No. 81734-1

SUPREME COURT OF THE STATE OF WASHINGTON

COLUMBIA PHYSICAL THERAPY, INC., P.S.

Petitioner / Cross-Respondent

v.

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

Respondents / Cross-Petitioners

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RESPONSE BRIEF
OF PETITIONER/CROSS-RESPONDENT
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TABLE OF CONTENTS

Page

I. INTRODUCTION AND SUMMARY OF ARGUMENT 1

II. STATEMENT OF THE CASE 5

A. The Defendant Physicians Direct Patients To Their Physical Therapy Clinic 5

B. BFOA Physicians Provide No More Supervision Over The Care Their Patients Receive At BFPT Then Their Patients Who Treat Elsewhere 6

C. Popts Incentivize Referrals And Harm Competition 8

III. ARGUMENT 11

A. The Common Law Prohibits Corporations From Providing Professional Services To The Public Without Specific Legislative Authorization 11

B. BFOA Violates The Professional Services Corporation Act Because It Provides Two Separate Professional Services Through A Single PLLC 16

1. The Professional Services Corporation Act governs who may own a professional service corporation and what types of services that corporation can provide to the public 17

2. The plain language of the PSCA and its legislative history indicate that the legislature intended to restrict the professions that could practice together in a single professional corporation 18

3. The Professional Services Corporation Act is in derogation of the common law and therefore must be strictly construed 22

C. BFOA's Business Arrangement Violates RCW 19.68 Because Defendant Physicians And Physical Therapists Pay Or Receive Compensation In Connection With Referrals To, And The Furnishing Of Care By, The Physical Therapists Employed By BFOA 24

1. BFOA physicians and physical therapists violate the referral and furnishing prongs of RCW 19.68.010 26

2. RCW 19.68.040 does not protect BFOA's business arrangement 27

D. RCW 74.09.240 And The Stark Law Do Not Authorize BFOA's Self-Referral And Profit Structure 29

1. RCW 74.09.240 Is Not At Issue In This Case And Does Not Authorize BFOA's Billing And Profit Structure 31

2. Medicare law does not authorize physicians to employ physical therapists, but instead expressly defers to the states on this issue 33

E. The Trial Court Properly Denied BFOA's Motion For Summary Judgment On Columbia's CPA Claim 43

1. BFOA engaged in a deceptive practice by compelling patients to receive physical therapy at its own physical therapy clinic 44

2. BFOA engaged in a deceptive practice within the meaning of the CPA by failing to disclose to its patients the nature of the relationship between BFOA and the clinic BFOA's physicians owned 47

3. BFOA's unlawful ownership arrangement and profit-bearing referrals constitute unfair methods of competition 48

IV. CONCLUSION 50

TABLE OF AUTHORITIES

Page

Cases

Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 719 P.2d 531 (1986) 39, 40

Hunter v. Brown, 4 Wn. App. 899, 484 P.2d 1162 (1971) 39

McNeal v. Allen, 95 Wn.2d 265, 621 P.2d 1285 (1980) 20

Morelli v. Ehsan, 110 Wn.2d 555, 756 P.2d 129 (1988) 11, 12, 15, 18

Omer v. Edgren, 38 Wn. App. 376, .2d 635 (1984) 39

Potter v. Washington State Patrol, 165 Wn.2d 67, 196 P.3d 691 (2008) 20, 21, 42

Standard Optical Co. v. Superior Court, 17 Wn.2d 323, 135 P.2d 839 (1943) 12

State ex rel. Madden v. Pub. Util. Dist. No. 1, 83 Wn.2d 219, 517 P.2d 585 (1973) 20

Sw. Sunsites, Inc. v. Fed. Trade Comm'n, 785 F.2d 1431 (9th Cir.1986) 40

Statutes

RCW 18.100 ..... 19, 25, 43

RCW 18.100.010 ..... 15, 17

RCW 18.100.050 ..... 16, 17, 18, 19, 20, 21

RCW 18.100.050(5) 16

RCW 18.100.050(5)(a) 15, 17, 18, 19, 21

RCW 18.100.050(5)(a)-(b) 15

RCW 18.100.050(5)(b) 13, 17

RCW 18.100.080 ..... 15, 17

RCW 19.68 ..... 23, 28, 43

RCW 19.68.010 ..... 3, 21, 22, 23

RCW 19.68.010(1) 21
RCW 19.68.040 ..... 3, 22, 23, 24, 25
RCW 74.09.240 ..... 26, 28, 29, 30, 38
RCW 74.09.240(3)(a) 29
RCW 74.09.240(3)(c) 13
RCW 74.09.240(5) 28

Regulations

42 C.F.R. § 355(b)(1)(iii) 32
42 C.F.R. § 410.32(b)(3)(i) and (iii) 37
42 C.F.R. § 410.32(b)(3)(ii) 37
42 C.F.R. § 410.60(c)(i) 34
42 C.F.R. § 485.707 ..... 14, 34
42 C.F.R. 410.32(b)(3) 36
42 C.F.R. 410.60(c)(1)(ii)(C) 35

Other Authorities

§1861(s) of the Social Security Act. 36
42 U.S.C. § 1395nn 26, 27, 28, 29, 30, 32, 35, 38
66 FR 856-01 ..... 32, 33
BNA's Health Law & Business Series, The Corporate Practice of Medicine Prohibition in the Modern Era of Health Care, No. 2800, Document 49, Washington (Westlaw cite BNAHLB No. 2800 WP 49 at 1) 17
Consumer Protection Act 38
Medical Profession – Anti-Kickback Statute, 45 Washington Law Rev. 838, n.9 (1970) 22
Medicare Benefit Policy Manual 14, 33, 34, 35, 36, 37

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The questions before the Court is straightforward: Does Washington common law prohibit a corporation from practicing physical therapy? If so, does the Professional Services Corp Act prohibit physicians from forming a corporation employing both physicians and physical therapists where they are by definition not performing the "same professional services"?

BFOA's response confuses the issue with numerous rhetorical flourishes, red herrings, and straw man arguments. For example, BFOA's argument that Columbia brought this suit to create a monopoly turns this suit on its head. The suit was not brought to create a monopoly, but instead to prevent a monopoly, and BFOA's argument ignores the empirical evidence demonstrating that POPTS suppress competition in the healthcare marketplace by creating captive referral markets. (CP 743). Physical therapists in private practice cannot compete on fair ground with orthopedic physicians who—as a practical matter—control the supply of physical therapy patients through their referrals to physical therapy.

Likewise, BFOA repeatedly (and erroneously) asserts throughout its brief that federal Medicare law controls, and that Medicare law authorizes physicians to employ physical therapists.

