

**IN THE SUPERIOR COURT OF PENNSYLVANIA**  
**EASTERN DISTRICT**

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et. al.*

Appellee

vs.

ROBERT J. CAVOTO, *et. al.*

Appellant

2953 EDA 2017

**BRIEF IN SUPPORT OF APPEAL**

Appeal from the Order of the Court of Common Pleas of Delaware County, Docket  
No. 2005-010716

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## **TABLE OF AUTHORITIES**

### **Cases**

*Marbury v. Madison*, 5 U.S. (1 Cranch) 137; 2 L. Ed. 60 (1803)

*State Farm Mut. Auto. Ins. Co. v. Cavoto*, 34 A. 3d 123 - Pa: Superior Court 2011

### **Statutes**

Pa.R.A.P. 1311

63 Pa.C.S. § 625.601

18 Pa.C.S. § 4117

Pa.C.S. §1712

Pennsylvania Rules of Professional Conduct

United States Constitution, Articles I and II, 1st and 14th Amendment

Pennsylvania Constitution, Article V

### **Other**

Francis Newton Thorpe (ed.), *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* (7 vols., Washington, 1909), VII, 3815

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IN THE SUPERIOR COURT OF  
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DELAWARE COUNTY NO. 2005-  
010716

## **BRIEF IN SUPPORT OF APPEAL**

Appellant Dr. Robert J. Cavoto, by and through his undersigned counsel, A. Jordan Rushie, files his brief and alleges the following in support.

### **I. STATEMENT OF JURISDICTION**

The Delaware Court of Common Pleas issued an Order on July 7, 2017. A substantial ground exists for a difference of opinion on the questions and why an immediate appeal may materially advance the termination of the matter. Pa.R.A.P. 1311.

### **II. ORDER SOUGHT TO BE OVERTURNED**

This Order being appealed is Judge Green's July 7, 2017 Memorandum Opinion, which is attached to this brief as Exhibit A.

### **III. QUESTIONS FOR REVIEW**

1. Can chiropractors delegate therapeutic exercise to unlicensed personnel?

Suggested Answer: Yes

2. Did the trial court improperly admit Dr. Michael Schneider as an expert witness, and place too much emphasis on the weight of his testimony?

Suggested Answer: Yes

3. Did the trial court improperly overlook the testimony and qualifications of Dr. Jon McCullough, a former Chairman of the State Board of Chiropractic?

Suggested Answer: Yes

4. Are chiropractors permitted to advise potential patients of their rights under their car insurance policies?

Suggested Answer: Yes

5. Can State Farm proceed with a damages trial on portions of the Amended Complaint that were never tried?

Suggested Answer: No.

### **IV. BRIEF SUMMARY OF ARGUMENT**

"It is emphatically the province and duty of the judiciary to say what the law is—not what it should be." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137; 2 L. Ed. 60 (1803).

State Farm filed a lawsuit against Dr. Cavoto for engaging in conduct that is completely permissible under the Pennsylvania Chiropractic Act. Without a legal basis, State Farm alleges that Dr. Cavoto's activities violate the Motor Vehicle Financial Responsibility Law. They do not.

State Farm did not file this lawsuit because Dr. Cavoto did anything wrong or illegal, even according to their own expert witness, but because they do not like certain portions of the Chiropractic Act. State Farm's attempt to change the Chiropractic Act through the judiciary violates a fundamental cornerstone of our law.

Boiled down, there are two issues before this Honorable Court. The first issue is referred to as "Delegation", which is whether chiropractors are permitted to delegate therapeutic exercise to unlicensed personnel. The Chiropractic Act specifically allows for chiropractors to 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. Therapeutic exercise does not require formal education, training, or the knowledge and skill of a licensed chiropractor, and therefore it may be delegated, provided that a chiropractor is on premises. Prior to receiving the treatment, the chiropractor makes a diagnosis of the patient and determines whether therapeutic

exercise would be both appropriate and beneficial. If performed on premises, a chiropractic assistant assists the patient with the actual exercises, while a licensed chiropractor is at the facilities at all times. Therapeutic exercise can be performed at the chiropractor's facility, at home, or in a gym. State Farm has presented no evidence that any patient has ever been harmed due to delegated therapeutic exercise by either Dr. Cavoto or anyone else.

