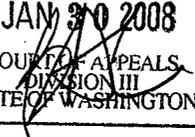




FILED

JAN 30 2008

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By 

No. 2 267024

81734-1

**COURT OF APPEALS,
DIVISION III
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.

**CROSS-PETITIONERS' MOTION FOR DISCRETIONARY
REVIEW**

**MICHAEL H. CHURCH
WSBA #24957
MATTHEW T. RIES
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Cross-Petitioners**

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A. IDENTITY OF CROSS PETITIONER

Benton Franklin Orthopedic Associates, P.L.L.C., and Defendants 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 (collectively referred to hereinafter as “Benton Franklin”), by and through their attorneys, Michael H. Church and Matthew T. Ries of Stamper Rubens, P.S., ask this Court to accept review the decisions designated in Part B of this motion.

B. DECISIONS

Benton Franklin seeks review of three decisions from Judge Dennis D. Yule’s December 17, 2007, Order Granting in Part Defendants’ Motion for Summary Judgment and Denying Plaintiff’s Motion for Summary Judgment (Appendix at pp. A-1 to A-3) and his December 17, 2007, Order Denying Defendants’ Motion for Summary Judgment. Appendix at pp. A-5 to A-7. The three decisions Benton Franklin seeks review of are:

1. The court’s decision regarding both parties’ motion for summary judgment on plaintiff Columbia Physical Therapy, Inc.’s (referred to hereinafter as “Columbia”) common law claim pursuant to the corporate practice of medicine doctrine (Appendix at p. A-2, ll. 22-26);

2. The court's denial of Benton Franklin's Motion for Summary Judgment dismissing the claim by Columbia that Benton Franklin violated RCW § 19.68.010 after the time period that operation of the physical therapy clinic was owned by Benton Franklin Orthopedic Associates, PLLC. (Appendix at p. A-2, ll. 27-31); and
3. The court's denial of Benton Franklin's Motion for Summary Judgment dismissing Columbia's RCW § 19.68.010 claim and its RCW Chapter 19.86 Consumer Protection Act claim against Benton Franklin. (Appendix at p. A-6, ll. 15-18).

C. ISSUES PRESENTED FOR REVIEW

1. Corporate Practice of Medicine Doctrine. As a matter of law, does a professional limited liability company or professional service corporation owned entirely by physicians, which employs the physicians and through which they conduct their professional medical practice, violate Washington's common law corporate practice of medicine doctrine by employing physical therapists?

2. RCW Chapter 19.68. As a matter of law, does a professional limited liability company or professional service corporation owned entirely by physicians, which employs the physicians and through which they conduct their professional medical practice, violate Chapter 19.68 RCW by also employing physical therapists? Addressing this issue requires resolution of four related legal questions concerning the application of RCW Chapter 19.68:

a. First, where Benton Franklin's physicians are giving their patients prescriptions for physical therapy without actively directing the patients to the physical therapists they employ at a separate location, is there a "referral" as contemplated by RCW § 19.68.010 and as interpreted by Day v. Inland Empire Optical, Inc., 76 Wn.2d 407, 456 P.2d 1011 (1969)?

b. Second, does Benton Franklin's employment of physical therapists fall within either the exception in RCW § 19.68.010(2) for services prescribed for medical, surgical, or dental diagnosis?

d. Third, the court in Day found that the physicians were unlawfully earning profits by referring their patients to another corporation they owned. In this case, after the dissolution of BFPT, Benton Franklin directly employed its physical therapists. Therefore, does RCW § 19.68.010 prohibit physician-owned professional corporations and limited liability companies from earning profits from the services provided by its employee physical therapists?

e. Fourth, in Day, the court created a "direct and immediate supervision" test in order to reconcile RCW § 19.68.040, which allowed the ophthalmologists to collect compensation for the services provided by employee opticians, with RCW § 18.34.010, which provides that if a licensed optician is dispensing eyeglasses under the "personal

supervision” of an ophthalmologist then the doctor is considered to be lawfully dispensing eyeglasses. Because physical therapists are not subject to a similar law, however, does Day’s “direct and immediate supervision” test apply?

3. Consumer Protection Act. Does a professional limited liability company or professional service corporation owned entirely by physicians, which employs the physicians and through which they conduct their professional medical practice, engage in unfair acts or methods of competition in violation of Chapter 19.86 RCW by providing additional services to its patients through its own employed physical therapists? Addressing this issue requires resolution of three related legal questions concerning the application of the Consumer Protection Act (“CPA”):

a. First, does Columbia, as a competing physical therapy provider, have standing to bring a CPA claim against Benton Franklin?

b. Second, if defendant physicians are not referring their patients to specific physical therapists, can Columbia still pursue its CPA claim based solely on the fact that a physician-owned professional limited liability company or professional service corporation employs physical therapists?

c. Third, because the Department of Health investigated the relationship between defendant physicians and physical therapists and concluded there was no violation of RCW § 19.68.010, does Benton Franklin's activity fall within the "specifically permitted" exception in RCW § 19.86.170?

D. STATEMENT OF THE CASE

Defendants Dr. Burgdorff, Dr. Thiel and Dr. Kontogianis formed Benton Franklin Orthopedic Associates, LLC, (referred to hereinafter as "BFOA") in November 1999. Appendix at pp. A-8 to A-11, originally attached as Exhibit D to the August 13, 2007, Declaration of Darrin Bailey. On August 1, 2004, the three physician-members signed a new operating agreement which, among other things, clarified that the three physicians were practicing medicine through a professional limited liability company. Appendix at pp. A-12 to A-28, originally introduced as Exhibit 13 to the Dep. of T. Burgdorff, M.D. and attached as Exhibit "H" to the 8/15/07 Aff. of Matthew T. Ries. The current members of this professional limited liability company are defendant physicians Dr. Burgdorff, M.D., Dr. Kontogianis, M.D., Dr. Thiel, M.D., Dr. Fischer, M.D., and Dr. Phipps, M.D. Appendix at p. A-29, ¶3, the May 5, 2006, Affidavit of Thomas R. Burgdorff.

In addition to providing medical services, BFOA has also

employed physical therapists. Id. In January 2003, Dr. Burgdorff, Dr. Thiel and Dr. Kontogianis decided to employ their physical therapists through a separate corporation, Benton Franklin Physical Therapy, Inc., (referred to hereinafter as “BFPT”) which they had created to own, operate, and manage the licensed physical therapy facility. Appendix at pp. A-38 to A-41, originally introduced as Exhibit 17 to the Dep. of T. Burgdorff, M.D. and attached as Exhibit “G” to the 8/15/07 Aff. of M. Ries. This arrangement only lasted for two years, however, and as of January 31, 2005, BFPT’s license had expired and it no longer conducted any business. Appendix at pp. A-29 to A-30, ¶3.

Plaintiff Columbia is a competing physical therapy company providing physical therapy services through several offices, including an office in Pasco, Washington. Appendix at p. A-30, ¶4. In April 2004, Richard Wright, who is a physical therapist and the president of Columbia, filed a complaint with the Washington State Department of Health against Dr. Burgdorff, Dr. Kontogianis, and Dr. Thiel, regarding referrals to their physical therapists at BFPT. Id. On October 15, 2004, the physicians sent the Department of Health a detailed response to the three allegations raised in Mr. Wright’s complaint. Appendix at pp. A-32 to A-37, originally attached as Ex. A to the May 5, 2006, Aff. of Thomas R. Burgdorff. As detailed in the letter, in Mr. Wright’s April 2004 complaint

he made the same basic arguments he would later make in Superior Court and now in the Court of Appeals.

In response to Mr. Wright's complaint, the Department of Health initiated an investigation on April 23, 2004. Appendix at p. A-45, ¶10, the May 5, 2006, Affidavit of Lisa Noonan, Disciplinary Manager for the Department of Health's Medical Quality Assurance Commission. The investigation was completed on October 18, 2004, and a final report was issued. Appendix at A-47, ¶18. After reviewing the investigation reports, the Department of Health sent a letter on January 20, 2005, to the defendant physicians indicating that there was insufficient evidence to prove a violation of RCW § 19.68.010. Appendix at A-47, ¶20.

Undeterred, on August 19, 2005, Mr. Wright, through Columbia, filed his Complaint against Benton Franklin in Benton County Superior Appendix at pp. A-49 to A-52. In its Complaint, Columbia's primary cause of action was based on its allegation that the receipt by Defendants of any form of profit flowing from the referral of patients for medical treatment violated RCW § 19.68.010. Appendix at p. A-51, ll. 14-16. Columbia Further contended that receiving any profits from BFPT constituted unprofessional conduct and that it violated Washington's Consumer Protection Act by "... unfairly reducing referrals to other area physical therapists, including Plaintiff Columbia." Appendix at p. A-52, ll.

1-3. Columbia subsequently amended its Complaint on June 5, 2007, and July 17, 2007, to add two additional claims alleging that employing physical therapists violates the Professional Services Corporation Act and the corporate practice of medicine doctrine. Appendix at pp. A-53 to A-66.

On May 5, 2006, Benton Franklin moved for partial summary judgment to dismiss Columbia's Consumer Protection Act claim for three reasons. First, Benton Franklin argued that there was no precedent for allowing a competitor to bring a Consumer Protection Act claim based on an alleged violation of the anti-kickback statute. Second, the Consumer Protection Act does not apply to activities permitted by a regulatory body. And third, even if the Consumer Protection Act did apply, Benton Franklin did not have the evidence to satisfy the elements of a Consumer Protection Act claim. On July 19, 2006, the court denied Columbia's motion but allowed it to re-file after more discovery had been completed.

After extensive discovery, on January 26, 2007, Benton Franklin renewed its motion for summary judgment, this time asking for dismissal of each of Columbia's three initial claims. Benton Franklin made the same basic arguments as in its May 5, 2006, motion, but also added the argument that RCW Chapter 19.68 contains two exceptions which specifically permit the practice of physicians employing physical therapists. The first exception, under RCW § 19.68.040, permits a licensee

to charge or collect compensation for professional services rendered by an employee licensee. The second exception, under RCW § 19.68.010(2), permits physicians to receive profits from a referral to a corporation or business that provides a diagnostic service as long as the physician's ownership interest is disclosed and alternate choices are provided to the patient.

Although the fact scenarios differed, in its response Columbia relied heavily on the holding in Day v. Inland Empire Optical, 76 Wn.2d 407, 456 P.2d 1011 (1969). Benton Franklin countered that Day did not apply and that even if it did, Benton Franklin satisfied the "personal and immediate direction and supervision" test expressed in Day. In its response, Columbia also argued that RCW § 19.68.040 should be interpreted to refer to only like-licensees, which, Benton Franklin pointed out, was neither supported by case law nor a plain reading of the statute.

In his oral ruling, Judge Yule first concluded that there were questions of fact concerning the supervision of the physical therapists. Appendix at p. A-68, the Verbatim Report of Proceedings originally attached as Ex. U to the August 13, 2007, Declaration of Darrin E. Bailey. Judge Yule next concluded that while physical therapists do not provide a diagnostic service, there was a question of fact regarding the required disclosures of ownership and alternative services. Appendix at p. A-69.

Judge Yule further concluded, with regard to the Consumer Protection Act claim, that there was insufficient evidence showing that the Department of Health permitted the practice of employing physical therapists and that Columbia had standing to raise a Consumer Protection Act claim. Appendix at p. A-70.

On August 15, 2007, Columbia and Benton Franklin cross-moved for summary judgment on Columbia's amended complaint. The court having previously denied Benton Franklin's motion for summary judgment with regard to the relationship between BFOA and BFPT, Benton Franklin this time focused on the time period after January 2005 when BFPT was no longer doing business. Because BFPT was no longer an issue, Benton Franklin argued that RCW Chapter 19.68 only applied to unlawful kickbacks and did not prohibit BFOA from simply earning a profit through its employee physical therapists. Furthermore, because the physical therapists are now directly employed by the defendant physicians, the supervision test expressed in Day would not apply.

With regard to Columbia's corporate practice of medicine doctrine argument, Benton Franklin pointed out that no reported case in the United States had ever found that physical therapists are held to the same standards as medical doctors or concluded that the corporate practice of medicine doctrine applies to physical therapists. In fact, the one reported

case Benton Franklin did find (Isles Wellness, Inc. v. Progressive Northern Insurance Co., 703 N.W. 2d 513 (Minn. 2005)) concluded that the common law doctrine did not apply to physical therapists. Id. at 523.

With regard to Columbia's Professional Services Corporation Act claim, Benton Franklin pointed out that the current case only involves the issue of employing physical therapists, not whether physical therapists can have an ownership in a professional services corporation with medical doctors. Therefore, the Act does not apply. Even if it did, however, Benton Franklin argued that because the corporate practice of medicine doctrine has never been applied to physical therapists, the Act did not apply pursuant to RCW § 18.100.040. In its reply to Columbia's response, Benton Franklin expanded on its analysis of the Professional Services Corporation Act by arguing that the legislative history shows that there was no intent to restrict the ability of physicians to employ physical therapists and that the Legislature actually wanted to abrogate the corporate practice of medicine doctrine rather than broaden it.

In the court's ruling, Judge Yule granted Benton Franklin's motion with regard to the Professional Services Corporation Act but denied its motion – and Columbia's motion – with regard to the issue of whether Benton Franklin violated RCW § 19.68.010 by directly employing physical therapists. Appendix at p. A-2. With regard to the issue of

whether physical therapists are covered by the common law corporate practice of medicine doctrine, the parties agreed that there were no material facts in dispute but the court did not rule on the issue. Id. The parties subsequently stipulated that discretionary review was appropriate and on December 17, 2007, Judge Yule signed an order certifying its summary judgment orders for discretionary review. Appendix at pp. A-74 to A-77.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Aside from the trial court's granting of Benton Franklin's motion to summarily dismiss Columbia's Professional Services Corporation Act claim (as it applies to professional limited liability companies pursuant to RCW § 25.15.045), and the trial court's decision not to rule on either parties' motion with regard to the application of the common law corporate practice of medicine doctrine to physical therapists, Benton Franklin and Columbia are both seeking discretionary review of the trial court's denial of their respective motions for summary judgment. Although parties generally cannot appeal the denial of a motion for summary judgment, RAP 2.3(4)(b) permits an appellate court to grant discretionary review if:

The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial

ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

See, e.g., French v. Uribe, Inc., 132 Wn. App. 1, 7, 130 P.3d 370 (2006); and In re Zyprexa Products Liability Litigation, 493 F. Supp. 2d 571, 580 (E.D.N.Y., 2007) (holding under the equivalent federal statute, 28 U.S.C. § 1292(b), that absent certification, an order denying summary judgment is not appealable).

As seen in Judge Yule's December 17, 2007, Stipulation and Order to Stay Proceedings and Certify Decisions for Discretionary Review, the superior court has certified, and all the parties have stipulated, that the court's orders on summary judgment are appropriate for discretionary review. With regard to the four issues Benton Franklin seeks discretionary review of, there are no remaining questions of material fact and all that is left to resolve are three fundamental questions of law.

1. Corporate Practice of Medicine Doctrine.

In this case, there is no dispute that a physician-owned limited liability company employs physical therapists. The sole determinative issue is whether the practice of physician-owned corporations or limited liability companies employing physical therapists violates the common law corporate practice of medicine doctrine. In the parties' summary judgment briefing, neither party found a reported appellate court decision

from any jurisdiction that has applied the corporate practice of medicine doctrine to the employment of physical therapists. In fact, the only reported decision Benton Franklin found on this issue is from the Minnesota Supreme Court which recently held that the doctrine did not apply to physical therapists. Resolution of this question will not only resolve this claim, it will also help resolve the other legal claims related to Benton Franklin's employment of physical therapists.

2. Prohibited rebating under RCW Chapter 19.68.

The foundation of Columbia's lawsuit is its allegation that Benton Franklin has violated the anti-rebating provisions in RCW Chapter 19.68 by referring patients to physical therapists it employs – either directly, or indirectly through BFPT. Although Columbia has alleged that a defendant physician specifically told his client to go to a Benton Franklin-employed physical therapist, there is a legal question concerning whether Benton Franklin's general prescription practice would be considered a referral under the Washington Supreme Court's analysis in Day.

In Day, the court found that the doctors' patients were being unlawfully referred to the optical shop, which the doctors received profits from, based on several facts including the fact that the shop was downstairs from the ophthalmologists and because there were signs directing patients to the optical shop. Day, 76 Wn.2d at 418. The court did

not require the doctors to give up their ownership in the optical shop, however, as long as the optical shop was in a separate location and as long as the doctors were not directly or indirectly referring patients to the shop. Day, 76 Wn.2d at 421.

Using that analysis, on summary judgment Benton Franklin argued that there were no referrals because its physical therapists are located in a separate building than the physicians' offices and that there is nothing in the physicians' offices or on their prescriptions which somehow directs patients to Benton Franklin's physical therapists. Therefore, the determinative legal question is whether, as a matter of law, does a professional limited liability company or professional service corporation owned entirely by physicians, which employs the physicians and through which they conduct their professional medical practice, violate Chapter 19.68 RCW by also employing physical therapists?