In fact, however, Medicare law requires compliance with state law and expressly reserves the question in this case—whether physicians can employ physical therapists—to the states. Far from being accepted "across the entire country" as BFOA claims, POPTS are a relatively new phenomena and at least two states, South Carolina and Delaware, have recently prohibited physicians from employing physical therapists. BFOA knows this, of course, as it cited the South Carolina Supreme Court case that decided the issue in that state.

Next, BFOA's argument that it is more convenient for its patients to attend treatment with its employee physical therapists makes no sense in the context of this case, where the physical therapists work in a separate building that is in many cases located in a different city than the BFOA physicians' office.

In contrast to BFOA's questionable characterizations, Columbia's arguments are straightforward. The common law corporate practice doctrine prohibits corporations like BFOA from providing professional services to the public absent specific legislative authorization. The Professional Services Corporation Act ("PSCA") is a narrow exception to the common law that authorizes individuals who perform the "same professional services" to form and render their professional services through a

professional corporation. The PSCA identifies physicians and physical therapists as separate professional services that prior to the PSCA could not be performed by a corporation. Therefore, the PSCA does not authorize BFOA to provide both of these professional services to the public. Because no other legislative authorization exists, BFOA is violating both the corporate practice doctrine and the PSCA.

The Anti-Rebate Statute prohibits health care professionals from paying or receiving rebates or profits in connection with the referral to or furnishing of care by another professional. RCW 19.68.010. However, "a licensee who employs another licensee" may charge and collect for the employee's services. RCW 19.68.040. Here, BFOA cannot satisfy the employee exception for three reasons: 1) the referring physicians do not employ the physical therapists, who are employed by the company the physicians own; 2) the exception applies only to similarly licensed professionals (which harmonizes the anti-rebate statute with the PSCA); and 3) the physicians do not supply the supervision over the therapists that is necessary under the exception.

Columbia asks the Court to enforce the plain language of the statutory scheme set up by the legislature; in contrast, BFOA asks this court to legislate, branding the statutory scheme as "absurd." BFOA ignores the important public health-care policies underlying the statutes, which are well-documented and empirically supported: the growing POPTS business practice leads to patient-provider conflicts of interest, unnecessary referrals, an over-utilization of health care services, increased health costs, and the diminished professional autonomy of two separately licensed professions (physicians and physical therapists).

Finally, the Court should reject BFOA's attempt to minimize its deceptive anti-competitive conduct. The testimony in this case demonstrates Defendants' intent to internalize patient referrals by implying (or in some cases expressly stating) that patients will receive superior care from physical therapists at the clinic they own. The testimony also shows how insidiously patients can be pressured into receiving such treatment, can feel coerced into going to Defendants' clinic, or may remain unaware of Defendants' financial interest in their referral. Regardless, Defendants' practices create an internal patient referral market that cannot be duplicated by non-physician-owned physical therapy clinics—clinics that should not be "competing" with physicians in the first place, but

with each other. Defendants' practices are unfair, have the capacity to deceive, and are harmful to both patients and other community physical therapists.

II. STATEMENT OF THE CASE

A. The Defendant Physicians Direct Patients To Their Physical Therapy Clinic.

The record shows that BFOA physicians pressure (and even coerce) their patients to go for treatment at the physical therapy clinic they own. Patients of BFOA physicians testified that the physicians directed them to go to BFPT for physical therapy. (CP 1075, 1003-1004). Some patients testified that they thought they had to go to BFOA's physical therapy clinic and did not know they had the right to go anywhere else. (CP 1075, 1077) (testifying "I honestly thought that you had to go wherever the doctor referred you....")(*see also* CP 743). One patient who specifically asked to go to an alternate clinic was told by a BFOA physician that he could <u>not</u> go to that clinic for physical therapy:

> Q. Let me back up for a second. Your first visit with Dr. Kontogianis, what did he say to you regarding the physical therapy clinic?
>
> A. I was -- I told him that I was already going to physical therapy at Columbia Physical Therapy for my back and it would be a lot easier for me if I could just do it

> all at one and that's where I wanted to be referred to, but he said that, no, he wanted me to go to his physical therapy office because that way he could oversee my therapy firsthand.

(CP 1003-1004).

B. BFOA Physicians Provide No More Supervision Over The Care Their Patients Receive At BFPT Than Their Patients Who Treat Elsewhere.

Despite BFOA's argument that its physicians oversee physical therapy at the BFOA clinic firsthand, the BFOA physicians repeatedly testified to the contrary, and in fact they are never present at the physical therapy clinic to observe or supervise the physical therapists who are treating their patients. For example, Dr. Fischer testified:

> Q. Have you ever been physically present at Benton Franklin Physical Therapy at the same time --
>
> A. No.
>
> Q. -- one of your patients was receiving treatment?
>
> A. No.

(CP 945). Likewise, Dr. Thiel testified:

> Q. Since you started Benton Franklin Orthopedic Associates have you ever visited Benton Franklin Physical Therapy while a patient is receiving physical therapy?
>
> A. I don't recall.

(CP 316).[1]

Moreover, the defendant physicians exert little or no administrative control over BFOA physical therapists. BFOA physical therapist Jay West testified that paid BFOA administrator Mike Nietzel is in charge of the day-to-day operation of BFPT. (CP 1058). Similarly, Rodney Kump testified that the physicians are not even present at BFPT's monthly staff meetings. (CP 1043). The performance reviews of the physical therapists are performed by Mr. Nietzel. (CP 1062, 1046). In fact, the defendant physicians exhibit no more supervision over the physical therapy provided at BFPT than they do over therapy provided to their patients at other clinics:

> Q. Do you supervise the treatment of physical therapists at physical therapy clinics other than Benton Franklin Physical Therapy?
>
> A. I believe that I supervise all my patients who go to physical therapy wherever they go.
>
> Q. Is there some supervision that you provide regarding patient care for the patients that go to Benton Franklin Physical Therapy that you do not provide for the patients that go elsewhere?
>
> A. No.

(CP 945, 1058).

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[1] This testimony is further corroborated by the BFPT physical therapists. (CP 1063, 1047).

Finally, BFOA physical therapist Jay West testified that he alone develops the patient's initial treatment plan, and that he has never received a single comment from a defendant physician regarding one of his plans. (CP 1061).

C. POPTS Incentivize Referrals And Harm Competition.

It is well-established that financial incentives influence referral behaviors in physician-owned clinics. (CP 740, 742, 744, 745, 789. Because the defendant physicians profit from the treatment provided at the physical therapy clinics they own, they have a financial incentive to refer patients to their physical therapy clinic. (CP 743, 745, 786, 789). In fact, because defendant physicians profit each time they refer a patient to their physical therapy clinic, the more patients they refer, the greater their profit. (CP 740, 744, 789).

