

NO. 81734-1

**SUPREME COURT
OF THE STATE OF WASHINGTON**

COLUMBIA PHYSICAL THERAPY, INC., P.S.,

Petitioner – Cross-Respondent,

v.

BENTON FRANKLIN ORTHOPEDIC ASSOCIATES, P.L.L.C.;
BENTON FRANKLIN PHYSICAL THERAPY, INC.; THOMAS R.
BURGDORFF; CHRISTOPHER A. KONTOGIANIS; ARTHUR E.
THIEL; DAVID W. FISCHER; HEATHER L. PHIPPS; RODNEY
KUMP; JAY WEST; and DOES 1 through 9

Respondents – Cross-Petitioners.

**AMICUS CURIAE BRIEF SUBMITTED BY PHYSICAL
THERAPY ASSOCIATION OF WASHINGTON - AMENDED**

By: Carmen R. Rowe, WSBA 28468
Jay A. Goldstein, WSBA 21492
JAY A. GOLDSTEIN LAW OFFICE, PLLC
1800 Cooper Point Road SW No. 8
Olympia, Washington 98502
Telephone: (360) 352-1970

Attorneys for *Amicus Curiae* Physical
Therapy Association of Washington, Inc.

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
09 SEP 17 AM 10:06
BY RONALD R. CARPENTER
CLERK

FILED AS
ATTACHMENT TO EMAIL

ORIGINAL

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. ARGUMENT.....	1
A. Physical Therapists as a Learned Profession are Subject to RCW 18.100 and the Common Law Corporate Practices Doctrine	1
B. The Law Applies to Any Corporation <i>Offering</i> Professional Services, Whether by an Owner or an <i>Employee</i>	6
1. Only a professional services corporation formed for that purpose can “offer” physical therapy services.....	6
2. Case law affirms that employment of a licensed professional constitutes “practicing” that profession	9
C. The Exclusion of Physical Therapists from the Groups of Medical Professionals Who May Practice Together is a Purposeful Legislative Determination – Not Mere Happenstance	11
1. Exclusion of physical therapists from RCW 18.100.050(a) is a legislative determination – not mere happenstance.....	12
2. Evolution of RCW 18.00 – including rejection of proposed changes – is valid legislative history providing important insight into legislative intent.....	14
3. Case law supports Columbia’s argument.....	15

D.	Anti-Rebate Statute and Consumer Protection Act ...	16
E.	The Importance of Consumer Confidence	17
III.	CONCLUSION	18

TABLE OF AUTHORITIES

<u>Cases – Washington</u>	<u>Page</u>
<i>Standard Optical Co. v. Chelan County</i> , 17 Wn.2d 323, 135 P.2d 839 (1943)	9-10

Statutes

RCW 18.74	3
RCW 18.100 <i>generally</i>	3, 10, 14
RCW 18.100.050	3-4, 7, 10-15
RCW 19.68	16
RCW 19.86	17

I. INTRODUCTION

The Physical Therapy Association of Washington, Inc. ("PTWA") respectfully files this *amicus curiae* brief in support of the Petitioner/Cross-Respondents Columbia Physical Therapy, P.S. ("Columbia"). PTWA's motion for leave to file this brief sets forth the general nature of PTWA and its active role in legislation affecting physical therapists and the practice of physical therapy in Washington.

PTWA joins Columbia in encouraging the Court to affirm the clear and unambiguous statutory language and framework embodied in the Professional Service Corporations Act ("PSCA," RCW 18.100 *et seq.*), prohibiting physicians, members of one learned profession, from owning a corporation that governs the practice of physical therapists, a separate learned profession.

