

IN THE MATTER OF * **BEFORE THE MARYLAND**
HERVE BAPTISTE, L.M.T. * **STATE BOARD OF**
Respondent * **CHIROPRACTIC AND**
License Number: M04431 * **MASSAGE THERAPY EXAMINERS**
* **Case Number: 11-15M**

* * * * *

FINAL NOTICE OF REVOCATION OF MASSAGE THERAPY LICENSE

PROCEDURAL BACKGROUND

On or about October 4, 2011, the Maryland State Board of Chiropractic and Massage Therapy Examiners (the "Board") notified Mr. Herve Baptiste, Licensed Massage Therapist ("L.M.T.") ("Mr. Baptiste" or the "Respondent") that his license to practice massage therapy in Maryland was being summarily suspended. That same day, the Respondent was notified that he was being charged with violation of certain provisions of the Maryland Chiropractic Act, Md. Health Occ. Code Ann. ("H.O.") § 3-101, *et seq.*, (the "Act"), and Code Md. Regs. ("COMAR") tit. 10, §§43.18 *et seq.* Those charges were then superseded by an amended charging document, to which the Respondent was notified of on or about October 18, 2011. Specifically, the Board charged the Respondent with violation of the following provisions of H.O. § 3-5A-11:

- (a) Subject to the hearing provisions of § 3-315 of this title, the Board may deny a license or registration to any applicant, reprimand any licensee or registration holder, place any licensee or registration holder on probation, or suspend or revoke the license of a licensee or the registration of a registration holder if the applicant, licensee, or registration holder:
 - (2) Fraudulently or deceptively uses a license or registration;
 - (5) Willfully and knowingly:
 - (i) Gives any false or misleading information about a material matter in an employment application;

- (8) Does an act that is inconsistent with generally accepted professional standards in the practice of massage therapy;
- (11) Has violated any provisions of this subtitle;
- (20) Engages in conduct that violates the professional code of ethics;
[and/or]
- (21) Knowingly does an act that has been determined by the Board to be a violation of the Board's regulations.

In addition, the Board also charged the Respondent with violation of the following provisions of the Code of Maryland Regulations ("COMAR"):

COMAR 10.43.17 MASSAGE THERAPY—GENERAL REGULATIONS

COMAR 10.43.17.03 License or regulation required; Exceptions

An individual shall be licensed by the Board in order to practice massage therapy, and shall be registered by the Board in order to practice non-therapeutic massage...

COMAR 10.43.18 MASSAGE THERAPY CODE OF ETHICS

COMAR 10.43.18.02 Definitions.

B. Terms Defined.

- (2) "Non bona fide treatment" means when a certificate holder or registration holder treats or examines a client in a way that involves sexual contact, but there is no therapeutic reason for the procedure, or the procedure falls outside of reasonable massage therapy or non-therapeutic massage practices.

COMAR 10.43.18.03 Standards of Practice.

C. A certificate holder or registration holder shall:

- (2) Engage in professional conduct at all times, with honesty, integrity, self-respect and fairness;
 - (3) Remain free from conflict of interest while fulfilling the objective and maintaining the integrity of the massage therapy profession;
 - (6) Practice massage therapy or non-therapeutic massage only as defined in the scope of practice set out in Health Occupations Article, §3-5A-01, Annotated Code of Maryland;
- D. A certificate holder or registration holder may not:
- (2) Knowingly engage in or condone behavior that:
 - (a) Is fraudulent,
 - (b) Is dishonest,
 - (c) Is deceitful, or
 - (d) Involves moral turpitude

COMAR 10.43.18.04

Relationship with Client.

- A. A certificate holder or registration holder shall:
- (4) Maintain legible, organized written records of treatment of any client under the care of the certificate holder or registration holder for at least 5 years after termination of treatment and as provided by applicable provisions of Health-General Article, Title 4, Subtitle 3, Annotated Code of Maryland.

