

No. 267024

81734-1

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

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

Petitioner,

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.

MOTION FOR DISCRETIONARY REVIEW

Attorneys for Petitioner/Plaintiff

Darrin E. Bailey, WSBA #34955
Danford D. Grant, WSBA #26042
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ORIGINAL

I. IDENTITY OF PETITIONER AND RELIEF REQUESTED

Pursuant to RAP 2.3 and 6.2, petitioner Columbia Physical Therapy Inc., P.S. ("Columbia") asks this court to accept review of the decisions designated in Section II of this motion.

II. DECISION

On December 17, 2007, the Benton Franklin County Superior Court issued two summary judgment orders. The court has certified these orders for discretionary review, and all parties have stipulated to discretionary review.¹ Columbia seeks review of portions of one of those orders, a copy of which is attached to this motion at Appendix B. Specifically, Columbia seeks review of the superior court's decision:

1. To deny Columbia's motion for summary judgment on its RCW 25.15 (RCW 18.100) claim and to grant defendant's motion for summary judgment dismissing Columbia's RCW 25.15 (RCW 18.100) claim;
2. Regarding both parties' motions for summary judgment on Columbia's common law claim pursuant to the corporate practice of medicine doctrine; and
3. To deny Columbia's motion for summary judgment on its RCW Chapter 19.68 claim; specifically: (1) the court's apparent rejection of Columbia's argument that RCW 19.68.040 applies only to similarly-licensed professionals; and (2) the court's decision that there is an issue of fact as to whether defendants can satisfy the supervision requirement under RCW 19.68.040.

¹ Appendix A.

III. ISSUES PRESENTED FOR REVIEW

A. Under the common law, corporations “cannot engage in the practice of a learned profession through licensed employees unless legislatively authorized.” *See, e.g., Morelli v. Ehsan*, 110 Wn.2d 555, 561, 756 P.2d 129 (1988). Absent specific legislative authorization, may a single PLLC provide the professional services of both physicians and physical therapists to the public without violating the common law prohibition against the corporate practice of a learned profession?

B. Does the Professional Limited Liability Company Act (RCW Chapter 25.15) prohibit licensed physicians and licensed physical therapists from providing their different professional services to the public through the same PLLC?

C. Defendant physicians divide the profits generated from the treatment provided by defendant physical therapists. Does the Anti-Rebate statute (RCW Chapter 19.68) prohibit a licensed physician from receiving a profit off the referral to or delivery of health care services by a physical therapist employed by a company the physician owns?

D. RCW 19.68.040 provides that the Anti-Rebate statute “is not intended to ... prohibit a licensee that employs another

licensee to charge or collect compensation for professional services rendered by the employee licensee.” Does the term “employee,” as used in RCW 19.68.040, apply to the defendant physical therapists, or only to employees who have a similar license to physicians as defined in RCW 18.100.050(5)(a)?

E. Defendant physicians and defendant physical therapists provide their professional services in geographically-separated buildings. Can a physician that owns a PLLC and works in different buildings on different properties from a physical therapist employed by the PLLC satisfy the “direct and immediate” supervision requirement set forth in *Day v. Inland Empire Optical, Inc.*, 76 Wn.2d 407, 456 P.2d 1011 (1969)?

IV. STATEMENT OF THE CASE

This case challenges the growing practice of physicians owning clinics that provide physical therapy services to the public through licensed physical therapists. Nationally, this practice is known as “POPTS” (physician-owned physical therapy services). In this case, plaintiff Columbia contends that the defendant physicians’ ownership of a physical therapy clinic violates the Corporate Practice of Medicine Doctrine, the Washington Professional Limited Liability Company Act, and the Washington

Anti-Rebate Statute.² Physicians and physical therapists in this state and elsewhere await the outcome of this case.

Columbia is a physical-therapist owned professional corporation with physical therapy clinics in Kennewick, Richland, and Pasco, and other locations in Washington, Idaho, and Oregon.

Benton Franklin Orthopedic Associates PLLC (“BFOA”) is a physician-owned professional company with orthopedic clinics in Kennewick, Richland, and Pasco, and a physical therapy clinic in Kennewick.³ The five defendant orthopedic surgeons own BFOA and treat patients at the BFOA orthopedic clinics. Defendant physical therapists – who are employees of BFOA but not owners – treat patients at the BFOA physical therapy clinic in Kennewick.⁴

Thus, the physicians own the company, the physical therapists work for the company, and both render their professional services to the public through the company, but at different clinics. Accordingly, the same Professional Limited Liability Company – BFOA – provides both orthopedic and physical therapy services to the public.

² Appendix C (Plaintiff’s Third Amended Complaint). In addition, plaintiff makes a claim under the Consumer Protection Act, but its CPA claim is based on alleged deceptive acts, and not on ownership alone.

³ See, e.g., Appendix D (Declaration of Darrin Bailey), Ex. A (telephone book advertisement).

BFOA was not always a PLLC. Defendant physicians Kontogianis, Theil, and Burgdorff originally formed BFOA as an LLC in November 1999 to personally provide their orthopedic services to the public.⁵ Then in September 2002, they formed a separate company, Benton Franklin Physical Therapy, Inc.⁶ (“BFPT”) to provide physical therapy to their orthopedic patients through licensed physical therapists employed by BFPT.⁷

In June 2004, defendant physicians reorganized BFOA as a PLLC. They also stripped BFPT, Inc. of its corporate status and merged it with BFOA, renaming the physical therapy business “BFOA d/b/a BFPT.”⁸ Although BFPT was no longer a separate company, defendant Kontogianis testified that “nothing changed except the corporate structure, which was changed at the advice of counsel.”⁹ Accordingly, the relationship between the defendant physicians and defendant physical therapists remained the same.

⁴ Appendix D, Ex. C (Deposition of Christopher Kontogianis, p. 68)

⁵ Appendix D, Ex. D. As originally organized, the entity was an LLC and not a PLLC (another violation of the Professional Services Corporation Act), but BFOA may have cured this violation in 2004 when it reorganized as a PLLC.

⁶ Appendix D, Ex. E (article of incorporation).

⁷ Appendix D, Ex. F (Deposition of Thomas Burgdorff, p. 42.).

⁸ See *also* Appendix D, Ex. G (Telephone book advertisement).

⁹ Appendix D, Ex. H (Kontogianis deposition, p. 43-44).

