

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

09 NOV -9 AM 11:36

BY RONALD R. CARPENTER

No. 81734-1

CLERK

SUPREME COURT OF THE STATE OF WASHINGTON

COLUMBIA PHYSICAL THERAPY, INC.,

Petitioner,

v.

BENTON FRANKLIN ORTHOPEDIC ASSOCIATES, ET AL.,

Respondents.

**BRIEF OF RESPONDENTS IN ANSWER  
TO THE AMICUS CURIAE BRIEF OF THE  
AMERICAN PHYSICAL THERAPY ASSOCIATION**

Michael H. Church  
WSBA #24957  
Matthew T. Ries  
WSBA #29407  
STAMPER RUBENS, P.S.  
720 West Boone, Suite 200  
Spokane, Washington 99201  
(509) 326-4800

Howard R. Rubin  
Kenneth J. Pfaehler  
Christopher L. Harlow  
SONNENSCHNEIN NATH &  
ROSENTHAL LLP  
1301 K Street, N.W.  
Suite 600, East Tower  
Washington, D.C. 20005  
(202) 408-6400

Attorneys for Respondents

ORIGINAL

FILED AS  
ATTACHMENT TO EMAIL

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
ARGUMENT.....	1
A.    APTA’s Opposition to Earned Profits By Physicians is Directly Contrary to Controlling Precedent.....	1
B.    BFOA May Hire Persons, However Licensed, Who Provide Medical Services, Care and Treatment to Its Patients.....	3
C.    RCW 18.100.050 Must Be Read In Pari Materia With RCW 18.74.140.....	6
D.    APTA’s Policy Arguments Do Not Address The Business Model at Issue in This Case. ....	8
CONCLUSION .....	12
CERTIFICATE OF SERVICE.....	14

**TABLE OF AUTHORITIES**

**CASES**

	<u>Page</u>
<i>Hallauer v. Spectrum Properties, Inc.</i> , 143 Wn.2d 126, 18 P.3d 540 (2001) .....	7
<i>Wright v. Jeckle</i> , 158 Wn.2d 375, 144 P.3d 301 (2006).....	2

**WASHINGTON STATUTES AND RULES**

RCW 18.100 .....	3, 7
RCW 18.100.010 .....	5
RCW 18.100.050 .....	6, 8
RCW 18.100.050(5)(a) .....	8
RCW 18.100.080 .....	4
RCW 18.71 .....	8
RCW 18.71.011(1) .....	4
RCW 18.74 .....	4, 7
RCW 18.74.010 .....	4
RCW 18.74.090(1) .....	4
RCW 18.74.140 .....	6, 7
RCW 19.68 .....	2, 3
RAP 10.3(f) .....	1

**FEDERAL STATUTES, REGULATIONS AND AUTHORITY**

42 C.F.R. § 410.60(a)(3) .....	5
42 C.F.R. § 410.61 .....	5

42 C.F.R. § 424.24.....	5
Dep't of Health & Human Servs., Centers for Medicare & Medicaid Services, "Enrollment of Physical and Occupational Therapists as Therapists in Private Practice," 67 Fed. Reg. No. 251 at 79987 (Dec. 31, 2002) .....	11
Dep't of Health & Human Servs., Centers for Medicare & Medicaid Services, Medicare Benefit Policy Manual (Pub.100-02) .....	5

**OTHER AUTHORITY**

Mitchell & Scott, " <i>Physician Ownership of Physical Therapy Services &amp; Effects on Charges, Utilization, Profits and Service Characteristics</i> ," 268 J. Am Med. Ass'n 152:2055-59(1992) .....	9
Swedlow Johnson, Smithline & Milstein, " <i>Increased Costs &amp; Rates of Use in the California Worker's Compensation System as a Result of Self-Referral by Physicians</i> ," New Eng. J. of Med., 327(21):1502-06 (1992) .....	11
Stuart Wright, Deputy Inspector General for Evaluation and Inspections, Memorandum to Leslie Norwalk, Deputy Administrator, Centers for Medicare & Medicaid Services, May 2, 2006.....	10

