after January 1, 1988, the licensee must be certified in accordance with this act to use adjunctive procedures.

(emphasis added). 63 Pa.C.S. § 625.102. For example, if a patient has an injury, the DC will perform an initial examination on the patient to determine the nature of the injury which includes an initial interview/discussion with the patient. The DC will often review the patient's history and symptoms and the DC can determine when and how the pain started; the location of the pain; whether the pain is sharp, dull, continuous, or throbbing; whether any activities make the pain worse; and other relevant information. The DC may order and interpret general tests such as blood pressure, pulse, and reflexes and then more specific orthopedic and neurological tests such as range of motion, muscle tone, muscle strength, and neurological integrity. The DC

may also order and interpret X-ray or other diagnostic studies that can reveal pathologies and to help the DC identify structural abnormalities. The DC will use this information to render a diagnosis and establish a plan of care (treatment plan) for the patient. The purpose of the treatment plan is to identify short term and long term goals for the patient and the type of treatment necessary to achieve those goals. There are three (3) categories of treatment that the DC may utilize 1) Spinal Manipulations (Adjustments), 2) Passive Modalities and/or 3) Therapeutic Procedures. Therapeutic Procedures are comprised of subcategories of procedures including, but not limited to, Therapeutic Exercise, Manual Therapy Technique, Massage Therapy, and Neuromuscular Reeducation. Therapeutic Exercises include, but are not limited to treadmill, wall squats, gymnastics ball, and wobble board. Throughout the course of care, the DC will often re-evaluate the patient to determine the patient's response to the treatment and the DC may alter the treatment plan accordingly. Evaluation and management of the patient involves three key components: history, examination, and

medical decision making. Most of the aforementioned activities that are performed by the DC require formal education and training in the practice of chiropractic or the knowledge and skill of a licensed chiropractor; therefore, these tasks require clinical skills of a DC and can be considered “specialized”.

There are, however, other specific tasks related to some of these procedures that do not require formal education and training in the practice of chiropractic or the knowledge and skill of a licensed chiropractor. These tasks can be considered “non-specialized” tasks. The Act permits DCs to utilize the assistance of unlicensed supportive personnel in the performance of non-specialized tasks. The relevant Section of the Act states:

**Supportive Personnel**

Nothing in this act shall prohibit a licensed chiropractor from utilizing the assistance of unlicensed supportive personnel performing under the direct on-premises supervision of a licensed chiropractor, provided that a chiropractor may not delegate any activity or duty to such unlicensed individuals which requires formal education or training in the practice of chiropractic or the knowledge and skill of a licensed chiropractor.

63 Pa.C.S. § 625.601.

The Act allows DCs to delegate X-rays to unlicensed personnel. X-rays are an invaluable diagnostic tool, used by a DC to view spinal alignment and structure. An X-ray is generally considered a specialized procedure because the DC must determine whether an X-ray is medically necessary, locate the parts of the body that require an X-ray, make sure the X-ray equipment is functioning properly, prepare the patient for the X-ray, interpret the X-ray, and establish a treatment plan for the patient based on the X-ray results. However, the Act expressly permits the DC to delegate the task of performing the X-ray on the patient to auxiliary personnel. The relevant Section of the Act states the following:

no auxiliary personnel shall perform radiologic procedures on the premises of a chiropractor unless such person is under the direct supervision of a chiropractor who is on the premises at the time the X-ray of the patient is taken and unless such person has passed an examination approved by the board. . .

63 Pa.C.S. § 625.522. As such, despite all of the specialized activities surrounding the X-ray examination, the Act permits auxiliary personnel to assist the DC by actually performing the X-

ray (application of ionizing radiation to patients for diagnostic purposes) so long as the auxiliary personnel is trained, the DC performs direct, on-premises supervision and other requirements are met.<sup>1</sup>

Courts have consistently interpreted the Act, specifically Section 601, to permit DCs to also delegate the application of Passive Modalities. Modalities are defined as “[a]ny physical agent applied to produce therapeutic changes to biologic tissue; includes but not limited to thermal, acoustic, light, mechanical, or electric energy.” Current Procedural Terminology (CPT) Copyright 1995-2018, American Medical Association (2018). Passive modalities include, but are not limited to, hot or cold packs, mechanical traction, and electrical stimulation. This Superior Court previously determined the following in the case at bar:

The majority of claims involve whether chiropractors are the only individuals who may apply hot and cold packs, turn on and off a mechanical, intersegmental, traction machine,

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<sup>1</sup> 49 Pa. Code § 5.62 requires auxiliary personnel to have passed an examination in radiologic procedures approved by the State Board of Chiropractic, the State Board of Medicine or the State Board of Osteopathic Medicines or examination approved by the American Chiropractic Registry of Radiologic Technologists or the American Registry of Radiologic Technologists.

assist in therapeutic exercise, provide electrical muscle stimulation, utilize the ultrasound machine, and administer hydrotherapy and paraffin. Appellants concede that 'the statutory language was necessary to allow chiropractors to delegate other, non-specialized duties (such as turning a heating pad on or off)'" (citing appellant's brief at 16).

We conclude the other tasks at issue largely fall in the same, non-specialized category. Importantly, all these tasks must be performed 'under the direct on-premises supervision of' the chiropractor. . .

However, it requires no formal education or training to apply hot or cold packs according to the chiropractor's specific instructions. Similarly, most elements of applying electrical muscle stimulation, ultrasound, hydrotherapy, or paraffin do not require particularly specialized skills, as long as it is the chiropractor making the diagnosis, determining the location on the patient's body where such therapies should be applied, and the intensity of the therapy.

State Farm Mutual Automobile Insurance Company, et al. v. Robert J. Cavoto, Jr. et al., 2011 PA Super 250, (November 21, 2011), pp 18-19. The trial court, in the instant case after remand from this Superior Court, also interpreted Section 601 to permit DCs to allow unlicensed personnel to apply Passive Modalities to patients. The trial court determined the following:

[n]on-specialized tasks associated with the performance of passive modalities (e.g. the placement of hot/cold packs, turning machines on/off, assisting patients on and off tables) may be delegated to unlicensed support personnel so long as a licensed chiropractor has made all of the clinical decisions. . . [a]s such, the following passive modalities may be delegated: (1) electrical muscle stimulation, (2) mechanical traction, (3) hot packs/cold packs, and (4) hydrotherapy.”

The Decision of The Honorable G. Michael Green dated July 7, 2017, State Farm Mutual Automobile Insurance Company, et al. v. Robert J. Cavoto, Jr. et al., No. 2005-010716 (CCP – Delaware County), p.15. And finally, both of these decisions are consistent with a prior federal court analysis in the case of State Farm Mutual Automobile Ins. Co. v. All-Care Chiropractic, 2004 WL 1446033 (Dalzell, J., E.D. Pa.). In that case, State Farm (the same party here) asked the court to declare that the Act prohibits a licensed chiropractor from delegating adjunctive therapy to unlicensed supportive personnel. While this case was decided in the federal court, the court recognized that the Pennsylvania Supreme Court has never decided whether the language of Section 601 of the Act prohibits unlicensed supportive personnel



from performing adjunctive procedures and the court stated, “we must predict how the state court would resolve these issues should it be called upon to do so”. *Id.* quoting Wiley v. State Farm Fire & Casualty Co., 995 F.2d 457, 459 (3<sup>rd</sup> Cir 1993). After a careful and thorough study of Section 601 of the Act, the court believed that the legislative history made clear that the General Assembly intended to authorize chiropractors to delegate adjunctive procedures to unlicensed supportive personnel. *Id.* The court predicted that “the Pennsylvania Supreme Court would interpret Section 601 to permit licensed chiropractors to delegate adjunctive procedures to unlicensed supportive personnel performing under their direct on-premises supervision”. *Id.*

**1. Section 601 of the Act permits DCs to delegate non-specialized tasks associated with Therapeutic Exercise to unlicensed supportive personnel, under the chiropractor’s direct, on-premises supervision.**

Therapeutic Procedures effect change through the application of clinical skills and/or services that attempt to improve function. Current Procedural Terminology (CPT) Copyright 1995-2018, American Medical Association (2018).

Therapeutic Exercise is the first subcategory of Therapeutic Procedures. Id. Therapeutic Exercise is defined as follows:

[t]herapeutic exercise incorporates one parameter (strength, endurance, range of motion or flexibility) to one or more areas of the body. Examples include, treadmill (for endurance), isokinetic exercise (for range of motion), lumbar stabilization exercises (for flexibility), and gymnastic ball (for stretching or strengthening).