In addition to these financial abuses, the POPTS business arrangement creates an inherent capacity to deceive patients, which is unfair to both the patients and competitors. This anti-competitive unfairness and capacity to deceive arises from the following aspects of Defendants' unlawful business arrangement: 1) the inherent conflict of interest between the physicians and the

patients they refer for profit;[2] 2) the information asymmetry between physicians and the patients who depend upon them for care;[3] 3) the way defendant physicians characterize their relationship with the defendant physical therapists to whom they refer their patients;[4] 4) the way defendant physicians provide patients documentation of their financial interests in the facility employing the defendant physical therapists;[5] 5) the role of Defendant staff and computer systems in the referral process;[6] 6) the way Defendants advertise their orthopedic and physical therapy services; 7) the extent to which Defendants capture profits by internalizing patient referrals;[7] 8) the way patients are led to believe they will receive better care at Defendant physical therapists;[8] and, 9) the extent to which patients feel pressured into receiving physical therapy at Defendants' clinic.[9] These are all issues of fact bearing on the unfairness and deception of the policies and procedures utilized by Defendants to generate income through the internalization of patient referrals.

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[2] (CP 743, 745-46).
[3] (CP 743, 752).
[4] *Supra.*
[5] *Supra.*
[6] (CP 943).
[7] (CP 721-725, 743, 751).
[8] *Supra.*

Moreover, it is well-documented that Defendants' business practices impact the public interest. For example, physician-owned physical therapy clinics lead to higher utilization rates, which drives health insurance premiums higher. (CP 745). In some cases, Defendants' practices keep the patient from selecting the clinic that is more convenient to their work or home. For example, Dr. DeKay, an economist whose research focuses on health care economics, analyzed area referral patterns and noted that following the establishment of BFOA's physical therapy clinic, there was a reduction in referrals to non-BFOA physical therapy clinics in Richland and Pasco, which under other circumstances would not be in competition with BFOA's physical therapy clinic in another city (the BFOA clinic is in Kennewick). (CP 789-90). Specifically, Dr. DeKay observed that Defendants' self-referral practices are "driving" patients to Benton Franklin Physical Therapy in Kennewick, and away from clinics with a more convenient location. (CP 790).

Here, Defendant physicians have set up a captive referral market in which they have financial incentives to refer patients to their own physical therapy clinic. (CP 743). The physicians control

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[9] *Supra.*

not only the demand for services but the referral for those services as well. (CP 743). This arrangement directly "results in reduced or diminished competition in the health care marketplace." (CP 747).

III. ARGUMENT

A. The Common Law Prohibits Corporations From Providing Professional Services To The Public Without Specific Legislative Authorization.

Washington's common law corporate practice doctrine prohibits a corporation from providing professional services through its employees without specific legislative authorization. *See, e.g., Morelli v. Ehsan*, 110 Wn.2d 555, 561, 756 P.2d 129 (1988). BFOA's response that the doctrine addresses only who can own a corporation, and not which services a corporation can provide through its employees, is without merit and ignores the court's concern about the compromised professional standards, loss of professional autonomy, divided professional/public loyalties, and loss of public trust that arises from the commercialization of learned professions. BFOA's focus solely on "lay ownership" over-simplifies the purpose of the doctrine, because lay control over professional decision-making has historically been only one of the many dangers against which the common law protected the public. *See Standard Optical Co. v. Superior Court*, 17 Wn.2d 323, 331-

332, 135 P.2d 839 (1943). Prior to the enactment of the Professional Services Corporation Act ("PSCA") in 1969, a corporation could not provide *any* professional services to the public through its employees, *regardless of who owned it*. For example, a group of physicians could not have formed a corporation for the sole purpose of providing their own physician services to the public, despite the fact that only they owned the corporation. This demonstrates that the doctrine governs what services a corporation can or cannot lawfully provide to the public, not merely who owns the corporation. *See Standard Optical,* 17 Wn.2d at 326 (common law violated despite fact corporation had no control over the professional's practice). Indeed, to this day, the corporate practice doctrine <u>still</u> prohibits corporations from providing professional services unless those corporations comply with every aspect of the PSCA, which this Court described as a "narrow statutory exception" to the common law. *Morelli*, 110 Wn.2d at 559.

Notably, BFOA seems to concede the requirement for legislative authorization, but then strains to argue that "the legislature has legislatively authorized BFOA's employment of licensed physical therapists by enacting RCW 74.09.240(3)(c)."

(Resp. Br. pp. 36-37). This statute incorporates federal Medicare law, but as explained below in section III.D., federal Medicare law expressly defers to each state to determine if physicians should be allowed to employ physical therapists. Thus, the statute adopts federal Medicare law, but federal Medicare law looks back to state law on employment of physical therapists.

BFOA's remaining corporate practice doctrine arguments are "straw man" arguments to which BFOA must resort because it cannot answer Columbia's real arguments. For example, BFOA argues that if Columbia is right about the corporate practice doctrine, "without RCW 18.100.050(5)(b) every physical therapist would have to be a solo practitioner" and that "no licensees could practice together under the doctrine." (Resp. Br. pp. 35-36, 39-37) .

In fact, that is not the result of Columbia's position on the corporate practice doctrine. The corporate practice doctrine does not prohibit licensed professionals from practicing in general partnerships, limited liability partnerships, or other group-structured non-corporate business forms. Nor does it prohibit such entities from employing similarly licensed professionals. Indeed, a law firm partnership is a classic example of a business entity that provides professional services through its employees without violating the

common law. Accordingly, contrary to BFOA's alarmist and inaccurate characterization of Columbia's position, there are many business forms that healthcare professionals can choose from when they decide to provide their services to the public. BFOA's current arrangement, however, is not one of them.

Likewise, BFOA's assertion that its physicians can employ physical therapists because Medicare permits physicians to bill for providing therapy services is irrelevant to whether BFOA's business practices violate Washington's corporate practice doctrine. The various and labyrinthine rules promulgated by the Centers for Medicare and Medicaid Services ("CMS") may in some circumstances permit physicians to bill for providing therapy services, but they do not permit physicians to form corporations in violation of state law. *See, e.g.*, 42 C.F.R. § 485.707 And in fact, CMS expressly recognizes that states—like Washington—may prohibit physicians from employing physical therapists. Medicare Benefit Policy Manual, Pub. 100-02, Ch. 15, § 230.4(A), *infra*. Therefore, even if CMS permits physicians to bill for certain therapy services, this is not legislation authorizing a physician to own a corporation that employs a physical therapist, and is therefore

unrelated to whether the corporate form chosen by BFOA physicians is in compliance with the law of this state.