Benton Franklin also made three additional legal arguments to the trial court. First, RCW § 19.68.010(2) permits a physician to have an ownership interest in any firm, corporation or association which provides services for medical or surgical diagnosis as long as the referring physician discloses the financial interest to the patient and gives the patient a list of effective alternative facilities. Because there is no dispute that the physicians have been providing the required disclosure and list of

alternative providers, the determinative legal issue is whether physical therapy fits within that exception.

Secondly, the underlying problem the court was concerned with in Day was that the doctors were earning profits by referring their patients to a separate corporation which they also owned. Here, after BFPT stopped doing business, Benton Franklin directly employed the physical therapists in its physical therapy clinic and therefore Benton Franklin was simply making a profit from the services it provided. In an analogous situation, the Washington Supreme Court in Wright v. Jeckle, 158 Wn.2d 375, 144 P.3d 301 (2006), found that it was permissible for a physician to make a profit from providing medical services and by selling prescription medication from his office.

Thirdly, under the plain language of RCW § 19.68.040, the defendant physicians are permitted to collect compensation for the professional services provided by their physical therapist employees. The trial court ruled that the “direct and immediate supervision” test from Day applied to Benton Franklin’s employment of physical therapists and therefore denied the parties’ motions for summary judgment because there was a question of fact on the supervision issue.

As Benton Franklin argued to the trial court, however, the Day court only created this test as a way to reconcile RCW § 19.68.040 with a

unique provision in RCW § 18.34.010 which specifies that “... if a licensed optician is working under the personal supervision of the ophthalmologist, the work of the licensed optician in dispensing glasses on the ophthalmologist's prescription in law amounts to no more than the lawful dispensing of eyeglasses by the doctor.” Day, 76 Wn.2d at 419.

Unlike RCW § 18.34.010, however, there is nothing in RCW Chapter 18.74 (governing physical therapists) which imposes a similar supervision requirement. Furthermore, there is a factual distinction because in Day the dispensing opticians were employed by a separate corporation and in the present case Benton Franklin directly employs its physical therapists. Given these differences, there is no basis to conclude that the “direct and immediate supervision” test created in Day would apply to Benton Franklin’s employment of physical therapists.

As shown above, while the underlying facts are undisputed, the parties have very different interpretations of RCW Chapter 19.68 as well as the holdings and applicability of Day and Wright. Unfortunately, aside from those two cases, an appellate court has not directly answered the question of whether RCW Chapter 19.68 prohibits physician-owned professional corporations and limited liability companies from earning profits by employing physical therapists. Because its RCW Chapter 19.68 claim forms the basis of Columbia’s case, resolution of the legal questions

regarding the chapter's application to the current facts will materially advance the resolution of this litigation.

3. Consumer Protection Act, RCW Chapter 19.86.

In analyzing Columbia's CPA claim, the first question that must be answered is whether Columbia, as a competing physical therapy provider, has standing to bring a CPA claim against Benton Franklin. As discussed in Benton Franklin's summary judgment briefing, in certain limited circumstances Washington courts have found that non-consumers have standing to file CPA claims where the alleged injury is to consumers. The only arguable standing exception that applies to the current facts, however, is under the learned intermediary doctrine established in Washington State Physicians Insurance Exchange Associates v. Fisons Corporation, 122 Wn.2d 299, 858 P.2d 1054 (1993).

In Fisons, the defendant drug company argued that the plaintiff physician did not have standing to bring a CPA claim because he was not a consumer. Id. at 312. The court disagreed, finding that certain learned intermediaries, such as physicians, are in the best position to stand in the shoes of the consumer and therefore have standing as a private attorney general to bring a CPA claim on behalf of those consumers. Id. at 313. Benton Franklin believes, however, that Columbia does not have the same relationship as the Fisons court found between drug manufacturers,

physicians, and patients, and therefore does not have standing to bring its CPA claim.

If it is determined that Benton Franklin's employment of physical therapists and prescription practice is not a referral prohibited by RCW § 19.68.010, the second legal question concerns whether Columbia can still maintain a CPA claim. In this case, Columbia has alleged that Benton Franklin has engaged in unfair acts and methods of competition by referring patients to its own physical therapists. If the court concludes that the Benton Franklin is either not referring patients (absent specific proof to the contrary) or that referrals its employees are not unlawful, then Franklin believes that as a matter of law Columbia's CPA claim should fail.

The third legal question concerns whether the Department of Health "specifically permitted" the ownership arrangement. If so, then the ownership arrangement would be exempt from a CPA claim pursuant to RCW § 19.86.170. Division II of the Washington Court of Appeals recently addressed this exception and concluded that in order to fall under that exception the activity had to be authorized by statute and that an agency took an overt affirmative action to specifically permit the activity. Singleton v. Naegeli Reporting Corp. Division II, Case No. 35234-6, filed January 15, 2008, p. 12. Here, the investigation conducted by the

Department of Health into Benton Franklin's ownership of a physical therapy clinic concluded that there was no violation of RCW § 19.68.010. Unlike the situation in Singleton, it is Benton Franklin's belief that the Department of Health specifically permitted Benton Franklin to own and operate a physical therapy clinic. While Columbia's CPA claim is secondary to its other claims, it is seeking its attorney fees through the CPA and therefore answering these questions would certainly expedite resolution of the litigation.

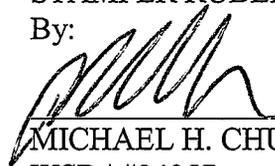
F. CONCLUSION

For the reasons state above, Benton Franklin respectfully requests that this Court accept discretionary review.

RESPECTFULLY SUBMITTED this 30th day of January 2008.

STAMPER RUBENS, P.S.

By:



MICHAEL H. CHURCH

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Attorneys for Respondents/Cross-Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of January, 2008, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

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<input type="checkbox"/>	U.S. Mail, Postage Prepaid
<input type="checkbox"/>	Hand Delivered
<input checked="" type="checkbox"/>	Overnight Mail
<input type="checkbox"/>	Telecopy (Facsimile)
<input checked="" type="checkbox"/>	Email



LEANN BLAIR

APPENDIX

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5 SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF BENTON

6 COLUMBIA PHYSICAL THERAPY, INC.,)
7 P.S.,)
8 Plaintiff,)
9 vs.)
10 BENTON FRANKLIN ORTHOPEDIC)
11 ASSOCIATES, P.L.L.C.; BENTON)
12 FRANKLIN PHYSICAL THERAPY, INC.;)
13 THOMAS R. BURGENDORFF; CHRISTOPHER)
14 A. KONTOGIANIS; ARTHUR E. THIEL;)
15 DAVID W. FISCHER; HEATHER L.)
16 PHIPPS; RODNEY KUMP; JAY WEST; and)
DOES 1 through 9,)
Defendants.)

NO. 05-2-01909-1

ORDER GRANTING IN PART
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT AND
DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT

17 THIS MATTER came before the Court on September 12, 2007, on Defendants' motion
18 for summary judgment, and on Plaintiff's motion for summary judgment. The Court, having
19 considered the pleadings filed herein, including:

- 20
21 1. Defendants' Motion for Summary Judgment;
22 2. Defendants' Memorandum in Support of Motion for Summary Judgment;
23 3. Affidavit of Matthew T. Ries in Support of Defendants' Motion for Summary Judgment;
24 4. Plaintiff's Response to Defendants' Motion for Summary Judgment;
25 5. Declaration of Darrin Bailey in Support of Plaintiff's Response to Defendants' Motion
26 for Summary Judgment;
27 6. Defendant's Memorandum in Reply to Plaintiff's Response to Defendants' Motion for
28 Summary Judgment;
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ORDER RE: DEFENDANTS' AND PLAINTIFF'S
MOTIONS FOR SUMMARY JUDGMENT: 1

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7. Declaration of Michael H. Church in Support of Defendant's Reply Memorandum for Defendants' Motion for Summary Judgment;
8. Plaintiff's Motion for Partial Summary Judgment;
9. Plaintiff's Memorandum in Support of Columbia's Motion for Partial Summary Judgment;
10. Declaration of Darrin Bailey in Support of Columbia's Motion for Summary Judgment;
11. Response Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment;
12. Declaration of Michael H. Church in Support of Response Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment; and
13. Plaintiff's Reply Memorandum in Support of Motion for Summary Judgment.

After reviewing the foregoing pleadings, and hearing argument of counsel, the Court hereby ORDERS, ADJUDGES AND DECREES as follows:

1. Defendants' motion for an order of summary judgment to dismiss Columbia Physical Therapy, Inc., P.S.' claim that Defendants violated RCW 18.100.010 et seq. (Professional Services Corporation Act) and RCW 25.15.045 (Professional Limited Liability Companies) is **GRANTED**.
2. The Court does not rule on the application of the common law Corporate Practice of Medicine Doctrine and therefore neither grants nor denies the Plaintiff's and Defendants' competing summary judgment motions on the Plaintiff's common law Corporate Practice of Medicine Doctrine claim.
3. Defendants' motion for an order of summary judgment dismissing the claim by Columbia Physical Therapy, Inc., P.S. that Defendants' violated RCW 19.68.010 after the time period that operation of the physical therapy clinic was owned by Benton Franklin Orthopedic Associates, PLLC is **DENIED**.

ORDER RE: DEFENDANTS' AND PLAINTIFF'S
MOTIONS FOR SUMMARY JUDGMENT: 2

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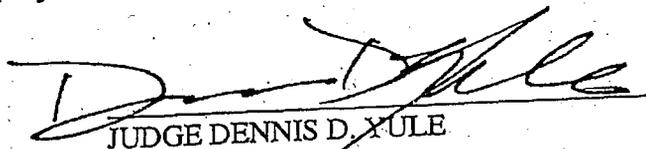
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4. Plaintiff's motion for an order of summary judgment that the Court rule as a matter of law that the Defendants violate RCW 18.100.010 et seq. (Professional Services Corporation Act) and RCW 25.15.045 (Professional Limited Liability Companies) is DENIED.

5. Plaintiff's motion for summary judgment that the Court rule as a matter of law that the Defendants have violated RCW 19.86.010 is hereby DENIED.

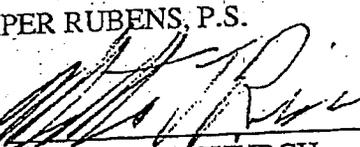
DONE IN OPEN COURT this 17th December day of ~~October~~ 2007.


JUDGE DENNIS D. YULE

Presented By:

STAMPER RUBENS, P.S.

By:


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ORDER RE: DEFENDANTS' AND PLAINTIFF'S
MOTIONS FOR SUMMARY JUDGMENT: 3

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A-3

EXHIBIT B

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF BENTON

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

NO. 05-2-01909-1

vs.)

ORDER DENYING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT

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

THIS MATTER came before the Court on April 4, 2007, on Defendants' motion for summary judgment. The Court, having considered the pleadings filed herein, including:

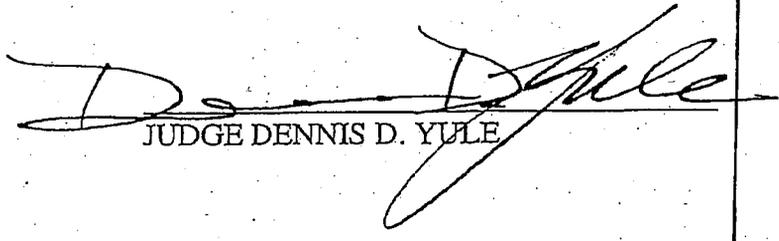
- 1. Note for Hearing;
2. Motion for Summary Judgment;
3. Memorandum in Support of Defendant's Motion for Summary Judgment;
4. Declaration of Randall L. Stamper in Support of Defendant's Motion for Summary Judgment;
5. GR 17 Affidavit of Plaintiff Columbia Physical Therapy, Inc.'s Opposition to Defendants' Motion for Summary Judgment;
6. Plaintiff Columbia Physical Therapy, Inc Opposition to Defendants' Motion for Summary Judgment;

- 7. Declaration of Darrin Bailey in Opposition to Defendants' Motion for Summary Judgment;
- 8. [Proposed] Order Denying Defendants' Motion for Summary Judgment;
- 9. Amended Note for Hearing;
- 10. Declaration of Darrin Bailey Opposing Defendants' Motion for Summary Judgment (Revised);
- 11. Plaintiff Columbia Physical Therapy, Inc's Opposition to Defendants' Motion for Summary Judgment (Revised); and
- 12. Defendants' Reply Memorandum in Support of Defendants' Motion for Summary Judgment.

After reviewing the foregoing pleadings, and hearing argument of counsel, the Court hereby ORDERS, ADJUDGES AND DECREES as follows:

- 1. Defendants' motion for an order of summary judgment to dismiss Columbia Physical Therapy, Inc., P.S.' RCW 19.68.010 claim, and RCW 19.86 et seq. Consumer Protection Act claim against the Defendants is DENIED.

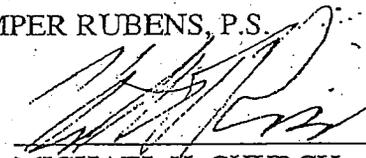
DONE IN OPEN COURT this 17th day of December October 2007.


 JUDGE DENNIS D. YULE

Presented By:

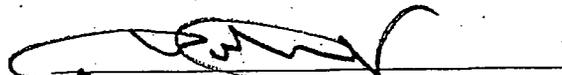
STAMPER RUBENS, P.S.

By:


 MICHAEL H. CHURCH
 WSBA #24957
 MATTHEW T. RIES
 WSBA #29407
 Attorneys for Defendants

STAFFORD FREY COOPER

By:



DARRIN E. BAILEY

WSBA #34955

DANFORD D. GRANT

WSBA #26042

Attorneys for Plaintiff

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STAMPER RUBENS PS
ATTORNEYS AT LAW

ORDER RE: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT: 3

720 WEST BOONE, SUITE 200
SPOKANE, WA 99201
TELEFAX (509) 326-4891
TELEPHONE (509) 326-4800

STATE of WASHINGTON



SECRETARY of STATE

I, RALPH MUNRO, Secretary of State of the State of Washington and custodian of its seal, hereby issue this

CERTIFICATE OF FORMATION

to

BENTON FRANKLIN ORTHOPEDIC
ASSOCIATES, L.L.C.

a Washington Limited Liability Company filed for record in this office on the date indicated below.

UBI Number: 601 994 293

Date: November 19, 1999



Given under my hand and the Seal of the State
of Washington at Olympia, the State Capital

A handwritten signature in black ink, appearing to read "Ralph Munro".

Ralph Munro, Secretary of State 2-967828-4

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Val: 11/19/1999 - 52931
\$195.00 on 11/19/1999
Check - 11/15/1999 - 28375

CERTIFICATE OF FORMATION

OF

NOV 1 - 1999

BENTON FRANKLIN ORTHOPEDIC ASSOCIATES, L.L.C.

The undersigned, for the purpose of forming a limited liability company under the Washington Limited Liability Company Act, hereby certifies and adopts the following Certificate of Formation

ARTICLE I

The name of this limited liability company shall be BENTON FRANKLIN ORTHOPEDIC ASSOCIATES, L.L.C.

ARTICLE II

Registered Agent

The registered agent of this limited liability company and the street address of the registered office of this limited liability company are as follows:

Registered Agent

Address

P. Craig Walker

503 Knight Street, Suite A
Richland, WA 99352

ARTICLE III

Place of Business

The address of the principal place of business of this limited liability company is 911 South Washington Suite B, Kennewick, Washington 99336.

ARTICLE IV

Duration

The duration of the limited liability company is perpetual.

ARTICLE V

Management

The management of the limited liability company is vested in its members.

ARTICLE VI

Formation

The name and address of the person executing this Certificate of Formation is:

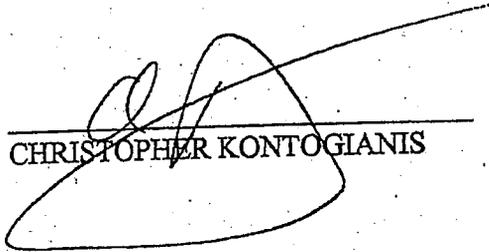
Name

Christopher Kontogianis

Address

911 S. Washington Suite B
Kennewick, WA 99336

IN WITNESS WHEREOF, the undersigned has executed this Certificate of Formation in duplicate this 12th day of November, 1999.


CHRISTOPHER KONTOGIANIS

CONSENT TO APPOINTMENT AS REGISTERED AGENT

I, P. CRAIG WALKER, consent to serve as registered agent in the State of Washington for the following limited liability company:

BENTON FRANKLIN ORTHOPEDIC ASSOCIATES, L.L.C.