COMAR 10.43.18.05

Professional Boundaries.

- A. A certificate holder or registration holder shall:
- (1) Maintain professional boundaries, even when the client initiates crossing professional boundaries of the professional relationship;
- B. A certificate holder or registration holder may not:
- (2) Engage in a sexually intimate act with a client; or
 - (3) Engage in sexual misconduct that includes, but is not limited to:
 - (b) Non bona fide treatment; or
 - (c) A sexually exploitative relationship.

On January 26, 2012, a hearing on the merits was held. Present were the following

Board members, which constituted a quorum: Stephanie J. Chaney, D.C., Board President, Jonathan Nou, D.C., Michael Fedorczyk, D.C., Karen Biagiotti, L.M.T., David Cox, L.M.T.,

Gwenda Harrison, L.M.T., and Ernestine Jones Jolivet. Also present were James J. Vallone, J.D., Board Executive Director, Adrienne Congo, M.S., Board Deputy Director, Grant Gerber, Esq., Board Counsel, and Robert Gilbert, Esq., Assistant Attorney General, Administrative Prosecutor. Neither the Respondent nor counsel appeared for the hearing.

The Board conducted the hearing without Mr. Baptiste present. "If after due notice the individual against whom the action is contemplated fails or refuses to appear, nevertheless the Board may hear and determine the matter." H.O. § 3-315(f). The Board provided Mr. Baptiste notice and he failed to appear.

EXHIBITS

The following exhibits were admitted into evidence:

STATE'S EXHIBITS

- | | | |
|-----|----|---------------------------------------------------------------------------------------------------------------------------------------------|
| No. | 1 | Application for Licensure |
| | 2 | Licensure Profile |
| | 3 | Investigative Report, dated July 6, 2011 |
| | 4 | Timeline |
| | 5 | Complaint from Client A, dated March 23, 2011 |
| | 6 | Transcript from interview of Respondent, dated June 21, 2011 |
| | 7 | Respondent's employment profile from Spa A, Silver Spring, MD |
| | 8 | Subpoena for treatment records from Spa A, Silver Spring, MD
Treatment Records, Client A [note – address and telephone numbers redacted] |
| | 9 | Subpoena for treatment records from Spa B, Rockville, MD |
| | 10 | Respondent's employment profile from Spa B, Rockville, MD |
| | 11 | Client incident report regarding Client B, Spa B, Rockville, MD [Note – address and telephone numbers redacted] |

- (1) 12 Transcript of interview of Client B, dated August 2, 2011 [Note – address and telephone numbers redacted]
- (2) 13 Complaint from Client C, dated October 11, 2011
- 14 Client incident report, Spa C, Bethesda, MD, Client C [Note – address and telephone numbers redacted]
- 15 Treatment notes, Client C [Note – name, address and telephone numbers redacted]
- 16 Transcript of interview of Client C, dated October 6, 2011 [Note – address redacted]
- 17 District Court records, charges, dated October 6, 2011
- 18 Subpoena for police reports/arrest records in Georgia for Respondent
- 19 Clinic incident report, Spa D, Alpharetta GA [Note – address and telephone numbers redacted]
- 20 Clinic incident report, Spa F, College Park, MD [Note – address and telephone numbers redacted]
- (3) 21 Amended charges

SYNOPSIS OF CASE

Client B¹, a Maryland resident, testified that on September 18, 2010, she received a two-hour massage performed by the Respondent at Spa B in Rockville, MD. Client B testified that after a brief conversation with the Respondent about what areas she wished to focus on during the massage and why, the Respondent suggested a chest massage, to which Client B agreed. Client B testified that when the Respondent began massaging her lower back, he began massaging underneath of her underwear, which she had never experienced before in previous massages she had received. Afterwards, the Respondent requested that Client B turn onto her back, to which she complied. Client B testified that once she was on her back, the

¹ Due to privacy concerns, the order does not use the witnesses' names. The Board has the names of the witnesses on file.

