

LAWSUIT

**STATE OF WASHINGTON *ex rel.* SOUTH SOUND
ACUPUNCTURE ASSOCIATION**, a State of Washington
non-profit corporation,
Plaintiff,

vs.

**PHYSICAL THERAPY SERVICES LLC; JOHN DOES 1-10;
and JANE DOES 1-10,**
Defendants.

Presentation by:
Jay A. Goldstein
Attorney At Law



In a nutshell lawsuit alleges:

1. Continuing education provider and attendees are practicing medicine and acupuncture without a license based on teaching DN at continuing ed workshop.
2. Acupuncture needles are federally regulated—and no authority to use these needles by PTs in DN.
3. DN uses acupuncture needles.
4. Acupuncture = Dry Needling
5. Dry needling not defined w/n scope of practice for PTs in WA
6. THEREFORE, PTs are practicing medicine and acupuncture without a license.

INTRODUCTION

The South Sound Acupuncture Association (“Plaintiff”) seeks injunctive relief enjoining the Defendants from the unlicensed practices of medicine and acupuncture

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INTRODUCTION

As the popularity of acupuncture has grown in recent years, some chiropractors, physical therapists, and naturopaths have started using acupuncture needles within their practices and inserting them into their patients' bodies as a therapeutic treatment.



These practitioners ... assert that what they are doing is not technically “acupuncture,” but is instead what they refer to as “dry needling,” and it is outside the State’s legal regulation of acupuncture.



As a part of the workshop, attendees are to be given a certification test and, **if they pass, will be “certified” ... to practice dry needling.**

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Those “certified” will be informed that they are sufficiently trained to safely begin using acupuncture needles to penetrate the skin of their patients as a part of their Washington practices immediately following the planned workshop.



While Washington acupuncture schools require over 2,000 hours of training prior to graduation and Washington Department of Health regulations require at least 500 hours of supervised clinical training as prerequisite for acupuncture, ... dry needling workshop attendees will receive a mere 27 hours of total training in the use of acupuncture needles.

Chiropractors, physical therapists, and naturopaths ... would begin using acupuncture needles to penetrate the skin of their patients as a part of their Washington practices immediately following the planned workshop.



Patients, however, would have no way of knowing about their health care provider's **extremely cursory training in the use of acupuncture needles.**



While Washington law does not specifically use the term “dry needling” within its statutes regulating health professions, it does strictly regulate the practice of medicine and the practice of acupuncture and prohibits the insertion of acupuncture needles absent required state training and licensing as a physician or East Asian medicine practitioner.

State of Washington Department of Health staff recently noted, “[d]ry needling is essentially acupuncture using different terminology” and ... sent a warning letter ... stating that, “dry needling is not listed in the scope of practice for Washington physical therapists” and ... are specifically prohibited from employing the use of needles in the treatment of a patient or practicing acupuncture in any form.”

Dry needling involves the use of labeled “acupuncture needles,” which, as required by the U.S. Food and Drug Administration (FDA), are labeled with a legal warning specifically limiting use of such needles to “qualified practitioners *of acupuncture.*”



The planned use of acupuncture needles by Defendants, both at the planned workshop and after the planned workshop, would constitute both the practice of medicine and the practice of acupuncture under Washington law which are both prohibited absent appropriate state licenses.

Washington law broadly states that: “[a] person is practicing medicine if he or she does one or more of the following: (3) Severs or penetrates the tissues of human beings.”



Those practicing what they refer to as “dry needling” target the same points within the human body that are targeted in acupuncture.

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The physical therapy scope of practice does not authorize licensed physical therapists to practice acupuncture.



The physical therapy scope of practice does not authorize licensed physical therapists to penetrate the tissues of human beings with acupuncture needles regardless of how such acts are referred to.