I understand that, as agent for the limited liability company, it will be my responsibility to accept service of process in the name of the limited liability company; to member(s) of the limited liability company; and to immediately notify the Office of the Secretary of State of my resignation or of any changes in the address of the registered office of the limited liability company for which I am agent.

Nov 12, 1999
Date

By: Ply Will
Address: 503 Knight Street, Suite A
Richland, WA 993526

OPERATING AGREEMENT

OF

BENTON FRANKLIN ORTHOPEDIC ASSOCIATES, P.L.L.C.

A Washington Professional Limited Liability Company

THIS OPERATING AGREEMENT dated as of the 1st day of August, 2004, is made and entered into by and between three (3) individual physicians; namely, Christopher Kontogianis, M.D., Thomas R. Burgdorff, M.D., and Arthur Thiel, M.D., who are associated as the members of Benton Franklin Orthopedic Associates, a Washington professional limited liability company (hereinafter referred to as the "Company"). Unless the context clearly indicates an intent for a more general reference, the above named parties (or their respective medical practice as provided in Section 2.1) may hereinafter sometimes be referred to individually as "Member" or collectively as the "Members" or the "Membership."

WHEREAS, the parties hereto desire to confirm and memorialize that they are associated together as Members for the practice of medicine and that they have filed with the Secretary of State for the State of Washington a Certificate of Formation to organize as a professional limited liability company named and known as Benton Franklin Orthopedic Associates pursuant to the provisions of RCW Chapter 25.15 et seq., also known as the Washington Limited Liability Company Act (hereinafter the "Act").

NOW, THEREFORE, the parties hereto agree as follows:

SECTION ONE
COMPANY BUSINESS

1.1 NAME. The Company shall engage in and conduct business under the name of "Benton Franklin Orthopedic Associates" The name shall belong to the Company, and shall not be sold or disposed of so long as the Company continues to exist, and the withdrawal of a Member or liquidation of a Member's interest in the Company shall not cause a forfeiture of the right of the surviving or remaining Member(s) to continue in the ownership and use of said Company name, and any such liquidation or withdrawal by any Member shall divest such Member from any right, title or interest in and to the Company name.

EXH 13 DATE 8-15-07
WITNESS [Signature] NOREEN NYSTROM

1.2 **PURPOSE AND SCOPE.** The purpose and scope of the Company shall be to engage in the practice of medicine. The Company shall not engage in any other business(es), unless the Members shall determine and agree otherwise.

The Members specifically intend that the Company shall not be a partnership (including, without limitation, a general or limited partnership) or joint-venture. In that regard, the Members further intend that no Member shall be a partner or joint-venture of any other Member (except for purposes of federal and state tax purposes), and that this Agreement shall not be construed to suggest or establish otherwise.

1.3 **PRINCIPAL OFFICE** The Company's principal office shall be 911 South Washington, Suite B, Kennewick, Washington, 99336

1.4 **COMPANY ASSETS** All revenue derived by any Member or any employee of the Company from the practice of medicine and/or the provision of medical-related services shall belong solely to the Company and shall be deposited in the Company bank account(s), except such items as outside consulting fees and committee reimbursements. All assets and property of the Company shall be acquired in the name of the Company and not in the names of any individual Member(s).

1.5 **TERM.** The Company shall actually commence doing business as a professional limited liability company on January 1, 2001, and the Company shall have a perpetual existence, unless sooner terminated as provided for herein.

1.6 **MEDICAL SERVICES**

(a) The Members of the Company will be licensed to practice medicine in the State of Washington and will render medical services, care and treatment to patients of the Company.

(b) The Members' respective work schedules, coverage schedules, and vacation and meeting/seminar schedules shall be determined by each Member, subject to the Company's final approval and periodic adjustment.

1.7 **HIRING OF ADDITIONAL PHYSICIANS.** The Company shall not hire and employ additional physicians without the prior written consent of at least two thirds (2/3) of the Company Members having voting rights.

1.8 **TERMINATION OF PHYSICIAN SERVICES.** No Member shall be allowed to perform any services through or on behalf of the Company when such Member has voluntarily or involuntarily withdrawn from the Company pursuant to Section Six below.

1.9 PATIENT FILES. Subject to any applicable ethical limitations, any and all files and records of patients serviced or treated by or on behalf of the Company shall remain the property of the Company.

SECTION TWO MEMBERS

2.1 MEMBERSHIP. The Membership shall consist of individual persons who are authorized and licensed to practice medicine in the State of Washington, or individual persons who have incorporated their practice and are the sole shareholders of such an entity. For purposes of this Operating Agreement, such incorporated medical practice and the individual practitioners will be used interchangeably as "Member". All such Member-physicians shall be board certified in orthopedics and shall also have active or courtesy staff privileges at all hospitals in the Tri City area where the Company provides services provided that, subject entirely to the sole discretion and prior approval of the Company, a Member may seek to reduce his/her hospital privileges due to age or health-related reasons.

2.2 ADMISSION OF NEW MEMBERS. With the written consent of at least two thirds (2/3) of the voting rights of the Company's Membership, the Company's Members may, from time-to-time, admit as additional Members, individual physicians (or incorporated practice consisting of an individual physician) who satisfy the following minimum admittance criteria: (i) authorized and licensed to practice medicine in the State of Washington, (ii) an associate employee-physician of the Company for at least two (2) years, and (iii) board certified in orthopedics. This minimum admittance criterion can be overridden by unanimous vote of the Company's Membership.

2.3 RESTRICTION ON TRANSFER. No Member may transfer or dispose of his/her interest in the Company without the unanimous written consent of all of the other Members. Any attempted transfer or disposition of a Member's interest, or any part thereof, without compliance with this Agreement shall be null and void *ab-initio* and shall constitute an event of dissociation as provided for in Section Six below.

2.4 VOTING RIGHTS. Subject to Section 4.2 below, each Member shall have one (1) vote on matters and decisions relating to the conduct of the Company's business affairs and activities.

SECTION THREE CAPITAL ACCOUNTS, ALLOCATION, ETC.

3.1 INITIAL CAPITAL CONTRIBUTION, START-UP EXPENSES, AND ADDITIONAL CAPITAL CONTRIBUTIONS

(a) The initial capital of the Company shall be the transfer of cash funds (and/or office and/or medical equipment) from the Members to the Company in the form of initial capital

contributions. The nature and extent of each Member's respective initial capital contribution to the Company is set forth as follows:

\$200.00

Further, the Members agree that furniture, furnishings and equipment used in common by the Members prior to formation of the Company will also be contributed and deemed of equal value. Existing accounts receivable shall not be specifically contributed, but shall be collected on behalf of predecessor entities by the Company without charge.

(b) The Members acknowledge that the Company may require an infusion of additional cash during its start-up of business activity to cover the Company's operating expenses. As a result of the customary and expected delay between the rendering of medical services and the collection of fees, therefore, each Member agrees to make additional capital contributions to the Company in equal cash amounts. Such additional capital contributions shall be made only upon the approval of the Members in accordance with Section 4.1 below.

(c) If during any fiscal year of the Company the sum of the "Common Expenses" (as defined in Section 3.4(a)(1) below), the "Allocated Expenses" (to be defined and redefined annually by the Membership), and the "Direct Expenses" (as defined in Section 3.4(a)(2) below) allocated to a Member pursuant to Section 3.4 exceeds the actual cash collections allocated and attributed to that Member pursuant to Section 3.4, then said Member shall make an additional capital contribution to the Company in an amount equal to such monetary deficit.

3.2 CAPITAL ACCOUNTS: The Company shall, in accordance with generally accepted accounting principals, establish and maintain a separate capital account for each Member to reflect such Member's capital interest in the Company. A Member's capital account shall be adjusted in accordance with rules set forth in applicable U.S. Treasury and/or Internal Revenue Regulations.

3.3 DISTRIBUTIONS OF CAPITAL. No Member has any right to demand or receive distributions of capital except upon dissolution or termination of the Company or as otherwise may be provided for in this Agreement or by law.

3.4 ALLOCATION OF INCOME AND EXPENSES.

(a) All items of Company income actually collected and received by the Company relating directly to medical services personally rendered by a Member shall be allocated to such Member after being reduced by the Member's share of Common Expenses and Allocated Expenses and further reduced by the Member's Direct Expenses. All actual cash collections received by the Company from services rendered by Company, employed non-member physicians and/or

staff-persons, after payment of all expenses directly related and attributable thereto, shall be allocated equally to the Members.

(1) For purposes of this Agreement, "Common Expenses" shall mean those items of Company expense that benefit all Members, such as the employment expenses of non-physician employees which are not allocated to any specific Member, including any employer contributions to any profit sharing or other retirement plans with respect to such non-physician employees; pharmaceuticals and drugs; property damage insurance; liability (other than professional liability insurance) and casualty insurance; administration and accounting personnel payroll (including fringe benefits and employer costs); and other general administrative and overhead costs such as, without limitation, office/facility rental, utilities, telephone, and office supplies.

(2) For purposes of this Agreement, "Direct Expenses" shall mean those items of Company expense that relate solely to a particular Member and not to the Company's medical practice in general. Direct Expenses shall include, without limitation, all regulatory issues that deal specifically with a Member's individual practice (such as OSHA or Internal Revenue Service issues); locus; attendance at meetings, seminars and conventions; professional entertaining; home or car telephone; subscriptions and dues; personal leave and vacation time; fringe benefits; the cost of medical periodicals and publications; travel; insurance premiums (including professional liability insurance); health, life and disability insurance for the Member; and other similar types of directly allocable costs.

(3) For purposes of this Agreement, "Allocated Expenses" are expenses incurred on a joint basis by more than one of the Members. Allocated Expenses may be divided evenly between the Members or based upon the formula described in section 3.4(a)(5) below.

(4) For purposes of this Agreement, "Common Expenses" shall be allocated and charged to the Members at the end of each fiscal year pro-rata based on the ratio obtained by dividing the amount of income actually collected by the Company from services personally rendered by a Member into the total income actually collected by the Company from services rendered by all of the Members. For example, by way of illustration, if the Company has two Members and the actual collections from services personally rendered by Member "X" equal \$400,000 and the actual collections from services personally rendered by Member "Y" equal \$500,000, Member X shall pay $\frac{4}{9}$ ths (i.e., $\frac{\$400,000}{\$900,000}$) of the Common Expenses and Member Y shall pay $\frac{5}{9}$ ths ($\frac{\$500,000}{\$900,000}$) of the Common Expenses.

(5) For the purpose of this Agreement, certain "Allocated Expenses and Common Expenses" will be considered Non productivity based and will be allocated evenly between Members based on addendums to this agreement and agreed to by 80 percent (80%) vote of Company's Membership.

(b) Notwithstanding the provisions of sub-section (a) above, in accordance with Section 704(c) of the Internal Revenue Code of 1986, as amended, and the applicable Regulations

hereunder, items of income, gain, loss, and deduction with respect to any property contributed to the capital of the Company shall, solely for tax purposes, be allocated among the Members so as to take account of any variation between the adjusted basis of such property to the Company for federal income tax purposes and its initial agreed value upon contribution to the Company, or as that value may be subsequently adjusted in accordance with applicable Regulations.

3.5 MEMBERSHIP DISTRIBUTIONS. Except as needed and required to satisfy the Company's Operating Requirements (or as otherwise agreed by the Members and subject to the provisions of Section Seven with respect to distributions upon the occurrence of a dissolution of the Company), the Cash Flow of the Company shall be distributed to the Members monthly or at such other intervals as the Members shall determine appropriate. Distributions shall be made to the Members in accordance with Section 3.4 above with respect to the allocations of Company profits, income, gain, loss, deduction and credit. If the Cash Flow to be distributed exceeds the amounts allocated under Section 3.4, whether as a result of non-cash deductions or otherwise, the excess Cash Flow shall be distributed to the Members equally unless and until membership shares are altered by virtue of new admissions and/or other circumstances ratified and confirmed in writing.

For purposes of this Agreement, the term "Operating Requirements" shall mean all expenses and costs of the Company.

For purposes of this Agreement, the term "Cash Flow" shall mean gross receipts derived and produced by the Company, less cash disbursements for Company purposes. For this purpose, any amount required to be set aside as a reserve shall be deemed to be a cash disbursement of the Company.

SECTION FOUR **OPERATIONS AND ADMINISTRATION**

4.1 CONTROL. Subject to Section 4.2 below, the overall management and control of the business and affairs of the Company shall be vested in the Membership, with each Member having one (1) vote. Members, including valid proxies, representing a majority of the Membership interests shall constitute a quorum at a meeting of the Membership. Except in the event of a greater voting requirement provided by this Agreement, if a quorum is present, the affirmative vote of two thirds (2/3) of the Membership interests represented at the meeting shall be deemed as being the decision and act of the entire Membership.

4.2 MANAGING MEMBER. The Membership shall designate one (1) Member of the Company to act as the Company's "Managing Member" for a one (1) year term (or until his respective successor has been elected and qualified) for purposes of exercising the authority as delegated herein below. There is no limit on the number of terms that a Member may serve as Managing Member. The Company's initial Managing Member shall be:

Thomas R. Burgdorff, M.D.

The Managing Member shall have the power and authority to transact all regular business of the Company during the interim between meetings of the Membership, provided that any such action taken does not conflict with the policies or expressed limitations of the Membership. Without limiting the scope or generality of this authority, this includes the power and authority to:

(a) Conduct, manage and control the routine and daily affairs and business of the Company, and to make such rules and regulations as may be necessary or desirable to do so provided they are not inconsistent with law or this Agreement.

(b) As member representative, hire and remove at will the agents and non-physician employees of the Company, and to prescribe the duties and fix the compensation of such agents and employees.

(c) Borrow money and incur indebtedness up to \$10,000.00 for the purposes of the Company and to cause to be executed and delivered for such purpose, in the Company's name, promissory notes, bonds, deeds of trust, mortgages, pledges, hypothecations, or other evidence of debt and securities therefore.

SECTION FIVE **ACCOUNTS AND RECORDS, MISCELLANEOUS**

5.1 RECORDS.

(a) At all times during the Company's existence, the Company shall keep or cause to be kept accurate and detailed books of account in which shall be entered fully and accurately each and every transaction of the Company. All books and records of the Company may be inspected by any Member, or his/her agent or attorney, for any proper purpose at any reasonable time.

(b) Within a reasonable period of time after the close of each fiscal year, a report shall be provided to each Member indicating such Member's respective share of the income, gain, loss, deduction, credit and Cash Flow of the Company for such year for federal income tax purposes. The Company's tax returns shall be prepared on a cash basis.

5.2 PROFESSIONAL AND OTHER INSURANCE.

(a) Each Member shall maintain primary, professional and comprehensive general liability insurance coverage in an amount as specified by the Membership. In addition, liability coverage will be maintained by each individual Member for owned and non-owned automobiles and for personal and real property owned or maintained by each Member (including, by way of example and not limitation, general automobile insurance and personal liability insurance) in an amount specified by the Membership. The Company shall maintain such additional coverage as it deems necessary or appropriate.

(b) The Company shall maintain professional liability, comprehensive general liability, and non-owned automobile and property damage insurance on the Company and its assets and properties. Such insurance shall be issued by a good and reputable insurance company or companies in policy coverage amounts to be determined by the Members.

(c) The Company shall also maintain appropriate insurance coverage against potential claims asserted against the Company's fiduciaries and Managing Member which may arise as a result of said individuals serving in such capacity.

(d) The Company may (but shall not be obligated to) also elect to maintain any other form(s) of insurance coverage deemed necessary or appropriate, including, without limitation, life insurance, disability insurance, and overhead insurance.

5.3 LIMITATION ON USE OF FUNDS AND ACTIVITIES. In the absence of the unanimous written consent of the Membership, the Company shall make no loans to any Member. The Company shall be authorized and empowered to pay reasonable compensation for services rendered by the Managing Member and to make other payments and distributions in furtherance of the purposes set forth in this Agreement.

5.4 FISCAL YEAR. The fiscal year of the Company shall end on the 31st day of December of each calendar year.

5.5 LIMITATION OF LIABILITY AND ON INDEMNIFICATION.

(a) Each Member's liability shall be limited as set forth in this Agreement, in the Act, and by other applicable law(s).

(b) No Member shall have any personal liability whatsoever for the debts, obligations or liabilities of the Company including, but not limited to, a judgment decree or order of a court. Members shall not be personally liable to the Company or its Members for monetary damages for conduct as a Member or Managing Member. Provided that, however, these provisions shall not eliminate or limit the liability of a Member or Managing Member for acts or omissions that involve gross negligence or intentional misconduct or a knowing violation of law; for conduct violating RCW 25.15.235; or for any transaction from which the Member or Managing Member will personally receive a benefit in money, property, or services to which he/she is not legally entitled.

