IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

NEW MEXICO BOARD OF PHARMACY
and NEW MEXICO MEDICAL BOARD,

Appellants,

v.

NEW MEXICO BOARD OF
CHIROPRACTIC EXAMINERS,

Appellee,

and

INTERNATIONAL CHIROPRACTORS
ASSOCIATION,

Appellant,

v.

NEW MEXICO BOARD OF
CHIROPRACTIC EXAMINERS,

Appellee.

No. 31,690
[CONSOLIDATED with No. 31,668]

Direct Appeal from Rulemaking by Appellee
New Mexico Board of Chiropractic Examiners

REPLY BRIEF
and Request for Oral Argument

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STATEMENT REGARDING CITATION FORM

Appellee New Mexico Board of Chiropractic Examiners' August 30, 2011 rulemaking hearing record and transcript are marked and cited as "CHIRO," with any preceding zeroes omitted. Appellee's August 30, 2012 Answer Brief is titled "Brief in Chief & Request for Oral Argument" and is cited as "AB."

I. INTRODUCTION TO ARGUMENT

The point of contention between the parties over the advanced practice formulary ("Formulary") promulgated by Appellee at 16.4.15.11(F) NMAC lies in allowing chiropractors to inject a new variety of "substances" into their patients. The substances at issue are listed in subparagraphs 16.4.15.11(F)(8)-(18) NMAC. Appellants assert that these specific substances require a prescription if in injectable form, which renders them as "dangerous drugs" and thus require Appellants' joint approval pursuant to NMSA 1978, Section 61-4-9.2(B) (2009). Appellee contends that so long as the injected drugs are listed in Section 61-4-9.2(A), it can include them with impunity regardless of their manner of delivery.

Appellee's brief correctly identifies this central issue. Unfortunately, it then creates a false conflict within Section 61-4-9.2(B) by reading each sentence separately, looking to the previous version of Section 61-4-9.2 (2008), citing the self-serving testimony of Appellee's licensees as evidence of "legislative history" [AB 11-13], and then urging this Court to take the dramatic step of rewriting the

current statute on the grounds that is a "jig-saw." [AB 11]. However, this Court need not, and should not, take such a drastic remedy.

As argued below, a logical reading of Section 61-4-9.2(B) yields the intent of the Legislature. First, its three sentences are hierarchical in nature, yielding no conflict. Second, Appellee's argument — not Appellants' argument — creates surplusage, by rendering the phrase "and substances not listed in Subsection A" inoperable. Third, Appellants' argument reflects their expertise regarding the safety and efficacy of injectable drugs, as reflected in the New Mexico Drug, Device and Cosmetic Act and the Board of Pharmacy's long-standing rules defining what are dangerous drugs, while Appellee disregards such agency expertise in favor of cutting its own definition out of whole cloth. Fourth, Appellants' construction of the statute is harmonious with Appellee's own rules. Appellants separately address each point below.

II. ARGUMENT: THE COURT SHOULD SET ASIDE APPELLEE'S 2011 AMENDMENTS TO ITS FORMULARY RULE AT 16.4.15.11 NMAC BECAUSE APPELLANTS HAVE NOT APPROVED PURSUANT TO SECTION 61-4-9.2(B)

A. The Second and Third Sentences of Section 61-4-9.2(B) Are Hierarchical In Nature, With Appellee's "Development" of the Formulary Preliminary to Appellants' "Approval" of It

The Court "must assume the legislature chose [its] words advisedly to express its meaning unless the contrary [intent] clearly appears." *State v. Maestas*, 2007-NMSC-001, ¶ 22, 140 N.M. 836, 149 P.3d 933 (quoted authority omitted).

[BIC 26]. The Court's "primary purpose is to give effect to the intent of the Legislature." *Town & Country Food Stores, Inc. v. N.M. Reg'n & Licensing Dept.*, 2012-NMCA-046, ¶ 9, __ N.M. __, 277 P.3d 490 (cited authority omitted).

This Court should read Section 61-4-9.2(B) as a complete paragraph, as the Legislature intended:

> B. A formulary that includes all substances listed in Subsection A of this section, including compounded preparations for topical and oral administration, shall be developed and approved by the board. A formulary for injection that includes the substances in Subsection A of this section that are within the scope of practice of the certified advanced practice chiropractic physician shall be developed and approved by the board. Dangerous drugs or controlled substances, drugs for administration by injection and substances not listed in Subsection A of this section shall be submitted to the board of pharmacy and the New Mexico medical board for approval.