Plaintiff filed suit in August 2005 alleging that defendants' business arrangement violates the Anti-Rebate statute (RCW Chapter 19.68) because the physicians receive a profit in connection with the referral of patients or the furnishing of care by other licensed professionals (in this case, the defendant physical therapists). RCW 19.86.010(1). It is undisputed that the defendant physicians divide among themselves the profit from the physical therapy treatment provided by physical therapists at BFOA's physical therapy clinic.¹⁰ It is also undisputed that over eighty percent of the patients treated by BFOA physical therapists were referred to physical therapy by BFOA physicians.¹¹ Plaintiff also made a Consumer Protection Act claim.

Plaintiff later added a claim under the common law corporate practice of medicine doctrine alleging that a single PLLC cannot provide to the public the professional services of both physicians and physical therapists. Plaintiff also added a claim under the Professional Limited Liability Company Act (RCW Chapter 25.15) alleging that the Act prohibits a physician and physical therapist

¹⁰ Appendix D, Ex. K (Deposition of Heather Phipps, p. 18).

¹¹ Appendix D, Ex. O (Dr DeKay report); *see also* Ex. P (Defendants' chart showing referral sources for BFPT) and Ex. Q (Defendants' report showing BFOA referrals to BFPT).

from providing their professional services through the same company.

In May 2006, defendants filed a motion for summary judgment seeking to dismiss plaintiff's claim under the CPA. The court denied this motion, in part to allow discovery. In January, 2007, defendants filed a second motion for summary judgment, again seeking to dismiss plaintiff's claims under the CPA and also seeking to dismiss plaintiff's claim under the Anti-Rebate statute. The court also denied this motion. Finally, in August 2007, the parties filed cross-motions for summary judgment on plaintiff's claims under the Anti-Rebate statute, the PLLC Act, and the corporate practice of medicine doctrine. On December 17, 2007, the court issued two orders: one formally denying defendants' January 2007 motion for summary judgment; and the other granting in part and denying in part the parties' August 2007 cross-motions. This latter order is the subject of this motion for discretionary review.

The parties agree that appellate review is appropriate in this case and have stipulated to discretionary review. The court has certified its December 17, 2007 summary judgment orders for discretionary review. We anticipate that defendants will seek

discretionary review on additional issues in the court's certification order.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Discretionary review is appropriate in this case because the criteria of RAP 2.3(b)(4) are satisfied. This rule provides for discretionary review where:

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

RAP 2.3(b)(4). In this case, the parties stipulated to appellate review and the court certified its orders for appellate review.

The court's December 17, 2007 summary judgment order involves several controlling questions of law, as described above in the statement of issues. No appellate case in Washington has directly addressed the issues in this case. To the best of our knowledge, only two appellate cases in Washington have addressed claims under the Anti-Rebate Statute, and no appellate cases in Washington have addressed the impact of the corporate practice of medicine doctrine, the Professional Limited Liability Act,

or the Professional Services Corporation Act on physician-owned companies that provide physical therapy services.

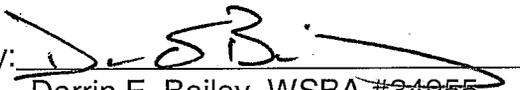
Finally, immediate review will materially advance the ultimate termination of this litigation. Both parties intend to eventually appeal if discretionary review is not granted. This case involves legal issues of statewide (and national) importance. Resolution of the purely legal issues in this case will likely resolve the litigation.

VI. CONCLUSION

For the foregoing reasons, Columbia respectfully asks the court to grant its motion for discretionary review.

Respectfully submitted this 4th day of January, 2008.

STAFFORD FREY COOPER

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

FILED

JAN 08 2008

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury according to the laws of the State of Washington that on this date I caused to be served in the manner noted below a copy of this ***Motion for Discretionary Review*** on the following individuals:

Michael H. Church
Stamper Rubens, PS
720 West Boone Avenue, Suite 200
Spokane, WA 99201

Attorneys for Respondents

VIA FACSIMILE
 VIA FIRST CLASS MAIL
 VIA MESSENGER

Dated this 4th day of January, 2008, at Seattle, Washington.


MARY ANN BLACKLEDGE

APPENDICES

- Appendix A** Stipulation and Order to Stay Proceedings and Certify Decisions for Discretionary Review entered December 17, 2007.
- Appendix B** Order Granting In Part Defendants' Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment
- Appendix C** Plaintiff's Third Amended Complaint
- Appendix D** Declaration of Darrin E. Bailey in Support of Columbia's Motion for Summary Judgment, with exhibits

APPENDIX A

The Honorable Dennis D. Yule

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SUPERIOR COURT OF WASHINGTON
IN AND FOR BENTON COUNTY

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

NO. 05-2-01909-1

Plaintiff,

v.

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

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.

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

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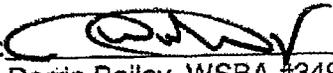
1 dismiss their Consumer Protection Act claim that is still pending in the trial court, leaving
2 no Consumer Protection Act claims of either party before the trial court.

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.

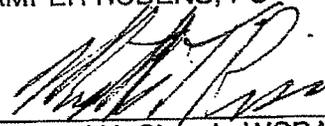
8 DATED this 17th day of October, 2007.

9 STAFFORD FREY COOPER

STAMPER RUBENS, PS

10
11 By: 

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

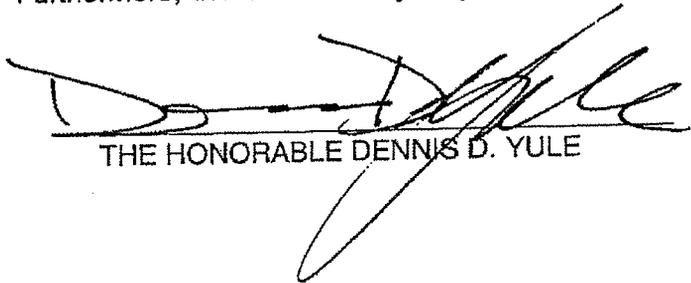
12 By: 

Michael H. Church, WSBA #24957
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 17, 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

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

STAFFORD FREY COOPER

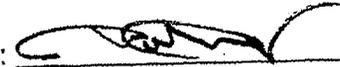
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Presented by:

STAFFORD FREY COOPER

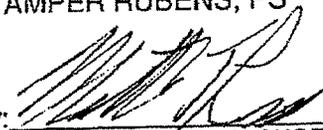
By:



Darrin E. Bailey, WSBA #34955
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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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APPENDIX B

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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. 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

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

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

1. Defendants' Motion for Summary Judgment;
2. Defendants' Memorandum in Support of Motion for Summary Judgment;
3. Affidavit of Matthew T. Ries in Support of Defendants' Motion for Summary Judgment;
4. Plaintiff's Response to Defendants' Motion for Summary Judgment;
5. Declaration of Darrin Bailey in Support of Plaintiff's Response to Defendants' Motion for Summary Judgment;
6. Defendant's Memorandum in Reply to Plaintiff's Response to Defendants' Motion for Summary Judgment;

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ATTORNEYS AT LAW

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ORDER RE: DEFENDANTS' AND PLAINTIFF'S
MOTIONS FOR SUMMARY JUDGMENT: 1

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**.

