

**IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND**

H. MERCEDES CLEMENS	*	
	*	
Plaintiff	*	
	*	
v.	*	<b>Case No. 296766-V</b>
	*	
MARYLAND BOARD OF CHIROPRACTIC EXAMINERS	*	<b>Boynton, J.</b>
	*	
Defendants	*	
	*	

---

**PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

---

In accordance with Maryland Rule 2-502, Plaintiff H. Mercedes Clemens respectfully moves for summary judgment. As explained more fully below, the Maryland Board of Chiropractic and Massage Therapy Examiners has exceeded its statutory authority by ordering Ms. Clemens to cease and desist the practice of animal massage, a subject over which the Chiropractic Board has no jurisdiction. The Board’s actions are therefore *ultra vires* and void, and Ms. Clemens is entitled to judgment as a matter of law.

**Legal Standard**

Under Maryland law, “[a]ny party may make a motion for summary judgment on all or part of an action on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law.” Md. Rule 2-501; *see*

*also Olde Severna Park Improvement Ass'n v. Gunby*, 402 Md. 317, 328, 936 A.2d 365, 371 (Md. 2007).

### **Facts**

Mercedes Clemens is a Maryland resident and a licensed massage therapist. Aff. of H. Mercedes Clemens in Supp. Mot. for Summ. J. ¶ 2. Ms. Clemens is also privately certified in equine massage. *Id.* Until February 2008, Ms. Clemens split her professional practice between people and animals. Clemens Aff. ¶¶ 5, 8. She advertised both her human- and animal-massage businesses on separate websites, [www.probodyworker.com](http://www.probodyworker.com) and [www.thebetteranimal.com](http://www.thebetteranimal.com). Clemens Aff. ¶ 5.

On February 15, 2008, the Maryland Board of Chiropractic Examiners sent an order to Mercedes Clemens, demanding that she cease and desist both the practice and advertising of animal massage. Aff. of Paul Sherman in Supp. Mot. for Summ. J., Ex. A (letter from Christopher J. Kelter, Deputy Dir./Massage Therapy Program Manager, Md. Bd. of Chiropractic Exam'rs, to H. Mercedes Clemens (Feb. 15, 2008)). Ms. Clemens corresponded with the Chiropractic Board through counsel, contesting their authority to regulate animal massage, but the Chiropractic Board maintained its position. Sherman Aff., Ex. B (letter from Kathleen J.P. Tabor to Christopher J. Kelter, Deputy Dir./Massage Therapy Program Manager, Md. Dep't of Health and Mental Hygiene (Feb. 25, 2008)); Sherman Aff., Ex. C (letter from Kathleen J.P. Tabor to Christopher J. Kelter, Deputy Dir./Massage Therapy Program Manager, Md. Dep't of Health and Mental Hygiene (Feb. 28, 2009)); Sherman Aff., Ex. D (letter from James J. Vallone, Executive Dir., Md. Bd. of Chiropractic Exam'rs, to Kathleen J.P. Tabor (Mar. 4, 2008)). Fearing

the loss of her massage-therapy license if she did not comply with the Chiropractic Board's cease-and-desist order, Ms. Clemens eventually relented and stopped practicing animal massage. Clemens Aff. ¶ 8. She has now been out of business for over a year.

*Id.* At the time Ms. Clemens was ordered to stop massaging animals, she had approximately thirty clients, some with multiple animals, which made up more than half of her practice. Clemens Aff. ¶ 9.

The Chiropractic Board has subsequently conceded that the regulation of animal massage is beyond the Board's authority. Sherman Aff., Ex. E (Mem. Supp. Md. State Bd. of Chiropractic Exam'rs' Mot. to Dismiss 1 (Dec. 22, 2008)) ("[T]he Maryland State Board of Chiropractic Examiners . . . has no authority to regulate the practice of animal massage."); Sherman Aff., Ex. F (Tr. of Oral Argument on Md. State Bd. of Chiropractic Exam'rs' Mot. to Dismiss at 7:17-18 (May 5, 2009)) ("MR. GERBER: The board's jurisdiction is purely over human massage."). Following oral argument on the Chiropractic Board's second motion to dismiss, during which this Court questioned the source of the Chiropractic Board's authority to regulate animal massage, the Chiropractic Board entered into settlement negotiations with Ms. Clemens. Sherman Aff. ¶2. Those negotiations broke down after the parties were unable to reach an acceptable agreement. *Id.*