Respondents Benton Franklin Orthopedic Associates, PLLC (“BFOA”), Benton Franklin Physical Therapy, Inc., Thomas Burgdorff, Christopher Kontogianis, Arthur Thiel, David Fischer, Heather Phipps, Rodney Kump and Jay West (collectively, “Benton Franklin”), pursuant to RAP 10.3(f) and the Court’s October 28, 2009 letter, hereby answer the amicus curiae brief filed by the American Physical Therapy Association (“APTA”) in support of Petitioner Columbia Physical Therapy, Inc. (“Columbia”).<sup>1</sup>

### **ARGUMENT**

#### **A. APTA’s Opposition to Earned Profits By Physicians is Directly Contrary to Controlling Precedent.**

APTA makes its agenda clear on the first page of its brief. “The American Physical Therapy Association opposes . . . participation in services that is in any way linked to financial gain of the referral source.” (APTA Br. at 1 n.1). This position is far outside the mainstream of federal and state law. Whether under federal Stark Law or the laws of the various states, we are unaware of any government entity adopting the extreme position that physician owners of a medical practice are prohibited, under any circumstance, from making a profit on health care services furnished by employees of the physicians’ medical practice to whom the physicians

---

<sup>1</sup> Amicus Curiae Brief of American Physical Therapy Association, dated and filed October 19, 2009 (cited herein as “APTA Br.”).

refer patients for treatment.

APTA's position was rejected by this Court just three years ago, when it held that the Anti-Rebate Statute, RCW 19.68, does not

prevent a health care provider from making a profit on furnishing goods or care to patients. We arrive at this conclusion based upon the purposes, structure, and words of this and related statutes. Our conclusion is reinforced by common sense.

*Wright v. Jeckle*, 158 Wn.2d 375, 381, 144 P.3d 301, 304-05 (2006).

The Court in *Wright* made clear that Washington law "would prohibit a doctor from receiving an 'unearned profit' (or 'kickback')" for making a referral. 158 Wn.2d at 381, 144 P.3d at 305. The example the Court offered in *Wright* was the taking of an unearned profit from a third party, such as "when a licensed health care professional is paid an *unearned profit* by another person who was permitted to furnish/sell something to a patient that has been prescribed by the professional." *Id.* at 381, 144 P.3d at 304 (emphasis in original). APTA does not suggest that BFOA's physician owners have been paid any money by the medical group's employee physical therapists, let alone an unearned profit or kickback in exchange for permission to furnish/sell physical therapy services to BFOA's patients. Washington law prohibits such a "kickback" arrangement, but does not prohibit the physician owners of a medical practice from earning "profits from treating patients or providing goods

and services,” 158 Wn.2d at 381, 382, 144 P.3d at 305, as occurs when an employee physical therapist furnishes care to patients of the medical practice that employs the physical therapist.

APTA’s brief offers no reason for the Court to reach a different conclusion now. Certainly, the statutes interpreted in *Wright v. Jeckle* three years ago have not been amended. Nor can the legislature be presumed to have done indirectly, in the Professional Service Corporations Act, RCW 18.100, *et seq.* (the “PSCA”), what this Court has held the Legislature did not do directly in the Anti-Rebate Statute, RCW 19.68, *et seq.*

**B. BFOA May Hire Persons, However Licensed, Who Provide Medical Services, Care and Treatment to Its Patients.**

At page five of its Amicus Brief, APTA quotes the trial court’s observation that physicians “could not form a professional services corporation and then enter the accounting business, hire accountants or hire attorneys or hire other non health-care professionals.” APTA draws a conclusion from this statement that does not follow: that the PSCA limits the types of health care professionals whom a physician-owned professional services corporation may employ. (*Id.*). This conclusion is not supported by the PSCA and is not the conclusion that the Superior Court reached. Instead, the Superior Court correctly concluded that the

PSCA prohibits a professional services corporation only from engaging “in any business other than the rendering of the professional services for which it was incorporated.” (RP Sept. 12, 2007, at 59:8-11, *citing* RCW 18.100.080). In other words, a physician-owned professional services corporation may engage in any business within the scope of a physician’s practice of medicine.