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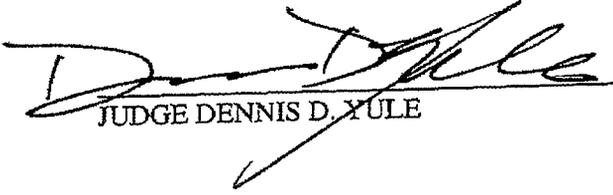
ORDER RE: DEFENDANTS' AND PLAINTIFF'S
MOTIONS FOR SUMMARY JUDGMENT: 2

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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.

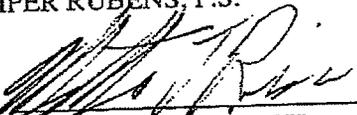
DONE IN OPEN COURT this 17th December day of October 2007.


JUDGE DENNIS D. YULE

Presented By:

STAMPER RUBENS, P.S.

By:


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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ORDER RE: DEFENDANTS' AND PLAINTIFFS
MOTIONS FOR SUMMARY JUDGMENT: 3

APPENDIX C

The Honorable Dennis D. Yule

OSIE DELVIN
BENTON COUNTY CLERK

JUL 23 2007

FILED

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 **II. JURISDICTION AND VENUE**

2 2.1. This Court has jurisdiction over the parties and the subject matter of this
3 lawsuit. Venue is proper in Benton County, Washington under RCW 4.12.025 as
4 Defendants reside in Benton County.

5 **III. FACTUAL BACKGROUND**

6 3.1. BFOA is a physician-owned medical practice providing orthopedic medical
7 treatment to patients. BFOA's main office is located at 911 South Washington Street in
8 Kennewick, Washington. BFOA was formed in November 1999, and is owned by the
9 following physicians: Thomas R. Burgdorff, M.D.; Christopher A. Kontogianis, M.D.;
10 Arthur E. Thiel, M.D.; David W. Fischer, M.D.; Heather L. Phipps, D.O; and John and/or
11 Jane Does 1-9.

12 3.2. Defendant physicians also own and operate Benton Franklin Physical
13 Therapy, Inc. (BFPT) and/or a "BFOA physical therapy office" located at 15 W 10th
14 Avenue in Kennewick. BFPT was incorporated on January 21, 2003. BFPT's corporate
15 license apparently expired on January 31, 2005, and now BFOA advertises that "Benton
16 Franklin Orthopedic Associates DBA Benton Franklin Physical Therapy." As a
17 consequence of their ownership of BFPT, Defendant physicians have legal, financial,
18 and managerial control over BFPT and/or the BFOA physical therapy office, to include
19 the right to keep profits derived from BFPT's and/or the BFOA physical therapy office's
20 physical therapy treatment of patients.

21 3.3. Defendant physicians refer patients for physical therapy to BFPT and/or
22 the BFOA physical therapy office and the profits of this treatment inure to Defendant
23

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

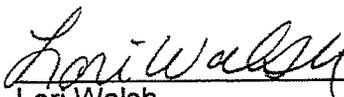
Certificate of Service

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

APPENDIX D

The Honorable Dennis Yule
Hearing Date: September 12, 2007
Hearing Time: 9:00 a.m.

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

DECLARATION OF DARRIN BAILEY
IN SUPPORT OF COLUMBIA'S
MOTION FOR SUMMARY
JUDGMENT

I, DARRIN E. BAILEY, certify and declare as follows:

1. I am over the age of 18 years and am otherwise competent to make this declaration. I am one of the attorneys of record for plaintiff, Columbia Physical Therapy, Inc., P.S. This declaration is made upon personal knowledge setting forth facts I believe to be true.

DECLARATION OF DARRIN BAILEY IN SUPPORT OF COLUMBIA'S MOTION FOR
SUMMARY JUDGMENT - 1
10266-027034 179864

COPY

STAFFORD FREY COOPER

PROFESSIONAL CORPORATION

801 Union Street, Suite 3100

Seattle WA 98101.1374

TEL 206.823.9000 FAX 206.824.9885

1 2. Attached hereto as Exhibit A is a true and correct copy of a telephone
2 book advertisement showing that defendants' orthopedic offices operate under the
3 name Benton Franklin Orthopedic Associates

4 3. Attached hereto as Exhibit B is a true and correct copy of an excerpt from
5 Defendants' responses to Columbia's First Interrogatories and Requests for Production
6 (Interrogatory No. 11).

7 4. Attached hereto as Exhibit C is a true and correct copy of an excerpt from
8 Defendant Kontogianis' deposition transcript, p. 68.

9 5. Attached hereto as Exhibit D is a true and correct copy of the Certificate of
10 Formation for Benton Franklin Orthopedic Associates, LLC, dated November 19, 1999.

11 6. Attached hereto as Exhibit E is a true and correct copy of Certificate of
12 Incorporation for Benton Franklin Physical Therapy, Inc., dated January 31, 2003.

13 7. Attached hereto as Exhibit F is a true and correct copy of an excerpt from
14 Defendant Burgdorff's deposition transcript, p. 42.

15 8. Attached hereto as Exhibit G is a true and correct copy of a telephone
16 book advertisement showing that defendants' physical therapy clinic operates under the
17 name Benton Franklin Orthopedic Associates d/b/a Benton Franklin Physical Therapy.

18 9. Attached hereto as Exhibit H is a true and correct copy of an excerpt from
19 Defendant Kontogianis' deposition transcript, p. 43.

20 10. Attached hereto as Exhibit I is a true and correct copy of an excerpt from
21 Defendant Burgdorff's deposition transcript, pp. 11-12.