B. BFOA Violates The Professional Services Corporation Act Because It Provides Two Separate Professional Services Through A Single PLLC.

The PSCA is a "narrow statutory exception" to Washington's corporate practice doctrine. *Morelli*, 110 Wn.2d at 559. Under the PSCA, a professional corporation can render one, and only one, professional service to the public. See RCW 18.100.010. The PSCA defines physicians and physical therapists as separate professional services. See RCW 18.100.050(5)(a)-(b). Therefore, BFOA cannot provide both of these separate professional services through a single corporation. *Supra*; *see also* RCW 18.100.080.

1. The Professional Services Corporation Act governs who may own a professional service corporation and what types of services that corporation can provide to the public.

BFOA's arguments under the PSCA are the same strained argument it made to support its position under the corporate practice doctrine – that the PSCA governs only who may *own* a professional service corporation, not who the PSCA employs or what services it provides to the public. To the contrary, the PSCA addresses both who may own a professional service corporation

and what types of services that corporation can provide to the public. Each subparagraph of RCW 18.100.050 governs who "may own stock and render their individual professional services" through one professional service corporation. See, generally, RCW 18.100.050(5).

Ironically, BFOA states that the history of the PSCA shows the legislature was concerned about "non-professional corporate control over professional judgment, divided loyalty of physician between patient and employer, and commercial exploitation of the medical practice." (Resp. Br. p. 32). These are precisely the same dangers that gave rise to the corporate practice doctrine in the first place, *supra*, and because not all of these concerns implicate ownership, it is clear that ownership was only one of the several concerns that the legislature had when it enacted the PSCA. BFOA further adds, without support, that the legislature was not concerned with "rebates, kickbacks, overutilization, [or] the physician's supposed incentive to self-refer." (Resp. Br. p. 33). However, BFOA ignores (or fails to recognize) that these dangers are part and parcel of the same inherent conflicts of interest associated with the commercialization of the learned professions referenced above.

2. The plain language of the PSCA and its legislative history indicate that the legislature intended to restrict the professions that could practice together in a single professional corporation.

BFOA argues that the PSCA does not limit who may practice together in a professional service corporation. However, the legislature has made it clear that "a professional corporation may render only one type of professional service through individuals licensed to render the same professional service."[10] RCW 18.100.010 allows for the incorporation of individuals "who render the same professional service." RCW 18.100.080 explains that a professional service corporation may only render the same professional services for which it was formed. RCW 18.100.050(5)(a) identifies 21 separate health care professionals who, for the purpose of the PSCA, provide "the same professional services." RCW 18.100.050(5)(b) permits physical therapists and occupational therapists to render their professional services "through one professional services corporation solely formed for the sole purpose of providing professional services within their respective scope of practice." As this Court has

[10] BNA's Health Law & Business Series, The Corporate Practice of Medicine Prohibition in the Modern Era of Health Care, No. 2800, Document 49, Washington (Westlaw cite BNAHLB No. 2800 WP 49 at 1).

recognized, "[t]he intent of the Legislature to bar other than **similarly licensed** health care professionals from involvement in professional services is amply delineated." *Morelli*, 110 Wn.2d at 559.

BFOA argues that permitting all of the healthcare professionals listed in RCW 18.100.050(5)(a) to practice together in a single professional corporation "but not with physical therapists," creates an "absurd result." This argument ignores decades of efforts by physical therapists to maintain their professional independence and resist encroachment by orthopedic surgeons who exert control over physical therapy patients through their referrals. In fact, Washington physical therapists have fought hard to protect their professional autonomy and to avoid inclusion in the statutory list of professions who can practice together. It is BFOA's argument that is absurd—that the outcome of these efforts by physical therapists was merely to prevent them from "owning" a professional corporation along with other professionals. It is not Columbia's argument, but the statutory scheme that BFOA dismissively labels as "absurd."

In a rhetorical flourish apparently intended to minimize legislative history it finds troubling, BFOA exaggerates Columbia's

reliance on several failed bills, complaining that Columbia's legislative history of the PSCA contains "a page and half litany of bills that failed to pass or were vetoed." (Resp. Br. p. 32-33). In fact, the supposed "litany" was three bills taking up just seven sentences over four pages, in which the legislature proves it is capable of amending RCW 18.100 in response to an evolving healthcare system. For example, in 2004 the legislature rejected a bill that would have added physical and occupational therapists to the list of professions permitted to practice together in RCW 18.100.050(5)(a). Although admittedly "unsuccessful attempts at legislation are not the best guides to legislative intent," the legislature certainly knows the difference between what it intends to list under RCW 18.100.050(5)(a) as opposed to (5)(b). This difference is more than simply who can own the business—it determines who can provide their professional services together in the same corporation; otherwise, the efforts of physical therapists to remain separate from (5)(a) to protect their professional autonomy would have succeeded only in surrendering their control by restricting their rights of ownership.

3. The Professional Services Corporation Act is in derogation of the common law and therefore must be strictly construed.

The PSCA is in derogation of the common law and therefore "must be strictly construed and no intent to change that law will be found, unless it appears with clarity." *Potter v. Washington State Patrol*, 165 Wn.2d 67, 77, 196 P.3d 691, 696 (2008) (*quoting McNeal v. Allen,* 95 Wn.2d 265, 269, 621 P.2d 1285 (1980)). A statute is in derogation of the common law when "the provisions of a ... statute are so inconsistent with and repugnant to the prior common law that both cannot simultaneously be in force." *Id. at 77* (*quoting State ex rel. Madden v. Pub. Util. Dist. No. 1,* 83 Wn.2d 219, 222, 517 P.2d 585 (1973)).

BFOA, citing a tax exemption case, erroneously argues that "strict construction means reading the words of a statute in their narrowest, literal sense." (Resp. Br. p. 31). In fact, however, this meaning of strict construction applies in tax exemption cases because of their special nature, and the case cited by BFOA explains this limited application.

In contrast, strict construction of statutes in derogation of the common law—like RCW 18.100.050—is based on a different concept altogether: the court's presumption that the legislature

departs from the common law as little as possible, and statutes must be interpreted in light of that presumption. *Potter v. Washington State Patrol*, 165 Wn.2d 67, 90, 196 P.3d 691, 703 (2008). Thus, a physician cannot employ a physical therapist in a corporation unless specifically permitted, and the PSCA—a statute in derogation of the common law—does not specifically permit this.

Moreover, the plain language of RCW 18.100.050(5)(a) lists 21 professions including physicians that can render their services together in a corporation, and then lists physical therapists in a different section. Thus, even the plain language of this statute separates physical therapists from the group of health care professionals that can render their services with physicians in the same professional corporation. *Cf. Potter*, 165 Wn.2d at 94 Madsen, J. (dissenting).