AMA CPT Assistant, Summer 1995 pages 5-9 "Significant Revisions: Physical Medicine and Rehabilitation". As with X-rays and Passive Modalities, Therapeutic Exercise represents a category of exercises that are generally comprised of specialized components including, but not limited to, examining the patient; determining that Therapeutic Exercise can improve strength, endurance, range of motion or flexibility; establishing short term and long term goals; identifying the exercises needed to achieve the goals; prescribing the exercise regimen (e.g. number of exercises, sets and repetitions, and time duration); and re-evaluating each patient visit to adjust the exercise program as necessary. These specialized tasks include all of the clinical skills

and decision making that only a DC can perform pursuant to the Act.

There are also non-specialized tasks associated with Therapeutic Exercise and these tasks can be delegated to unlicensed supportive personnel, so long as the DC is providing direct, on-premises supervision. The non-specialized tasks generally include observing and assisting the patient during the exercise, counting repetitions, monitoring basic form, counting time, helping the patient on/off an exercise machine, and other rudimentary activities.

**a. The trial court decision conflicts with this Superior Court's specific instruction on remand and the legislative intent of Section 601 of the Act**

This Superior Court previously determined that Therapeutic Exercise is comprised of non-specialized tasks that can be delegated to unlicensed personnel. Specifically, this Superior Court instructed the trial court, on remand, to make a determination as to whether certain procedures performed by unlicensed personnel in this case required formal, chiropractic education or training. State Farm Mutual Automobile Insurance

Company, et al. v. Robert J. Cavoto, Jr. et al., 2011 PA Super 250, (November 21, 2011), p. 24. The Court's instructions were as follows:

Upon remand, the trial court should make more specialized findings and determine whether any of the procedures allegedly performed by unlicensed personnel require formal chiropractic education or training, including further inquiry by the court as to the scope of those procedures.

Id. at 20.

. . . such determinations must be made on a case-by-case basis, in which the trial court must evaluate whether the procedure, or an aspect of the procedure in question, requires formal education or training in the practice of chiropractic.

Id. at 2.

[a]ssisting in therapeutic exercise, meanwhile, may fall under either category. While some forms of assistance, such as applying equipment or monitoring repetitions, would be innocuous, other forms of assistance, such as monitoring form or recommending equipment, may require formal education or training.

Id. at 19. Contrary to this specific instruction, the trial court determined that, "[t]he following adjunctive procedures which are therapeutic procedures may not be delegated to unlicensed support staff: (1) Massage, (2) Manual Therapy, and (3)

Therapeutic Exercise.” The Decision of The Honorable G. Michael Green dated July 7, 2017, State Farm Mutual Automobile Insurance Company, et al. v. Robert J. Cavoto, Jr. et al., No. 2005-010716 (CCP – Delaware County), p.15.

The trial court’s decision is an over-generalization prohibiting delegation of all tasks associated with Therapeutic Exercise. Specifically, the trial court rejects the assertion by this Superior Court that some tasks, may in fact be innocuous, which would permit them to be delegated. The trial court should have reviewed each exercise to make a “case by case” determination as to whether any task associated with the exercise is non-specialized and delegable. The trial court failed to do so and instead, it improperly rendered a decision that now renders a case by case determination pointless and moot.

This Superior Court already determined that a case by case analysis must be performed to determine whether any delegated tasks are non-specialized. For example, when a DC prescribes treadmill to improve endurance as part of the treatment plan, and the DC instructs his or her staff to assist the patient on the

treadmill, turn the treadmill on to a speed and resistance determined by the DC, and to keep track of time per the DC's instructions, a determination must be made in this scenario as to whether those delegated tasks are non-specialized. Since the Act permits unlicensed staff to perform non-specialized tasks and this Superior Court has already determined that many tasks related to Therapeutic Exercise can be considered innocuous, one should likely conclude that the delegated tasks in the example above are proper. Moreover, a decision that these tasks are non-specialized would also be consistent with unlicensed staff performing X-ray and applying passive modalities with proper DC supervision.