### **Argument**

Few principles of law are less controversial than that agencies have no inherent authority beyond that granted by statute, and that a court may set aside an agency action that exceeds its statutory authority. *See Holy Cross Hosp., Inc. v. Health Servs. Cost*

*Review Comm'n.*, 283 Md. 677, 683, 393 A.2d 181, 184 (Md. 1978); *Halsey v. Bd. of Educ.*, 273 Md. 566, 572-75, 331 A.2d 306, 310-11 (Md. 1975). As explained below, the Chiropractic Board clearly exceeded its statutory authority in ordering Ms. Clemens to stop practicing animal massage, and that order should be set aside.

**I. The Chiropractic Board does not have the statutory authority to regulate animal massage; therefore, its cease-and-desist order to Ms. Clemens is *ultra vires* and void.**

By its own admission, “the Maryland State Board of Chiropractic Examiners . . . has no authority to regulate the practice of animal massage.” Sherman Aff., Ex. E at 1; *see also* Sherman Aff., Ex. F at 7:17-18 (“MR. GERBER: The board’s jurisdiction is purely over human massage.”). This is clear not only from the Board’s statements to this Court, but from an analysis of the Board’s practice act, which limits the Board’s jurisdiction to regulating massage on humans. Under the act, the Board is empowered to adopt regulations “for the licensure and practice of massage therapists.” Md. Health Occ. Code Ann. § 3-5A-02. The act defines “practice massage therapy” as “engag[ing] professionally and for compensation in massage therapy, § 3-5A-01(g), which, in turn, is defined as “the use of manual techniques on soft tissues of *the human body* . . . .” § 3-5A-01(f)(1) (emphasis added). “When a statute specifically defines a word for the purposes of the whole title, the word should have uniform application throughout.” *Gambo v. Bank of Md.*, 102 Md. App. 166, 184, 648 A.2d 1105, 1113 (Md. Ct. Spec. App. 1994)); *see also Meese v. Keene*, 481 U.S. 465, 484 (1987) (“It is axiomatic that the statutory definition of [a] term excludes unstated meanings of that term.”). Accordingly, because the Maryland law limits the definition of massage therapy to acts performed on

human tissue, the Board's authority to regulate the practice of massage therapy must necessarily be limited to regulating acts performed on humans, and must necessarily exclude the regulation of acts performed on animals.

The Chiropractic Board, nevertheless, continues to believe to this day that it *does* have the authority to regulate animal massage, at least when performed by licensed massage therapists like Ms. Clemens. The basis for this belief is unclear, but it seems to flow from two flawed interpretations of Maryland law. The first is an apparent belief that the definition of "massage therapy" imposes a substantive limit on licensed massage therapists. This is evidenced by the Board's repeated claims that the massage-therapy practice act "limit . . . licensees . . . to the treatment of humans with massage therapy." Sherman Aff., Ex. E at 6; *see also* Sherman Aff., Ex. F at 10:14-25; Sherman Aff., Ex. D. But this claim is simply a tautology. Because "massage therapy" is defined as manipulation of human tissue, it is semantically impossible for a licensed massage therapist, or anyone else, to perform "massage therapy" on animals—once a person begins manipulating animal tissue, by definition they are no longer engaged in the practice of "massage therapy."

Further, the premise of this claim is that the Board may prohibit its licensees from engaging in activities *other than massage therapy* simply because those activities are not encompassed within the definition of massage therapy. But this turns administrative law, and the Board's practice act, on its head. When the Chiropractic Board's practice act prohibits licensed massage therapists from engaging in activities other than massage therapy, those activities are expressly enumerated in the act. *See, e.g.*, Md. Health Occ.