The second issue is "Solicitation" (more properly described as "Patient Advisement"), which is whether Dr. Cavoto violated 18 Pa.C.S. § 4117 by calling people who were in car accidents and advising them that they can seek medical treatment under their car insurance policies. (Exhibit B, Amended Complaint, Count II). Dr. Cavoto has every right to contact anyone he wishes<sup>1</sup>, provided his statements are not "misleading, deceptive, untrue or fraudulent representations in the practice of chiropractic." State Farm has presented no evidence that Dr. Cavoto or any of his staff has ever made misleading, deceptive, untrue, or fraudulently representations to any potential or current patient. State Farm also takes issue because Dr. Cavoto legally purchased a list of people involved in car accidents from the City of Philadelphia, which was completely legal. That aside, Count II of the Amended

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<sup>1</sup> Contrary to State Farm's arguments, chiropractors are not governed by the Pennsylvania Rules of Professional Conduct. Chiropractors are allowed to solicit potential patients provided their activities do not violate the Pennsylvania Chiropractic Act.

Complaint has never been tried or decided. Inexplicably, Judge Pagano found against Dr. Cavoto on Count III of the Amended Complaint. When asked to clarify the decision, Judge Green refused. State Farm is now attempting to conduct a damages trial on a count of the Amended Complaint that has never been heard or decided.

Given that Dr. Cavoto's conduct was completely legal, it is obvious that State Farm is attempting to use the judiciary to change the law to the way they want it. Their attempts violate the cornerstone of our laws, which mandate a separation of powers between the judiciary and legislative branch.

Articles I and II of the United States Constitution assign the legislative branch responsibility for passing laws and the executive branch responsibility for “tak[ing] Care that the Laws be faithfully executed.” “The legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercises the powers properly belonging to the other; nor shall any person exercise the powers of more than one of them, at the same time; except that the justices of the County Courts shall be eligible to either House of Assembly<sup>2</sup>.” See also, Pennsylvania Constitution, Article V.

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<sup>2</sup> Francis Newton Thorpe (ed.), *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* (7 vols., Washington, 1909), VII, 3815.



Lawmaking and law enforcement were separated to prevent officials from simply rewriting or ignoring laws they do not like. However, that is exactly what State Farm is trying to do in this case.

Notably, State Farm has not challenged the constitutionality of the Chiropractic Act, but is instead making claims that Dr. Cavoto violated the Motor Vehicle Financial Responsibility Law (MVFRL), Pa.C.S. §1712 by engaging in conduct that is completely legal.

Judge Green committed reversible error by interpreting the Chiropractic Act applies how he feels it should be, rather than what it is.

## **V. LEGAL ARGUMENT**

### **1. The "Delegation" Issue**

By way of background, Dr. Cavoto is a neighborhood chiropractor. He primarily treats people who are involved in accidents. As part of his treatment, Dr. Cavoto prescribes "therapeutic exercise". Prior to prescribing therapeutic exercise, Dr. Cavoto, or another licensed chiropractor, makes a diagnosis and determines whether therapeutic exercise would be appropriate and beneficial. If performed on premises, the actual activities are supervised by a chiropractic assistant while a licensed chiropractic remains on site.

Therapeutic exercise basically consists of activities such as using stretch bands, walking on a treadmill, stretching, progressive weight lifting, and progressive aerobics<sup>3</sup>.

The Chiropractic Act forbids chiropractors from delegating "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 activities described above do not require formal education or training; these exercises can be performed at home without any supervision whatsoever, at a gym, or with a personal trainer. Almost every chiropractic office in Pennsylvania delegates therapeutic exercise unlicensed assistants, because it does not require chiropractic skill or training.

Nevertheless, State Farm alleges that Dr. Cavoto violated the Motor Vehicle Financial Responsibility Law (MVFRL), Pa.C.S. §1712<sup>4</sup>. (Amended Complaint).

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<sup>3</sup> Rather than burden this Honorable Court with duplicative information, Appellant incorporates by reference the Amicus Brief submitted by the Pennsylvania Chiropractic Association. Amicus's brief's contains a detailed and comprehensive explanation of therapeutic exercise.

<sup>4</sup> It is believed that State Farm targeted Dr. Cavoto because he filed a lawsuit against them in Philadelphia. State Farm has spent over a decade trying to destroy Dr. Cavoto's chiropractic practice through use of "mad dog" tactics described in the Utah Supreme Court's decision. (Exhibit J). They do so under the guise of "investigating insurance fraud." To date, after over a decade long investigation, Dr. Cavoto has never been found to have committed insurance fraud.