(c) The Company shall indemnify any Member or Managing Member from and against any judgments, awards, settlements, penalties, fines, or expenses incurred in a proceeding to which an individual is made a party because he/she is, or was, a Member or Managing Member of the Company. Provided that, there shall be no indemnification available to any Member or Managing Member finally adjudged to have engaged in gross negligence or intentional misconduct or a knowing violation of law; in conduct in violation of RCW 25.15.235; or in any transaction with

respect to which such Member or Managing Member received a benefit in money, property or services to which he/she was not legally entitled.

(d) In the event one or more Members is found liable for negligence or misconduct, that Member shall be liable for his portion to the extent that it is possible to determine such liability.

SECTION SIX DISSOCIATION

6.1 **EVENTS OF DISSOCIATION.** A Member shall cease to be a Member of the Company upon the occurrence of any one (1) or more of the following events:

(a) **Voluntary Withdrawal.** A Member may voluntarily withdraw from the Company by giving not less than ninety (90) days notice to the other Member(s) of the intention to withdraw. The effective date of withdrawal shall be the date specified in the withdrawing Member's notice, which date shall not be less than ninety (90) days after the date such notice is delivered to the other Member(s); provided that, the other Members may elect to establish an effective date of not less than thirty (30) days from date of delivery of notice. In the event a withdrawing member fails to provide ninety (90) days written notice, said withdrawing member shall nevertheless be responsible for ninety (90) days of overhead, i.e. his share of direct, indirect, and common expenses as defined at paragraph 3.4 above, which sum shall be deducted from said Member's withdrawal value as defined at paragraph 6.3 above.

(b) **Involuntary Withdrawal.** The occurrence of one (1) or more of the below-listed and described events shall be deemed to constitute an involuntary withdrawal of the Member to whom the event applies, unless within sixty (60) days of such event, all other Members consent in writing to allow such Member to continue as a Member in the Company. The affected Member shall be provided with written notice of the reasons for the involuntary withdrawal and of the time and place of the meeting of the Members at which the possibility of the affected Member's continuation of membership shall be considered. Such notice shall be given not less than ten (10) days prior to such meeting. At such meeting, the affected Member shall be entitled to present evidence relevant to the issues under consideration. Except as otherwise specified in this Agreement, the effective date of withdrawal shall be deemed as being the last day of the calendar month immediately preceding the calendar month during which such event occurred. The events that shall trigger an involuntary withdrawal are as follows:

(1) A Member's right and license to practice medicine is suspended or revoked by the State of Washington (or any agency or official body thereof).

(2) A legal determination of a Member's incompetence.

(3) A Member's filing of a voluntary petition in bankruptcy, a Member's assignment for the benefit of the Member's creditors, or the adjudication of a Member as being

bankrupt in connection with an involuntary proceeding in bankruptcy against such Member.

(4) A Member's removal, without cause, as a result of a vote of three fourths (3/4) of the remaining Membership.

(5) A Member's failure to make additional capital contributions as required by Section 3.1 within ninety (90) days after the delivery to such Member of written notice of said call for capital contribution.

(6) A Member's loss of or inability to maintain professional liability insurance with a carrier approved by the Membership in the coverage amount(s) specified by the Membership.

(7) A Member's attempted transfer or disposition of a Membership interest in contravention of Section 2.3 above

(8) A Member's death.

6.2 EFFECT OF DISSOCIATION.

A. Subject to Section 7.1.A(d), if a Member withdraws or is treated as having withdrawn from the Membership, the withdrawing Member's interest in the Company shall be liquidated at the value and according to the terms hereinafter provided in Sections 6.3 and 6.4.

B. All withdrawing Members shall be subject to and bound by the following:

1. Except a Member who has been removed from the Company on a no cause basis, it is the intention of the Company that a withdrawing Member not interfere with the operation of the Company or its personnel. Therefore, for a period of two (2) years following the date of withdrawal, and in consideration of the joint undertaking hereof by each and every Member to each other and to the Company, the Members individually and collectively agree among themselves that a withdrawing Member shall not (directly or indirectly and either for such Member or for any other person, firm or corporation) solicit, hire or employ, or attempt to solicit, hire or employ, any of the other Members or any of the physicians or other staff employees of the Company.

2. The Company may withhold any payments due to a withdrawing Member under this Agreement during the period(s) that such Member is in violation of any provision of this Section 6.2.B and/or the Company may offset against such payments the amount of any damages incurred by the Company on account of such violation

3. The Members acknowledge and agree that the Company will develop its patients and business goodwill at a substantial investment of time and money. The Company's business is based largely upon the personal and professional relationships developed by the Company, its Members and its staff. The Members agree that most of these relationships have

developed, or will develop, into permanent or near-permanent relationships. As a result, it is agreed that the breach of any of the covenants contained in this Section 6.2.B will result in irreparable harm and continuing damages to the Company and its business and that the Company's remedy at law for any such breach or threatened breach will be inadequate.

4. The Members recognize that it will be difficult, if not impossible to ascertain the amount of damages incurred by the Company in the event of a breach of section 6.2.B. The Members agree, however, that one-fourth (1/4) of the withdrawing Member's gross billings for the first two years received in violation of the agreement is a close estimate of the amount of damages that will be sustained. In the event a withdrawing Member breaches this clause, the withdrawing Member shall become liable to and shall pay the Company one-fourth (1/4) of the withdrawing Member's gross billings of the first two years received in violation of this agreement. The Company shall be entitled to full review of the withdrawing Member's business records.

5. If any provision of this Section 6.2.B is found by a court to be invalid or unenforceable for any reason, including, without limitation, the scope or the duration thereof, such provision shall be construed and/or reduced or reformulated by the court (or by the parties if the court refuses to do so) in such a way as to make it valid and enforceable to the maximum extent possible. Any invalidity or unenforceability of any provision of this Section 6.2.B shall attach only to such provision and shall not affect or render invalid or unenforceable any other provision(s) of such Section, this Agreement or any other agreement or instrument.

6.3 WITHDRAWAL VALUE.

(a) Subject to Section 7.1.A(d), upon the dissociation of a Member from the Company for any reason whatsoever, the remaining Members may purchase the withdrawing Member's interest in the Company, which interest shall be determined pursuant to the following valuation process: Within thirty (30) days of the date of withdrawal, the remaining Members shall designate a Certified Public Accountant who, in conjunction with duly-qualified appraisers, shall establish within thirty (30) days thereafter the net fair market value of the Company and the withdrawing Member's interest therein as of the date of withdrawal. Goodwill of the Company, if any, shall not be considered in making such a determination. Accounts receivable of the Company shall be considered and valued in the manner indicated below. All professional fees and costs associated with the making of such a determination shall be charged to and borne by the withdrawing Member.

(b) Accounts receivable shall be separately valued with those associated with an individual Member's practice 80% collected, 20% reserved to the Company for services associated with the collection activity.

(c) Once such a determination has been made and finalized by the Certified Public Accountant, the remaining Members may purchase the withdrawing Member's interest in the Company for an amount equal to ninety percent (90%) of the determined value of the withdrawing Member's interest in the Company (exclusive of accounts receivable) plus an amount equal to the

withdrawing Member's interest in accounts receivable as determined pursuant to Section 6.3.(b) above

(d) Certain large assets as determined by the Company may be dealt with in separate addendums to this Agreement as agreed to by 2/3 vote of Company's Members.

6.4 **PAYMENT.** If the non-withdrawing Members vote to continue the Company and purchase a withdrawing Member's interest therein, the value of the withdrawing Member's interest (as determined in accordance with the provisions of Section 6.3 above) shall be paid to the withdrawing Member (or, if applicable, to such Member's estate or legal representative) as follows:

(a) The amount attributable to the withdrawing Member's determined interest in accounts receivable shall be paid as collected at 80% of the amount received, on a monthly basis.

(b) The net remaining balance of the determined purchase price shall be paid in equal monthly installments over a period of up to five (5) years (at the Company's discretion) with interest at an annual rate equal to the prime rate promulgated by the Wall Street Journal from time-to-time, changing as and with such rate, and shall be evidenced by a non-negotiable promissory note from the Company which shall be subject to the following conditions:

(1) The note may be prepaid by the Company, in whole or in part, at any time without penalty.

(2) The unpaid principal balance of the note, and all accrued unpaid interest due thereon, shall accelerate, at the note holder's option, in the event of a default which is not cured by the Company within thirty (30) days after specific notice of such default is given to the Company.

(3) In the event of a default, the note holder shall be entitled to recover reasonable attorneys' fees and costs for all proceedings, trials and appeals and in all appearances in and connected with any bankruptcy or similar proceeding.

(4) The note shall be subject to setoff as set forth in this Agreement.

(5) Notwithstanding the above payment schedule, the aggregate amount payable by the Company pursuant to this Section Six during any fiscal year shall not exceed ten percent (10%) of the Company's actual cash collections for the immediately preceding year. In that regard, if in any year the Company is obligated to make payments to more than one (1) withdrawing Member under this Section, and such percentage limitation applies, the amounts payable to all such withdrawing Members (or their legal representatives) shall be reduced on a proportionate basis in accordance with the amount due to such Members (or their legal representatives) in such year.

(c) If the Company elects to continue the medical practice of the withdrawing Member, the Company shall be responsible for paying all contractual obligations of such Member's medical practice; provided that, however, the Company shall not be required to assume any liability for bodily injury or property damage which is not fully covered by insurance, whether the same is known, unknown, contingent or otherwise; nor shall the Company be required to assume any liability of the withdrawing Member with respect to a deficit in such Member's capital account(s)

(d) A withdrawing Member and/or such Member's estate shall remain responsible to indemnify, defend and hold the Company and the other Members harmless from all debts and claims which arise or which may arise from the acts or omissions of the withdrawing Member.

6.5 **TAIL COVERAGE** Upon the withdrawal of a Member, the withdrawing Member shall, at such Member's sole cost and expense, obtain "tail" insurance coverage or continuing coverage for a term of at least four (4) years following the date of withdrawal in an amount as the Membership deems necessary and appropriate. The Company shall be named as an additional insured on such policy or policies, and such policy or policies shall contain a provision that the insurance company shall notify the Company at least thirty (30) days prior to any change in the policy terms or coverage limits. In the event the withdrawing Member fails to provide the requested tail coverage or continuing coverage, the Company shall have the right (but not the obligation) to obtain such coverage and the withdrawing Member shall be fully obligated to reimburse the Company for such expense. The Company shall have the right to setoff any amount due to it with respect to said reimbursement against any amount otherwise due to the withdrawing Member from the Company.

SECTION SEVEN DISSOLUTION

7.1 DISSOLUTION

A. The Company shall be dissolved and its affairs shall be expeditiously wound up upon the occurrence of any one (1) of the following events:

- (a) The unanimous vote of the Membership to dissolve;
- (b) The entry of a decree of judicial dissolution under RCW 25.15.275;
- (c) The expiration of two (2) years after the effective date of any administrative dissolution under RCW 25.15.285 et seq. without reinstatement of the Company; or
- (d) The failure of the non-withdrawing Members to vote to continue the Company within sixty (60) days from an event of dissociation (as defined in Section 6.1) and to liquidate and purchase the withdrawing Member's interest in the Company pursuant to Sections 6.2, 6.3, and 6.4.

B. In the event of dissolution, the Company shall immediately commence to wind up its affairs. The Company and the Membership shall continue to share tax items and Cash Flow during the period of winding up in the same proportions as before the commencement of the winding up of the Company business. The net proceeds from the liquidation of Company assets shall be applied and distributed in the following order:

(a) To the debts of the Company; and

(b) To the Members equally (unless Membership shares have been hereafter modified) after allocation of income, gain, loss, deduction and credit; provided accounts receivable shall be allocated to individual Members in accordance with section 3.4 above.

7.2 **RESTORATION OF NEGATIVE CAPITAL ACCOUNT.** Upon the withdrawal of a Member from the Company or upon the dissolution of the Company, any Member whose capital account has a negative, deficit balance (after factoring in all contributions, distributions, and allocations for all taxable years, including the year during which the withdrawal or dissolution occurs) shall promptly contribute to the capital of the Company the amount necessary to restore such deficit balance to Zero Dollars (\$0.00).

SECTION EIGHT **ARBITRATION AND DISPUTES**

8.1 **WAIVER OF RIGHT TO COURT DECREE OF DISSOLUTION OR PARTITION.** The Members agree that irreparable damage would be done to the goodwill and reputation of the Company if any Member brought a judicial action to partition the Company's assets and property upon an event of dissociation, which does not result in the dissolution of the Company. Care has been taken in this Agreement to provide for what the Members all believe are fair and equitable payments to be made to a Member whose relationship with the Company is terminated for any reason. Accordingly, each of the Members accepts the provisions of this Agreement as establishing and setting forth a Member's sole and exclusive entitlement on the termination of a Member's relationship with the Company. In that regard, each Member hereby waives and renounces any and all right to pursue any action for dissolution of the Company or for partition in-kind or a partition by sale, or to seek the appointment by a court of a liquidator, receiver, or similar type of fiduciary for the Company or its assets and properties.

8.2 **ARBITRATION.** In the event of a dispute between the parties arising out of this Agreement, the Members agree that they will submit the dispute to binding arbitration in the Tri-Cities, Washington. A single arbitrator shall be selected by agreement of the parties or, in the absence of agreement, shall be appointed by the then-presiding Judge of the Benton County Superior Court. Each party shall be responsible for the payment of one-half of the fees and expenses of the

arbitrator. The mandatory arbitration rules, as implemented locally, of the Benton County Superior Court shall be binding as to procedure, except as to the right of appeal, which is not applicable herein. Within ten (10) days of notice of arbitration, an arbitrator shall be designated and the hearing shall be held within thirty (30) days thereafter. The arbitrator shall render a decision within ten (10) days of such hearing. The prevailing party shall be entitled to recover such party's reasonable attorneys' fees, costs and expenses from the non-prevailing party as a part of the arbitration decision and award. In the event of suit or action to enforce an arbitration award, venue shall exclusively lie in Benton County Superior Court.

SECTION NINE **CONSTRUCTION EFFECT**

9.1 **CONSTRUCTION.** The Section headings herein are used for convenience only and shall not be resorted to for interpretation of this Agreement. Wherever the context so requires, the masculine shall refer to the feminine and the singular shall refer to the plural. This Agreement shall be construed and interpreted exclusively under the laws of the State of Washington.

9.2 **TAX MATTERS PARTNER.** The Membership may appoint a "Tax Matters Partner" (as defined in Section 6231, or amendments thereto, of the Internal Revenue Code) by vote at any regular or special meeting of the Members. The Tax Matters Partner shall take such action as may be necessary to cause each other Member to become a "Notice Partner" within the meaning of Code Section 6223, or amendments thereto. The Tax Matters Partner shall inform each other Member of all significant matters that may come to his/her attention in such capacity and shall promptly forward to each other Member copies of all significant written communications received in such capacity. The Company's initial Tax Matters Partner shall be: Christopher Kontogianis, M.D.

9.3 **AMENDMENTS.** Any amendment(s) to this Agreement shall be approved by two thirds (2/3) of the voting rights of the Members. Any amendments so approved shall be reduced to writing; shall be signed by all the Members who approved the amendment, and shall be attached to this initial Agreement. Any Member who does not vote in approval of an amendment which subsequently passes shall nevertheless be bound by the amendment so approved.

9.4 **BINDING EFFECT.** This Agreement shall be binding upon the Members' respective heirs, legal representatives, executors, administrators, successors and assigns.

9.5 **SEVERABILITY.** In the event any one or more provisions contained in this Agreement shall, for whatever reason, be held invalid, illegal or unenforceable in any respect, such invalid, illegal or unenforceable provision(s) shall not affect any other provision hereof, and this Agreement shall be construed and enforced as if such invalid, illegal or unenforceable provision(s) had not been contained herein.

9.6 **WAIVER.** No consent or waiver (expressed or implied) by a Member to or of any breach or default by any other Member in the performance of such other Member's obligations hereunder shall be deemed or construed to be consent or waiver to or of any other breach or default in the performance by such other Member of the same or any other obligation(s) of such other Member hereunder. Failure on the part of any Member to complain of any act or failure to act of another Member or to declare that other Member in default, irrespective of how long such failure continues shall not constitute a waiver of the non-complaining Member's rights hereunder.

9.7 **COUNTERPARTS AND COPIES.** This Agreement may be executed in counterparts, each of which will be deemed an original, and all of which together will constitute the same instrument, fully binding on the parties hereto.

9.8 **NOTICES.** Any notice to be given under this Agreement shall be given in writing and may be given personally or by mail. If given by mail, the notice will be deemed duly given when deposited in the United States mail (postage prepaid, certified or registered mail, return receipt requested) addressed to the recipient at the recipient's address shown on the records of the Company (which a Member may change at any time by sending to the Company a notice of change of address satisfying the requirements of this Section)

9.9 **ACTIONS BY WRITTEN CONSENT.** Any action required or permitted by this Agreement or applicable law may, in lieu of actually being taken at a meeting of the Members, be taken without a meeting if such action is consented to in a writing setting forth the action taken and signed by all of the Members entitled to vote with respect to the particular action taken. Such consent shall have the same force and effect as a unanimous vote of the Membership and may be described as such.