C. BFOA's Business Arrangement Violates RCW 19.68 Because Defendant Physicians And Physical Therapists Pay Or Receive Compensation In Connection With Referrals To, And The Furnishing Of Care By, The Physical Therapists Employed By BFOA.

RCW 19.68.010 prohibits licensed health care providers from paying or receiving rebates or profits in connection with a referral to, or the furnishing of care by, another provider. RCW 19.68.010(1). In passing the statute, the legislature sought to

protect the public from hidden rebates and charges, and to eliminate the motive to make unnecessary prescriptions.[11] The legislature stated that it did not, however, intend to prohibit a licensee who partners with or employs another licensee from receiving compensation for services rendered by that other licensee. RCW 19.68.040.

The following facts are undisputed:

- Defendant physicians own BFOA, a company that employs both physicians and physical therapists.
- Defendant physical therapists work at Benton Franklin Physical Therapy ("BFPT"), a d/b/a of BFOA.
- BFPT was a separate corporation until 2004, when the physician owners changed it to a d/b/a of their other company, BFOA, LLC.
- The physicians' offices in Kennewick and Pasco are geographically separated from BFPT, and defendant physicians rarely if ever visit BFPT.
- Defendant physician-owners receive a profit in connection with both the referral of patients to and the furnishing of care at BFPT.
- Defendant physical therapists bill for the professional services they render and pay that money back to defendant physicians.

The question before the Court, then, is whether such a business arrangement violates RCW 19.68.010. If the answer is yes, the

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[11] See Wash. Att'y Gen., Memorandum No. 651, as cited in Medical Profession – Anti-Kickback Statute, 45 Washington Law Rev. 838, n.9 (1970).

next question is whether the legislature nevertheless intended to permit this type of arrangement under RCW 19.68.040. Contrary to BFOA's arguments, the legislature did not intend to permit such an arrangement.

1. BFOA physicians and physical therapists violate the referral and furnishing prongs of RCW 19.68.010.

Although this court has recognized that RCW 19.68 is not a "model of clarity," it is nevertheless clear that the statute prohibits health care professionals from paying or receiving a profit in connection with either 1) the referral of patients or 2) the furnishing of care to those patients. RCW 19.68.010(1). BFOA concedes that its physicians profit each time they refer a patient to their physical therapy clinic, and each time a patient is treated at that clinic. Therefore, as in *Day*, defendants violate both the referral and furnishing prongs of RCW 19.68.010.

BFOA argues that this arrangement does not violate RCW 19.68.010 because the physicians have "earned" the profit from these referrals. (Resp. Br. p. 18). However, defendant physicians are not rendering the physical therapy at BFPT; the therapy is provided by separately licensed physical therapists billing under their own physical therapist in private practice ("PTPP") number

and working in a geographically separate physical therapy clinic. The physicians are receiving a profit for doing nothing more than referring their patients to their own physical therapy clinic. Any profit the physicians receive flowing from the care provided by the physical therapists is not "earned" pursuant to *Day* and *Wright*.

2. RCW 19.68.040 does not protect BFOA's business arrangement.

The proviso to RCW 19.68.040 states:

> That it is not intended to prohibit two or more licensees who practice their profession as copartners to charge or collect compensation for any professional services by any member of the firm, or to prohibit a licensee who employs another licensee to charge or collect compensation for professional services rendered by the employee licensee.

On its face, the employee exception applies where one licensee "employs another licensee." In other words, it contemplates a direct employment relationship which, prior to the PSCA, was the only arrangement permitted (e.g., in partnerships). In this case, however, the profiting physicians do not employ the physical therapists; rather, they own a company that employs the physical therapists. Therefore, BFOA's business arrangement does not satisfy the express requirements of the proviso and the exception does not apply.

Moreover, if the Court expands RCW 19.68.040 beyond the direct employer-employee relationship contemplated in the proviso, the statute must be read to require employment of similarly licensed individuals, to harmonize the plain language reading of the statute with RCW Chapter 18.100, in the context of corporate employment. *Supra*. The legislature has defined physicians and physical therapists as different professional services, and, therefore, the employee exception does not apply in our case.

Finally, even where the exception applies, the *Day* court imposed a supervision requirement that is not met in this case. In *Day*, the Court considered the nature of the relationship between the licensees and concluded that in situations like this – where the employment relationship is indirect – the employee exception requires "direct and immediate personal supervision." In *Day*, one floor downstairs in the same building was too far away to satisfy the required level of supervision.

Because the BFOA physicians provide no direct or immediate personal supervision over the BFOA physical therapists, defendants cannot satisfy the employee exception in RCW 19.68.040 and the physicians cannot profit from services rendered by the physical therapists.

D. RCW 74.09.240 And The Stark Law Do Not Authorize BFOA's Self-Referral And Profit Structure.

BFOA misinterprets both state and federal law when it argues that the Washington legislature has "adopted as its own" the Stark law, 42 U.S.C. § 1395nn, and that the Stark law authorizes physicians to employ, refer patients to, and derive profits from physical therapists in Washington.

As an initial matter, BFOA's Stark law argument is thinly briefed, was not argued to or decided by the lower court, and is not adequate to allow this Court to interpret and apply this staggeringly complex area of federal Medicare law. In fact, not only did BFOA fail to raise this Stark Law argument below, BFOA's counsel expressly declared during a deposition that this case had "nothing to do with Stark," and would not permit questioning on the subject. Now, with no statutory or regulatory analysis, BFOA simply asserts, *ipse dixit*, that it is in compliance with the Stark law and its corporate structure and business practice are valid.

Additionally, RCW 74.09.240, the Washington statute upon which Defendants rely and that references the Stark law, applies only to certain state-reimbursed health services that are not at issue in this case. Although RCW 74.09.240 admittedly excepts

from *its* coverage self-referrals permitted under Stark, it does not override the separate provisions of Chapters 18.100, 19.68, and 19.86 RCW that prohibit BFOA's business arrangement.

Finally, as noted above, the Stark law and related rules and regulations specifically defer to state law with regard to the types of practices and entities in which a physical therapist may practice. The Stark implementing regulations refer to the Medicare and Medicaid rules for physical therapy to define the supervisory requirements where physicians profit from "in-office ancillary physical therapy services." Those rules contemplate two billing methods for physical therapists, neither of which authorizes BFOA's profit structure in Washington. On the one hand, where physical therapists bill clients directly as "Physical Therapists in Private Practice" ("PTPP"), the Stark and Medicare rules defer to state law restrictions on the corporate practice of physical therapy, and they do not authorize direct billing through a professional corporation like BFOA. On the other hand, where physical therapists bill "incident to" the services of physicians in a practice group, the Stark and Medicare rules require the physical therapists to be "directly supervised" by the physicians. In this case, BFOA violates these requirements.