The first sentence allows Appellee to "develop and approve" a Formulary including all substances in Section 61-4-9.2(A), including topical and oral administration. The second sentence similarly does so for administration by injection. However, these two sentences separate the former (topical and oral) from the latter (injection) because of the third sentence, which empowers Appellants with separate approval authority with regard to, *inter alia*, "dangerous drugs" and "drugs for administration by injection." Section 61-4-9.2(B).

Thus, the Legislature charged Appellee with the first step in promulgating a Formulary, which is identifying the substances its licensees would administer. It

could have vested either of Appellants with this task, but logically chose not to because Appellee should best know the competency of its licensees.

However, the competencies of its licensees are not enough. The Legislature then required a separate approval by Appellees for any substances that could raise a public health or safety concern. The Legislature provides this approval authority in the third sentence of Section 61-4-9.2(B). The third sentence generally does not pertain to any substances listed in Section 61-4-9.2(A) if administered orally or topically, hence the separation of the first two sentences. Only the grant of authority in the second sentence is subordinate to the grant of authority in the third sentence.

Appellee mistakenly tries to read these three sentences as legislating mutually exclusive authority. In other words, Appellee insists that the third sentence cannot impart approval authority that is already authorized in the first two sentences. [AB 6-11]. The result, as shown in Appellee's brief, requires the linguistic gymnastics of adding punctuation and otherwise rewriting the law so as to deny Appellants the statutory authority to approve the Formulary.

If the Court instead reads the third sentence as an overarching authority, Section 61-4-9.2(B) is in perfect harmony. Of course, such interpretation makes complete sense in light of the fact that the Formulary allows chiropractors to do what is otherwise traditionally within the training of allopathic physicians, not

chiropractors. Hence the separate requirement in the Chiropractic Physician Practice Act that chiropractors receive additional education and that the institutions providing such education must be approved by the New Mexico Medical Board. NMSA 1978, § 61-4-9.1 (2008).

In this vein, Appellee complains that Appellants do not seek a statutory interpretation that treats all three agencies as "equals." [AB 16]. Such complaint misses the point of this law. The Formulary seeks to expand the scope of its licensees' practice into the traditional practice of medicine. Deference to Appellants' expertise is thus appropriate, and likely intended by the Legislature. Appellee's remedy lies with changing its law.

Furthermore, this hierarchical interpretation avoids any surplusage in the second sentence of Section 61-4-9.2(B), as argued by Appellee. [AB 10]. The second sentence requires Appellee to first approve the injectable substances for its Formulary; the third sentence adds a separate approval by Appellants for these and other drugs. The statute must "be construed according to its obvious spirit or reason," because to do otherwise improperly ignores the Legislature's express intent to require all three boards to play separate roles in approving a Formulary. *Bishop v. Evangelical Good Samaritan Soc'y*, 2009-NMSC-036, ¶ 9, 146 N.M. 473, 212 P.3d 361.

The Court will not rewrite a statute. *See, e.g., James v. N.M. Human Servs. Dep't,* 106 N.M. 318, 320, 742 P.2d 530, 532 (Ct. App. 1987). Appellee relies upon *Roswell v. Hall*, 45 N.M. 116, 119, 112 P.2d 505 (1941) for an exception to this rule for "re-punctuation" of a statute. [AB 11-12]. However, in *Roswell*, the Court re-punctuated a sentence in an ordinance where "there [was] no question as to its intended meaning." *Id.*, 45 N.M. at 119, 112 P.2d at 506. *Roswell* has only been cited once for this proposition since its publication, in *Estate of Thompson v. O'Cheskey*, 86 N.M. 534, 535, 525 P.2d 894, 895 (Ct. App. 1974), *overruled by In re Will of Clark*, 87 N.M. 108, 529 P.2d 1229 (1974). Although in *Thompson* the Court of Appeals added a comma to a statute to correct a "manifest grammatical error," 86 N.M. at 535, 525 P.2d at 895, the Supreme Court in *Clark* reversed *Thompson* three months later, holding that the statute at issue in both cases was unambiguous, and thus declined to apply technical rules of grammatical construction given the "plain common sense interpretation" of the statute's words. *Clark*, 87 N.M. at 110, 529 P.2d at 1231 (quoted authority omitted).