Physical therapy, as defined in the physical therapy licensing statute, plainly falls within the physician’s broader authorized scope of the practice of medicine.<sup>2</sup> So, for example, Medicare Part B covers outpatient physical therapy services only if a physician certifies in writing that the patient has a therapeutic (as opposed to palliative) medical need for the services, the physical therapy is furnished while the patient is under the care of a physician, and the physical therapy is provided pursuant to a plan of treatment that identifies the patient’s diagnosis and prescribes the type,

---

<sup>2</sup> Compare RCW § 18.71.011(1) (broadly defining the practice of medicine to include those who “diagnose, cure, advise, or prescribe for any human disease, ailment, injury, infirmity, deformity, pain or other condition, physical or mental, real or imaginary, by any means or instrumentality”) with RCW § 18.74.010(8)(a) (defining the practice of physical therapy to include “[e]xamining, evaluating, and testing individuals with mechanical, physiological, and developmental impairments, functional limitations in movement, and disability or other health and movement-related conditions in order to determine a diagnosis, prognosis, plan of therapeutic intervention, and to assess and document the ongoing effects of intervention”). See also RCW 18.74.090(1) (Chapter RCW 18.74 not intended to limit any other profession’s authorized scope of practice).

amount, frequency and duration of the physical therapy services.<sup>3</sup> Moreover, under Medicare rules and regulations, a physician may not only supervise the physical therapy furnished by his or her employees but, indeed, may personally furnish such services.<sup>4</sup> Consistent with this, physical therapy is encompassed within the ambit of the professional services for which BFOA was organized, which include the full range of “medical services, care and *treatment* to the patients of the company.” (CP 385 (emphasis added)).

As the Superior Court observed, the PSCA “addresses the act of incorporation” (RP Sept. 12, 2007, at 60:2-3) – not the act of employment. The PSCA reflects an express “legislative intent to *provide for the incorporation* of an individual or group of individuals to render the same professional service to the public for which such individuals are required by law to be licensed . . . .” RCW 18.100.010 (emphasis added). This statement of legislative intent precisely describes BFOA: an incorporated group of physicians, with no other owners, who have incorporated to render the professional services that physicians may render. Physical therapy is one of those services.

---

<sup>3</sup> 42 C.F.R. §§ 424.24, 410.61; *see also* Dep’t of Health & Human Servs., Centers for Medicare & Medicaid Services, Medicare Benefit Policy Manual (Pub. 100-02), ch. 15, § 220.1.

<sup>4</sup> 42 C.F.R. §§ 410.60(a)(3)(iii).

Therefore, BFOA's inability to render accounting or legal services to the public has nothing to do with whether BFOA can render physical therapy services to the public using licensed physical therapists. Accountants and lawyers do not provide medical services, care or treatment to the patients of BFOA. Physical therapists, in contrast, furnish services that are ordered, supervised, and even furnished by physicians.

**C. RCW 18.100.050 Must Be Read In Pari Materia  
With RCW 18.74.140.**

Not only do physical therapists furnish services ordered, supervised and, on occasion, performed by physicians, but as described in greater detail in the October 15, 2009 amicus brief submitted by the Washington State Medical Association and 18 other amici (at pages 5-6 and footnote 4), physicians formerly were required to provide supervision of physical therapy under State law. When the physical therapy licensing statute was enacted, the legislature made clear that physical therapists could continue to be employed as they had been before:

“Nothing in this chapter restricts the ability of physical therapists to work in the practice setting of their choice.”  
RCW 18.74.140.