Respondent began massaging her arm and then her armpits, at which point Client B became very uncomfortable but decided not to say anything because she was new to Spa B and unfamiliar with their specific techniques. Afterwards, the Respondent began to massage Client B's chest, including her breasts. Client B testified that during the chest massage, the Respondent placed his hands under the draping and touched her left nipple. Client B testified that at this point she said nothing because she assumed it was a mistake. Client B testified that as the Respondent continued the chest massage, he touched her nipple two more times. After this contact, Client B said to the Respondent "you need to stay out of my chest area," and told him to "massage somewhere else."² Shortly thereafter, Client B told the Respondent that she did not want to continue with the massage. Client B testified that in response to her ending the massage, the Respondent acted as if nothing had happened. Client B then dressed herself and left the room. Client B testified that after the massage with the Respondent, she immediately went to the manager and reported the incident. Client B testified that at the time of the conversation, she was shaking and "very angry and uncomfortable."³ The manager told Client B that she would investigate the matter and talk to the Respondent. Client B testified that the incident gave her nightmares and deterred her from getting another massage for at least six months, despite having several massages left for the program that she paid for previously.

Client A, a resident of Maryland, testified that she regularly received massages for approximately ten years, and was familiar with proper draping techniques. Client A testified that she had a massage performed by the Respondent on March 15, 2011 at Spa A in Wheaton, Maryland. Client A testified that prior to the massage, the Respondent asked her to undress to her comfort level and left the room. Client A undressed and laid on the massage

² Hearing Transcript (32 7-11).

³ Hearing Transcript (34 18-20)

() table face-down under the draping. Client A testified that when the Respondent walked back into the room, he closed the door and placed a rubber door stop under it. The Respondent told Client C that he didn't want anyone to walk in on them. Client A testified that the massage continued as normal at first, with the Respondent massaging her back, shoulders, neck, legs and feet. Afterwards, the Respondent asked Client A to roll over onto her back, to which he complied. The Respondent began to massage Client A's legs, and asked her if she wanted her upper legs massaged, to which she replied "yes," although unsure as to what the Respondent meant.

() Afterwards, the Respondent began massaging Client A's upper legs, during which he made contact with her underwear several times. Client A testified that she did not speak up about the contact with her underwear because she thought that perhaps the Respondent was just clumsy. The Respondent then asked Client A if she would like her abdominals massaged, to which she replied that she did. At that point, the Respondent removed the draping from the waist up, completely exposing her breasts. Client A testified that after the Respondent began the abdominal massage, he began massaging her breasts. Client A estimated that the breast massage lasted around seven (7) minutes. Client A testified that she never gave the Respondent permission to touch her breasts. Client A also testified that during the abdominal massage, the Respondent placed his fingers slightly under her underwear.

() After the massage was over, the Respondent told Client A to get dressed and meet him at the reception desk. When Client A reached the reception desk, the Respondent was waiting for her, which deterred her from saying anything about the incident. The Respondent then handed her his business card and Client A left the spa. Shortly after, Client A called the police from her car on her ride home and filed a police report on the incident the following day. Client A testified that she has not had a massage since the incident with the Respondent. Client A

testified that she thinks that it is important for the Respondent's license to be revoked so that he cannot harm anyone else.

Client C, a resident of Maryland, testified that she has received massages for approximately twenty years. Client C testified that after signing up for a massage therapy program at Spa C in Bethesda, she made two appointments for a massage with the Respondent on June 7, 2011 and June 9, 2011. Client C testified that the first two appointments with the Respondent were professional, causing her to schedule three more appointments with him. Client C testified that on June 30, 2011, she had another massage performed by the Respondent. While Client C was laying face down on the massage table, the Respondent began massaging her back, neck, and shoulders. As the Respondent began massaging Client C's back, the Respondent moved towards the area where the drape was still covering Client C's buttocks. At this point, Client C felt as if the draped was moved far enough that her buttocks were exposed. When the Respondent began massaging the left side of Client C's body around her left thigh and buttocks, Client C felt that the drape was then pushed too high, further making her uncomfortable.