22 11. Attached hereto as Exhibit J is a true and correct copy of an excerpt from
23 Defendant Fischer's deposition transcript, pp. 42.

1 12. Attached hereto as Exhibit K is a true and correct copy of an excerpt from
2 Defendant Phipps' deposition transcript, p. 18.

3 13. Attached hereto as Exhibit L is a true and correct copy of an excerpt from
4 Melanie Hanson's deposition transcript, p. 27.

5 14. Attached hereto as Exhibit M is a true and correct copy of an excerpt from
6 Defendant Burgdorff's deposition transcript, pp. 116-117.

7 15. Attached hereto as Exhibit N is a true and correct copy of an excerpt from
8 Defendant Kontogianis' deposition transcript, pp. 76-77.

9 16. Attached hereto as Exhibit O is a true and correct copy of Plaintiff expert
10 Dr. Fred DeKay's expert report.

11 17. Attached hereto as Exhibit P is a true and correct copy of a chart
12 produced by Defendants showing the referral sources for Benton Franklin Physical
13 Therapy patients.

14 18. Attached hereto as Exhibit Q is a true and correct copy of a report
15 produced by Defendants showing the number of patients referred by Defendant
16 physicians to Benton Franklin Physical Therapy.

17 19. Attached hereto as Exhibit R is a true and correct copy of an excerpt from
18 Defendant Burgdorff's deposition transcript, p. 119.

19 20. Attached hereto as Exhibit S is a true and correct copy of an excerpt from
20 Defendants' responses to Columbia's First Interrogatories and Requests for Production
21 (Interrogatory No. 9).

22 21. Attached hereto as Exhibit T is a chart showing professional services
23 grouped under RCW 18.100.050(5)(a) and RCW 18.100.050(5)(b).

Exhibit A

Physicians & Surgeons - M.D. & D.O.

HEAP ADRIAN J MD FACS FRCSC
 General & Thoracic Surgery
Dr. A J Heap, M.D.
 Diplomate American Board of Surgery
 1201 Jadin Av Suite 104 Rhd
 509 943-
 James Charles W MD 55 W Tietan St WIWIWI
 Toll Free-Dial 1 & Then 800 21
 Kincaid Steven MD PC 750 Swift Blvd Rhd
 911 S Wash WY 915
 Scully J Michael MD FACS FICS
 216 West 10th Ave Kennwick
 51

SHAW TIMOTHY J MD FACS
 Follower, Associate, College of Surgeons
 Orthopedic, Arthroscopic Board of Surgery
 216 W. 10th Ave Suite 202 Kennwick
 Shaw Timothy J MD FACS 750 Swift Blvd Rhd
 Trotta Thos C MD FACS 780 Swift Blvd Rhd
 Please See Advertisement This Page

BENTON FRANKLIN ORTHOPEDIC ASSOCIATES
 Boarded Certified in Orthopedic
 Heather L. Phipps
 Andres Garcia, Jr.
 http://www.BF
KENNEWICK PASCO
586-2828 545-8883
 911 S. Wash WY 9115 Smaller Phys

BENTON FRANKLIN ORTHOPEDIC ASSOCIATES
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 Andres Garcia, Jr., P.A.C.
 http://www.BFSA.com
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 911 S. Wash WY 9115 Smaller Phys

Exhibit C

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

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

Plaintiff,)

v.)

No. 05-2-01909-1

BENTON FRANKLIN ORTHOPEDIC)
ASSOCIATES, PLLC; 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.)

DEPOSITION UPON ORAL EXAMINATION
OF
CHRISTOPHER A. KONTOGIANIS, MD

May 31, 2007

10:00 a.m.

Red Lion Hotel

N 1101 Columbia Center Blvd

Room Clearwater A

Kennewick, Washington

NOREEN A. MATTIMOE-NYSTROM, RPR

CERTIFIED COURT REPORTER

1 or disapproves of any hiring decision?

2 A. No.

3 Q. Who would that person be?

4 A. It's a collaborative effort.

5 Q. In other words, all the managing -- excuse me.

6 All the members of Benton Franklin Orthopedic
7 Associates participate in the decision on whether
8 to hire or not hire staff?

9 A. To some basis.

10 Q. I mean, if you needed a new receptionist, for
11 example, who would make that decision?

12 A. Mike would evaluate the employee needs, make a
13 recommendation, and ultimately the managing
14 partner, or the members of the group, would make a
15 final decision.

16 Q. Now, do you rely on Michael Nietzel to provide any
17 supervision to the physical therapists that work
18 at Benton Franklin Orthopedic Associates?

19 MR. RIES: Object to the form.

20 A. The physical therapists are employees of Benton
21 Franklin Orthopedic Associates, all of which
22 answer to Michael Nietzel, the office manager.

23 Q. Do they answer to you, as well?

24 A. Yes.

25 Q. Do they answer to you for different questions than

Exhibit D

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 2-907828-4

601994293
2-907828-4

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

P. Craig Walker

Address

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

Address

Christopher Kontogianis

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

Exhibit E

UNITED STATES OF AMERICA

The State of



Washington

Secretary of State

I, SAM REED, Secretary of State of the State of Washington and custodian of its seal, hereby issue this

CERTIFICATE OF INCORPORATION

to

BENTON FRANKLIN PHYSICAL THERAPY, INC.

A Washington Profit Corporation. Articles of Incorporation were filed for record in this office on the date indicated below

UBI Number: 602 229 719

Date: January 21, 2003

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



A handwritten signature in cursive script that reads "Sam Reed".

Sam Reed
Secretary of State

D2007-00591
CONFIDENTIAL

Exhibit F

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

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

Plaintiff,)

v.)

No. 05-2-01909-1

BENTON FRANKLIN ORTHOPEDIC)
ASSOCIATES, PLLC; 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.)

DEPOSITION UPON ORAL EXAMINATION

OF

THOMAS R. BURGdorFF, MD

June 15, 2007

10:00 a.m.

Red Lion Hotel

N 1101 Columbia Center Blvd

Ballroom III

Kennewick, Washington

NOREEN A. MATTIMOE-NYSTROM, RPR

CERTIFIED COURT REPORTER

1 Benton Franklin Orthopedic Associates, but Benton
2 Franklin Orthopedic Associates did not own Benton
3 Franklin PT, directly.