1. RCW 74.09.240 Is Not At Issue In This Case And Does Not Authorize BFOA's Billing And Profit Structure.

A cornerstone of BFOA's new defense is that RCW 74.09.240 authorizes BFOA's corporate profit structure. RCW 74.09.240, which BFOA completely misinterprets, narrowly applies only to certain patients eligible for state-reimbursed physical therapy services:

> (3)(a) Except as provided in 42 U.S.C. § 1395nn, physicians are prohibited from self-referring any client *eligible under this chapter* [Public Assistance] for the following health services to a facility in which the physician or an immediate family member has a financial relationship:
>
> . . . .
>
> (ii) Physical therapy services. . .

RCW 74.09.240(3)(a) (emphasis added). The statute does not purport to override Chapters 19.68, 18.100, or 19.86 with respect to corporate structure or physician self-referrals, nor does it authorize anything those chapters prohibit. In fact, at most the statute supersedes Chapter 19.68 with respect to remuneration (including kickbacks, bribes, or rebates) only for referring patients for services paid by the state under Chapter 74.09, leaving other statutes intact with respect to prohibiting physician self-referrals. *See* RCW 74.09.240(5).

BFOA boldly asserts that "Columbia . . . is proposing two sets of referral standards for Washington orthopedists: one when public assistance is paying the bill and another when a private payor is involved." Resp. Br. p. 22. But Columbia has not proposed this: the legislature – and the Supreme Court – have said this. In fact, BFOA quoted from *Wright v. Jeckle* this exact same point. RCW 74.09.240 does not *authorize* anything. Rather, it *prohibits* physician self-referrals for certain state-paid physical therapy services and excepts from that prohibition conduct authorized under the Stark law. *See* RCW 74.09.240(3)(a). Because an exception to a prohibition is not an authorization, it is incorrect to argue that RCW 74.09.240 permits conduct that other Washington statutes prohibit, even if that conduct would otherwise be allowed under Stark. BFOA's reliance on that statute and Stark is misplaced.

2. Medicare law does not authorize physicians to employ physical therapists, but instead expressly defers to the states on this issue.

Contrary to BFOA's strained argument, RCW 74.09.240 and its Stark exception do not supersede provisions of Washington law with respect to physician self-referrals.

Like RCW 74.09.240, the Stark law generally prohibits referrals to an entity with which the referring physician has a financial relationship:

> Except as provided in subsection (b) of this section, if a physician (or an immediate family member of such physician) has a financial relationship with an entity specified in paragraph (2), then--
>
> (A) the physician may not make a referral to the entity for the furnishing of designated health services for which payment otherwise may be made under this subchapter, and
>
> (B) the entity may not present or cause to be presented a claim under this subchapter or bill to any individual, third party payor, or other entity for designated health services furnished pursuant to a referral prohibited under subparagraph (A).

42 U.S.C. § 1395nn(a)(1).[12] An exception to this general prohibition applies to certain "in-office ancillary services":

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[12] The statute defines "financial relationship: as follows:

> (2) Financial relationship specified
>
> For purposes of this section, a financial relationship of a physician (or an immediate family member of such physician) with an entity specified in this paragraph is--
>
> (A) except as provided in subsections (c) and (d) of this section, an ownership or investment interest in the entity, or
>
> (B) except as provided in subsection (e) of this section, a compensation arrangement (as defined in subsection (h)(1) of this section) between the physician (or an immediate family member of such physician) and the entity.
>
> An ownership or investment interest described in subparagraph (A) may be through equity, debt, or other means and includes an interest in an entity that holds an ownership or investment interest in any entity providing the designated health service.

Subsection (a)(1) of this section shall not apply in the following cases:

. . . .

(2) In-office ancillary services

In the case of services (other than durable medical equipment (excluding infusion pumps) and parenteral and enteral nutrients, equipment, and supplies)--

(A) that are furnished--

(i) personally by the referring physician, personally by a physician who is a member of the same group practice as the referring physician, or personally by individuals who are directly supervised by the physician or by another physician in the group practice, and

(ii)(I) in a building in which the referring physician (or another physician who is a member of the same group practice) furnishes physicians' services unrelated to the furnishing of designated health services, or

(II) in the case of a referring physician who is a member of a group practice, in another building which is used by the group practice--

(aa) for the provision of some or all of the group's clinical laboratory services, or

(bb) for the centralized provision of the group's designated health services (other than clinical laboratory services),

unless the Secretary determines other terms and conditions under which the provision of such services does not present a risk of program or patient abuse, and

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42 U.S.C. § 1395nn(a)(2). BFOA does not dispute that the referring physicians had a financial relationship with the entity to which they referred their patients for physical therapy.

> (B) that are billed by the physician performing or supervising the services, by a group practice of which such physician is a member under a billing number assigned to the group practice, or by an entity that is wholly owned by such physician or such group practice,
>
> if the ownership or investment interest in such services meets such other requirements as the Secretary may impose by regulation as needed to protect against program or patient abuse.

42 U.S.C. § 1395nn(b)(2). As its plain language indicates, this exception applies only to "ancillary services" that satisfy criteria commonly referred to as 1) "direct supervision" (subsection (b)(2)(A)(i)), 2) "building requirements" (subsection (b)(2)(A)(ii)), and 3) "billing requirements" (subsection (b)(2)(B)). *Id.*; *see also* 66 FR 856-01 (Jan. 4, 2001) at 880-94.

Examining the direct supervision requirement, the Stark regulations implemented by HHS (specifically 42 CFR 411.355(b)(1)), clarify that the service must be rendered by "[a]n individual who is supervised by the referring physician or, if the referring physician is in a group practice, by another physician in the group practice, provided that the supervision complies with all other applicable Medicare payment and coverage rules for the services." 42 C.F.R. § 355(b)(1)(iii). In its 2001 final rule, HHS clarified that it did not believe Congress used "direct supervision" in

a technical sense but meant to require supervision consistent with the requirements of applicable Medicare and Medicaid payment or coverage rules for the particular service. *See, e.g.*, 66 FR 856-01 at p. 885. Thus, according to HHS, the ultimate question under Stark's supervision requirement is whether the Medicare and Medicaid payment or coverage rules for physical therapy permit physicians to profit from referrals to physical therapists as BFOA does in this case. The answer is "no."