Plaintiff has brought two (2) causes of action
against Defendants

FIRST CAUSE OF ACTION

Defendants' insertion of acupuncture needles into the tissues of human beings constitutes the unlicensed practice of medicine

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SECOND CAUSE OF ACTION

Defendants' insertion of acupuncture needles into the tissues of human beings constitutes the unlicensed practice of acupuncture



PRAYER FOR RELIEF

1. Find that the Defendants' use of acupuncture needles constitutes both the practice of medicine and the practice of acupuncture which is not authorized under the relevant licensing statutes for chiropractors, physical therapists, and naturopaths

PRAYER FOR RELIEF

2. Issue an injunction barring Defendants from practicing dry needling until and unless they obtain state licensing as a physician or East Asian medicine practitioner



DISCOVERY

Please identify and describe what measures or protocols you take when purchasing, receiving, or possessing needles so as to comply with federal laws regulating acupuncture needles



DISCOVERY

Please identify and describe in detail the complete chain of possession and handling for all needles used at the workshop including details on who purchased or otherwise acquired the needles, transported them to the workshop, was responsible for them between workshop sessions, and disposed of them after use.

DISCOVERY

Please identify and describe the workshop curriculum taught identifying specifically the content and total amount of time spent on each discrete topic or task ... specifically address the discrete amount of time and the nature of educational content, if any, spent on clean needle protocols, safety issues, and compliance with state and federal legal requirements related to dry needling and use of acupuncture needles.



DISCOVERY

Please identify and describe the nature and extent of written and practical testing administered during the workshop as a condition of receiving a certification including the minimum test criteria.



DISCOVERY

Please identify and describe each of the defendants' personal experiences with using any types of needles or other medical devices intended to pierce the human skin.



DISCOVERY

Please identify and describe all treatments other than dry needling that are used within the scope of the defendant's business that involves piercing of the skin.

DISCOVERY

Please identify and describe in detail any incidents or complaints that you are aware of relating to any injuries whatsoever caused by dry needling.



DISCOVERY

Please identify and describe whether you have any reason to believe that any insurance policy related to the workshop, including any policies covering defendant Physical Therapy activities at PT offices, excluded coverage for dry needling.



DISCOVERY

Please identify and describe all details regarding how defendants bill, or have billed, patients, private health insurance, and Medicare, Medicaid or any other governmental entity for “dry needling” or any other similar term meant to describe defendants insertion of needles into patients.



DISCOVERY

Please identify how you describe to patients and prospective patients the level of training and experience you have in the use of needles for dry needling



REQUEST FOR PRODUCTION

Please produce copies of all communications relating to the instant case between the defendants and any persons who are not parties to the instant lawsuit.

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REQUEST FOR PRODUCTION

Please produce copies of all documents that identify, document or are otherwise related to any injury caused by dry needling.

REQUEST FOR PRODUCTION

Please produce copies of all documents used for training workshop instructors including but not limited to training manuals, curriculum, safety protocols, videos, and photographs.

REQUEST FOR PRODUCTION

Please produce copies of all product information for all needle brands and types that were used in any way during the workshop.

REQUEST FOR PRODUCTION

Please produce copies of all blank billing forms used by defendants in their practice of dry needling to bill patients, insurance companies, or governmental insurance provider such as Medicare, Medicaid or state entity.

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REQUEST FOR PRODUCTION

Please produce copies of all documents related to defendants' compliance with clean needle protocol and other legal requirements related to the use of acupuncture needles.

WASHINGTON LAW

A. Therapists exempt from Acupuncture statute

The East Asian Medicine statute exempts “[t]he practice by an individual credentialed under the laws of this state and performing services within such individual's authorized scope of practice.” RCW 18.06.045(1). As such, if physical therapists are performing services within the scope of their practice, they would not be violating the East Asian Medicine statute.

WASHINGTON LAW

B. The State Board of Physical Therapy has the authority to authorize dry needling.

The State Board of Physical Therapy (Board) is given the authority to “adopt rules relating to standards for appropriateness of physical therapy care.”