4 Q. Did Benton Franklin Orthopedic Associates provide
5 physical therapy services at any time prior to the
6 standing up of Benton Franklin Physical Therapy,
7 Inc.?

8 A. No.

9 Q. So Benton Franklin Orthopedic Associates, by
10 inference, started providing physical therapy
11 services once Benton Franklin Physical Therapy,
12 Inc. changed its corporate status and became a
13 "doing business as"?

14 MR. RIES: Object to the form
15 and foundation.

16 Go ahead.

17 A. Yeah, that's the way I would perceive it.

18 Q. Okay. And whose idea was it to start Benton
19 Franklin Physical Therapy, Inc., if you recall?

20 A. Well, the three of us, Dr. Kontogianis, Dr. Thiel
21 and myself, made a joint decision to do that.

22 Q. Why did you decide to do that?

23 A. So we could provide physical therapy services to
24 our patients.

25 Q. And the members or shareholders of that company

Exhibit G

• FOSTURE ANALYSIS • L.I.P.A.
STATE OF THE ART RELIEF FROM:
 Neck & Back Pain • Joint Pain
 Work & Auto Injuries • Orthopedic Injuries
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Benton Franklin Orthopedic Associates
DBA Benton Franklin Physical Therapy

Rodney D. Kump, D.P.T.
Jay M. West, M.P.T.

*Specializing in Sports
 & Orthopedic Therapy*

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 Near The Mall

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West Kennewick Physical Therapy
 Ken Call MS PT DPT - Director
 1408 N Louisiana St Ste 104-A
 Kennewick 509 783-1962

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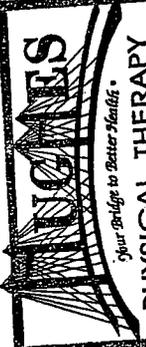
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 Women's Health Issues

SUMMIT PHYSICAL THERAPY

Phillip G. Drussel, PT
 Jamie Smith, MPT
 Cindy Wright, JIMP

783-3444

830 N Columbia Center Blvd Suite D
 Kennewick, WA



Exhibit H

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF BENTON

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INC., P.S.)

Plaintiff,)

v.)

No. 05-2-01909-1

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CHRISTOPHER A. KONTOGIANIS;)
ARTHUR E. THIEL; DAVID W.)
FISCHER; HEATHER L. PHIPPS;)
RODNEY KUMP; JAY WEST; and)
DOES 1 through 9,)

Defendants.)

DEPOSITION UPON ORAL EXAMINATION

OF

CHRISTOPHER A. KONTOGIANIS, MD

May 31, 2007

10:00 a.m.

Red Lion Hotel

N 1101 Columbia Center Blvd

Room Clearwater A

Kennewick, Washington

NOREEN A. MATTIMOE-NYSTROM, RPR

CERTIFIED COURT REPORTER

1 Q. What I'm trying to figure out is whether the
2 nature of the physical therapists' work, as
3 physical therapists, changed at all from the time
4 they were working at Benton Franklin Physical
5 Therapy, Inc., to becoming employees of Benton
6 Franklin Orthopedic Associates.

7 A. Repeat the whole question.

8 Q. Sure.

9 MR. GRANT: Can you read that
10 back?

11
12 [The requested testimony was read back.]

13
14 MR. RIES: Object to the form,
15 foundation, vague?

16 A. All of the therapists that have ever been employed
17 have always been employed by the physicians, and
18 they continue to provide orthopedic physical
19 therapy for patients today.

20 Q. Just like they did back when it was Benton
21 Franklin Physical Therapy, Inc.?

22 MR. RIES: Object to the
23 form. Go ahead.

24 A. Our employed therapists provided physical therapy
25 care when it was Benton Franklin Physical Therapy,

1 Inc. Nothing changed except the corporate
2 structure, which was changed at the advice of
3 counsel.

4 Q. Okay.

5 A. I will qualify that as stating that they have
6 always been employees. The only owners have been
7 physicians. They continue to be employees, the
8 only owners continue to be physicians.

9 Q. You said the corporate structure was changed on
10 advice of counsel?

11 A. Correct.

12 Q. Don't tell me anything they advised you, but what
13 counsel?

14 MR. RIES: Objection as to
15 form.

16 A. Legal counsel.

17 Q. No, I know. Stamper Rubens, or a different firm?

18 MR. RIES: Objection, if
19 you're getting into who he
20 consulted -- again, which attorney
21 was consulted and which gave
22 advice, then I think that's getting
23 into the attorney-client
24 communication.

25 Instruct you not to answer

Exhibit K

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF BENTON

COLUMBIA PHYSICAL THERAPY,)	
INC., P.S.,)	No. 05-2-01909-1
)	
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.)	

DEPOSITION UPON ORAL EXAMINATION

OF

HEATHER PHIPPS, D.O.

December 6, 2006
1:45 p.m.
1632 West Court Street
Pasco, Washington

JANICE L. TEGARDEN
CERTIFIED COURT REPORTER

1 MR. RIES: Object to foundation.

2 Go ahead.

3 A. I don't know.

4 Q. (By Mr. Bailey) So you're not sure what happens to the
5 income that's generated by the physical therapists?

6 A. Well, it would be brought in through physical therapy.

7 Q. Well, do you know how that's distributed, then?

8 A. Equally among the physicians.

9 Q. I believe that answers what I was asking a few questions
10 ago; it may be feebly, but that is what I attempted to ask
11 a couple questions ago.

12 So the physicians then divide the profits from the
13 physical therapists evenly amongst themselves?

14 A. Yes.

15 Q. And then those profits go into your salary, correct?

16 A. No.

17 Q. Income? Those profits go into your income, correct?

18 A. Yes.

19 Q. So the more patients that are referred to Benton Franklin
20 Physical Therapy, that leads to greater overall profits to
21 the owners, correct?

22 A. Yes.

23 Q. Do you receive bonuses?

24 A. Bonuses?

25 Q. Bonuses. We've been talking about you take the receivables

Exhibit O

C. Frederick DeKay

CONSULTING ECONOMIST
6313 N.E. 194TH STREET
KENMORE, WASHINGTON 98028

206-296-5709
425-483-1644

January 11, 2007

Mr. Darrin E. Bailey
Stafford Frey Cooper
601 Union Street, Suite 3100
Seattle, WA 98101

Re: Preliminary Estimate of the Economic Loss to Columbia Physical Therapy

Dear Mr. Bailey:

The purpose of this letter is to provide a preliminary estimate of the economic loss to Columbia Physical Therapy due to the allegedly improper establishment of and referrals to Benton Franklin Physical Therapy (BFPT) by Benton Franklin Orthopedic Associates, (BFOA).