The Medicare Benefit Policy Manual contains the operating instructions, policies, and procedures relating to Medicare,[13] and lays out the requirements for Medicare to fund the treatment of a physical therapist in private practice. As set forth in the Benefit Policy Manual, a physical therapist's services are compensable under Medicare if they are billed either a) directly by the physical therapist as a "Physical Therapist in Private Practice" (PTPP), or b) "incident to" a physician's services.

For PTPP billing, the Benefit Policy Manual provides that:

> In order to qualify to bill Medicare directly as a therapist, each individual must be enrolled as a private practitioner and employed in one of the

[13] Health and Human Services, Centers for Medicare and Medicaid Services home page, "Overview," available online at http://www.cms.hhs.gov/Manuals/01_Overview.asp (last visited May 16, 2009).

> following practice types: an unincorporated solo practice, unincorporated partnership, unincorporated group practice, physician/NPP group or groups that are not professional corporations, if allowed by state and local law. Physician/NPP group practices may employ physical therapists in private practice (PPTP) and/or occupational therapists in private practice (OTPP) *if state and local law permits this employee relationship*.[14]

Notably, the PTPP Medicare requirements specifically defer to state law as to the types of entities in which a physical therapist may lawfully practice. *See id.*; *see also* 42 C.F.R. § 485.707 (clinic billing Medicare for physical therapy services must be in compliance with all State and local laws); 42 C.F.R. § 410.60(c)(i) (to qualify under Medicare as supplier of outpatient physical therapy services physical therapist in private practice must meet State practice requirements). Thus, the rules do not, as BFOA contends, authorize physicians to employ physical therapists in private practice where state law otherwise prohibits such employment. *See id.* Although the rules permit PTPPs working for professional corporations to enroll with Medicare, they apparently omit professional corporations like BFOA from the types of practices

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[14] Medicare Benefit Policy Manual, Pub. 100-02, Ch. 15, § 230.4(A) (Services Furnished by a Physical or Occupational Therapist in Private Practice) (available online at http://www.cms.hhs.gov/Manuals/Downloads/bp102c15.pdf, last visited May 16, 2009) (emphasis added).

through which a therapist may bill as a PTPP. *See id.* Because BFOA's physical therapists do not practice in any of the forms permitted under the Medicare rules, and because the rules defer to state law, the Medicare rules—and therefore the Stark law—neither authorize the therapists to bill as PTPP nor permit BFOA physicians to employ therapists or profit from their services.

Furthermore, it is not even clear that Stark and the Medicare rules and regulations permit a physical therapist to bill Medicare directly as a PTPP when the physical therapist practices in a professional corporation. Although a PTPP may *enroll* in Medicare as a PTPP if s/he engages in the private practice of physical therapy as an employee of a professional corporation, *see* 42 C.F.R. 410.60(c)(1)(ii)(C), the Medicare rules do not specifically authorize an enrolled physical therapist to *bill* Medicare directly when a patient is referred by a physician/owner within the same professional corporation. *See, e.g.*, Medicare Benefit Policy Manual, Pub. 100-02, Ch. 15, § 230.4(A) ("In order to qualify to *bill* Medicare directly as a therapist, each individual must be *enrolled* as a private practitioner *and* employed in one of the following practice types: an unincorporated solo practice, unincorporated partnership, unincorporated group practice, physician/NPP group or

groups that are not professional corporations, if allowed by state and local law") (emphasis added). Thus, although BFOA physical therapists may enroll as PTPPs under Medicare, they have no specific authorization to bill directly as employees of a professional corporation, and BFOA's argument under Stark fails for this reason as well.

The alternative to the PTPP rules is Medicare's provision that may in some cases permit physical therapy services furnished "incident to" the services of physicians. Specifically, Medicare pays for services and supplies that are a) furnished "incident to" a physician's or other practitioner's services, b) commonly included in the physician's or practitioner's bills, and c) not paid under a separate benefit category listed in §1861(s) of the Social Security Act. Medicare Benefit Policy Manual, Pub 100-02, Ch. 15, § 60(A). To qualify as "incident to" a physician's services, however, Medicare requires physical therapy services to be provided under the "direct supervision" of the physician:

> Therapy services must be provided by, or under the direct supervision of a physician (a doctor of medicine or osteopathy) or NPP who is legally authorized to practice therapy services by the state in which he or she performs such function or action. Direct supervision requirements are the same as in 42 C.F.R. 410.32(b)(3).

Medicare Benefit Policy Manual, Pub 100-02, Ch. 15, § 230.5.

The regulations define three levels of supervision on a continuum from "general supervision" (under physician's overall direction and control, but physician's presence is not required) to "personal supervision" (physician must be in the room during procedure). 42 C.F.R. § 410.32(b)(3)(i) and (iii). As noted above, the level of supervision required for "incident to" billing is "direct supervision," *see* 42 U.S.C. § 1395nn(b)(2)(a)(i), Medicare Benefit Policy Manual, Pub 100-02, Ch. 15, § 230.5. "Direct supervision" in this context means "the physician must be present in the office suite and immediately available to furnish assistance and direction throughout the performance of the procedure." 42 C.F.R. § 410.32(b)(3)(ii). It is undisputed that BFOA does not satisfy this requirement and therefore cannot bill for physical therapy furnished "incident to" physicians' services.

Thus, the profit structure of BFOA's physical therapy practice does not pass muster under either billing scenario. On the one hand, if the physical therapists bill directly as PTPP, BFOA runs afoul of Washington's statutory and common law prohibitions against rebates, self-referrals, and kickbacks and the restrictions on the corporate practice of medicine and physical therapy; the

Medicare rules specifically defer to state law regarding the settings in which a physical therapist may practice. The physical therapists also provide their services and bill as part of a professional corporation, an entity excluded from those allowed to bill for PTPP services under the Medicare rules. On the other hand, if BFOA's physical therapists bill "incident to" BFOA physicians' services, BFOA undisputedly does not satisfy the Medicare requirements because the therapists do not work in the same office suite under the "direct supervision" of the referring and profiting physicians.

Thus, BFOA's argument under RCW 74.09.240 and its reference to the Stark law is an unavailing distraction from the real issues in this case—the corporate practice of medicine and physical therapy, the Washington Professional Service Corporations Act, RCW 19.68, and the Consumer Protection Act. Neither RCW 74.09.240 nor Stark alter the application of these laws in this case.

E. The Trial Court Properly Denied BFOA's Motion For Summary Judgment On Columbia's CPA Claim.

BFOA's corporate structure and referral practices are deceptive to its patients and unfair to their competitors. BFOA physicians coerced their patients to get treatment at BFPT. In

some cases patients were not informed that their physician owned the physical therapy clinic and would profit from the referral.