Code Ann. § 3-5A-11(a)(17)-(18) (authorizing suspension or revocation of licensure for individuals who are habitually intoxicated or addicted to a controlled substance). This enumeration is consistent with the fundamental notion that, in our free society, one may engage in any activity that is not expressly prohibited by law. *See Thorne v. Jones*, 765 F.2d 1270, 1274 (5th Cir. 1985) (“Whatever is not forbidden on our blessed shores is permitted.”).

The Chiropractic Board’s second apparent basis for its authority to regulate animal massage is the Maryland Veterinary Board’s previously held position that animal massage by non-veterinarians violates Maryland’s Veterinary Practice Act. *See Sherman Aff.*, Ex. F at 11:25-12:1 (describing the Chiropractic Board’s cease-and-desist order as “an effort to speak with one voice for two different boards.”). While this may, indeed, be the *reason* for the Chiropractic Board’s actions, it is not a justification for those actions. The Chiropractic Board does not have the vicarious authority to enforce another agency’s practice act. “Administrative agencies derive *all* their authority and power from the enabling statutes that govern them.” *Brzowski v. Maryland Home Improvement Comm’n*, 114 Md. App. 615, 626, 691 A.2d 699, 704 (Md. Ct. Spec. App. 1997) (emphasis added); *see also id.* (“agencies have no powers beyond those that have been conferred upon them by statute”); *Holy Cross Hosp., Inc.*, 283 Md. at 683, 393 A.2d at 184 (“It is elementary that since an administrative agency . . . is a creature of statute, it has no inherent powers and its authority thus does not reach beyond the warrant provided it by statute.”).<sup>1</sup>

---

<sup>1</sup> Even if the Chiropractic Board did have the authority to enforce the Veterinary Practice Act at the time it sent Ms. Clemens the cease-and-desist order, it no longer has the authority to maintain that order, because, as the Chiropractic Board acknowledges, the Veterinary Board has abandoned its previous position that

Accordingly, because the Chiropractic Board does not have authority to regulate animal massage, its cease-and-desist order to Ms. Clemens, ordering her to stop practicing and advertising animal massage, was *ultra vires* and must be reversed. See *Halsey*, 273 Md. at 572-75, 331 A.2d at 310-11.

## **II. Declaratory judgment for Ms. Clemens is the appropriate remedy**

Having established that the Chiropractic Board did not have the authority to prohibit Ms. Clemens from practicing animal massage, the only remaining question is whether declaratory judgment in Ms. Clemens's favor is an appropriate remedy. The Declaratory Judgment Act empowers this Court to "grant a declaratory judgment or decree in a civil case, if it will serve to terminate the uncertainty or controversy giving rise to the proceeding, and if . . . [a]n actual controversy exists between contending parties." Md. Cts. & Jud. Proc. Code Ann. § 3-409(a). Both requirements are easily satisfied in this case.

It is beyond dispute that there is an actual controversy between Ms. Clemens and the Chiropractic Board. The Chiropractic Board has issued a cease-and-desist order that prohibits Ms. Clemens from freely practicing her chosen occupation of animal massage, and Ms. Clemens contests their authority to do so. Therefore, the controversy requirement is satisfied. *Hatt v. Anderson*, 297 Md. 42, 45-46 (Md. 1983) ("a controversy is justiciable when there are interested parties asserting adverse claims upon a state of facts which must have accrued wherein a legal decision is sought or

---

animal massage by non-veterinarians violates the Veterinary Practice Act. Sherman Aff., Ex. E at 1, 3, 6; see also Sherman Aff., Ex. F at 11:13-23.

demanded.”). Thus, declaratory judgment is appropriate so long as it will terminate the controversy between the parties.