In September 2002, a group of orthopedic surgeons, BFOA, established BFPT. BFOA began referring patients needing physical therapy to BFPT. As owners of BFPT, the physicians of BFOA, earned profits from the services provided by BFPT. These referrals were contrary to statutes prohibiting a physician from referring patients for health services to an entity with which the physician has a financial relationship. Further, the physicians in BFOA had an incentive to refer patients to BFPT rather to other physical therapy providers because the profits earned by BFPT would accrue to them. Because of the unlawful referral of patients by BFOA to BFPT, Columbia Physical Therapy lost patients that would have been referred to them in the absence of the establishment of BFPT.

Table 1 shows the historical pattern of patient referrals for physical therapy services by BFOA from 2001 to 2006. The number of referrals has grown substantially, largely because in each of the years, 2003 and 2004, BFOA added a physician to their practice. Physical therapy referrals for the three physicians who have been with BFOA from 2000 to 2006 also appear in this table. BFOA patients would seek physical therapy services from the 18 or so providers of service within 10 miles of BFOA's offices. BFOA provides a list of providers that identifies 24 locations where these 18 providers deliver services, plus two other providers in Othello and Yakima. This list is attached as Exhibit 1.

Columbia Physical Therapy Loss Estimate

Table 1. BFOA Physical Therapy Referrals, by Physician, 2001-2006

	<u>2001</u>	<u>2002</u>	<u>2003</u>	<u>2004</u>	<u>2005</u>	<u>2006*</u>
Burgdorff	190	173	231	206	189	79
Thiel	172	149	158	153	198	76
Kontogianis	300	304	348	324	359	148
Fischer	0	0	0	141	468	226
Phipps	0	0	47	419	422	188
Total Referrals	662	626	784	1243	1636	717
Subtotal						
Burgdorff, Thiel and Kontogianis	662	626	737	683	746	303

Values for 2006 are for only part of the year
Source: BFOA responses to Interrogatories

Table 2 shows the number of referrals made by BFOA to BFPT, the total number of physical therapy referrals made by BFOA and the share of BFOA referrals received by BFPT. That share averages over 30%. This table also shows the number of total referrals received by BFPT from all sources. Over 80% of BFPT's referrals come from BFOA. These patterns are consistent with the allegations of improper referral practices that favor BFPT over other physical therapy providers.

Table 2. Benton Franklin Physical Therapy Patient Referrals

	2001	2002	2003	2004	2005	2006*
Referrals to BFPT from BFO	0	13	283	356	437	236
Referrals to BFPT from Other Sources	0	2	93	70	80	38
Total referrals to BFPT	0	15	376	426	517	274
% of BFPT referrals from BFOA			75%	84%	85%	86%
% of BFOA referrals to BFPT			36%	29%	27%	33%

Values for 2006 are for only part of the year
Source: BFOA responses to Interrogatories

Exhibit 2 shows the number of patient referrals recorded by Columbia PT from the five physicians currently working with BFOA. Drs. Burgdorff, Thiel and Kontogianis have been with BFOA since before 2001. Dr. Phipps joined BFOA in 2003. Dr. Fischer joined BFOA in 2004. Since Dr. Fischer had worked in the Tri-Cities before joining BFOA, Columbia PT has recorded some referrals from him prior to his joining BFOA.

Table 3 shows the number of referrals received by the three Tri-Cities locations of Columbia PT from three BFOA physicians, Drs, Thiel, Kontogianis, and Burgdorff

Columbia Physical Therapy Loss Estimate

working for BFOA in each of the years, 2000 to 2005, as reported by Columbia PT. In 2001 and 2002, Columbia received an average of 66.5 referrals for physical therapy per from those three physicians at BFOA. In 2003, 2004 and 2005, after BFPT was established, the number of referrals from these three physicians at BFOA, received by Columbia PT, declined to an average of 46 referrals per year, in spite of the increase in the number of referrals made by these three physicians at BFOA.

Table 3. Referrals from Drs. Burgdorff, Thiel and Kontogianis to Columbia PT Clinics, 2001-2005

	Before BFPT		After BFPT established		
	2001	2002	2003	2004	2005
Total PT Referrals from Burgdorff, Thiel and Kontogianis to Columbia PT	662	626	737	683	746
Referrals from Burgdorff, Thiel and Kontogianis to Columbia PT	81	64	40	49	53
% of BFOA referrals to Columbia PT	12.2%	10.2%	5.4%	7.2%	7.1%
Average for 2001-2002		11.26%			
Referrals from Burgdorff, Thiel and Kontogianis to Columbia PT: Kennewick Clinic	32	25	19	18	20
% of BFOA referrals to Columbia PT	4.8%	4.0%	2.6%	2.6%	2.7%
Average for 2001-2002		4.43%			

Columbia PT alleges that they have suffered losses by improper actions of the physicians at BFOA in referring patients to BFPT. Columbia PT alleges that BFPT was improperly established as an entity that allowed physicians to earn profits from medical services that they did not provide. They also allege that BFOA improperly directed patients to BFPT. If BFPT was properly established, but BFOA improperly referred patients to BFPT, Columbia PT would have lost the opportunity to receive the patients that were improperly referred. This would lead to losses for Columbia PT as well as for other physical therapy providers in the area. To determine the losses to Columbia PT, I estimate the number of improperly referred patients received by BFPT from BFOA, estimate the portion of those patients that would have gone to Columbia Physical Therapy, and then estimate the loss in revenue associated with those patients.

To determine the number of improperly referred patients, I estimate the number of referrals BFPT would have received if it competed for referrals on the same basis as similar clinics. Dr. Thiel has stated in his deposition, that almost all the PT providers in the Tri-Cities area provide nearly identical services. One of the primary determinants of patient choice for physical therapy services is a convenient location. The Columbia PT Kennewick clinic is located within one or two blocks of both BFOA and BFPT. Ignoring the fact that Columbia PT has been established for several years, in the absence of the

Columbia Physical Therapy Loss Estimate

alleged biased referrals, if the primary determinant of choice is location and the two providers are in virtually the same location, then there should be little if any difference in the number of patients from BFOA choosing Columbia PT and the number choosing BFPT.