The fiduciary relationship between a patient and a physician recognizes a physician's level of influence over a patient. *See, e.g., Omer v. Edgren*, 38 Wn. App. 376, 685 P.2d 635 (1984) (quoting *Hunter v. Brown*, 4 Wn. App. 899, 905, 484 P.2d 1162 (1971)). By pressuring patients into giving their physical therapy dollars to BFOA's clinic, rather than one that might have been preferable to the patient for any of a myriad of reasons, BFOA committed an unfair practice within the meaning of the CPA.

1. BFOA engaged in a deceptive practice by compelling patients to receive physical therapy at its own physical therapy clinic.

To prevail in a private CPA claim, the plaintiff must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation. *Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784, 719 P.2d 531 (1986). Claiming a right to summary judgment, BFOA limited its argument to the first prong and claimed only that Columbia failed to

meet the first element: the showing of an unfair or deceptive act or practice.[15]

With respect to deceptive practices, Columbia need only show that the practice had the "capacity to deceive" the public. *Hangman Ridge*, 105 Wn.2d at 785-86.[16] Deception exists if there is a representation, omission, or practice that is likely to mislead "a reasonable consumer." *Id.* (citing *Sw. Sunsites, Inc. v. Fed. Trade Comm'n*, 785 F.2d 1431, 1435 (9th Cir.1986)).

BFOA admits, as it must, that patients have the right to choose whichever physical therapy provider they want, based on the patients' personal needs and preferences. Despite this, Defendant physicians either pressured or actively directed their patients to go to BFPT.[17] *Supra*. In fact, at least two patients testified that they did not know they had the right to go somewhere else. *Supra*. One patient expressly asked to continue seeing his

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[15] At the trial court level, BFOA made several other arguments in claiming entitlement to summary dismissal of the CPA claim: alleged lack of standing, alleged lack of public interest, alleged "specific permission" to engage in the challenged activities, and more. Because BFOA has abandoned those arguments on appeal, Columbia does not address them and they are not before this Court. Regardless, most of the arguments BFOA raised were recently rejected by this Court in *Panag*.

[16] Even a communication of truthful information may be deceptive "by virtue of the 'net impression' it conveys." *Panag*, 204 P.3d at 895-896 (quoting *Fed. Trade Comm'n v. Cyberspace.Com LLC*, 453 F.3d 1196, 1200 (9th Cir.2006).

physical therapist at Columbia, but was told by a defendant physician that he could not go to Columbia and had to go to BFPT. *Supra*.

BFOA ignores these deceptive acts in its brief, and instead, suggests that its physical therapy patients receive "superior care" at BFPT because 1) it prevents patients "who may be in great physical discomfort, from having to travel a greater distance to undergo his therapy sessions," and 2) the physicians can provide greater direction over their patients' care. These claims are irrelevant and unsupported by the record, and make no sense based on the facts of this case.

As noted above, BFOA's physicians do not work in close proximity to BFOA's physical therapists; rather, they work in entirely separate locations (and in many cases different cities). (*See, e.g.*, Resp. Br. p. 6). On those occasions where a patient might need to travel directly from one of the defendant physicians' office to BFPT, even the closest of their physician offices requires patients to walk, or drive, across two streets to get to BFPT. And, ironically, BFOA's business practices are actually having the opposite effect on

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[17] In fact, 85 percent of the patients at BFOA's clinic were referred from BFOA. (CP 722).

patients: area referral patterns show that BFOA's practices are causing patients to choose BFPT over more conveniently located physical therapy offices. (CP 790).

Moreover, BFOA's physicians do not provide greater direction over their patients' treatment when they go to BFPT. One physician testified that he provides no more supervision over patient care for patients treating at BFPT than for patients treating elsewhere. Additionally, defendant physicians testified that they are never present when their patients receive therapy at BFPT.

2. BFOA engaged in a deceptive practice within the meaning of the CPA by failing to disclose to its patients the nature of the relationship between BFOA and the clinic BFOA's physicians owned.

Failing to disclose a material fact that one is bound in good faith to disclose has the capacity to deceive and may be unfair or deceptive. *Potter*, 62 Wn. App. at 327. Several BFOA patients testified that they had no idea that their physician owned or had a financial stake in the physical therapy clinic. (CP 988, 1006, 1075-1076, 1077). In fact, BFOA's own physicians conceded they do not always inform their patients that they own the clinic. (CP 961). This practice has an inherent capacity to under inform and deceive, and violates the CPA.

3. BFOA's unlawful ownership arrangement and profit-bearing referrals constitute unfair methods of competition.

In addition to the factual issues raised by patients who were deceived by BFOA, Columbia has a CPA claim based solely upon BFOA's unfair methods of competition. BFOA's method of competition is unfair because it depends on violating the statutory and common law rules that prevent physicians from employing physical therapists or profiting off of referrals to physical therapists. *Supra*. Columbia cannot adequately compete with BFOA unless Columbia, like BFOA, creates an illegal joint operation with physicians who will funnel patients to Columbia in exchange for profit.

Arguing to the contrary, BFOA erroneously portrays the CPA unfair competition claim as a "per se" claim for violation of the Act. But Columbia has not made a per se claim because the legislature has not yet declared that violations of RCW 18.100, RCW 19.68 are per se violation of the act.

But this does not mean, as BFOA contends, that BFOA's statutory violations are "insufficient as a matter of law" to establish a CPA claim. For instance, the court in *Holiday Resort* found a

CPA violation based solely on the violation of a statute (the Mobile Home Landlord Tenant Act) even though the plaintiffs in that case were not making "per se" claims. 134 Wn.App. at 226. Statutory violations can be relevant to non-per se CPA claims. *See Panag*, 204 P.3d at 897.

The statutes and common law rules that BFOA violates as a business strategy are highly relevant to, and demonstrate, the unfair competition portion of the Columbia's CPA claim. BFOA's statutory violations give them an unfair competitive advantage through the ability to create an internal patient market that cannot be duplicated by non-physician-owned physical therapy clinics. In addition, the physicians are able to pick and choose which patients go to their clinic. As such, their method of competition is unfair.

IV. CONCLUSION

For the reasons explained above, the Court should conclude that BFOA is in violation of Washington's common law corporate practice doctrine, the Professional Services Corporation Act, and the Anti-Rebate Statute, and therefore reverse and remand for entry of partial summary judgments in favor of Columbia. The

Court should also deny Defendants' motion to dismiss Columbia's CPA claim.

RESPECTFULLY SUBMITTED this 22nd day of May, 2009.

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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 true and correct copies of ***Reply Brief of Petitioner/Cross-Respondent Columbia Physical Therapy, Inc. P.S.*** on the following individuals:

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