II. ARGUMENT

A. **PHYSICAL THERAPISTS AS A LEARNED PROFESSION ARE SUBJECT TO RCW 18.100 AND THE COMMON LAW CORPORATE PRACTICES DOCTRINE.**

The case law and statutory scheme defining the boundaries between medical professions is simple and straight forward. Under the corporate practice doctrine, no one - including a corporation - may "practice" a learned profession without being duly licensed. Because a

corporation is an entity, not an individual, it can never be duly licensed. The Washington Legislature subsequently created a *narrow* exception allowing learned professionals from the *same* profession to practice together in a professional services corporation formed for the purpose of offering services in that *same* profession. RCW 18.100 *et seq.*

Over time, the Washington Legislature fine-tuned this law to allow certain *specific* groups to practice together. First was the change allowing varying medical professions to practice together under an HMO. Next, by way of RCW 18.100.050(5), the Legislature defined certain *specified* medical practices as being the "same specific professional services" for purposes of the PSCA, thus allowing those practices to collectively own and *render services through* a professional services corporation formed for the purpose of providing services within those *same* professions.

Washington law has long recognized physical therapy as a learned profession. Physical therapists are obligated to meet stringent licensing, education, practice and ethical requirements as necessary to maintain the autonomy and integrity of the profession. Physical therapists work autonomously, and perform a great percentage of their services without the supervision of or referral by a physician. *See* Appellant's Brief at 20-24 and cases cited therein (discussing the requirements of a "learned

profession"); *see also see also* RCW 18.74 *et seq.* (governing the practice of physical therapy in Washington).

By the plain language of the statute, physical therapists are not included in the group of medical professionals allowed to own or *offer services* under a single corporate entity with orthopedics. RCW 18.100.050(5)(a).

But, the Legislature had not simply forgotten physical therapists. In the very next section the statute provides that physical therapists and occupational therapists "may own stock in *and render their individual professional services* through *one* professional service corporation formed for the *sole* purpose of providing professional services within their *respective scope of practice.*" RCW 18.100.050(5)(b). There is nothing in the statutory scheme that suggests that the specific professions listed are merely guidelines. The statute provides a *specific* list of *distinct* professions allowed to work under one umbrella as part of the *narrow* exception carved out of the corporate practices doctrine under the PSCA.

Legislative recognition of physical therapy as an independent medical practice is due in no small part to the ongoing and dedicated efforts of physical therapists at the legislative level. Physical therapists, including those working through PWTA, work hard to maintain

independence for the practice of physical therapy in Washington, both through collective legislative efforts and by maintaining the high bar of education, licensing and ethical standards required of Washington physical therapists as a learned profession.

Washington physical therapists, represented in large part by PTWA, worked hard at the legislative level to keep physical therapists excluded from the list of collective practices enumerated in RCW 18.100(5)(a), instead offering the separate provision addressing physical therapists under RCW 18.100(5)(b). The physicians' proposed reading of the statutes would completely undermine these efforts, and ignore the legislative intent expressed in statutes passed after lengthy debate and input from all sides.

Respondents ask this Court to turn aside long-standing Washington law and legislative determination. The physicians' proposed interpretation of the law flies in the face of substantial legislative history and the plain words of the statutes and case law. They would have this Court demote the practice of physical therapy to a supportive medical profession rather than an independent profession as the legislature currently provides.

The physicians' argument that "physical therapy has long been considered ... as an extension of (or incident to) a physician's services"

reveals the physicians' objectives - and bias - in this case. Respondent's Brief at 34. The physicians would turn back time as if the Legislature did not recognize physical therapy as an independent medical practice. However, neither the case law nor the statutes support the physicians' conclusions. To ignore the legislative directive as embodied in the statute would be to ignore the law and overrun the Legislature's inherent powers of setting public policy.

Worse, a structure such as proposed by the physicians undermines the integrity of the system that the current law is meant to safeguard, and erodes public trust and confidence in the system. Of particular concern here is the very real risk of allowing physical therapy referrals to be driven by profit motives rather than good medicine, posing harm to both the public and the public's faith in the medical system. The proposed twisting of the law would allow physician ownership and control of physical therapy services: whether by owning a physical therapy practice outright or hiring a physical therapist to render services, the result is the same, and prohibited by law. The physicians seek to do in the courts what they have not done in the legislature. Washington law does not allow this end-run.

PWTA joins Columbia in asking this Court to respect this delineation created by the Washington Legislature.