If this provision is to be given meaning and effect, it must mean that a physical therapist can choose to work for a physician-owned medical

practice.<sup>5</sup>

In arguing that 18.100.050 prohibits Benton Franklin's business model, APTA completely ignores RCW 18.74.140.<sup>6</sup> In fact, neither Columbia, APTA, nor amicus Physical Therapy Association of Washington cite or even mention RCW 18.74.140 anywhere in their briefs filed with this Court.

But the Legislature's express direction in one section of Title 18 cannot be ignored when interpreting another. The Legislature is presumed to have intended RCW 18.74 to work in harmony with RCW 18.100. Where "statutes relate to the same subject matter," they "must be construed together . . . [and] are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes." *Hallauer v. Spectrum Props., Inc.*, 143 Wn.2d 126, 146, 18 P.3d 540, 550 (2001) (internal citations and quotation marks omitted).

---

<sup>5</sup> Likewise, RCW 18.74.140 also permits a physical therapist to choose to work for a company such as petitioner Columbia. Benton Franklin does not take the position that physical therapists can only work for physician-owned medical practices. Rather, it is Columbia and APTA that seek to restrict the employment options for physical therapists.

<sup>6</sup> Rather than addressing RCW 18.74.140, APTA devotes four pages of heavily footnoted discussion to the laws of the different states, finally drawing the unsurprising conclusion that state laws vary and the enactments of the Washington legislature govern this case. (APTA Br. at 8-11). Benton Franklin agrees with this principle, but believes that *all* of the relevant Washington statutes govern this case, including RCW 18.74.140.

APTA also is incorrect when it says that “RCW 18.100.050(5)(a) authorizes multi-disciplinary *practice* by members of not just one profession but of the many healthcare professions . . . .” (APTA Br. at 7 (emphasis added)). RCW 18.100.050 does not authorize the *practice* of any healthcare profession. Doctors are authorized to practice medicine by RCW 18.71, *et seq.*; physical therapists are authorized to practice physical therapy by RCW 18.74, *et seq.* RCW 18.100.050, by contrast, simply authorizes the formation of corporations by certain professionals, including physicians, and in so doing places limits on who may jointly own a professional corporation. The words of RCW 18.100.050 do not address who those physicians may employ or the scope of their practice.

**D. APTA’s Policy Arguments Do Not Address The Business Model at Issue in This Case.**

APTA devotes much of its policy argument to attacking a business model that is not at issue in this case. APTA contends that “[s]everal studies point toward high utilization of physical therapy services in situations where MDs are in a position to profit from their referrals.” (APTA Br. at 13). For this proposition, APTA cites a 2006 memorandum from the Office of the Inspector General of the U.S. Department of Health and Human Services (“HHS OIG”); a 1992 article from the Journal of the American Medical Association (“JAMA”); and a 1992 article published in

the New England Journal of Medicine. (APTA Br. 13-14 n.12).

None of these studies, however, addresses the business model at issue here, where physicians are the sole owners of a medical group practice that employs licensed physical therapists to provide particular treatment services in the practice's offices and bills those services as services furnished by a physical therapist in private practice.<sup>7</sup> Instead, for instance, the JAMA study examined utilization of physical therapy services by *physician joint ventures* (i.e., not within the medical office setting). This study was designed as a "[s]tatistical comparison by physician joint venture ownership status of freestanding physical therapy and comprehensive rehabilitation facilities providing physical therapy treatments in Florida."<sup>8</sup> "*Physician practices offering physical therapy services within the practice were not surveyed.*"<sup>9</sup>

A physician joint venture, in which separately practicing physicians refer their separate pools of patients to therapists working outside of the physician's respective medical practices, is the antithesis of BFOA's business model. BFOA's physical therapists are employed by

---

<sup>7</sup> See, e.g., CP 291, 1047, 1058 1061.

<sup>8</sup> Mitchell & Scott, "Physician Ownership of Physical Therapy Services & Effects on Charges, Utilization, Profits and Service Characteristics," 268 J. Am Med. Ass'n 152:2055-59, at 2055 (1992).