**b. The trial court rationale contradicts its own prior determinations regarding the proper delegation of Passive Modalities**

The trial court's rationale which it used to determine that Therapeutic Exercise cannot be delegated is inconsistent with its own determination permitting delegation of Passive Modalities. In particular, the trial court stated:

. . . the key word is **"therapeutic"** when discussing therapeutic procedures and exercises. The proper application of *therapeutic* procedures involves constant dialogue and observation

between a patient and a skilled practitioner. In order to achieve the goal of effecting change through the application of clinical skills, the practitioner must modify the procedures when necessary based on patient feedback and observation. Responding to patient feedback is an essential element of therapeutic procedures and requires the clinical decision-making of a skilled practitioner. In a chiropractic setting, knowing how and when to make what are often subtle modifications to a patient's care requires the formal education and training of a licensed chiropractor and, for this reason, cannot be delegated to unlicensed support staff.

(emphasis added). State Farm Mutual Automobile Insurance Company, et al. v. Robert J. Cavoto, Jr. et al., No. 2005-010716 (CCP – Delaware County) Paragraph 13.

As described herein, the trial court already determined that a DC can delegate non-specialized tasks associated with the application of Passive Modalities. Passive Modalities are also “therapeutic” in nature. Modalities are defined as “[a]ny physical agent applied to produce **therapeutic** changes to biologic tissue; includes not limited to thermal, acoustic, light, mechanical, or electric energy.” (emphasis added). Current Procedural Terminology (CPT) Copyright 1995-2018, American Medical Association (2018).

The trial court contradicts itself because on the one hand, certain non-specialized tasks associated with “therapeutic” Modalities can be delegated regardless of the therapeutic value of the Modalities, but on the other hand, the therapeutic nature of the Therapeutic Exercise somehow means that no task associated therewith can be delegated. The trial court essentially created a double-standard to justify its decision.

The trial court also fails to consider the legislative intent behind the requirement that the DC must provide direct, on-premises supervision when a non-specialized activity is delegated to unlicensed personnel. The trial court states, “[r]esponding to patient feedback is an essential element of therapeutic procedures and requires the clinical decision making of a skilled practitioner.” State Farm Mutual Automobile Insurance Company, et al. v. Robert J. Cavoto, Jr. et al., No. 2005-010716 (CCP – Delaware County) Paragraph 13.

First, there is no support for the conclusion that patient feedback is an “essential” element of therapeutic exercises. To accept this statement as true, one would have to believe that a



lack of communication during the performance of the exercise would somehow invalidate the need for the exercise or the therapeutic value of the exercise on the patient's overall condition. In fact, the exercises are often so basic; that there is usually no expectation of patient feedback during the performance of the exercise that would require "real time" modifications to the program.

Second, the Act requires direct, on-premises supervision by the DC for the very purpose of the DC being able to respond to the patient and/or modify the exercise in real time, in the unlikely event that real time response is needed.

**c. Other states expressly permit delegation of therapeutic exercises to unlicensed supportive personnel**

Other states have expressly permitted DCs to delegate adjunctive procedures to unlicensed personnel, including Therapeutic Exercise.<sup>2</sup> In Ohio, unlicensed supportive personnel, who are properly supervised and who are qualified by education,

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<sup>2</sup>It should be noted that a full 50 state survey was not conducted.

training and/or experience can perform certain duties and professional responsibilities which include the following:

- (1) Taking measurements for height, weight, blood pressure, respiration, pulse, and temperature;
- (2) Recording observable signs and symptoms;
- (3) Collecting bodily fluids for diagnostic purposes;
- (4) Applying hot and/or cold packs;
- (5) Applying mechanical traction;
- (6) Applying electrical stimulation;
- (7) Applying vasopneumatic devices;
- (8) Applying diathermy;
- (9) Applying therapeutic ultrasound;
- (10) **Exercise instruction and supervision of exercise activities;**
- (11) **Supervision of therapeutic procedures;**
- (12) Assist patients to safely perform activities related to the development of strength and endurance;
- (13) Other services or procedures as deemed appropriate by the board.

(emphasis added). Ohio Administrative Code 4734-8-02.

Similarly, California regulations permit the following:

. . . (c) Unlicensed individuals may administer **physical therapy treatments as an adjunct to chiropractic adjustment**, provided the physical therapy treatment is conducted under the adequate supervision of a licensed Doctor of Chiropractic. Adequate supervisions shall include the following:

(1) The doctor shall be **present in the same chiropractic facility** with the unlicensed individual at least fifty percent of any work week or portion thereof the said individual is on duty unless this requirement has been waived by the board. The doctor shall be **readily available** to the said individual at all other times for **advice, assistance and instruction**.