Here, in contrast, Appellee seeks to re-punctuate because it claims the statute's cloudy intent renders it like a "jig-saw puzzle." [AB 11]. Neither *Roswell*, *Thompson* nor *Clark* stand for the proposition that re-punctuation can

impart meaning in the absence of clear legislative intent. Nor did they involve the Court inserting an additional word — "and" — into the law, as Appellee urges.[1]

Appellants submitted uncontroverted evidence in the administrative record that each of the injectable substances at issue at 16.4.15.11(F)(8)-(18) NMAC requires a prescription, and were otherwise known to be and considered dangerous drugs by Appellee pursuant to the above standard. [CHIRO at 42-46; 83-86]. Indeed, several chiropractors opposing this rule similarly pointed out that it would improperly amount to allowing chiropractors to prescribe. [CHIRO 58-59 (Marilyn Coady, D.C.); 61 (C.A. Riekeman, D.C.); 77 (World Federation of Chiropractic)]. These substances are thus "dangerous drugs." *See* NMSA 1978, § 26-1-2(F) (1967, as amended through 2011), 16.19.17.7(B)(2) NMAC. As such, these dangerous drugs must be approved by Appellants for inclusion in the Formulary. *See* § 61-4-9.2(B).

For the foregoing reasons, the Court should not rewrite this rule as urged by Appellee. The Court should set aside Appellee's amendments to 16.4.15.11 NMAC.

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[1] Nor are Appellants also "working on the punctuation in the sentence." [AB 15, n. 3]. Any modification to punctuation in Appellants' Brief in Chief was incidental and not intended as substantive.

B. Appellee's Argument Renders Part of Subsection B as Surplusage, Because Section 61-4-9.2(B) Explicitly Contemplates That Some of the Drugs Listed in Section 61-4-9.2(A) May Be Dangerous If Injected

Appellee argues that Section 61-4-9.2(B) is confusing because the Legislature did not coherently state which substances listed in Subsection A it is free to include without Appellants' approval. It thus re-writes the law to make clear that if a substance is listed in Subsection A, Appellee need not seek approval for its inclusion in the formulary. [AB 15]. Appellee asks this Court to "establish a line between those items in Subsection A and everything else." [AB 15].

Appellee correctly cites *Katz v. N.M. Dept. of Human Servs.*, 95 N.M. 530, 534, 624 P.2d 39, 43 (1981) for the proposition that "a statute must be construed so that no part of the statute is rendered surplusage or superfluous." [AB 10]. Yet Appellee neglects this rule of construction in construing Section 61-4-9.2(B). [AB 10-11].

The Legislature did not intend to exclude all substances listed in Section 61-4-9.2(A) from Appellants' approval. Rather, in circumscribing Appellants' approval authority, the Legislature includes the phrase "and substances not listed in Subsection A of this section" after the phrase "Dangerous drugs or controlled substances, drugs for administration by injection..." Section 61-4-9.2(B). Implicit in the former phrase is that <u>some</u> dangerous drugs or controlled substances or drugs for administration by injection <u>are</u> listed in Subsection A. Otherwise, the

Legislature would have no need to include the phrase "and substances not listed in Subsection A of this section." *Id.* If, for example, a dangerous drug could not include an injectable B12 vitamin because it is listed in Subsection A, then the Legislature would have no reason to include this phrase.

The phrase "and substances not listed in Subsection A of this section" is thus an important part of understanding the law as a whole. Appellee cannot ignore it. For the foregoing reasons, the Court should set aside Appellee's amendments to 16.4.15.11 NMAC.

C. This Court Should Defer to the Board of Pharmacy's Definition of a "Dangerous Drug" That Reflects Its Expertise, Which Appellee Disregards

The Court "must remain mindful that in resolving ambiguities in the statute or regulations which an agency is charged with administering, the [c]ourt generally will defer to the agency's interpretation if it implicates agency expertise." *Rio Grande Chpt. of the Sierra Club v. N.M. Mining Comm'n,* 2003-NMSC-005, ¶ 17, 133 N.M. 97, 61 P.3d 806 (internal quotation marks and citation omitted). Appellants' concerns about what the Formulary can contain flow directly from the statutory and regulatory definitions of "dangerous drugs."

A "dangerous drug" is defined by the New Mexico Drug, Device and Cosmetic Act as:

> ... a drug ... that because of a potentiality for harmful effect or the method of its use or the collateral measures necessary to its use is not

> safe except under the supervision of a practitioner licensed by law to direct the use of such drug and hence for which adequate directions for use cannot be prepared ....

Section 26-1-2(F) (emphasis added). The Board of Pharmacy further clarifies by rule that a "dangerous drug" is one that "shall be dispensed only upon the prescription of a practitioner licensed by law to administer or prescribe such drug." 16.19.17.7(B)(2) NMAC. The Board of Pharmacy interprets and enforces the Drug, Device and Cosmetic Act. *See, e.g.*, NMSA 1978, §§ 26-1-4 (1967) (Board of Pharmacy is authorized to seek to enjoin violations of the Drug, Device and Cosmetic Act) and 26-1-18 (1972, as amended through 2005) (Board of Pharmacy may promulgate regulations for the efficient enforcement of the Drug, Device and Cosmetic Act, and shall, by regulation, declare a substance a "dangerous drug").