Client C also testified that while the Respondent was massaging her left thigh, his hand actually touched her genital area. Afterwards, the Respondent asked Client C to turn onto her back, to which she complied. Client C testified that while the Respondent was massaging her left arm, he began to place his hands under the drape and touched her breasts several times. Afterwards, the Respondent placed his full palms under the draping and across Client C's breasts and nipples. Client C estimated that this contact with her breasts by the Respondent took place for more than five (5) minutes. Client C testified that she did not give the Respondent permission to touch her breasts at any time. Client C left the spa without reporting the incident, but called the manager several days later to describe the inappropriate contact,

although Client C did not describe the draping issues. Client C requested that all of her personal information be deleted from the spa's computer program, to which the manager agreed. Client C testified that the manager indicated to her that the Respondent would likely be fired for his conduct with Client C. When Client C returned from vacation and discovered that the Respondent had not been fired, she called the local police department and spoke to Investigator McNerney. Mr. McNerney requested that she make a written statement describing the incident, which she wrote and sent to the investigator on July 22, 2011. Client C testified that she cooperated with the Board's investigation because she wanted to help prevent this kind of behavior by the Respondent from happening to another individual in the future.

The Board found the testimony of Clients A, B and C to be very credible. Each client told their story with lots of detail and personal insight. Each testified with the knowledge that Mr. Baptiste could be present at the hearing. The Board found that Clients A, B, and C all testified with a great deal of conviction. Their stories all fit together to show a pattern of abuse. In spite of the circumstance, all of three of the clients had a calm demeanor. For all these reasons, the Board found their testimony to be quite credible.

Investigator Patrick McNerney, a detective for the Montgomery County Police in their Major Crimes Division, testified that he was involved in the criminal investigation of the Respondent based on his conduct with Client C on June 30, 2011. Mr. McNerney testified that after receiving Client C's written description of what happened with the Respondent during her massage at Spa C, he obtained an arrest warrant for the Respondent for fourth-degree sex offense and second-degree assault. Mr. McNerney contacted the Respondent and explained his options to him. The Respondent replied that he would need to speak to legal counsel. However, a day or two later, the Respondent came into Mr. McNerney's office without counsel. Mr. McNerney took the Respondent back to an interview room and read him his Miranda

rights. The Respondent replied that he understood his rights, and Mr. McNerney began the interview. The Respondent said that he remembered Client C and that he had given her several massages. When Mr. McNerney confronted the Respondent about Client C's allegation that he touched her breasts, the Respondent admitted that his hands made contact with Client C's breasts, but claimed that Client C had signed a form allowing him massage her pectoral muscles. The Respondent acknowledged that he understood draping techniques and that the drape acts as a boundary for where the massage can occur. The Respondent denied saying something to the effect of "do you like this" while touching Client C's breasts. Mr. McNerney testified that the Respondent's admittance of touching Client C's breasts was significant in that it showed that the Respondent believed it was permissible.

Marc Ware, a former investigator of the Board, testified that he was assigned to investigate the Board's case involving the Respondent. The Board found Mr. Ware's testimony to be very credible. After the Board's receipt of a complaint from Client A regarding the Respondent, Mr. Ware made arrangements to interview the Respondent and issued a subpoena requesting records from the establishment where the alleged incident occurred. However, no client records could be found. When Mr. Ware interviewed the Respondent, he asked the Respondent whether he maintained client records. The Respondent admitted that he did not. When asked about his employment history, the Respondent said that he left his place of employment in Georgia because of a distance issue and because there were some draping issues at that particular establishment. Although not admitting to being "fired," the Respondent did admit that he had to find other employment because of the draping issues. Mr. Ware testified that he had an opportunity to inspect the Respondent's employment records from Spas A, B and C. In regards to the Respondent's previous employment in Georgia, the Respondent indicated on his applications to those establishments that he left because of a

distance issue. Mr. Ware testified that the real reason the Respondent left his employment in Georgia was because he had been fired due to criminal charges that had been brought against him for inappropriate conduct with a client. Mr. Ware testified that he discovered the allegations made by Client B regarding the Respondent while inspecting his employment records from the Spa B in Rockville, Maryland. Mr. Ware contacted Client B, who gave a statement regarding the Respondent and his inappropriate contact with her breasts during a massage.