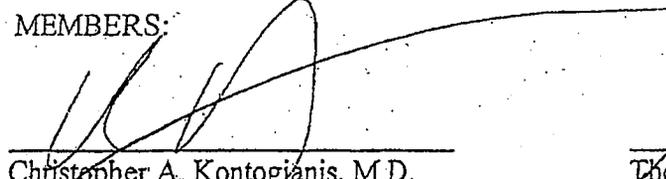
9.10 **WAIVER OF NOTICE.** Whenever any notice is required to be given to any Member by this Agreement or applicable law, a written waiver of notice signed by the person(s) entitled thereto (regardless of whether signed before or after the occurrence of the time or event for which notice was required to be given) shall be the full equivalent to the giving of such notice.

9.11 **RULES OF PROCEDURE.** At any meeting of the Membership, the procedural rules contained in *Robert's Rules of Order on Parliamentary Procedure*, as amended, so far as applicable and when not inconsistent with this Agreement or with any resolution of the Membership, shall be utilized and implemented.

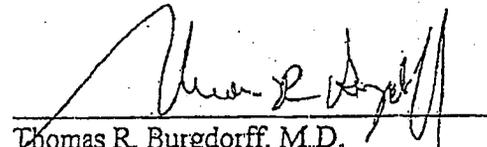
9.12 **PRIOR AGREEMENTS.** This operating agreement fully replaces and supersedes our original operating agreement dated December 30, 2000.

IN WITNESS WHEREOF, the Members hereto have executed and dated this Agreement.

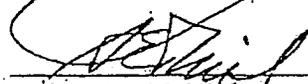
MEMBERS:



Christopher A. Kontogianis, M.D.



Thomas R. Burgdorff, M.D.



Arthur E. Thiel, M.D.

08/01/04

JOSIE DELVIN
BENTON COUNTY CLERK

MAY 05 2006

FILED

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF BENTON

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

Plaintiff,)

vs.)

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

Defendants.)

NO. 05-2-01909-1

AFFIDAVIT OF THOMAS R.
BURGDORFF, M.D.

STATE OF WASHINGTON)
County of Benton) ss.

1. I am over eighteen (18) years of age, I am competent to testify in this matter and I make this affidavit based upon personal knowledge of the facts stated herein.

2. I am a Physician licensed to practice medicine in the state of Washington.

3. Benton Franklin Orthopedic Associates, P.L.L.C. ("BFOA") is a Washington professional limited liability company, whose managing members are myself, Christopher A. Kontogianis, M.D., Aruther E. Thiel, M.D., David W. Fischer, M.D., and Heather L. Phipps, M.D. BFOA operates a medical office in Kennewick, Washington. BFOA employs two physical therapists, Rodney Kump and Jay West, who do business as Benton Franklin Physical Therapy ("BFPT"). In January 21, 2003, several of the physician managing members of BFOA

LAW OFFICES OF
STAMPER, RUBENS,
STOCKER & SMITH, P.S.

720 WEST BOONE, SUITE 200
SPOKANE, WA 99201
TELEFAX (509) 326-4891
TELEPHONE (509) 326-4800



1 shareholders and officers of a corporation called Benton Franklin Physical Therapy, Inc.
2 ("BFPT, Inc."). BFPT, Inc. employed the same two physical therapists, Rodney Kump and Jay
3 West. BFPT, Inc.'s license with the Washington Secretary of State expired on January 31, 2005,
4 and the corporation no longer conducts any business.

5 4. Columbia is a competing professional corporation that offers physical therapy
6 services. Columbia's office building is located in Pasco, Washington. In April, 2004, Richard
7 Wright, who is a physical therapist and the president of Columbia, filed complaints with the
8 Washington State Department of Health against myself, Dr. Kontogianis, and Dr. Thiel,
9 regarding the referrals to the physical therapists at BFPT, Inc. In October, 2004, we prepared,
10 with the assistance of our counsel, a detailed response to the three allegations raised in Mr.
11 Wright's complaint and submitted it to the Washington Department of Health. Attached hereto
12 as Exhibit "A" is a true and correct copy of this letter that was sent to the Washington
13 Department of Health on October 15, 2004.

14 5. The information contained in the October 15, 2004 letter is accurate. Now when a
15 BFOA physician refers a patient to physical therapy, the physician provides the patient with a list
16 of 24 possible physical therapy sites, and specifically advises the patient of the physician's
17 ownership interest in Benton Franklin Physical Therapy. Furthermore, there is a conspicuous
18 notice advising all patients of the same fact. Attached hereto as Exhibit "B" is a true and correct
19 copy of the referral list with the notice.

20 6. The Washington State Department of Health initiated a preliminary investigation
21 into the BFOA and BFPT relationship and whether it violates RCW 19.68.010 and RCW
22 19.68.020. That investigation did not yield facts that would prove a violation of rules or
23 regulations governing BFOA, and no disciplinary action was taken.

24
25 DATED this 25th day of April 2006.

26 By: 

27 THOMAS R. BURGDORFF, M.D.

28 SIGNED AND SWORN to before me this 25th day of April 2006.

29
30 
31 NOTARY PUBLIC in and for the State of
Washington, residing at ~~Spokane~~ Kennecook
My Commission expires: 11/02/2008

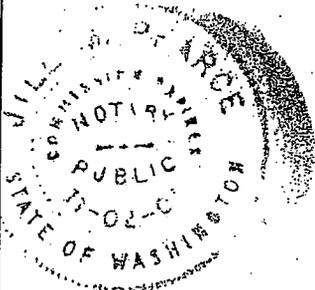


EXHIBIT "A"

LAW OFFICES OF
STAMPER, RUBENS,
STOCKER & SMITH, P.S.

COPY

RANDALL L. STAMPER *
STEVEN R. STOCKER
SCOTT R. SMITH *
ALAN L. RUBENS
THOMAS R. LUCIANI *
MICHAEL H. CHURCH
MICHAEL K. STAUB ***

720 WEST BOONE
SUITE 200
SPOKANE, WASHINGTON 99201
TELEFAX (509) 326-4891
TELEPHONE (509) 326-4800

Of Counsel:
THOMAS SIDNEY SMITH

+ Also admitted in IL
++ Also admitted in TX
* Also admitted in ID
** Also admitted in CA
*** Also admitted in ID and CA

MATTHEW T. RIES **
RACHELLE L. MCFETRIDGE
BRIAN M. WERST
EDWARD H. TURNER ++
MELODY D FARANCE +
MIKEL J. WIER

October 15, 2004

EMAIL: rstamper@stamperlaw.com
WEB SITE: stamperlaw.com

Tom Heafey, HCI III
Department of Health
Medical Investigations Unit
Freeway Plaza Building, Suite 313
1500 West Fourth Avenue
Spokane, WA 99204

Re: Your File Number 2004-04-0086MD

Dear Mr. Heafey:

I am writing in response to your letters to Dr. Burgdorff, Dr. Kontogianis, and Dr. Thiel regarding the complaint received by the Washington State Attorney General's office concerning certain practices at the Benton Franklin Orthopedic Associates facilities. As you know, our office represents Benton Franklin Orthopedic Associates in connection with this investigation. Following, please find the three allegations contained in your letter, with responses thereto.

Allegation 1: "It is alleged that you are referring patients to Benton Franklin Physical Therapy, an entity that you have an ownership in, without making it known the patient has a choice in determining where they receive their physical therapy."

Response: There is no truth in this allegation. When a Benton Franklin Orthopedic Associates physician refers a patient to physical therapy, he provides the patient with a list of 13 possible physical therapy sites, and specifically advises the patient of his ownership interest in Benton Franklin Physical Therapy. Furthermore, there is a conspicuously posted notice advising all patients of the same fact. Attached to this letter please find a copy of the referral list currently being provided to all patients being referred for physical therapy.

Further, the referral numbers do not support the allegation. In the year 2003, Benton Franklin Orthopedic Associates referred approximately 1,139 patients for physical therapy services, of which only 386 patients chose Benton Franklin Physical Therapy. The remaining 753 patients, constituting approximately two-thirds (2/3) of all referrals, opted to seek therapy from physical therapists that had no relationship with the physicians of Benton Franklin Orthopedic Associates.

Allegation 2: "It has also been reported that a patient was told that if she used Benton Franklin Physical Therapy, she would only be charged half price for the visit. The patient did not have medical insurance at the time."

Response: At no time have Benton Franklin Orthopedic Associates physicians offered patients discounts for using Benton Franklin Physical Therapy, or any other provider. On one occasion, a Benton Franklin Orthopedic Associates physician was referring a patient for physical therapy, when the patient advised that since she had no medical insurance, she would be unable to receive physical therapy treatment and would be unable to utilize the referral. The physician advised the patient that he was aware that Benton Franklin Physical Therapy, of which he had an ownership interest, often provided a discount for cash payment for services. This discount is often available to patients who do not have medical insurance, to approximate the cost savings preferred providers receive. This is the usual and customary practice for many providers, as uninsured patients are often required to pay substantially higher prices for services since they do not have the benefit of preferred provider discounts. Benton Franklin Physical Therapy often allows an insured patient to receive the benefit and the same discount as insurance providers. This information was in no way provided to induce a referral, but to advise of a known billing practice. The patient was provided the referral list, advised as to the physician's ownership interest, and advised to investigate her options.

Allegation 3: "In one case, a patient was told that he **could not** go elsewhere."

Response: This allegation is completely false, there is no situation in which a physician or any other provider at Benton Franklin Orthopedic Associates has ever advised a patient of information of this nature.

In addition to the above information, it may be useful to understand the complainant.

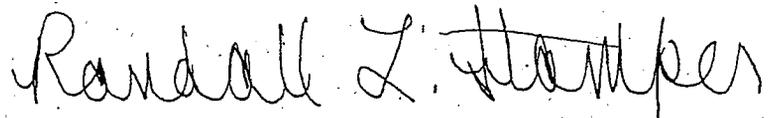
you can see on the attached list.

which

Tom Heafey
October 15, 2004
Page 3

I hope this information has answered the questions raised by the complaint. As you can see, the allegations are unfounded and look suspiciously like a competitor attempting to negatively impact my clients' business for his own benefit. If you should have any questions, or need additional information, please feel free to contact me. Thank you.

Very truly yours,



RANDALL L. STAMPER

Enclosure

cc: Mike Neitzel
Dr. Burgdorff
Dr. Kontogianis
Dr. Thiel

RLM/kp:10/15/2004
H:\Clients\Benton Franklin Surgical\tr Heafey.doc

Benton Franklin Physical Therapy, Inc.
15 West 10th Ave.
Kennewick, WA 99336
Tel: 582-6335 Fax: 582-6375

Columbia Physical Therapy P.S.
1632 West Court
Pasco, WA 99301
Tel: 547-3636 Fax: 545-5095

907 S. Auburn
Kennewick, WA 99336
Tel: 582-0429 Fax: 582-1182

926 Stevens #1D
Richland, WA 99352
Tel: 946-9181 Fax: 946-8247

Hand Works NW
719 Jadwin Ave.
Richland, WA 99352
Tel: 943-8818 Fax:

Healingsouth
122 S. Ely Street
Kennewick, WA 99336
Tel: 783-4644 Fax: 735-7368

Hughs Physical Therapy
3121 W. Kennewick Ave.
Kennewick, WA 99336
Tel: 735-7433 Fax: 735-8577

Kadlec Medical Center
888 Swift Blvd.
Richland, WA 99352
Tel: 942-2660 Fax: 942-2727

KGH Physical Therapy Center
216 W. 10th #101
Kennewick, WA 99336
Tel: 586-5866 Fax: 586-5152

Lourdes Physical Medical Center
9915 Sandifur Parkway
Pasco, WA 99301
Tel: 548-2306 Fax: 548-2347

Oasis Therapy & Sports Rehab
4215 Convention Pl. Suite B
Pasco, WA 99301
Tel: 545-1010 Fax: 545-1112

Our Lady of Lourdes Health Center
9915 Sandifur Parkway Rd 100
Pasco, WA 99301
Tel: 548-2306 Fax: 548-2347

Physical Therapy & Sports
7513-A.W. Kennewick Ave.
Pasco, WA 99301
Tel: 735-4343 Fax: 736-5414

Progressive Rehab Canyon Lakes
2802 W. 35th Ave.
Kennewick, WA 99337
Tel: 586-5633 Fax: 586-5016

Richland Physical Therapy
925 Stevens Drive 3-D
Richland, WA 99352
Tel: 948-8497 Fax: 948-8767

Summit Physical Therapy
830 N. Columbia Center Blvd. Suite B1
Kennewick, WA 99336
Tel: 783-3444 Fax: 735-7711

Therapy Solutions
1313-B Young St.
Kennewick, WA 99336
Tel: 736-6060 Fax: 736-3939

Washington Physical Therapy
3807 W. Court St.
Pasco, WA 99301
Tel: 547-3725 Fax: 547-9852

W. Kennewick Physical Therapy
8390 W. Gage Blvd., Suite 112
Kennewick, WA 99338
Tel: 783-1962 Fax: 783-1706

NOTICE

Benton Franklin Physical Therapy, Inc. is owned and operated by the owners of Benton Franklin Orthopedic Associates, P.L.L.C. Specifically those owners are:

Christopher A. Kontogianis, M.D.
Thomas R. Burgdorff, M.D.
Arthur E. Thiel, M.D.

If for any reason you are uncomfortable with this financial relationship the above list has many other qualified physical therapists from which to choose from. You have a choice in where you receive your care and will not be treated differently by any referring provider at Benton Franklin Orthopedic Associates, P.L.L.C. if you choose one of the alternative facilities.

EXHIBIT "B"

Physical Therapy Offices

Benton Franklin Physical Therapy
15 West 10th Ave., Kennewick
Tel: 582-6335 Fax: 582-6375

Columbia Physical Therapy P.S.
1632 West Court, Pasco
Tel: 547-3636 Fax: 545-5095
907 S. Auburn, Kennewick
Tel: 582-0429 Fax: 582-1182
925 Stevens #1D, Richland
Tel: 946-9191 Fax: 946-8247

Hand Works NW
719 Jadwin Ave., Richland
Tel: 943-8818 Fax: 943-0649

Gale Physical Therapy & Sports
7513-A W. Kennewick Ave., Kennewick
Tel: 735-4343 Fax: 736-5414

Good Shepard PT
Fax: 541-667-3659

Hughes Physical Therapy
3121 W. Kennewick Ave., Kennewick
Tel: 735-7433 Fax: 7356577

Kadlec Medical Center
888 Swift Blvd., Richland
Tel: 942-2660 Fax: 942-2727

KGH Physical Therapy Center
216 W. 10th #101, Kennewick
Tel: 586-5866 Fax: 586-5152

Lourdes Physical Medical Center
9915 Sandifur Parkway Rd 100, Pasco
Tel: 546-2306 Fax: 546-2347

Medical Center Physical Therapy
& Sports Rehab Clinic Yakima
307 S. 12th Ave. Suite 5, Yakima
Tel: 509-453-3103 Fax: 509-453-2057

Oasis Therapy & Sports Rehab
4215 Convention Pl. Suite B, Pasco
Tel: 545-1010 Fax: 545-1112
2418 West Garlic Blvd., Richland
Tel: 375-1015 Fax: 375-1381

Othello Community Hospital PT
315 N. 14th St., Othello
Tel: 509-331-2641 Fax: 509-331-2612

Personal Physical Therapy
702 Jadwin Ste. A, Richland
Tel: 946-9007

Progressive Rehab Canyon Lakes
2802 W. 35th Ave., Kennewick
Tel: 586-5633 Fax: 586-5016

Tri-City Court Club PT
1350 N. Grant, Kennewick
Tel: 783-5465 Fax: 735-3980

Summit Physical Therapy
830 N. Columbia Center Blvd. Ste. B1, Kennewick
Tel: 783-3444 Fax: 735-7711

Swift Rehabilitation
122 S. Ely, Kennewick
Tel: 783-8977 Fax: 783-6151
875 Swift Blvd., Richland
Tel: 943-8977 Fax: 943-6151
5210 Rd.68, Ste. F, Pasco
Tel: 543-7377 Fax: 543-7677

Therapeutic Associates
1408 N. Louisiana St. Ste. 104 A, Kennewick
Tel: 783-1962 Fax: 783-1706
925 Stevens Drive 3-D, Richland
Tel: 946-8497 Fax: 946-8767

Therapy Solutions
552 N. Colorado St. Ste. 200, Kennewick
Tel: 736-6060 Fax: 736-3939

Washington Physical Therapy
3807 W. Court St., Pasco
Tel: 547-3725 Fax: 547-9852

West Kennewick Physical Therapy
1408 N. Louisiana St. Ste. 104-A Kenn
Tel: 783-1962

NOTICE

Benton Franklin Physical Therapy is owned and operated by the owners of Benton Franklin Orthopedic Associates, P.L.L.C.. Specifically those owners are:

Christopher A. Kontogianis, M.D.
Thomas R. Burgdorff, M.D.
Arthur E. Thiel, M.D.
David W. Fischer, M.D.
Heather L. Phipps, D.O.