Thus, both the Drug, Device and Cosmetic Act and the Board of Pharmacy define a "dangerous drug" as one that requires a lawful prescription. The Board of Pharmacy's rule so defined this term as a matter within its area of expertise. The Board of Pharmacy did not except any drug from this definition, provided that it needs a lawful prescription. It certainly did not exempt the substances listed in Section 61-4-9.2(A) because, if these substances were intended to be administered by injection, they are defined as "dangerous drugs," and thus required approval by both Appellants. Section 61-4-9.2(B), 3rd sentence.

As stated above, Appellants submitted uncontroverted evidence in the administrative record that each of the substances at issue at 16.4.15.11(F)(8)-(18) NMAC requires a prescription, and were otherwise known to be and considered dangerous drugs by Appellee pursuant to the above standard. [CHIRO 42-46; 83-86]. Thus, in deference both to the statutory and regulatory definitions and the Board of Pharmacy's expertise in classifying drugs, these substances are "dangerous drugs."

Appellee would have the Court disregard the Board of Pharmacy's expertise. Its interpretation of Section 61-4-9.2(B) has the effect of defining a "dangerous drug" as one that does not include the substances listed in Subsection A. [AB 7-10, 14-17]. Put another way, Appellee urges a definition of a "dangerous drug" in Subsection B that is different from the definition promulgated by the Board of Pharmacy pursuant to the Drug, Device and Cosmetic Act. [AB 8-10]. Appellee offers no justification for ignoring agency expertise in this manner except to say that the power of an advanced practice chiropractor's prescriptive authority is "really limit[ed]" by Appellant Board of Pharmacy's enforcement of the statute and its administrative rule defining "dangerous drugs." [AB 9]. Well-established authority says otherwise. *See, e.g., Rio Grande Chapter,* 2003-NMSC-005, ¶ 17.

For the foregoing reasons, the Court should set aside Appellee's amendments to 16.4.15.11 NMAC.

D. Appellee's Position is Inconsistent With Its Own Rule at 16.4.15.8(C) NMAC

It is axiomatic that an agency should interpret its own rules in a consistent manner. Here, Appellee's rule governing the advanced practice registration is set forth at 16.4.15.8 NMAC. In short, this rule states that only chiropractors who register with Appellee and satisfy certain requirements — including additional education provided by institutions approved by the Medical Board — can "administer through injection ... substances that are authorized in the [Formulary]." 16.4.15.8(A)-(B) NMAC. For those chiropractors without advanced practice registration, Appellee's rule circumscribes their scope of practice:

> A chiropractic physician without advanced practice certification may administer, dispense and prescribe any natural substance that is to be used in an oral or topical manner so long as that substance is not considered a dangerous drug.

16.4.15.8(C) NMAC (emphasis added).

This subsection interprets Appellee's authority consistently with Appellant's position, and inconsistently with its own. [Contra AB 17-18]. The scope of practice for chiropractors without advanced practice certification in this rule essentially tracks the first sentence of Section 61-4-9.2(B). More importantly, 16.4.15.8(A) NMAC considers a "dangerous drug" to potentially include any substance "administer[ed] through injection." It does not consider certain drugs

not to be dangerous by virtue of being listed in the formulary. Appellee's rule does not separately define a "dangerous drug." Instead it defers to the Board of Pharmacy's definition.

Thus, Appellants assert a position similar to the Appellee's own rule at 16.4.15.8(C) NMAC. Appellee's position contradicts its own rule. For the foregoing reasons, the Court should set aside Appellee's amendments to 16.4.15.11 NMAC.

III. CONCLUSION

Section 61-4-9.2(B) of the Chiropractic Physician Practice Act mandates Board of Pharmacy and Medical Board approval before Appellee may promulgate an advanced practice Formulary containing "dangerous drugs or controlled substances," "drugs for administration by injection," and "substances not listed in [Section 61-4-9.2(A)]." Appellee included dangerous drugs in its formulary at 16.4.15.11 NMAC without such approval.

Appellee failed to submit its proposed Formulary containing certain dangerous drugs to Appellants for their prior approval. Therefore, the Court should set aside Appellee's 2011 amendments to its Formulary rule at 16.4.15.11 NMAC.

IV. REQUEST FOR ORAL ARGUMENT

Appellants Board of Pharmacy and the Medical Board respectfully request oral argument. Appellants believe oral argument would permit the Court to question all parties both as to what Section 61-4-9.2(B) means, and what roles Appellants and Appellee must play in the establishment, administration and enforcement of an advanced practice chiropractic Formulary.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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