Mr. Ware testified that the Respondent applied for a massage therapy license in Maryland on May 3, 2010. In the Respondent's application, he answered "no" to Question D, which asks if the applicant has ever been arrested before. Mr. Ware testified that this answer was incorrect based on his criminal charges in Georgia. Mr. Ware testified that the Respondent received his massage therapy license from the Board on November 1, 2010 and that therefore the Respondent was unlicensed when he provided a massage to Client B on September 18, 2010. Mr. Ware testified that through his investigation, he discovered that the Respondent had been fired from two spas in Georgia due to inappropriately touching a client and resulting criminal charges.

FINDINGS OF FACT

The Board makes the following Findings of Fact based on the foregoing record:

1. That Respondent was initially licensed to practice massage therapy in the State of Maryland on November 1, 2010, under License Number M04431.
2. The Board initiated an investigation of the Respondent after reviewing a complaint dated March 23, 2011, from a woman ("Client A") who reported that on March 15, 2011, the Respondent engaged in improper and unwanted intimate physical contact with her while giving her a massage at a massage therapy spa ("Spa A") in Wheaton, Maryland.

3. While investigating the matter involving Client A, the Board discovered a second instance where the Respondent engaged in improper and unwanted intimate physical contact with another female massage therapy client ("Client B") when giving her a massage at a massage therapy spa ("Spa B" in Rockville, Maryland. At that time, the Respondent was not licensed to practice massage therapy but represented himself as a licensed massage therapist.

4. The Board's investigation determined that two massage therapy spas in Georgia ("Spa D" and "Spa E") also terminated the Respondent's employment after receiving allegations of him involving acts of unprofessional conduct. The Respondent was terminated from one spa for sexual misconduct with a massage therapy client.

5. In addition, the Board determined that the Respondent made material misrepresentations/omissions about his employment terminations on at least two employment applications, and failed to keep appropriate massage therapy notes at one of the massage therapy spas ("Spa A") where he was employed in Maryland. The Respondent also made material misrepresentations to a Board investigator regarding the reason for his termination from a Spa in Georgia.

6. After conducting its investigation, the Board issued an Order for Summary Suspension of License to Practice Massage Therapy (the "Order"), dated October 4, 2011, in which it summarily suspended the Respondent's massage therapy license. The Board issued its Order pursuant to Md. State Gov't Code Ann. § 10-226 (c)(2), concluding that the Respondent's history of professional misconduct and boundary violations constitutes a substantial likelihood of a risk to the public health, safety or welfare, which imperatively required the immediate suspension of his license to practice massage therapy.

7. After issuing its Order, the Board continue investigating the Respondent and discovered that on or about June 30, 2011, he engaged in a third instance of impermissible and unwanted touching of a female client ("Client C") during a massage he provided at a massage therapy spa ("Spa C") in Bethesda, Maryland.

8. On October 6, 2011, the Respondent was criminally charged with committing a second degree assault and a fourth degree sex offense against Client C for the incident occurring at Spa E on June 30, 2011. Those charges are currently pending.

9. The Board's investigation determined that the Respondent engaged in at least four instances of impermissible, unwanted physical contact and boundary violations with female massage therapy clients, resulting in his forced termination from at least one massage therapy spa in Georgia, two massage therapy spas in Maryland, and the issuance of criminal charges against him. In one of those instances, involving Client B, the Respondent was not licensed to practice massage therapy but represented himself as a licensed massage therapist.