WASHINGTON LAW

C. Washington's regulations governing Physical Therapy encourage innovative techniques.

Washington's regulations governing the practice of physical therapy not only permit non-traditional methods, but require physical therapists to be open to new techniques: physical therapists ... shall recognize the need for continuing education and shall be open to new procedures and changes.

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WASHINGTON LAW

C. Washington's regulations governing Physical Therapy encourage innovative techniques (cont.)

Additionally, the use of a nontraditional treatment by itself shall not constitute unprofessional conduct, provided that it does not result in injury to a patient or create an unreasonable risk that a patient may be harmed.

WASHINGTON LAW

C. *Washington's regulations governing Physical Therapy encourage innovative techniques (cont.)*

While new techniques certainly may require additional training, physical therapists' licensing already includes extensive training and education on the function and anatomy of the human body. In fact, physical therapist education is much more extensive and comprehensive than the training that acupuncturists receive. As such, with proper training on the specific techniques involved in dry needling, physical therapists can safely and effectively treat their patients.

FEDERAL MEDICAL DEVICE REGS

Acupuncture needles are a Class II medical device. These devices are governed under the provisions of 21 CFR 801.109. However, the federal rules neither define acupuncture nor limit sales of these devices to acupuncture practitioners. While the act does restrict sales to the general public, the determination of which practitioners are allowed to use these devices is explicitly left to the states. This is clearly stated in 21 CFR 801.109(b)(1), which directs how these medical devices are to be labeled:

FEDERAL MEDICAL DEVICE REGS

*The statement "Caution: Federal law restricts this device to sale by or on the order of a _____", the blank to be filled with the word "physician", "dentist", "veterinarian", **or with the descriptive designation of any other practitioner licensed by the law of the State in which the therapist practices to use or order the use of the device.***



Dry Needling in the U.S.

- A. States with similar physical therapy statutes.

- B. Examples of Other Statutes.



Attorney General Opinions

One Attorney General Opinion in part relied upon other professional organizations' approach to this issue. American Academy of Orthopedic Manual Physical Therapists (Academy) issued a position statement in 2009 that "dry needling is within the scope of physical therapist practice."

"The Academy stated:



Attorney General Opinions

Dry needling is a neurophysiological evidence-based treatment technique that requires effective manual assessment of the neuro-muscular system. Physical therapists are well trained to utilize dry needling in conjunction with manual physical therapy interventions. Research supports that dry needling improves pain control, reduces muscle tension, normalizes biochemical and electrical dysfunction of motor endplates, and facilitates an accelerated return to active rehabilitation.”

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Federation of State Boards of Physical Therapy

The AGO also reviewed the Federation of State Boards of Physical Therapy (Federation) and its position on this issue. The AGO notes that according to the Federation, “26 jurisdictions ... have definitively ruled dry needling is allowed by PTs” while “7 ... have ruled definitively that it is not.”

CONCLUSION

In conclusion, Washington physical therapists are exempt from Washington's acupuncture statute. In addition, the State Board of Physical Therapy has the authority to authorize dry needling as within the practice statute for physical therapists. Moreover, Washington's regulations governing physical therapy encourage innovative techniques, and federal statute leaves it to the states to determine which practitioners are allowed to use these devices.

CONCLUSION

Most importantly, the overwhelming number of states and jurisdictions (27-7) that currently authorize physical therapists to perform dry needling should provide the Board the background it needs to make a reasoned decision: nationally physical therapists are authorized by most states to use dry needles in their physical therapy practice.



CONCLUSION

The American Academy of Orthopedic Manual Physical Therapists includes dry needling within the scope of physical therapist practice; and the Federation of State Boards of Physical Therapy notes that the few states that have found against the practice have based this decision on the particular language of the state statute.

QUESTIONS & COMMENTS

Should you have comments or questions, please do not hesitate to contact me.



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