If for any reason you are uncomfortable with this financial relationship the above list has many other qualified physical therapists from which to choose from. You have a choice in where you receive your care and will not be treated differently by any referring provider at Benton Franklin Orthopedic Associates, P.L.L.C. if you choose one of the alternative facilities.

6002 229 719

ARTICLES OF INCORPORATION

FILED
SECRETARY OF STATE
JAN 21 2003
STATE OF WASHINGTON

FOR

BENTON FRANKLIN PHYSICAL THERAPY, INC.

I, the undersigned person of age eighteen years or more as incorporator of a corporation under the Washington Business Corporation Act, adopt the following Articles of Incorporation for such corporation:

ARTICLE I. NAME

The name of this corporation is BENTON FRANKLIN PHYSICAL THERAPY, INC.

ARTICLE II. DURATION

The period of its duration is perpetual.

ARTICLE III. PURPOSES

This corporation is organized for the following purposes:

- (a) To own, operate and manage a licensed physical therapy facility; and
- (b) To engage in all such activities as are incidental or conducive to the attainment of the purposes of this corporation or any of them and to exercise any and all powers authorized or permitted to be done by a corporation under any laws that may now or hereafter be applicable or available to this corporation.

The foregoing clauses of this Article III shall each be construed as purposes and powers, and the matters expressed in each clause shall be in no way limited or restricted by reference to or inference from the terms of any other clauses, but shall be regarded as independent purposes and powers; and nothing contained in these clauses shall be deemed in any way to limit or exclude any power, right or privilege given to this corporation by law or otherwise.

ARTICLE IV. SHARES

This corporation shall have authority to issue 10,000 shares of common stock, and each share shall have no par value.

ARTICLE V. CONTRACTS IN WHICH DIRECTORS HAVE INTEREST

Any contract or other transaction between this corporation and one or more of its directors, or between this corporation and any corporation, firm, association or other entity of which one or

ARTICLES OF INCORPORATION - 1

COWAN WALKER, P.S.
Attorneys at Law
P.O. Box 927
507 Knight Street, Suite B
Richland, Washington 99352
Telephone (509) 943-2676

D2007-00592
CONFIDENTIAL

EXH 17, DATE 6-15-07
WITNESS [Signature]
ALICE M. WATSON

more of its directors are stockholders, members, directors, officers or employees or in which they are interested, shall be valid for all purposes, notwithstanding the presence of such director or directors at the meeting of the Board of Directors which acts upon or in reference to such contract or transaction and notwithstanding that his or their participation in such action, by voting, or presence for a quorum, might have been necessary to obligate this corporation upon such contract or transaction; provided, that the fact of such interest shall be disclosed to or known by the Directors acting on such contract or transaction.

ARTICLE VI. DIRECTORS

The number of directors of this corporation shall be fixed by the bylaws and may be increased or decreased from time to time in the manner specified therein. The initial Board of Directors shall consist of three directors, and the names and addresses of the persons who shall serve as directors until the first annual meeting of shareholders and until their successors are elected and qualify, unless they resign or are removed, are:

Arthur Thiel

911 S. Washington Suite B
Kennewick WA 99336

Thomas Burgdorff

911 S. Washington Suite B
Kennewick WA 99336

Christopher Kontogianis

911 S. Washington Suite B
Kennewick WA 99336

ARTICLE VII. BYLAWS

The Board of Directors shall have the power to adopt, amend or repeal the bylaws for this corporation, subject to the power of the shareholders to amend or repeal such bylaws.

ARTICLE VIII. REGISTERED OFFICE, AGENT

The address of the initial registered office of this corporation is 911 S. Washington Suite B, Kennewick, Washington 99336 and the name of its initial registered agent is Mike Neitzel.

ARTICLE IX. PREEMPTIVE RIGHTS

Preemptive rights shall exist with respect to shares of stock or securities convertible into shares of stock of this corporation.

ARTICLE X. CUMULATIVE VOTING

The right to cumulate votes in the election of directors shall exist with respect to shares of this corporation.

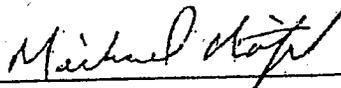
ARTICLE XI. AMENDMENT OF ARTICLES OF INCORPORATION

This corporation reserves the right to amend or repeal, by the affirmative vote of the holders of two-thirds of the shares entitle to vote thereon, any of the provisions contained in these Articles of Incorporation, and the rights of the shareholders of this corporation are granted subject to this reservation.

ARTICLE XII. INCORPORATOR

The name and address of the incorporator is Mike Neitzel, 911 S. Washington Suite B, Kennewick, Washington 99336.

DATED this 1 day of JANUARY, 2003.

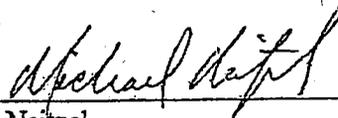


Mike Neitzel

CONSENT TO SERVE AS REGISTERED AGENT

I, MIKE NEITZEL hereby consent to serve as Registered Agent, in the State of Washington, for the following corporation: BENTON FRANKLIN PHYSICAL THERAPY, INC. I understand that as agent for the corporation, it will be my responsibility to receive service of process in the name of the corporation; to forward all mail to the corporation; and to immediately notify the office of the Secretary of State in the event of my resignation, or of any changes in the registered office address of the corporation for which I am agent.

Date: JANUARY 1, 2003.



Mike Neitzel

Registered office address:

911 South Washington, Suite B
Kennewick WA 99336

D2007-00595
CONFIDENTIAL

CONSENT TO SERVE AS REGISTERED AGENT - 1

EXHIBIT "H"

JOSIE DELVIN
BENTON COUNTY CLERK

MAY 05 2006

FILED

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF BENTON

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

Plaintiff,)

vs.)

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

Defendants.)

NO. 05-2-01909-1

AFFIDAVIT OF LISA NOONAN

STATE OF WASHINGTON)

) ss.

County of Thurston)

I, Lisa Noonan, being first duly sworn upon oath, depose and state:

1. I am over eighteen (18) years of age, I am competent to testify in this matter and I make this affidavit based upon personal knowledge of the facts stated herein.

2. I am the Disciplinary Manager for the Medical Quality Assurance Commission for the State of Washington Department of Health (hereinafter referred to as the "Commission"). My office is located at 310 Israel Road, P.O. Box 47866, Olympia, Washington 98504-7866. I

AFFIDAVIT OF LISA NOONAN: 1

A-43

COPY

LAW OFFICES OF
STAMPER, RUBENS,
STOCKER & SMITH, P.S.

720 WEST BOONE, SUITE 200
SPOKANE, WA 99201
TELEFAX (509) 326-4891
TELEPHONE (509) 326-4800

1 have been the Disciplinary Manager for the Commission for 4 years. I have worked for the
2 Commission in various roles for over 15 years.

3
4 3. Part of my duties as the Disciplinary Manager is to oversee the investigation of
5 complaints regarding allegations of unprofessional conduct by practicing physicians in the State
6 of Washington. RCW 18.130.050, the Uniform Disciplinary Act authorizes the Commission to
7 investigate complaints of unprofessional conduct.

8
9 4. The following describes the process as it was prior to July 2005.

10 5. The Commission staff and board members manage each case through the initial
11 complaint and disciplinary process. They work with investigators, staff attorneys, and the Office
12 of the Attorney General to identify violations and evaluate evidence. If the evidence does not
13 support the circumstances contained in the complaint, the complaint is closed. If the evidence
14 suggests a violation, the case is presented to a panel of members from the Commission for a
15 decision to close the case or for approval to take action for unprofessional conduct.

16
17 6. The adjudicative procedures that govern the complaint and disciplinary process
18 are described in the Administrative Procedure Act Title 35 RCW. The disciplinary actions the
19 Department and board may take against a health care provider are described in the Uniform
20 Disciplinary Act under RCW 18.130.160. Actions the Commission may take against health care
21 providers include, but are not limited to, fines, counseling, re-training, practice limitations, or
22 suspension from practice. The Commission is responsible to ensure first that the public is
23 protected and then to rehabilitate the health care provider.

24
25 7. When the Commission receives a complaint regarding a physician or a physician
26 assistant practitioner an intake coordinator sets up the case file, checks the license status of the
27 practitioner, and researches prior disciplinary history. Information received by the intake
28 coordinator is logged into the computer tracking system and the file is given a number. A
29 physician assistant consultant then reviews the information and may present the complaint and
30 initial information to the Initial Review Panel of the Commission. The Initial Review Panel
31 meets and reviews the information and makes a preliminary analysis as to whether an
investigation is warranted. If the Initial Review Panel recommends that an investigation take

1 place, the matter is forwarded to an investigator from the Department of Health, Medical
2 Investigations Unit. Alternatively, the physician assistant consultant may send the complaint and
3 file directly to an investigator from the Department of Health, Medical Investigations Unit. The
4 investigator reviews the documents submitted and interviews witnesses and gathers other
5 relevant facts.

6
7 8. All completed investigations are presented to an Initial Review Panel of the
8 Commission. The Initial Review Panel considers the facts of the investigation and either sends it
9 to a reviewing commissioner and the legal unit for a legal review, or closes the case because
10 there is no cause for action. The case may be closed for various reasons including a
11 determination that the evidence does not support the allegation, or disproves the allegation.

12
13 9. If the case is not closed, a Reviewing Commission Member (RCM) reviews the
14 case and presents the facts to a case review panel of the Commission. The RCM makes a
15 recommendation concerning the case, but does not participate in the decision making. The panel
16 considers the facts and comes to a decision. That decision may be to get more information, to
17 order formal or informal action, or to close the case. All cases are presented in closed session
18 without revealing the practitioner's name or location.

19
20 10. On April 20, 2004, the Washington State Department of Health received a
21 complaint regarding Dr. Thomas R. Burgdorff, Case No. 2004-04-0086MD. The Washington
22 State Department of Health also received complaints on April 20, 2004, against Dr. Christopher
23 Kontogianis, Case No. 2004-04-0084MD, and Dr. Arthur E. Thiel, Case No. 2004-04-0085MD.
24 One complaint against all three physicians was initially filed with Office of the Attorney
25 General, who then forwarded it to the Washington Department of Health. Attached hereto as
26 Exhibit "A" is a copy of the Intake Sheet showing the cases open on April 23, 2004, as well as a
27 copy of the initial complaint which has been redacted to protect the identity of the complainant.

28
29 11. Since the same complaint was filed against all three physicians, the Washington
30 Department of Health assigned a different case number for each physician and assigned the same
31 intake coordinator for each case, Cindy Hamilton. When she received the complaints, she set up
the files, researched the physicians' licensing status, as well as their educational background and

1 other certification information. She similarly researched any prior disciplinary history for the
2 physicians, as well as prior complaints made by the complainant. Ms. Hamilton then presented
3 the file to the Physician Assistant-Consultant, Lynn Larsen-LeVier who reviewed the
4 information and allegations and performed an initial assessment of the complaint. Since the
5 complaints and information concerning the physicians is virtually the same in each of the files,
6 and the files were handled by and reviewed by the same persons, I will refer to Dr. Burgdorff's
7 file as an outline on the Commission's review process. Attached hereto as Exhibit "B" is a true
8 and correct copy of this information that Ms. Hamilton placed in the file concerning Dr.
9 Burgdorff. Attached hereto as Exhibit "C" is a true and correct copy of documentation
10 concerning prior complaints made by the complainant, which have been redacted to protect the
11 identity of the complainant.

12
13 12. PA-Consultant, Lynn Larsen-LeVier, decided to send the complaint and file
14 directly to an investigator from the Department of Health, Medical Investigations Unit. Attached
15 hereto as Exhibit "D" is a true and correct copy of the document prepared by Ms. Larsen-LeVier.

16
17 13. James H. Smith was the Chief Investigator from the Department of Health,
18 Medical Investigations Unit assigned to investigate the cases and his office is located in
19 Olympia. Thomas R. Heafey, whose office was located in Spokane, Washington, was the health
20 care investigator assigned to interview the parties and to gather the facts. Attached hereto as
21 Exhibit "E" is a letter to Dr. Burgdorff from James H. Smith, Chief Investigator of the
22 Commission dated April 28, 2004. James H. Smith sent similar letters to the Complainant
23 informing them of the status of the investigation.

24
25 14. On June 14, 2004, the law office of Stamper, Rubens, Stocker & Smith, P.S. filed
26 a Notice of Appearance on behalf of all three physicians before the Commission. A true and
27 correct copy of this Notice of Appearance is attached hereto as Exhibit "F."

28
29 15. On September 29, 2004, Investigator Thomas R. Heafey met with the
30 administrator, Mike Neitzel, at Benton Franklin Orthopedic Associates, PLLC, in Kennewick,
31 Washington, to discuss the matter and the complaints.

1 16. On October 6, 2004, Investigator Thomas R. Heafey sent Dr. Burgdorff a letter
2 informing Dr. Burgdorff of the investigation and directing Dr. Burgdorff to provide a full and
3 complete explanation in the matter under investigation and provide copies of any papers or
4 documents in his possession. A true and correct copy of this letter is attached hereto as Exhibit
5 "G."

6
7 17. On October 15, 2004, the attorney for Dr. Burgdorff, and the other physicians,
8 filed a detailed response responding to each of the allegations and accusations. A true and
9 correct copy of this letter is attached hereto as Exhibit "H."

10 18. On October 18, 2004, Investigator Thomas R. Heafey completed his investigation
11 and forwarded his report and information about Dr. Burgdorff's file to the Commission's Chief
12 Investigator, James H. Smith. Mr. Smith reviewed the report and gave his approval of the report
13 on October 25, 2004. A true and correct copy of this report is attached hereto as Exhibit "I."

14
15 19. The completed investigation report of the physicians' files were then sent back to
16 PA-Consultant, Lynn Larsen-LeVier, to analyze the additional information and prepare a report
17 to present to the Initial Review Panel of the Commission. On January 26, 2005, Ms. Larsen-
18 LeVier presented her report to the Initial Review Panel of the Commission. Present at this
19 meeting were four Commissioners, Hampton Irwin, MD, Frederick Dore, MD, Kenneth Cogen,
20 MD and Judy Tobin, Public Member, as well as PA-Consultant, Lynn Larsen-LeVier, as well as
21 the Chief Investigator, James H. Smith. The Panel again considered the complaint and discussed
22 the facts of the investigation with the PA-Consultant and the Chief Investigator. Attached hereto
23 as Exhibit "J" is a true and correct copy of the report that was presented to the Commission for
24 its review.

25
26 20. After a careful and thorough investigation of the records and information obtained
27 during the investigation, the Initial Review Panel Commission determined that there was no
28 cause for action due to the fact that the evidence did not support the allegations. The Panel
29 determined that that files should be closed and no further proceedings or investigation should
30 take place. On January 31, 2005, I sent letters to the physicians explaining the Commission's
31

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decision. Attached hereto as Exhibit "K" is a true and correct copy of the letter I sent to Dr. Burgdorff on January 31, 2005.

Lisa Noonan
LISA NOONAN

SIGNED AND SWORN to before me this 26th day of April, 2006.



Nicki Creighton
NOTARY PUBLIC in and for the State of
Washington, residing at ~~Spokane~~ Olympia
My Commission expires: 2-15-07

H:\BentonFranklin\Columbia\BentonFranklin\NoonanAffr.doc

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E. KAY STAPLES
BENTON COUNTY CLERK

AUG 19 2005

FILED

SUPERIOR COURT OF WASHINGTON IN AND FOR BENTON COUNTY

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

Plaintiff,

v.

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

Defendants.

No. **05-2-01909-1**
COMPLAINT

Plaintiff Columbia Physical Therapy, Inc., P.S. (Columbia) avers:

I. PARTIES

1.1 Plaintiff Columbia is a Washington corporation doing business in the state of Washington. Columbia has satisfied all requisites to the maintenance of this lawsuit.

1.2 Defendant Benton Franklin Orthopedic Associates, P.L.L.C. (BFOA) is a Washington corporation doing business in the State of Washington.

COMPLAINT - 1

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A-49

COPY

STAFFORD FREY COOPER

PROFESSIONAL CORPORATION

601 Union Street, Suite 3100

Seattle WA 98101.1574

TEL 206.625.0900 FAX 206.624.8885

1 1.3. Defendants Thomas R. Burgdorff, M.D.; Christopher A. Kontogianis, M.D.;
2 Arthur E. Thiel, M.D.; David W. Fischer, M.D.; and Heather L. Phipps, D.O. are the
3 physician-owners of BFOA and Benton Franklin Physical Therapy, Inc. (BFPT).