B. THE LAW APPLIES TO ANY CORPORATION OFFERING PROFESSIONAL SERVICES, WHETHER BY AN OWNER OR AN EMPLOYEE.

Benton repeatedly argues in their briefing that the PSCA and attendant common law corporate practices doctrine merely serves to preclude members of one profession from *owning* stock with those not licensed to practice their particular art, but does not restrict who a professional services corporation can *employ*. Respondents' Brief at 2. This argument ignores and attempts to overturn decades of legislation prohibiting any entity from *offering* professional licensed services unless *specifically* allowed under statute.

1. Only a professional services corporation formed for that purpose can "offer" physical therapy services.

The common law corporate practices doctrine prohibits *offering* physical therapy services - or any other services of a learned profession - outside the umbrella of a professional services corporation *formed for the singular purpose of providing that particular professional service* under the narrow statutory framework of the PSCA. The PSCA provides a *narrow* exception to the general prohibition against a corporation "practicing" a learned profession by way of its members. The corporation either meets the carefully delineated parameters of the statutory exception

- or it does not. It does not matter whether an owner *or employee* is the one offering those services. The corporation is bound by the law, whomever they may choose to *offer* such services.

The PSCA does allow members of the "same" profession to form a corporation and own stock in *or render individual professional services* within limited specialized corporations. RCW 18.100.050. But physical therapists are not considered the "same" professional services as orthopedics per the specific defined professions listed in RCW 18.100.050(5)(a).

Unless the corporate members are duly licensed in the *same* scope of practice, and the corporation is formed for the purpose of rendering those *same* services, they are not authorized to offer such services through the corporation *at all*. These limitations naturally apply to employees rendering such services, whether they own stock or not. Physical therapists are not included in those who are considered to provide the "same" services as orthopedic professionals under the statutory definition.

The physicians' entire argument of "owner versus employee" is a *non-sequitur*. Aside from being contrary to the plain language of the statute and case law, it defies common sense in light of the public policies underlying these doctrines. If such an argument were to hold, the

physicians would then have to concede that while a physical therapist may not co-own a professional services corporation with orthopedic surgeons, a physical therapists' professional services corporation could hire orthopedic surgeons to serve their clients. This is not a scenario the physicians are likely to agree with. But, it has to work both ways or not at all.

To take it out of the strictly medical context, by extension of the physicians' argument a law office might employ various medical professionals to serve their clients in injury-related cases; or, conversely, a group of physicians such as Benton might employ a lawyer to serve their client's legal needs relating to physical injuries being treated. This would be an absurd reading of the statutes, violate every public policy served by the corporate practice doctrine, and open the door to professional relationships that the law - and the Legislature - has steadfastly rejected.

Either the Professional Services Corporation Act allows a non-licensed person (or an entity formed of persons not licensed in a particular profession) to hire employees of a learned profession; or it does not. The answer is simple: it does not. The entire point is to prevent someone - or a group of someones - from overseeing and influencing the practice of a learned profession, where that person (or the persons making up the corporate entity) are not duly licensed in that profession.

Thus, the PSCA and corporate practices doctrine do indeed limit who such a corporation can *hire*. To argue otherwise is to throw out the entire body of public policy underlying the corporate practices doctrine, which applies to *every case* other than those that fit into the narrow statutory exceptions in the Professional Services Corporation Act.

2. Case law affirms that employment of a licensed professional constitutes "practicing" that profession.

The case law further belies the physicians' creative but ultimately false premise. It is difficult to see, for example, how to reconcile the physicians' attempted distinction between ownership of a professional services corporation and hiring an employee to render a professional service with *Standard Optical Co. v. Chelan County*:

This court [in a prior case] followed the general rule that **an unlicensed person may not engage in the practice of medicine by employing a licensed agent.** ... [T]his court [also previously] recognized the rule that a corporation may not engage in the practice of law through licensed agents.