<sup>9</sup> *Id.* at 2056 (emphasis added).

and perform services within BFOA's practice. BFOA's Operating Agreement, entered into in 2000, makes clear that the medical practice is *not* a joint venture (CP 385), and there has been no suggestion made to the contrary by Columbia or its supporting amici curiae. Thus, when the JAMA article concludes that "[j]oint venture physical therapy clinics render on average about 50% more visits per year than their non-joint venture counterparts,"<sup>10</sup> BFOA's business model is part of the group that has 50% less visits.

The HHS Inspector General's memorandum, meanwhile, addresses only "incident to" billing, not the billing model of physical therapists in private practice ("PTPP") used by BFOA.<sup>11</sup> As Benton Franklin has explained in its briefs, BFOA does not bill its physical therapists' services "incident to" the furnishing of physicians' services. Rather, BFOA bills the physical therapy services in its own name as directly provided by the therapist, using BFOA's tax identification and National Provider Identifier ("NPI") numbers and the therapist's Medicare Personal Identification Number or NPI number.<sup>12</sup> The Inspector General's memorandum does

---

<sup>10</sup> *Id.* at 2057.

<sup>11</sup> Memorandum from Stuart Wright, Deputy Inspector General for Evaluation and Inspections, to Leslie Norwalk, Deputy Administrator, Centers for Medicare & Medicaid Services, May 2, 2006 (cited herein as "Wright Mem.").

<sup>12</sup> *See, e.g.*, 3/13/09 Brief of Respondents at 6, 21; 6/23/09 Reply Brief of Respondents at 15-16.

not address, much less criticize, PTPP services. To the contrary, physician billing of PTPPs has been expressly endorsed by HHS in a Final Rule:

We proposed to clarify national policy and revise §§ 410.59 and 410.60 to state we would allow enrollment of therapists as PTs [physical therapists] or OTs [occupational therapists] in private practice when employed by physician groups. We believe that this reflects actual practice patterns, will permit more flexible employment opportunities for therapists and will also increase beneficiaries' access to therapy services, particularly in rural areas.<sup>13</sup>

The Inspector General's memorandum cannot be understood as rejecting HHS's Final Rule concerning PTPP services.<sup>14</sup>

Similarly, the study published in the New England Journal of Medicine focused on physician referral of patients to a facility "outside their office practice at which they do not directly provide care or services when they have an investment interest in the facility."<sup>15</sup> The study did not focus on physical therapy provided at medical offices that were part of the

---

<sup>13</sup> Dep't of Health & Human Servs., Centers for Medicare & Medicaid Services, "Enrollment of Physical and Occupational Therapists as Therapists in Private Practice," 67 Fed. Reg. No. 251 at 79987 (Dec. 31, 2002) (Attachment A-2 to Respondents' Reply Brief).

<sup>14</sup> Indeed, the Inspector General's memorandum states that the concerns it identified were largely addressed by final rules adopted by the Centers for Medicare & Medicaid Services, in particular rules requiring that physical therapists be licensed and have appropriate training and skills. Wright Mem. at 1. BFOA's physical therapists are licensed (CP 1041 at 12:18-21, 13:1-3; CP 1057 at 9:21-24), and there is no contention that they lack appropriate skills.

<sup>15</sup> Swedlow, Johnson, Smithline & Milstein, "Increased Costs & Rates of use in the California Worker's Compensation System as a Result of Self-Referral by Physicians," New Eng. J. of Med., 327(21):1502-06 (1992).

physicians' own practice.<sup>16</sup> Significantly, the New England Journal of Medicine article cites to three other studies, all of which examined physician joint ventures.<sup>17</sup> That, of course, is not the business model at issue here.