(2) The doctor shall **initially examine** and prepare a **written treatment program** for a patient prior to the providing of physical therapy treatment by the unlicensed individual.

(3) The doctor shall provide **periodic reevaluation** of the treatment program and of the individual's performance in relation to the patient. "Periodic reevaluation" shall mean at least once every thirty days the patient is under active care.

(4) The doctor shall perform and record an evaluation of the patient and his or her response to treatment at the termination thereof.

16 CCR § 312 (emphasis added). In Texas, regulations permit the following:

(f) A licensee may allow or direct a qualified and properly trained person, who is **acting under the licensee's delegation**, to perform a task or procedure that assists the doctor of chiropractic in making a diagnosis, prescribing a treatment plan or treating a patient if the performance of the task or procedure **does not require the training** of a doctor of chiropractic in order to protect the health or safety of a patient, **such as**:

. . . (6) **performing prescribed physical therapy modalities, therapeutic procedures, physical medicine and rehabilitation**, or other treatments as described in the **American Medical Association's Current Procedural Terminology Codebook**, the Centers for Medicare and Medicaid Services' Health Care Common Procedure Coding System, or other national coding system; . . .

(g) A licensee **may not allow** or direct a person:

(1) to perform activities that are outside the licensee's scope of practice;

(2) to perform activities that **exceed the education, training, and skill** of the person or for which a person is not otherwise qualified and properly trained; or

(3) to **exercise independent clinical judgment** unless the person holds a valid Texas license or certification that would allow or authorize the person to exercise independent clinical judgment.

22 TAC § 77.5. And in Wisconsin, the regulations state the following:

A chiropractor . . . may delegate the performance of adjunctive services to an unlicensed person only if all of the following conditions are met:

(1) The chiropractor maintains records by which the chiropractor has verified that the unlicensed person has successfully completed a **didactic and clinical training program** approved by the board and covering the performance of the delegated service. Successful completion of a training program is demonstrated by attaining proficiency in the delivery of that service to **minimally competent chiropractic practice standards** as measured by objective knowledge and skills testing.

(2) The chiropractor exercises **direct supervision** of the unlicensed person performing the delegated service.

(3) The Chiropractor **retains ultimate responsibility** for the manner and quality of the service.

(emphasis added). Wis. Admin. Code. CHIR § 10.02 (2014). And in particular, the Wisconsin rules state:

A chiropractor may delegate the performance of patient services through **physiological therapeutics that include but are not limited to heat, cold, light, air, water, sound, electricity, massage, and physical exercise** with and without assistive devices to an

unlicensed person only if the delegation is consistent with s. Chir 10.02 and the unlicensed person has **adequate training, education and experience to perform** the delegated function to minimally acceptable chiropractic standards.

(emphasis added). Wis. Admin. Code. CHIR § 10.05 (2014). In sum, the legislative intent of Section 601 of the Act and this Superior Court's prior determination comports with the regulations of various states which essentially permit delegation of Therapeutic Exercise when a DC performs the specialized tasks and the unlicensed supportive personnel is observing and assisting the patient in the performance of the exercises. Similar to the other states, the Act expressly requires direct on, premises supervision and an implicit requirement that the unlicensed staff be properly trained. This is evidenced by the DC's overall responsibility for the patient's care, including the tasks performed by the unlicensed, supportive personnel.

## **CONCLUSION**

In conclusion, for the reasons set forth herein, Amicus Curiae, Pennsylvania Chiropractic Association, respectfully requests that this Court overturns the trial court determination that Therapeutic Exercise cannot be delegated to unlicensed support staff even when the DC is providing direct, on-premises supervision.

Respectfully submitted,



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Dated: February 7, 2018

**CERTIFICATE OF WORD COUNT**

I certify that this brief is 4675 words long and therefore complies with the word count limit in Pa.R.A.P. 531(b)(3).

Dated: February 7, 2018

  
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Jason B. Martin, Esquire



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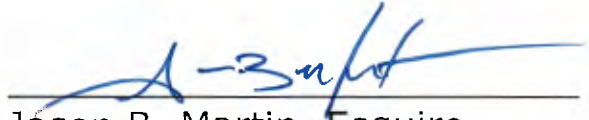
**PROOF OF SERVICE**

I hereby certify that on this 7th day of February, 2018, I am serving the foregoing Brief of Amicus Curiae, The Pennsylvania Chiropractic Association to the persons stated below by first class, United States Postal Service mail:

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