Appellant argues that the mere employment of licensed agents, in so far as the question here presented is concerned, does not constitute the practice of optometry. ... In determining the question, of course, each court has considered the governing statute of the particular jurisdiction, and interpreted the same in accordance with the legislative intent, **with particular attention to the question of whether or not the legislature considered optometry a profession, or, on the other hand, a business or trade.**

17 Wn.2d 323, 135 P.2d 839 (1943)(emphasis added).

As discussed in the preceding section, the Washington Legislature has unambiguously named physical therapy as one of the learned professions in RCW 18.100.050(5)(b), when it recognized the profession as one subject to the corporate practice doctrine unless a practice meets the requirements of the PSCA.

Thus, by the plain language of *Standard Optical*, employing a physical therapist, as a member of a learned profession as opposed to a trade member, constitutes "practicing" that profession. Under the corporate practice doctrine and the plain language of RCW 18.100 *et seq.*, Benton cannot "practice" physical therapy *except* through a professional services corporation owned by licensed physical therapists, formed for the sole and specific purpose of providing physical therapy services.

The physicians' attempt to get around this obstacle with the odd statement in Benton's opening salvo that the law simply precludes *lay* people from owning a corporation providing professional services –which seriously misstates the law. Respondent's Brief at 2. The public policy at play is clearly meant to prevent *anyone* to govern, direct or profit from the practices of a profession in which they are not licensed - whether they be lay people or licensed in another field.

Benton asks this Court to blur the lines in a way that physicians have not been able to attain in legislation, a result not allowed under Washington law. Prohibitions against a non-licensed individual - or corporation formed and owned by non-licensed individuals - governing the practice of a learned profession necessarily apply to *employing* members of a learned profession as well as co-owning stock. To argue otherwise eviscerates the purpose and clear meaning of the statutes.

C. THE EXCLUSION OF PHYSICAL THERAPISTS FROM THE GROUPS OF MEDICAL PROFESSIONALS WHO MAY PRACTICE TOGETHER IS A PURPOSEFUL LEGISLATIVE DETERMINATION - NOT MERE HAPPENSTANCE.

There are indeed some medical professions that may practice together under the auspices of a professional services corporation - a carefully crafted list of professions resulting from much legislative wrangling. RCW 18.100.050(5)(a) and (b). PTWA can speak from experience in observing that the Legislature's determination of which professions would be included involved careful consideration, ongoing education about the fields, and input from the medical professions themselves. Exclusion of physical therapists from subsection (a) was no mere accident.

1. Exclusion of physical therapists from RCW 18.100.050(a) is a legislative determination - not mere happenstance.

In their discussion of RCW 18.100.050, the physicians imply that the exclusion of physical therapists in RCW 18.100.050(5)(a) was mere happenstance, without particular intent or desire on the part of the Washington Legislature to keep physical therapists separate from the other listed healthcare professions. Respondent's Brief at 32-35.

Nothing could be further from the truth. PTWA played a major role in this process. To ignore the statutory language and treat the list as a mere "guideline," as encouraged by the physicians, would inappropriately unravel the results of hard work on the part of PTWA and any other group involved in the legislative process when these statutes were considered.

Looking at the plain language and history of the statute, it is difficult to argue that the Legislature merely forgot physical therapists when developing the collective group of those rendering the "same" services. The statute went through several evolutions, a failed attempt to specifically add physical therapists to that list, and, critically, specifically refers to physical therapists in the very next subsection. The legislators were apparently well aware of physical therapists as a potential category, and perfectly capable of including them in subsection (a) *had they so*

chosen. Yet the Legislature repeatedly declined to add physical therapists to the list.

This cannot be construed as mere happenstance. The only rational conclusion is that declining to include or add physical therapists was a conscientious decision on the part of the Legislature.

PTWA can further affirm this logical conclusion by attesting to the concentrated efforts on the part of Washington physical therapists to maintain the exclusion of physical therapists from subsection (a).

PTWA has expended considerable energy over the last two decades to build and maintain the physical therapy profession as a "learned profession" within the eyes of the Washington legislature.