In the absence of an improper incentive to refer patients to BFPT, I assume that the number of BFOA patients that would have chosen BFPT would have been the same as the number of patients referred to the Columbia PT Kennewick clinic. Columbia PT in Kennewick received an average of 4.43% of BFOA's referrals in 2001 and 2002. I have assumed that in the absence of improper referral behavior, the new BFPT would have received the same share of BFOA referrals in 2003, 2004, 2005 and 2006 as Columbia PT Kennewick clinic did in 2001 and 2002, or about 4.43%. I have estimated the number of improperly referred patients as the number of patients actually received by BFPT from BFOA, less those predicted if there had been no improper referral behavior. I have then assumed that the three Columbia PT clinics would have received the same share, about 11.26%, of the improperly referred BFOA patients in 2003, 2004 and 2005 as they did in 2001 and 2002. I have ignored any losses that may have occurred in 2002. These calculations are shown in Table 4. I estimate that Columbia PT lost about 28 referrals in 2003, 34 referrals in 2004 and 41 referrals in 2005.

Table 4 also shows BFPT revenues per referral. I assume that Columbia PT would have generated similar revenues per referral for referrals lost. Not all of the revenues lost represent damages to Columbia PT. If they had received the referrals, they would have incurred expenses associated with providing the incremental services. Since they did not treat these patients, they did not incur these expenses, so their incremental expenses are deducted from the incremental revenues lost to determine the damages.

According to Richard Wright, the owner of Columbia PT, they incur incremental expenses for supplies, billing expenses and since the Kennewick clinic is near normal capacity, he expects that they would have experienced additional labor expenses to provide these services. Based on information from Mr. Wright and an examination of expenses reported on Columbia PT's tax returns, I estimate that incremental supplies are about 5% of revenue, billing services would be 6% of revenue and labor and benefits would be 24% of revenue, for a total incremental expense of about 35%. Other expenses, such as rent, advertising or administrative expenses, would not be increased by the addition of these referrals.

Columbia Physical Therapy Loss Estimate

Table 4. Estimate of Losses of Referrals, Revenue and Profits for Columbia PT, 2003-2006

	<u>2001</u>	<u>2002</u>	<u>2003</u>	<u>2004</u>	<u>2005</u>	<u>2006</u>
BFOA referrals out for PT, by all physicians	662	626	784	1243	1636	
Actual BFPT referrals from BFOA			283	356	437	
If the BFPT clinic was established legitimately, they should have gotten about 4.43% of the BFOA referrals (the same as Columbia: Kennewick)						
Estimated Unbiased BFPT referrals from BFOA based on Columbia, Kennewick share in 2001/2002, 4.43%			34.7	55.0	72.4	
Estimated BFPT referrals from BFOA due to bias, Actual less estimated.			248.3	301.0	364.6	
The three Columbia clinics combined received about 11.26% of BFOA referrals in 2001-02.						
Number of Estimated BFPT referrals from BFOA due to bias that should have gone to three Columbia PT clinics based on share for 2001/2002, 11.26%			28.0	33.9	41.0	
Revenue per referral for BFPT			\$ 870.23	\$ 885.30	\$ 852.91	
Total Revenue Lost by Columbia PT			\$ 24,326	\$ 29,998	\$ 35,008	
Total incremental expenses, 35%			\$ 8,514	\$ 10,499	\$ 12,253	
Estimated Incremental Profit			\$ 15,812	\$ 19,499	\$ 22,755	\$ 22,755
Total Losses to Columbia PT, 2003-2006						\$ 80,822

Table 4 shows the estimates of losses for 2003, 2004 and 2005 at \$15,812, \$19,499 and \$22,755, respectively. Losses for 2006 are estimated to be the same as for 2005. Total losses from 2003 through 2006 are estimated at \$80,822.

Columbia Physical Therapy Loss Estimate

These estimates are preliminary. If additional information becomes available, I may choose to revise these estimates. If you have any questions regarding this analysis, please call me at 206-296-5709.

Sincerely,



C. Fred DeKay, Ph.D.
Consulting Economist

Encl.

Exhibit 1

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 Convection 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.

Columbia Physical Therapy Loss Estimate

**Exhibit 2. Referrals from BFOA Physicians to Columbia PT Clinics by
Physician and Clinic Location, 2000-2006**

	<u>2001</u>	<u>2002</u>	<u>2003</u>	<u>2004</u>	<u>2005</u>	<u>2006*</u>
Columbia PT: PASCO						
Burgdorff	9	15	4	8	10	4
Kontogianis	20	7	7	14	11	7
Thiel	11	8	7	8	6	4
Phipps			4	23	17	16
Fischer*	18	13	17	15	10	5
TOTAL:	58	43	39	68	54	36
Columbia PT: KENNEWICK						
Burgdorff	12	10	6	8	8	4
Kontogianis	11	9	7	9	4	2
Thiel	9	6	6	1	8	3
Phipps			2	12	13	11
Fischer*	19	8	10	9	10	8
TOTAL:	51	33	31	39	43	28
Columbia PT: RICHLAND						
Burgdorff	3	5	2	0	2	3
Kontogianis	4	3	1	0	0	4
Thiel	2	1	0	1	4	2
Phipps			1	2	1	5
Fischer*	1	6	6	1	3	3
TOTAL:	10	15	10	4	10	17
Columbia PT: Tri-Cities locations						
Burgdorff	24	30	12	16	20	11
Kontogianis	35	19	15	23	15	13
Thiel	22	15	13	10	18	9
Phipps			7	37	31	32
Fischer*, 2001-03 excluded				25	23	16
All referrals from BFOA to Columbia PT, excludes Dr. Fisher before 2004	81	64	47	111	107	81
Total PT referrals from BFOA	662	626	784	1243	1636	717
% of BFOA referrals to Columbia PT	12%	10%	6%	9%	7%	
BFOA referrals to BFPT		13	283	356	437	236
% of BFOA referrals to BFPT			36%	29%	27%	33%