### CONCLUSION

For all the reasons set forth above and in Benton Franklin's opening Brief, Reply Brief, Brief in Answer to the Amicus Curiae Brief of PTAW, and in the amicus curiae briefs filed by the Washington State Medical Association together with 18 other amici, the American Association of Orthopedic Surgeons together with three other amici, and the Washington Ambulatory Surgery Center Association, Benton Franklin respectfully requests this Court to (1) reverse the trial court's denial of summary judgment for Benton Franklin on Columbia's claims under the Anti-Rebate Statute and the Consumer Protection Act, (2) remand this case to the trial court for entry of summary judgment in favor of Benton Franklin on Columbia's claims based on the Anti-Rebate Statute, the Consumer Protection Act and the common law corporate practice of medicine doctrine, and (3) affirm the trial court's grant of summary judgment in favor of Benton Franklin on Columbia's PSCA claim.

---

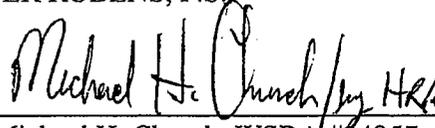
<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at nn. 7-9.

Respectfully submitted this 9th day of November, 2009

STAMPER RUBENS, P.S.

By:

Handwritten signature of Michael H. Church, with "HRR" written at the end.

Michael H. Church, WSBA #24957  
Matthew T. Ries, WSBA #29407

SONNENSCHN NATH & ROSENTHAL LLP

By:

Handwritten signature of Howard R. Rubin.

Howard R. Rubin (admitted pro hac vice)  
Kenneth J. Pfahler (admitted pro hac vice)  
Christopher L. Harlow (admitted  
pro hac vice)

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

09 NOV -9 AM 11:36

BY RONALD R. CARPENTER

**CERTIFICATE OF SERVICE**

~~CLE~~The undersigned certifies, under penalty of perjury under the laws of the United States and the State of Washington, that on this date he caused to be served a copy of the foregoing Brief of Respondents in Answer to the Amicus Curiae Brief of the American Physical Therapy Association, by e-mail and by Federal Express, overnight delivery, on the following counsel:

Darren Bailey, Esq.  
Danford Grant, Esq.  
Stafford Frey Cooper  
601 Union Street, Suite 3100  
Seattle, Washington 98101  
*Counsel for Petitioner*

Charles K. Wiggins, Esq.  
Wiggins & Masters PLLC  
241 Madison Avenue North  
Bainbridge Island, Washington 98110  
*Counsel for Petitioner*

Howard M. Goodfriend, Esq.  
Edwards, Sieh, Smith & Goodfriend, P.S.  
1109 First Avenue, Suite 500  
Seattle, Washington 98101  
*Counsel for Amicus Curiae American Physical  
Therapy Association*

John J. Bennett, Esq.  
American Physical Therapy Association  
1111 North Fairfax Street  
Alexandria, Virginia 22314  
*Counsel for Amicus Curiae American Physical  
Therapy Association*

FILED AS  
ATTACHMENT TO EMAIL

ORIGINAL

Carmen R. Rowe, Esq.  
Jay A. Goldstein, Esq.  
Jay A. Goldstein Law Office, PLLC  
1800 Cooper Point Road SW  
No. 8  
Olympia, Washington 98502  
*Counsel for Amicus Curiae Physical  
Therapy Association of Washington, Inc.*

Kristiana Farris O'Brien, Esq.  
Montgomery Purdue Blankinship & Austin PLLC  
701 Fifth Avenue, Suite 5500  
Seattle, Washington 98104-7096  
*Counsel for Amicus Curiae Washington State Medical  
Association, et al.*

Leonard J. Feldman, Esq.  
Jason T. Morgan, Esq.  
Stoel Rives LLP  
600 University Avenue, Suite 3600  
Seattle, Washington 98101  
*Counsel for Amicus Curiae American Association of  
Orthopaedic Surgeons, et al.*

Emily R. Studebaker, Esq.  
Garvey Schubert Barer, P.S.  
1191 Second Avenue, Suite 1800  
Seattle, Washington 98101  
*Counsel for Amicus Curiae Washington Ambulatory  
Surgery Center Association*

Dated this 9th day of November, 2009, at Washington, D.C.



---

Howard R. Rubin