The Washington Legislature has responded by exercising the necessary restraints and expectations on physical therapists as necessary to be a learned profession (licensing, ability to practice independently, extensive ongoing education, ethical standards, etc.). And, of particular interest to this case, Washington's legislators *specifically* reference physical therapists in the PSCA in RCW 18.100.050(5)(b).

To read physical therapists into subsection (a) would be to ignore the Legislative determination *not* to include physical therapists in that list.

2. Evolution of RCW 18.100 - including rejection of proposed changes - is valid legislative history providing important insight into legislative intent.

With respect to the legislative history, the physicians dismiss the value of Columbia's accounting of legislative history to inform the Court as to legislative intent in Washington. It is true that the simple failure to pass a bill, in and of itself, is not enough to reveal the Legislature's intent due to the variables at play in the legislative process. However, that does not mean that in *this* case the legislative history cited does not provide an informative window into the result of concerted efforts of physical therapists in maintaining an autonomous role in the practice of medicine.

The separation of physical therapists from other practices that may operate under a physicians' professional services corporation is the result of many a hard-fought battle. The reasons for the referenced bills' failure in this case is something more than speculation. It is a result of the extensive and ongoing efforts of PTWA and other groups representing the interests of physical therapists in Washington.

A simple reading of RCW 18.100.050(5) belies the physicians' argument that the failure to include physical therapists from the list of those professionals who may organize together was a mere incidental omission. Again, this statute carves out a *narrow exception* to the

common law corporate practices doctrine, and as such must be read with care and is not to be construed broadly. Here, the Legislature - through several evolutions of the statute - included in RCW 18.100.050(5)(a) a long list of medical professions that may organize and be considered the "same specific professional services" for purposes of forming *or working for* a professional corporation - *but did not include physical therapists*. Yet, the legislature does so in the very next section (subsection (b)).

3. Case law supports Columbia's argument.

In their brief Benton discusses classic statutory interpretation: each word is to be accorded meaning; the Legislature is presumed to have used no superfluous words; the court shall accord meaning to every word; and interpret and construe the statute so *all* language used is given effect, with no portion rendered meaningless or superfluous. This is correct. To read the statute as the physicians urge, would be to *ignore* the inclusion of physical therapists in subsection (b), which points to the fact that the Legislature certainly could have included physical therapists in the list under subsection (a) *had it chosen to do so*. This is not a result in line with Washington law regarding statutory interpretation.

The important distinction between the various cases cited by the physicians and the statutes at issue here is that here we are talking more

than mere speculation. At issue is a list of specific professions listed under the narrow statutory exception to the corporate services doctrine, and the *exclusion* of physical therapists from that group – a result specifically fought for by PTWA. This is an issue further addressed by the statute itself, and the reference to physical therapists in another section, demonstrating the Legislature did not simply "forget" physical therapists.

The Legislature has consistently recognized physical therapists as an independent learned profession, maintaining its autonomy throughout the last decades of PTWA's involvement. The Court must consider the Legislature's intent to keep physical therapists separate from those who may practice together under subsection (a) absent proof to the contrary.

D. ANTI-REBATE STATUTE AND CONSUMER PROTECTION ACT.

The trial testimony discussed by the parties makes it clear that Benton has every intention of continuing to expand its physical therapy arm to serve more than the current load. The only apparent reason that Benton physical therapists do not serve the vast majority of Benton's referrals is a simple lack of capacity, a short-falling Benton has declared they intend to remedy as the business evolves. This is exactly the kind of profiteering that the anti-rebate statute is meant to prevent. RCW 19.68 *et*

seq. This is also exactly the type of suppression of an open competitive physical therapy market that PTWA has long fought to protect against.

Similarly, Benton's offering of physical therapy services without being either duly licensed or a professional services corporate formed *by licensed physical therapists for the purpose of offering physical therapy services*, runs afoul of the Consumer Protection Act, RCW 19.86 *et seq.* For all of the reasons cited by Columbia in this case - the risk of public misunderstandings, referrals that carry a heavy potential for bias or profit motives, the violation of the public policies underlying the corporate practices doctrine - it is hard to see how such practice does *not* pose great harm to the public, and public confidence in the medical system.