In 2011, this matter was heard before the Superior Court who issued a Memorandum Opinion. *See State Farm Mut. Auto. Ins. Co. v. Cavoto*, 34 A. 3d 123 - Pa: Superior Court 2011. The Superior Court Memorandum Opinion is attached to this brief as Exhibit C.

On April 3rd, 2017, through April 4th, 2017, a bench trial was heard before the Honorable G. Michael Green in the Delaware County Court of Common Pleas. (Notes of Testimony are attached as Exhibit D).

Judge Green stated on the record that the only count of the Amended Complaint being tried was Count I. (April 3, 2017 N.T.p. 4-5). As such, no evidence was presented regarding any other counts of the Amended Complaint, including Counts I or II.

At trial, State Farm presented Dr. Michael J. Schneider as his expert witness. Dr. Schneider testified that he delegated therapeutic exercise to "a certified personal trainer" who was qualified because he brought her "to seminars to learn 16 some of the rehab procedures that we performed" in Florida. (See, April 3, 2017 NT. P. 153-154). Dr. Schneider specifically testified that he delegated "back and neck exercises" to his unlicensed assistant. (*Id.*)

Further, Schneider testified that he is only "somewhat" familiar with the Pennsylvania Chiropractic Act, that he was not involved in drafting it, and he has

never been called to testify as an expert about the Act. (April 3, 2017 N.T., 157-158). Dr. Schneider was only qualified as an expert in the education and training of a chiropractor. (April 3, 2017, N.T. p. 139).

Based on the testimony and his own admissions, Appellant contends that Dr. Schneider was unqualified to proffer expert testimony as it pertains to the Pennsylvania Chiropractic Act. Dr. Schneider admitted at trial that a chiropractor does not have to render therapeutic exercise under the CPT billing guidelines. (April 4, 2017, N.T. 115-116). Dr. Schneider even admitted that he does not contend that Dr. Cavoto did anything "wrong." (April 4, 2017, N.T. 191).

In contrast, Dr. Cavoto presented Dr. Jonathan McCullough as an expert witness. (April 4, 2017 N.T. p. 176). Unlike Dr. Schneider, the Court of Common Pleas specifically qualified Dr. McCullough as an expert in delegation and the regulation of chiropractors. Dr. McCullough testified that the doctor formulates a diagnosis, a treatment plan, an assessment of what's wrong, and then has in effect a prescription of care. (April 4, 2017, N.T. p. 192). He further testified that the State Board only requires that the patient is seen during the office visit and the doctor is present at all times during the procedure. The doctor has direct supervision of his support personnel. (April 4, 2017, N.T. p. 193.) The doctor only needs to be on premises there therapeutic exercise, but not in the same room as the patient. (*Id.*) Dr.

McCullough testified that nothing he had read in the trial documents suggested Dr. Cavoto did was unlawful or did not meet the standard of care in the chiropractic profession. (April 4, 2017, N.T. p. 197-198).

Inexplicably, and against the weight of the evidence, Judge Green found that Dr. Cavoto committed statutory insurance fraud under the MVFRL, although Dr. Schneider testified Cavoto did nothing wrong, and the former Chairman of the State Board of Chiropractic testified to the same. At best, Dr. Schneider's testimony is a personal opinion that having a chiropractor directly supervise therapeutic exercise is a best practice. It is most certainly not insurance fraud.

Notably, State Farm presented no evidence that any patient has ever been injured by delegating adjunctive therapies, either by Dr. Cavoto or any other chiropractor. Dr. Cavoto has been practicing chiropractic for approximately twenty-two years, and the profession itself is over a century old. There are approximately 3800 chiropractors in Pennsylvania. Dr. Schneider had no basis in law or science to suggest delegating therapeutic exercise harms patients. More importantly, neither State Farm nor Dr. Schneider cited to any laws or portions of the Chiropractic Act that were violated in doing so. Quite the contrary — Dr. Schneider admitted that he himself delegated therapeutic exercise to a personal trainer.

Critically, Judge Green's memorandum opinion does not even acknowledge several crucial points: first, Dr. McCullough was the Chairman of the State Board of Chiropractic at all times relevant to the Amended Complaint. Second, Dr. McCollough was qualified as an expert witness on both delegation and regulation of chiropractors, while Dr. Schneider was only qualified as an expert on the education and training of a chiropractor. Third, Dr. Schneider acknowledged in his testimony that his report does not say Dr. Cavoto did anything wrong, and that " Section 601 language is so unclear that I have a question about that." (April 4, 2017 N.T., p. 124). Fourth,

Further, Dr. Cavoto billed all therapeutic exercise under CPT Code 97110, which is for Therapeutic Exercise. However, CPT Code 97530 is therapeutic activities direct (one on one). In other words, the CPT billing codes recognize that there are two situations involving therapeutic exercise – there is therapeutic exercise provided in groups or by unlicensed personnel, and there is therapeutic exercise that is provided one on one directly by the treatment provider. That is why there are two different billing codes.