4 1.4 Other defendants, corporate or otherwise, designated as Does 1 through
5 9, are presently unknown to plaintiff, who therefore sues said defendants by such
6 fictitious names. Plaintiff is informed, believes and thereon alleges that each of the
7 defendants fictitiously named herein as a Doe are legally responsible in some manner
8 for the statutory violations hereinafter alleged. Plaintiff will seek to amend this
9 Complaint to insert the true names and/or capacities of said fictitiously named
10 defendants if and when the same have been ascertained.

11 II. JURISDICTION AND VENUE

12 2.1. This Court has jurisdiction over the parties and the subject matter of this
13 lawsuit. Venue is proper in Benton County, Washington under RCW 4.12.025 as
14 Defendant corporation resides in Benton County.

15 III. FACTUAL BACKGROUND

16 3.1. BFOA is a physician-owned orthopedic clinic located in Kennewick,
17 Washington. BFOA was incorporated on November 19, 1999, and is owned by the
18 following physicians: Thomas R. Burgdorff, M.D.; Christopher A. Kontogianis, M.D.;
19 Arthur E. Thiel, M.D.; David W. Fischer, M.D.; Heather L. Phipps, D.O; and John and/or
20 Jane Does 1-9.

21 3.2. These physicians also own and operate Benton Franklin Physical
22 Therapy, Inc. (BFPT). BFPT is also located in Kennewick, and was incorporated on
23 January 21, 2003. As a consequence of their ownership of BFPT, Defendant

COMPLAINT - 2

\\CLMDEV761102882708APLD\COMPLAINT.DOC

STAFFORD FREY COOPER

PROFESSIONAL CORPORATION

801 Union Street, Suite 3100

Seattle WA 98101, 1974

TEL 206.629.9900 FAX 206.624.6885

1 physicians have legal, financial, and managerial control over BFPT, to include the right
2 to keep profits derived from BFPT's provision of medical treatment to patients.

3 3.3. Defendant physicians refer patients for physical therapy to BFPT and the
4 profits of this treatment inure to said Defendant physicians. Defendants' referral of
5 patients to their own corporation unfairly reduces the number of patients seen by other
6 physical therapy clinics, including Plaintiff Columbia. Such referrals are unlawful under
7 Washington's anti-rebate statute, constitute unprofessional conduct, and otherwise
8 violate Washington's Consumer Protection Act.

9 IV. CAUSES OF ACTION

10 4.1. RCW 19.68.010—anti-rebate. Beginning at least as early as 2003, the
11 exact date being unknown to Plaintiff, and continuing up to and including the date of this
12 Complaint, Defendants unlawfully referred patients to BFPT. Given Defendant
13 physicians' status as sole shareholders of BFPT, any profits or other gain BFPT derives
14 from providing physical therapy to patients inure to those physicians. Such an
15 arrangement violates RCW 19.68.010, which prohibits the receipt by Defendants of any
16 form of profit flowing from the referral of patients for medical treatment.

17 4.2. RCW 19.68.020 and RCW 18.130.180—unprofessional conduct.
18 Likewise, Defendants' receipt of any profits or other valuable consideration resulting
19 from its ownership of BFPT constitutes unprofessional conduct under RCW 19.68.020
20 and RCW 18.130.180.

21 4.3. RCW 19.86.020—Consumer Protection. Furthermore, Defendants'
22 business practices violate Washington's Consumer Protection Act. Specifically,
23 Defendants engaged in unfair acts and methods of competition when they created a

COMPLAINT - 3

REVOLVENT\1026927\03-14-05\COMPLAINT.DOC

STAFFORD FREY COOPER

PROFESSIONAL CORPORATION

501 Union Street, Suite 3100

Seattle WA 98101.1374

TEL 206.623.9900 FAX 206.624.6665

1 physical therapy corporation to which they could refer patients. Defendants unlawfully
 2 refer patients to their own corporation, thus unfairly reducing the referrals to other area
 3 physical therapists, including Plaintiff Columbia.

4 **V. PRAYER FOR RELIEF**

5 WHEREFORE, Columbia requests the following relief:

6 5.1. For judgment in favor of Columbia and against Defendants granting
 7 injunctive relief against Defendants preventing further violations of RCW 18.130.180 (as
 8 allowed under RCW 18.130.185);

9 5.2. For judgment in favor of Columbia and against Defendants disciplining
 10 Defendants for violating RCW 19.68.020 (as allowed under RCW 19.68.030);

11 5.3. For judgment in favor of Columbia and against Defendants for treble
 12 damages and attorney fees resulting from Defendants' unfair acts and methods of
 13 competition, in an amount to be proven at trial (as allowed under RCW 19.86.090);

14 5.4. For Columbia's attorneys' fees and costs incurred herein;

15 5.5. For such other and further relief as the Court deems just and equitable.

16
 17 DATED this 11th day of August, 2005.

18 STAFFORD FREY COOPER

19
 20 By 
 21 Marcus B. Nash, WSBA #14471
 22 Darrin E. Bailey, WSBA #34955
 23 Attorneys for Plaintiff

The Honorable Dennis Yule

SUPERIOR COURT OF WASHINGTON
IN AND FOR BENTON COUNTY

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

Plaintiff,

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,

Defendants.

NO. 05-2-01909-1

PLAINTIFF'S SECOND AMENDED
COMPLAINT

Plaintiff Columbia Physical Therapy, Inc., P.S. (Columbia) avers:

I. PARTIES

1.1. Plaintiff Columbia is a Washington corporation doing business in the state of Washington. Columbia has satisfied all requisites to the maintenance of this lawsuit.

1.2. Defendant Benton Franklin Orthopedic Associates, P.L.L.C. (BFOA) is a Washington Professional Limited Liability Company doing business in the State of Washington as a medical office.

COPY

1 1.3. Defendant Benton Franklin Physical Therapy, Inc. (BFPT) is a Washington
2 corporation doing business in the State of Washington as a physical therapy practice.
3 State records indicate BFPT's corporate license expired on January 31, 2005; however
4 BFOA advertises that it continues to do business as "Benton Franklin Physical
5 Therapy."

6 1.4. Defendants Thomas R. Burgdorff, M.D.; Christopher A. Kontogianis, M.D.;
7 Arthur E. Thiel, M.D.; David W. Fischer, M.D.; and Heather L. Phipps, D.O. are licensed
8 to practice medicine in the State of Washington. They are the physician-owners of
9 BFOA and Benton Franklin Physical Therapy (BFPT).

10 1.5. Defendants Rodney D. Kump, D.P.T. and Jay M. West, M.P.T. are
11 physical therapists at Benton Franklin Physical Therapy, and/or Benton Franklin
12 Orthopedic Associates d/b/a Benton Franklin Physical Therapy. Kump and West are
13 licensed to practice physical therapy in the State of Washington.

14 1.6. Other defendants, corporate or otherwise, designated as Does 1 through
15 9, are presently unknown to plaintiff, who therefore sues said defendants by such
16 fictitious names. Plaintiff is informed, believes and thereon alleges that each of the
17 defendants fictitiously named herein as a Doe are legally responsible in some manner
18 for the statutory violations hereinafter alleged. Plaintiff will seek to amend this
19 Complaint to insert the true names and/or capacities of said fictitiously named
20 defendants if and when the same have been ascertained.

1 physicians. Defendant physical therapists receive compensation from Defendant
2 physicians for providing physical therapy care to their patients.

3 3.4 Defendants' referrals of patients to their own physical therapy corporation
4 or business are unlawful under Washington's anti-rebate statute, constitute
5 unprofessional conduct, and violate Washington's Consumer Protection Act.

6 3.5 Defendant physicians profit from physical therapy care provided at BFPT
7 and/or BFOA's physical therapy office, which is unprofessional conduct and unlawful
8 under Washington's anti-rebate statute.

9 3.6 Defendant BFOA, defendant physicians, and BFOA employees are
10 engaged in business other than the rendering of professional services for which their
11 company was formed or for which they are licensed.

12 3.7 Defendant physical therapists practice physical therapy as part of a
13 company owned by physicians.

14 IV. CAUSES OF ACTION

15 4.1. RCW 19.68.010—anti-rebate. Beginning at least as early as 2003, the
16 exact date being unknown to Plaintiff, and continuing up to and including the date of this
17 Complaint, Defendants unlawfully referred patients to BFPT and/or BFOA's physical
18 therapy office. Given Defendant physicians' status as sole shareholders of BFPT
19 and/or BFOA, any profits or other gain BFPT and/or BFOA's physical therapy office
20 derives from providing physical therapy to patients inure to those physicians. Such an
21 arrangement violates RCW 19.68.010, which prohibits the receipt by Defendants of any
22 form of profit flowing from the referral of patients for treatment.

1 4.2. RCW 19.68.020 and RCW 18.130.180—unprofessional conduct.

2 Defendants' receipt of any profits or other valuable consideration resulting from its
3 ownership of BFPT and/or a physical therapy office constitutes unprofessional conduct
4 under RCW 19.68.020 and RCW 18.130.180.

5 4.3. RCW 19.86.020—Consumer Protection. Defendants' business practices

6 violate Washington's Consumer Protection Act. Specifically, Defendants engaged in
7 unfair acts and methods of competition when they created a physical therapy
8 corporation and/or opened a physical therapy office to which they could refer patients.
9 Defendants unlawfully refer patients to their own physical therapy office, thus unfairly
10 reducing the referrals to other area physical therapists, including Plaintiff Columbia.

11 4.4. RCW 18.100.010 et seq—Professional Services Corporation Act.

12 Defendant corporation and defendant physicians are engaged in business other than
13 the rendering of professional services for which their company was formed. Likewise,
14 Defendant physical therapists are not duly licensed to perform the same professional
15 services for which the company was formed.

16 4.5. Washington's Corporate Practice of Medicine Doctrine. Defendant BFOA

17 and its physicians violate the corporate practice of medicine doctrine by engaging in the
18 practice of a learned profession through licensed employees without legislative
19 authorization. Defendant physical therapists violate this doctrine by performing
20 professional services through a company without legislative authorization.

1 V. PRAYER FOR RELIEF

2 WHEREFORE, Columbia requests the following relief:

3 5.1. For judgment in favor of Columbia and against Defendants granting
4 injunctive relief against Defendants preventing further violations of RCW 18.130.180 (as
5 allowed under RCW 18.130.185) and RCW Chapter 18.100;

6 5.2. For judgment in favor of Columbia and against Defendants disciplining
7 Defendants for violating RCW 19.68.020 (as allowed under RCW 19.68.030);

8 5.3. For judgment in favor of Columbia and against Defendants for treble
9 damages and attorney fees resulting from Defendants' unfair acts and methods of
10 competition, in an amount to be proven at trial (as allowed under RCW 19.86.090);

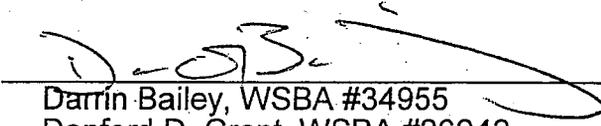
11 5.4. For judgment in favor of Columbia and against Defendants and ordering
12 the immediate dissolution of Defendants' company;

13 5.5. For Columbia's attorneys' fees and costs incurred herein;

14 5.6. For such other and further relief as the Court deems just and equitable.

15
16 DATED this 5th day of June, 2007.

17 STAFFORD FREY COOPER

18
19 By: 

20 Darrin Bailey, WSBA #34955
21 Danford D. Grant, WSBA #26042
22 Attorneys for Plaintiff
23

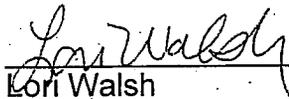
1 Certificate of Service

2 The undersigned certifies under the penalty of perjury according to the laws of the
3 United States and the State of Washington that on this date I caused to be served in the
4 manner noted below a copy of this document entitled PLAINTIFF'S SECOND
5 AMENDED COMPLAINT on the following individual(s):

6 Matthew T. Ries, 29407
7 Stamper, Rubens, Stocker & Smith, PS
8 Suite 200 Post Place
9 720 West Boone
10 Spokane, WA 99201
11 (509) 326-4800
12 FAX: (509) 326-4891
13 *Attorneys for Defendants*

- 14 Via Facsimile
15 Via First Class Mail
16 Via Messenger

17 DATED this 5th day of June, 2007, at Seattle, Washington.

18 
19 _____
20 Lori Walsh

The Honorable Dennis D. Yule

RECEIVED

JUL 19 2007

STAMPER, RUBENS
STOCKER & SMITH

SUPERIOR COURT OF WASHINGTON
IN AND FOR BENTON COUNTY

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

NO. 05-2-01909-1

Plaintiff,

PLAINTIFF'S THIRD AMENDED
COMPLAINT

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,

Defendants.

Plaintiff Columbia Physical Therapy, Inc., P.S. (Columbia) avers:

I. PARTIES

1.1. Plaintiff Columbia is a Washington corporation doing business in the state of Washington. Columbia has satisfied all requisites to the maintenance of this lawsuit.

1.2. Defendant Benton Franklin Orthopedic Associates, P.L.L.C. (BFOA) is a Washington Professional Limited Liability Company doing business in the State of Washington as a medical office.

1 1.3. Defendant Benton Franklin Physical Therapy, Inc. (BFPT) is a Washington
2 corporation doing business in the State of Washington as a physical therapy practice.
3 State records indicate BFPT's corporate license expired on January 31, 2005; however
4 BFOA advertises that it continues to do business as "Benton Franklin Physical
5 Therapy."

6 1.4. Defendants Thomas R. Burgdorff, M.D.; Christopher A. Kontogianis, M.D.;
7 Arthur E. Thiel, M.D.; David W. Fischer, M.D.; and Heather L. Phipps, D.O. are licensed
8 to practice medicine in the State of Washington. They are the physician-owners of
9 BFOA and Benton Franklin Physical Therapy (BFPT).

10 1.5. Defendants Rodney D. Kump, D.P.T. and Jay M. West, M.P.T. are
11 physical therapists at Benton Franklin Physical Therapy, and/or Benton Franklin
12 Orthopedic Associates d/b/a Benton Franklin Physical Therapy. Kump and West are
13 licensed to practice physical therapy in the State of Washington.

14 1.6. Other defendants, corporate or otherwise, designated as Does 1 through
15 9, are presently unknown to plaintiff, who therefore sues said defendants by such
16 fictitious names. Plaintiff is informed, believes and thereon alleges that each of the
17 defendants fictitiously named herein as a Doe are legally responsible in some manner
18 for the statutory violations hereinafter alleged. Plaintiff will seek to amend this
19 Complaint to insert the true names and/or capacities of said fictitiously named
20 defendants if and when the same have been ascertained.

1 physicians. Defendant physical therapists receive compensation from Defendant
2 physicians for providing physical therapy care to their patients.

3 3.4 Defendants' referrals of patients to their own physical therapy corporation
4 or business are unlawful under Washington's anti-rebate statute, constitute
5 unprofessional conduct, and violate Washington's Consumer Protection Act.

6 3.5 Defendant physicians profit from physical therapy care provided at BFPT
7 and/or BFOA's physical therapy office, which is unprofessional conduct and unlawful
8 under Washington's anti-rebate statute.

9 3.6 Defendant BFOA, defendant physicians, and BFOA employees are
10 engaged in business other than the rendering of professional services for which their
11 company was formed or for which they are licensed.

12 3.7 Defendant physical therapists practice physical therapy as part of a
13 company owned by physicians.

14 IV. CAUSES OF ACTION

15 4.1. RCW 19.68.010—anti-rebate. Beginning at least as early as 2003, the
16 exact date being unknown to Plaintiff, and continuing up to and including the date of this
17 Complaint, Defendants unlawfully referred patients to BFPT and/or BFOA's physical
18 therapy office. Given Defendant physicians' status as sole shareholders of BFPT
19 and/or BFOA, any profits or other gain BFPT and/or BFOA's physical therapy office
20 derives from providing physical therapy to patients inure to those physicians. Such an
21 arrangement violates RCW 19.68.010, which prohibits the receipt by Defendants of any
22 form of profit flowing from the referral of patients for treatment.

1 4.2. RCW 19.68.020 and RCW 18.130.180—unprofessional conduct.
2 Defendants' receipt of any profits or other valuable consideration resulting from its
3 ownership of BFPT and/or a physical therapy office constitutes unprofessional conduct
4 under RCW 19.68.020 and RCW 18.130.180.

5 4.3. RCW 19.86.020—Consumer Protection. Defendants' business practices
6 violate Washington's Consumer Protection Act. Specifically, Defendants engaged in
7 unfair acts and methods of competition when they created a physical therapy
8 corporation and/or opened a physical therapy office to which they could refer patients.
9 Defendants unlawfully refer patients to their own physical therapy office, thus unfairly
10 reducing the referrals to other area physical therapists, including Plaintiff Columbia.