E. THE IMPORTANCE OF CONSUMER CONFIDENCE.

The physicians claim that by bringing the lawsuit against Benton, Columbia (and by extension, other physical therapists) "hope[] to eliminate competition," and "seek to create a monopoly for independent physical therapy clinics," putting "at stake ... the ability of patients throughout Washington to receive post-surgical and other medically necessary physical therapy from licensed physical therapists who work as employees of the patients' orthopedic surgeons. Respondent's Brief at 1-2. The very terminology of the physicians' argument belies its fallacy, and

begs the question: what stake does the Washington public have in obtaining treatment from *employees of the patients' orthopedic surgeons* versus *independent* therapists?

The answer should be clear - and is one long-answered by a succession of Washington legislation with the benefit of the involvement of various groups during that process, including PTWA. Physical therapy is a separate learned profession, and thus can only be offered by licensed individuals or duly authorized professional services corporations. The public policy underlying Washington's common law corporate practice doctrine, as well iterated in the myriad cases discussed by Columbia, prohibits precisely the type of corporate structure Benton has set up.

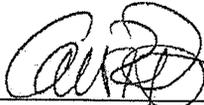
III. CONCLUSION

The medical doctors' arguments in this case advocate a view of Washington law that would severely restrict medical trade in physical therapy services, by channeling orthopedic referrals in an area into the physical therapists working under the orthopedic. It is difficult to see what motive an orthopedic surgeon would have to do anything *but* make all referrals in-house, to the extent of capacity of its own in-house therapists. Benton's practice also presents the strong temptation to make referrals that a surgeon might otherwise think twice about, where each

referral has the potential to add to the surgeon's overall profit. This conduct is precisely the result that the corporate practice doctrine is meant to avoid.

Allowing doctors such as Benton an essential monopoly over the physical therapy arena would erode if not eliminate healthy competition, and threaten public faith in the profession overall. PTWA urges the Court to follow the statutory and case law dictates in this matter, and find that Benton's practice violates both the case law and statutes at issue.

Respectfully submitted September 17, 2009



Carmen R. Rowe, WSBA 28468
Jay A. Goldstein, WSBA 21492
JAY A. GOLDSTEIN LAW OFFICE, PLLC
1800 Cooper Point Rd. SW, Bldg. 8
Olympia, WA 98502

CERTIFICATE OF SERVICE

I, Carmen Rowe, certify that on September 17, 2009, I personally caused to be delivered via the method set out a true and correct copy of this Amicus Curiae Brief to the following parties:

Document e-filed to SUPREME@COURTS.WA.GOV

VIA electronic copy

Attorneys for Petitioner

**DARRIN E. BAILEY, WSBA #34955
DANFORD D. GRANT, WSBA #26042
STAFFORD FREY COOPER
601 Union Street, Suite 3100
Seattle, WA 98101
(206) 623-9900
dbailey@staffordfrey.com
dgrant@staffordfrey.com**

**CHARLES KENNETH WIGGINS, WSBA #6948
WIGGINS & MASTERS PLLC
241 Madison Ave N
Bainbridge Island, WA 98110-1811
(206) 780-5033
charlie@appeal-law.com**

VIA electronic copy

Attorneys for Respondents – Cross-Petitioners

MICHAEL H. CHURCH, WSBA #24957
MATTHEW T. RIES, WSBA #29407
STAMPER RUBENS, P.S.
720 West Boone, Suite 200
Spokane, WA 99201
(509) 326-4800
mchurch@stamperlaw.com
mries@stamperlaw.com

HOWARD R. RUBEN
KENNETH J. PFAEHLER
CHRISTOPHER L. HARLOW
SONNENSCHN NATH & ROSENTHAL LLP
1301 K Street, N.W.
Suite 600, East Tower
Washington, D.C. 20005
(202) 408-6400
hrubin@sonnenschein.com
kpfaehler@sonnenschein.com
charlow@sonnenschein.com

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct.

DATED and signed this 17th day of September, 2009


CARMEN ROWE