*Some of Dr. Fischer's referrals in 2004 were before joining BFOA

Exhibit P

PT Referrals by Doctor

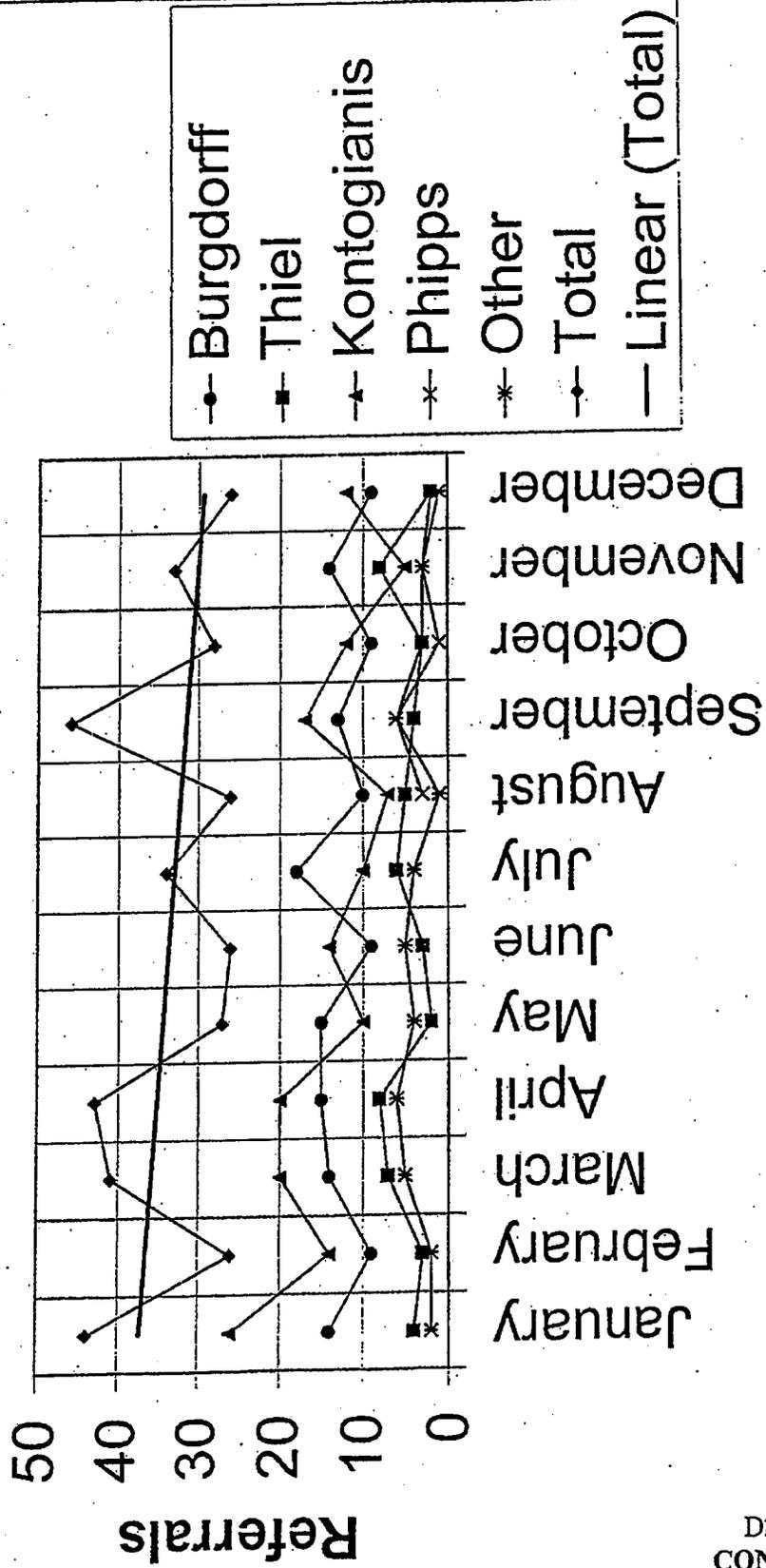


Exhibit Q

All new PT and BFPT referrals from 01 01 2003 to 01 01 2004 by Doctor

AET	Referred 33	New Patients to BFPT
AET	Referred 200	Patients to Physical Therapy
AGJ	Referred 67	New Patients to BFPT
AGJ	Referred 274	Patients to Physical Therapy
CAK	Referred 158	New Patients to BFPT
CAK	Referred 373	Patients to Physical Therapy
HLP	Referred 12	New Patients to BFPT
HLP	Referred 54	Patients to Physical Therapy
TRB	Referred 106	New Patients to BFPT
TRB	Referred 255	Patients to Physical Therapy

376 BFPT
1156 TOTAL
32.5%

All new PT and BFPT referrals from 01 01 2003 to 01 01 2004 by Insurance

BASIC HEAL	Referred 1	Patients to Physical Therapy
BCBS	Referred 1	Patients to Physical Therapy
BLUE CROSS	Referred 65	New Patients to BFPT
BLUE CROSS	Referred 231	Patients to Physical Therapy
CIGNA	Referred 3	Patients to Physical Therapy
CIGNA - CO	Referred 2	New Patients to BFPT
CIGNA***	Referred 1	New Patients to BFPT
CIGNA***	Referred 6	Patients to Physical Therapy
FIRST CHOI	Referred 2	Patients to Physical Therapy
GROUP HEAL	Referred 142	Patients to Physical Therapy
HMO	Referred 2	Patients to Physical Therapy
L&I	Referred 137	New Patients to BFPT
L&I	Referred 250	Patients to Physical Therapy
MEDICAID	Referred 19	New Patients to BFPT
MEDICAID	Referred 7	Patients to Physical Therapy
MEDICAID/M	Referred 46	New Patients to BFPT
MEDICAID/M	Referred 24	Patients to Physical Therapy
MEDICARE	Referred 81	New Patients to BFPT
MEDICARE	Referred 224	Patients to Physical Therapy
MEDICARE/G	Referred 1	New Patients to BFPT
MEDICARE/G	Referred 3	Patients to Physical Therapy
MSC	Referred 2	Patients to Physical Therapy
PPO	Referred 4	Patients to Physical Therapy
PRIVATE	Referred 58	New Patients to BFPT
PRIVATE	Referred 229	Patients to Physical Therapy
RRMEDICARE	Referred 1	Patients to Physical Therapy
SELF PAY	Referred 4	New Patients to BFPT
SELF PAY	Referred 100	Patients to Physical Therapy
TRI CARE	Referred 1	New Patients to BFPT
TRI CARE	Referred 4	Patients to Physical Therapy
UNIFORM	Referred 1	Patients to Physical Therapy

MEDICARE
MEDICAID
TOTAL 227
BFPT 82
% 36
37
26
70

462

86