A judgment declaring that the Chiropractic Board does not have the authority to regulate animal massage, and that its cease-and-desist order to Ms. Clemens is *ultra vires* and void, will surely resolve the dispute between the parties. Indeed, declaratory judgment would be necessary even if the Chiropractic Board rescinded its cease-and-desist order, because without a declaration that the Chiropractic Board lacks the authority to regulate animal massage, there would be nothing to prevent the Board from sending Ms. Clemens an identical cease-and-desist order in the future. For this very reason, courts in Maryland and around the country recognize that a defendant’s voluntary cessation of a challenged activity will not moot a controversy between the parties. *See Carroll County Ethics Comm’n v. Lennon*, 119 Md. App. 49, 61, 703 A.2d 1338, 1344 (Md. Ct. Spec. App. 1998) (noting that voluntary cessation of a challenged activity will not moot an action for declaratory judgment); *see also Stevenson v. Lanham*, 127 Md. App. 597, 621, 736 A.2d 363, 376 (Md. Ct. Spec. App. 1999) (“*Lennon* stands for the proposition that the voluntary cessation of allegedly illegal or wrongful conduct will not render a declaratory judgment action to determine the illegality or impropriety of the conduct moot.”); *Adarand Constructors v. Slater*, 528 U.S. 216, 222 (2000) (noting that “[v]oluntary cessation of challenged conduct moots a case . . . only if it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur” and that “the heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.” (internal quotation

marks and emphasis omitted)); *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 (1982) (“It is well settled that a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.”).

If courts failed to grant declaratory judgment where a defendant voluntarily ceases his activity, a defendant could easily escape a judicial determination of the legality of his actions and remain “free to return to his old ways.” *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953). And that is exactly the case here. The Chiropractic Board still maintains that, in some manner, it has the authority to regulate the practice of animal massage by licensed massage therapists. Sherman Aff., Ex. E at 6; Sherman Aff., Ex. F at 10:14-25. Without a declaratory judgment concerning the scope of the Board’s authority to regulate animal massage, the Chiropractic Board could send Ms. Clemens an identical cease-and-desist order in the future, and Ms. Clemens would once again find herself in jeopardy of losing her license to perform massage therapy for engaging in a practice over which the Chiropractic Board has no jurisdiction. Accordingly, declaratory judgment is necessary to ensure that the Chiropractic Board does not evade review of its *ultra vires* order, and to ensure that Ms. Clemens may practice her chosen occupation without the fear of future disruptions from the Chiropractic Board.

### **Conclusion**

The Chiropractic Board does not have, and has never had, the authority to regulate animal massage, regardless of who performs it. Accordingly, the Board had no authority to order Mercedes Clemens to stop practicing the occupation she loves, or for maintaining that prohibition after it admitted to this Court that it lacked the authority to

regulate animal massage. Ms Clemens respectfully requests that this Court enter summary judgment in her favor, declare that the Chiropractic Board's cease-and-desist order to Ms. Clemens is *ultra vires* and void, declare that the Chiropractic Board does not have the authority to regulate animal massage, permanently enjoin the Chiropractic Board from regulating animal massage, and grant other legal and equitable relief as this Court sees fit.

**Request for Hearing**

In accordance with Maryland Rule 2-311(f), Plaintiff respectfully requests a hearing on this motion.

Dated: June 3, 2009

Respectfully submitted,

**INSTITUTE FOR JUSTICE**

William H. Mellor\*

Scott G. Bullock\*

Paul M. Sherman\*

901 N. Glebe Rd., Suite 900

Arlington, VA 22203

Tel: (703) 682-9320

Fax: (703) 682-9321

Email: [wmellor@ij.org](mailto:wmellor@ij.org), [sbullock@ij.org](mailto:sbullock@ij.org),

[psherman@ij.org](mailto:psherman@ij.org)

Attorneys for Plaintiff

*\*admitted pro hac vice*

**JOSEPH, GREENWALD & LAAKE, P.A.**

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

Timothy F. Maloney

Joseph M. Creed

6404 Ivy Lane, Suite 400

Greenbelt, MD 20770  
Tel: (301) 220-2200  
Fax: (301) 220-1214  
Email: tmaloney@jgllaw.com; jcreed@jgllaw.com  
Maryland Counsel for Plaintiff

**CERTIFICATE OF SERVICE**

I certify that on June 3, 2009, a copy of Plaintiff's Motion for Summary Judgment was mailed, first class, postage prepaid to:

- Grant Gerber, Assistant Attorney General, Department of Health and Mental Hygiene, 300 W. Preston St., Baltimore, MD 21201, Counsel for Defendant Maryland Board of Chiropractic and Massage Therapy Examiners