10. The Respondent's misconduct placed his clients in fear for their safety and caused them to experience significant emotional distress. In total, four separate massage therapy spas in two states have terminated the Respondent's employment for various forms of unprofessional conduct. At least three of those terminations involved the Respondent engaging in sexually oriented misconduct during the course of providing massages.

CONCLUSIONS OF LAW

Based on the foregoing evidence and Findings of Fact, the Board concludes that the Respondent violated his ethical and professional duties as a Massage Therapist. As a matter of law, the Board finds that Mr. Baptiste violated the provisions of the Board's Practice Act and Code of Ethics and regulations. See H.O. § 3-5A-11(a)(2), (5), (8), (11), (20) and (21), and COMAR 10.43.18 *et seq.*

First, the Board finds that Mr. Baptiste violated professional boundaries and committed acts of sexual misconduct against Clients A, B, and C. In Maryland, a licensed massage therapist “may not engage in sexual misconduct that includes, but is not limited to: therapeutic deception, non bona fide treatment, or a sexually exploitative relationship.” See H.O. §§ 3-5A-11(a)(20) and (21), COMAR 10.43.18.05(B). The Board finds that Mr. Baptiste committed acts of sexual misconduct when he made unwanted and improper contact with his clients’ breasts and/or pubic areas. The Board finds that Mr. Baptiste used his position as massage therapist to commit acts of sexual misconduct that placed his clients in fear for their safety and caused them significant emotional distress. The Board finds this behavior as a substantial risk to the public health, safety or welfare. Mr. Baptiste is found to be in violation of H.O. §§ 3-5A-11(a)(11) and COMAR 10.43.18.05.

Secondly, the Board finds that Mr. Baptiste made material misrepresentations/omissions about his criminal history in his application for massage therapy licensure in Maryland by failing to disclose that he had been arrested in Georgia for sexual misconduct with a client. See COMAR 10.43.18.03. The Board further finds that Mr. Baptiste made material misrepresentations/omissions about his employment history on at least two job applications regarding his reasons for leaving his previous employment in Georgia, as well as to a Board Investigator regarding the reason for his termination from Spa C. The Board finds that Mr. Baptiste fraudulently and deceptively used and his license and made misrepresentations on employment applications in violation of H.O. §§ 3-5A-11(a)(2) and (5). Accordingly, Mr. Baptiste is also found to be in violation of COMAR 10.43.18.03.

The Board further finds that Mr. Baptiste failed to maintain proper massage therapy notes at Spa A, in violation of COMAR 10.43.18.04. Finally, the Board finds that Mr. Baptiste

was unlawfully practicing massage therapy without a license at Spa B in Rockville, Maryland, in violation of COMAR 10.43.17.03.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is one this ____ day of May, 2012 that the majority of the Board hereby:

ORDERED that, pursuant to the authority vested in the Board of Chiropractic Examiners by H.O. Article, §3-5A-11, the Respondent's massage therapy certification is hereby **REVOKE**D; and be it further

ORDERED that Respondent must immediately return to the Board both the wall and wallet size certificate numbered M04431; and be it further

ORDERED that for the purposes of public disclosure and as permitted by Md. State Govt. Code Ann. §§10-601 et seq.

5/10/2012

Date



J.J. Vallone, JD, CFE, Exec. Director for
Stephanie J. Chaney, DC, President
State Board of Chiropractic and Massage
Therapy Examiners

NOTICE OF THE RIGHT TO APPEAL

Pursuant to Maryland Health Occ. Code Ann. § 3-316, you have a right to direct judicial appeal. A petition for appeal shall be filed within thirty (30) days from mailing of this Final Decision and Order and shall be made as provided for judicial review of the final decision in the Maryland Administrative Procedure Act, Maryland State Gov't Code Ann. §§1-201 *et seq.*, and Title 7, Chapter 200 of the Maryland Rules.