11 4.4. RCW 25.15.045 (Professional Limited Liability Companies) and RCW
12 18.100.010 et seq—Professional Services Corporation Act. Defendant corporation and
13 defendant physicians are engaged in business other than the rendering of professional
14 services for which their company was formed. Likewise, Defendant physical therapists
15 are not duly licensed to perform the same professional services for which the company
16 was formed.

17 4.5 Washington's Corporate Practice of Medicine Doctrine. Defendant BFOA
18 and its physicians violate the corporate practice of medicine doctrine by engaging in the
19 practice of a learned profession through licensed employees without legislative
20 authorization. Defendant physical therapists violate this doctrine by performing
21 professional services through a company without legislative authorization.
22
23

1
2 **V. PRAYER FOR RELIEF**

3 WHEREFORE, Columbia requests the following relief:

4 5.1. For judgment in favor of Columbia and against Defendants granting
5 injunctive relief against Defendants preventing further violations of Washington's
6 corporate practice of medicine doctrine, RCW 19.68 *et seq.*, RCW 18.130.180 (as
7 allowed under RCW 18.130.185), RCW 25.15.045, and RCW Chapter 18.100 *et seq.*

8 5.2. For judgment in favor of Columbia and against Defendants for treble
9 damages and attorney fees resulting from Defendants' unfair acts and methods of
10 competition, in an amount to be proven at trial (as allowed under RCW 19.86.090);

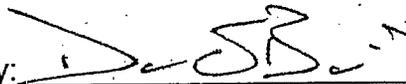
11 5.3. For judgment in favor of Columbia and against Defendants and ordering
12 the immediate dissolution of Defendants' company;

13 5.4. For Columbia's attorneys' fees and costs incurred herein;

14 5.5. For such other and further relief as the Court deems just and equitable.

15
16 DATED this 17th day of July, 2007.

17 STAFFORD FREY COOPER

18
19 By: 
20 Darrin Bailey, WSBA #34955
21 Danford D. Grant, WSBA #26042
22 Attorneys for Plaintiff
23

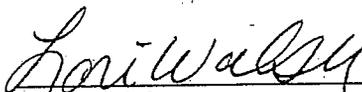
Certificate of Service

The undersigned certifies under the penalty of perjury according to the laws of the United States and the State of Washington that on this date I caused to be served in the manner noted below a copy of this document entitled PLAINTIFF'S THIRD AMENDED COMPLAINT on the following individual(s):

Matthew T. Ries, 29407
Stamper, Rubens, Stocker & Smith, PS
Suite 200 Post Place
720 West Boone
Spokane, WA 99201
(509) 326-4800
FAX: (509) 326-4891
Attorneys for Defendants

- Via Facsimile
- Via First Class Mail
- Via Messenger

DATED this 17th day of July, 2007, at Seattle, Washington.



Lori Walsh

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
2 IN AND FOR THE COUNTY OF BENTON

3 COLUMBIA PHYSICAL THERAPY,)
4 INC., P.S.,)

Plaintiff,)

5 vs.)

6 BENTON FRANKLIN ORTHOPEDIC)
7 ASSOCIATES, P.L.L.C; BENTON)
8 FRANKLIN PHYSICAL THERAPY,)
9 INC.; THOMAS R. BURGENDORFF;)
10 CHRISTOPHER A. KONTOGIANIS;)
11 ARTHUR E. THIEL; DAVID W.)
12 FISCHER; HEATHER L. PHIPPS;)
13 RODNEY KUMP; JAY WEST; and)
14 DOES 1 through 9,)

Defendants.)

CAUSE NO. 05-2-01909-1

(Motions for Summary Judgment)
(Judge's Decision)

VERBATIM REPORT OF
PROCEEDINGS

15 TRANSCRIPT

16 of the proceedings had in the above-entitled cause before the
17 HONORABLE DENNIS D. YULE, Superior Court Judge, on April 4,
18 2007, at Kennewick, Washington.

19 APPEARANCES:

20 STAFFORD FREY COOPER, P.C. (by:)
21 DARRIN BAILEY
22 601 Union Street, Suite 3100
23 Seattle, Washington 98101

On Behalf of the Plaintiff

(Continued on next page...)

Lisa S. Lang - Official Court Reporter

1 APPEARANCES: (continuation)

2 STAMPER, RUBENS, STOCKER & SMITH, P.S. (by:)
3 MATTHEW T. RIES and
RANDALL L. STAMPER

153288

4 Suite 200 Post Place
720 West Boone
5 Spokane, Washington 99201

6 On Behalf of the Defendants
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□ Page 3

1 April 4, 2007

2 Kennewick, Washington

3 PROCEEDINGS

4 THE COURT: Thank you very much, counsel. I
5 appreciate your briefing and your excellent arguments.

6 The Court concludes with respect to 19.68.040 there
7 are questions of fact relating to the degree and nature of
8 supervision of the physical therapists. The construction of

Page 2

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9 19.68.040 and its use of the term license, as I indicated
10 during argument, I think is a fairly compelling argument just
11 on the four corners of the statute. That was an initial
12 impression I had as I was reading through it, but that
13 certainly wasn't what the Day court indicated, and I would
14 agree that that would have been addressed if that was
15 considered to be a problem.

16 With respect to 19.68.010(2), by its terms, that
17 applies only to enterprises providing diagnostic services,
18 and I'm not persuaded that a declaration by a physical
19 therapist that he's doing diagnostic work brings it within
20 any reasonable meaning of the statute. That stretches the
21 term diagnostic or diagnosis I believe beyond any
22 commonly-accepted definition. So I do not -- I construe the
23 statute as not extending to, in this case, physical therapy.

24 In any event, I think there are, again, issues of fact
25 with respect to the required disclosures as to ownership and

Page 4

1 alternative sources of services. The 19.68 cause of action
2 -- and that's been clarified apparently there is no dispute
3 that that is related -- is limited to injunctive relief, and
4 I was going to clarify that, but I gather that that is
5 understood and agreed by the parties that the only relief to
6 which the plaintiffs would be entitled under 19.68 would be
7 injunctive relief.

8 MR. BAILEY: Your Honor, if I may interrupt
9 real quick, there's the suspension of the license, which I
10 don't know if that's considered injunctive relief, but that
11 falls within --

12 THE COURT: Yeah. I would include whatever is
13 under that statute.

Page 3

14 With respect to the Consumer Protection Act cause of
15 action, the claims asserted by the plaintiffs with respect to
16 unfair and deceptive practices I do not find to be exempt
17 from the provisions of the Consumer Protection Act. They are
18 not the equivalent of unprofessional conduct necessarily and
19 are not precluded by any regulatory jurisdiction over
20 unprofessional conduct.

21 If the claims were potentially exempt, I conclude that
22 there is no evidence that the Medical Quality Assurance
23 Commission permitted the claimed practices. The conclusion
24 by the Commission based on its investigation that there was
25 insufficient evidence to go forward is not, in the Court's

Page 5

1 view, the equivalent of an express regulatory permission that
2 would wrest these claims from the jurisdiction of this Court.
3 I believe that there is jurisdiction.

4 I note that the objective of the Consumer Protection
5 Act is to protect competition, not individual competitors.
6 The case law would appear to me to be broad enough to include
7 the plaintiffs within those who may raise those claims under
8 the Consumer Protection Act, and the Court accordingly will
9 deny the defendant's Motions For Summary Judgment.

10 The plaintiff's motion to -- Motion in Limine, Motion
11 to strike the testimony of certain experts and a Motion in
12 Limine to preclude Dr. DeKay from testifying at trial are
13 denied. Those issues have been addressed not separately, but
14 within the arguments on the Motion for Summary Judgment, and
15 I conclude that they would be testifying within the purview
16 of an expert witness. To the extent that the objection is
17 based upon their not having personal knowledge of facts, that
18 is typically the case of experts.

Page 4

19 The plaintiff has demonstrated to the Court's
20 satisfaction the provision of information and evidence, which
21 certainly will be contested at trial and ultimately decided
22 by the trier of fact, but which are for the purpose of their
23 being considered with respect to the hearing today, and Dr.
24 DeKay's testimony as an expert in trial are a sufficient
25 basis for their testifying, so that the Motion in Limine,

Page 6

1 Motion to Strike, is denied as well.

2 Counsel, I have just -- I realized when I was handed
3 this file that there are a collection of documents I think
4 that have been provided by the defendants initially provided
5 to Judge Runge apparently for in-camera review.

6 MR. BAILEY: Yes, Your Honor.

7 THE COURT: I have not had a chance to look at
8 those. I assume you're still awaiting the Court's in-camera
9 review to determine whether there are protected items of
10 protected information under the protective order that should
11 be redacted or --

12 MR. RIES: Right. Pursuant to the ruling, as I
13 understand from Judge Runge, she permitted us to redact it.
14 We provided two sets of documents. One is just redaction for
15 attorney/client, which is more limited. But further is
16 information we think is trade secret and more of the
17 proprietary, and what we're concerned about in handing that
18 over to competitors, talking about marketing plans and what
19 have you, that we, you know, proprietary trade-secret
20 information we did not want to turn over. That's why there's
21 two sets, and we are asking for a review of that.

22 MR. BAILEY: As far as what we were looking
23 for, we're waiting for these final depositions. At the

Page 5

24 court's leisure, once you provide those documents to
25 plaintiff after you make those determinations that defense

Page 7

1 counsel is talking about, we'll go ahead with the remaining
2 depositions, but discovery is on a hold until we receive
3 those documents back.

4 THE COURT: What's the current trial date?

5 MR. BAILEY: May 21st.

6 THE COURT: I will get to those just as soon as
7 I can. I'll try to get them out to you sometime next week.

8 MR. BAILEY: That would be great, Your Honor.

9 MR. RIES: Thank you, Your Honor.

10 MR. BAILEY: Thank you, Your Honor.

11 THE COURT: Thank you again very much.

12

13 (whereupon court adjourned.)

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Page 8

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REPORTER'S CERTIFICATE

Page 6

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2 STATE OF WASHINGTON)
3 COUNTY OF BENTON)

SS:

4 I, Lisa S. Lang, Official Court Reporter for the
5 Benton/Franklin Counties Superior Court, do hereby certify
6 that I reported the proceedings had in the matter of COLUMBIA
7 PHYSICAL THERAPY, INC., P.S. v. BENTON FRANKLIN ORTHOPEDIC
8 ASSOCIATES, P.L.L.C., et al, Cause No. 05-2-01909-1, before
9 the HONORABLE DENNIS D. YULE, Superior Court Judge in and for
10 Benton/Franklin Counties, on April 4, 2007 ; that the same
11 was transcribed by computer-aided transcription; and that the
12 foregoing transcript constitutes a full, true and accurate
13 Report of the Proceedings which then and there took place.

14 SIGNED and DATED this ____ day of _____,
15 2007.

LISA S. LANG, CCR, RMR, CRR
Official Court Reporter
CCR LIC. NO. 2476

1 STATEMENT

2 DATE: April 5, 2007
3 FROM: LISA S. LANG, CSR, RMR, CRR
4 Official Court Reporter
5 7122 W. Okanogan Place
6 Building A
Kennewick, Washington 99336
(509) 736-3071

The Honorable Dennis D. Yule

SUPERIOR COURT OF WASHINGTON
IN AND FOR BENTON COUNTY

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

Plaintiff,

v.

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

Defendants.

NO. 05-2-01909-1

STIPULATION AND ORDER TO
STAY PROCEEDINGS AND
CERTIFY DECISIONS FOR
DISCRETIONARY REVIEW

STIPULATION

The parties hereby stipulate to a stay of proceedings in this matter and to discretionary review of the Court's order regarding the Plaintiff's and Defendants' summary judgment motions argued before the Court on September 12, 2007, and review of the Court's April 4, 2007 decision denying Defendants' motion for summary judgment to dismiss plaintiff Columbia's Consumer Protection Act claim, and its RCW 19.68 claim, both of which were memorialized in the Court's ^{December 17} October 17, 2007

STIPULATION AND ORDER TO CERTIFY SUMMARY
JUDGMENT DECISIONS FOR DISCRETIONARY
REVIEW - 1

10268-027034 196170

A-74

STAFFORD FREY COOPER

PROFESSIONAL CORPORATION

601 Union Street, Suite 3100

Seattle WA 98101.1374

TEL 206.623.9900 FAX 206.624.6885

1 written Orders. Specifically, the parties respectfully ask the Court to stay the
2 proceedings for the purpose of appellate review, and to certify the following decisions
3 for discretionary review in the Court of Appeals:

4 1. The Court's denial of Columbia's motion for summary judgment on its
5 RCW 25.15 (RCW 18.100) claim, and the Court's granting of Defendants' motion for
6 summary judgment dismissing Columbia's RCW 25.15 (RCW 18.100) claim against the
7 Defendants.

8 2. The Court's ruling on both parties' motions for summary judgment on
9 Columbia's common law claim pursuant to the Corporate Practice of Medicine Doctrine;

10 3. The Court's denial of Columbia's motion for summary judgment on its
11 RCW Chapter 19.68 claim, specifically, the Court's apparent rejection of Columbia's
12 argument that RCW 19.68.040 applies only to similarly licensed professionals, and the
13 Court's decision that there is an issue of fact as to whether defendants' could satisfy the
14 supervision requirement under RCW 19.68.040.

15 4. The Court's denial of Defendants' motion for summary judgment to
16 dismiss Columbia's RCW Chapter 19.86 Consumer Protection Act claim and
17 Columbia's RCW 19.68 claim that the Court ruled upon on April 4, 2007.

18 5. The Court's September 12, 2007 denial of Defendants' motion for
19 summary judgment to dismiss Columbia's RCW Chapter 19.68 claims against the
20 Defendants.

21 Furthermore, the parties stipulate that if Defendants prevail on review regarding
22 Plaintiff's Consumer Protection Act claim, and the court enters judgment against
23 Columbia on (or orders dismissal of) Columbia's CPA claim, Defendants will voluntarily

STIPULATION AND ORDER TO CERTIFY SUMMARY
JUDGMENT DECISIONS FOR DISCRETIONARY
REVIEW - 2
10268-027034 196170

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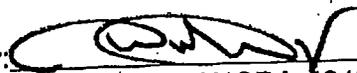
1 dismiss their Consumer Protection Act claim that is still pending in the trial court, leaving
2 no Consumer Protection Act claims of either party before the trial court.

3 In this case, discretionary review is appropriate because both parties believe
4 questions of law control the outcome in this case, and immediate review before trial
5 likely will resolve the matter in an efficient and less expensive manner than certain
6 appeal after trial. Furthermore, the questions at issue in this case have a statewide
7 impact on the delivery of health care services in Washington.

8 DATED this 17th day of October, 2007.

9 STAFFORD FREY COOPER

STAMPER RUBENS, PS

10 By: 

By: 

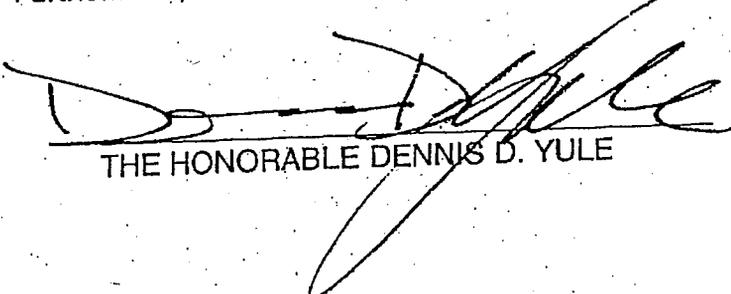
11 Darrin Bailey, WSBA #34955
12 Danford D. Grant, WSBA #26042
Attorneys for Plaintiffs

11 Michael H. Church, WSBA #24957
12 Matthew T. Ries, WSBA #29407
Attorneys for Defendants

13 ORDER

14 The Court, having read and considered the foregoing stipulation of the parties,
15 hereby certifies for discretionary review in the Court of Appeals its ~~October 17~~^{December} 2007
16 Orders memorializing its September 12, 2007 and April 4, 2007 decisions on the parties'
17 motions for summary judgment. Furthermore, the Court hereby stays this matter until
18 further order of the Court.

19 DATED: 12/17/07


20 THE HONORABLE DENNIS D. YULE

21
22
23 STIPULATION AND ORDER TO CERTIFY SUMMARY
JUDGMENT DECISIONS FOR DISCRETIONARY
REVIEW - 3
10268-027034-196170

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STAFFORD FREY COOPER

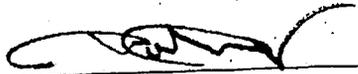
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Presented by:

STAFFORD FREY COOPER

By: 
Darrin E. Bailey, WSBA #34955
Danford D. Grant, WSBA #26042
Attorneys for Plaintiff

STAMPER RUBENS, PS

By: 
Michael H. Church, WSBA #24957
Matthew T. Ries, WSBA #29407
Attorneys for Defendants

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STIPULATION AND ORDER TO CERTIFY SUMMARY
JUDGMENT DECISIONS FOR DISCRETIONARY
REVIEW - 4
10268-027034 196170

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