Boiled down, the trial court found that Dr. Cavoto committed statutory insurance fraud in contravention of the testimony of former Chairman of the Chiropractic State Board, and in contravention of State Farm's expert witness. Judge

Green had no basis in law or fact to determine that delegation of therapeutic exercise violates the MVFRL.

Judge Green decided to interpret the law in the way he feels it should be, but not the way it is.

## **2. The "Solicitation" Issue**

Count II of the Amended Complaint alleges that Dr. Cavoto violated the MVFRL by calling prospective patients and advising them that they may be able to treat by utilizing their car insurance policies<sup>5</sup>. To do so, Dr. Cavoto legally obtained a list of people involved in motor vehicle accidents from City Hall, by paying the City of Philadelphia a fee of \$125.00<sup>6</sup>.

The Chiropractic Act provides that chiropractors may not "misleading, deceptive, untrue or fraudulent representations in the practice of chiropractic." Provided that his statements are not deceptive, untrue, or fraudulent, Dr. Cavoto has an absolute right to contact anyone he wishes. Dr. Cavoto is not bound by the Pennsylvania Rules of Professional Conduct, as they only apply to attorneys.

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<sup>5</sup> Every policy of insurance in Pennsylvania covering a motor vehicle, including a bus, must provide coverage for medical benefits in the amount of \$5,000. 75 PA. CS. 1711(a).

<sup>6</sup> The City of Philadelphia has since made these lists unavailable.

More importantly, however, the "Solicitation" issue has never actually been tried. In or about 2007, rather than hold a trial, Judge Pagano decided he would read the deposition transcripts and make a decision on Counts I and II.

On or about July 10th, 2009, Judge Pagano issued an Order finding for Dr. Cavoto on Count I of the Amended Complaint, and against Dr. Cavoto on Count III. (Exhibit E). State Farm appealed the decision on Count I.

On or about February 14, 2011, Judge Pagano issued a 1925 Opinion that only addressed Count I of the Amended Complaint. Neither Count II or Count II was addressed. (Exhibit F).

There are very few citations to the record in this section of the brief. There is a reason for that – there is no record to cite to. There is no trial transcript. Judge Pagano's Order states that he finds against Dr. Cavoto on Count III of the Amended Complaint, which was not at issue. Judge Pagano's 1925 Opinion reiterates that he finds against Dr. Cavoto on Count III of the Amended Complaint, but explains nothing about his finding on Count III. The Superior Court opinion in *State Farm Mut. Auto. Ins. Co. v. Cavoto*, 34 A. 3d 123 - Pa: Superior Court 2011 did not address the solicitation issue, either.

Inexplicably, Judge Green's Memorandum Opinion states that Dr. Cavoto was found liable on Count II of the Amended Complaint, even though that contrasts



Judge Pagano's Order and 1925 Opinion. When asked to clarify, Judge Green denied the motion without opinion. That is the entire record regarding the "Solicitation" issue. (Exhibit G and H, and I).

Fearfully, State Farm is now taking the position that they are entitled to a damages trial on either Count II or Count III<sup>7</sup>. This means State Farm is seeking damages on a case that was never tried. Undersigned counsel has no way to defend Dr. Cavoto in a damages trial by simply guessing what State Farm is holding him liable for. Such action is a deprivation of Dr. Cavoto's fundamental due process rights under both the Pennsylvania and United States Constitution.

## **CONCLUSION**

Based on the foregoing reasons, Appellant respectfully requests this Honorable Court to overturn Judge Green's decision regarding delegation of therapeutic exercise, and Judge Pagano's decision on Count III of the Amended Complaint. Should this matter be remanded, Appellant respectfully requests this Honorable Court to remand the case to a new judge.

Finally, Appellant respectfully requests oral argument on all issues.

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<sup>7</sup> State Farm admitted in their response to Appellant's Motion for Clarification that it's "unclear" exactly which count Judge Pagano found against Dr. Cavoto on.

Dated: February 8, 2018

**Rushie Law PLLC**



By: \_\_\_\_\_

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Dated: February 8, 2018