

No. 267024

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**FILED**

**FEB 19 2008**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By                     

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

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81734-1

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.*

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**RESPONSE TO CROSS-PETITIONER'S MOTION FOR  
DISCRETIONARY REVIEW**

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*Attorneys for Petitioner/Plaintiff*

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**ORIGINAL**

## **I. INTRODUCTION**

The parties stipulated to discretionary review and seek discretionary review in this Court. The trial court certified its summary judgment decisions for discretionary review. RAP 2.3(b)(4) permits discretionary review in response to a stipulation and/or court certification. Review in this case will resolve important state-wide legal issues and help end this litigation. Accordingly, Columbia agrees with Defendants that this Court should accept review.<sup>1</sup> Nevertheless, as explained below, Columbia disagrees with Defendants' characterization of several issues.

## **II. COUNTERSTATEMENT OF THE CASE**

Columbia incorporates the "statement of the case" from its motion for discretionary review.<sup>2</sup> In addition, the following description of Columbia's claims and the trial court's prior decisions on those claims will help clarify the issues being presented for review by the Cross-Petitioner Defendants.

The five defendant physicians own Benton Franklin Orthopedic Associates PLLC. Benton Franklin employs six physicians, including the five owners, and three physical

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<sup>1</sup> Columbia has also filed a motion for discretionary review.

<sup>2</sup> Columbia's Motion For Discretionary Review, filed January 8, 2008.

therapists.<sup>3</sup> Both the physicians and the physical therapists are licensed professionals and for a fee provide their professional services to the public through Benton Franklin. Thus, Benton Franklin Orthopedic Associates provides professional services to the public through licensed employees. And, as owners of the company, the five defendant physicians profit each time a Benton Franklin physical therapist charges a fee to treat a patient.

The Benton Franklin physicians and physical therapists provide their professional services to the public at separate offices. In some instances the physical therapists work across the street and down the road from the physicians, and in other instances they work in a different city.

Over 80 percent of the patients treated by Benton Franklin physical therapists get their so-called "prescription" for physical therapy (i.e. "referral" for physical therapy) from a Benton Franklin physician.

Defendant physicians report that they gave at least some patients a form listing the Benton Franklin physical therapy clinic (along with other physical therapy clinics in the area) and

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<sup>3</sup> Two of the physical therapists are defendants, and one was hired after Columbia filed its complaint and is not a necessary defendant.

describing their ownership interest in it.<sup>4</sup> Furthermore, someone at Benton Franklin “highlighted” the Benton Franklin physical therapy office listing on some of these ownership disclosure forms. And some patients report that the physicians told them to go for treatment only at Benton Franklin’s physical therapy clinic. Therefore, in at least some cases, the Benton Franklin physicians provided patients with a direct referral to physical therapy at Benton Franklin. But even without the highlighting or physician statements, the Washington Supreme Court has concluded that informing patients of a financial interest—in this case the ownership disclosure form itself—is tantamount to a direct referral. *Day v. Inland Empire* 76 Wn.2d 407, 418, 456 P.2d 1011 (1969).

Defendants seek review of the trial court’s rejection of their argument that physical therapy is a diagnostic service.<sup>5</sup> Patients go to Benton Franklin’s physical therapy clinic for treatment, not to obtain a medical diagnosis. In fact, the trial court concluded that Defendants’ argument that physical therapy is a diagnostic service

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<sup>4</sup> Appendix to Cross Petitioner’s Motion for Discretionary Review, A-37.

<sup>5</sup> Cross Petitioner’s Motion for Discretionary Review at 3.

“stretches the term diagnostic or diagnosis ... beyond any commonly accepted definition.”<sup>6</sup>

Defendants also seek review of the trial court’s decision to deny its summary judgment motion on Columbia’s Consumer Protection Act claim. At trial, Columbia will present evidence that Benton Franklin physicians told at least some patients that they must go to Benton Franklin for physical therapy treatment instead of Columbia or other local physical therapy clinics. This deceptive act—which is hotly contested by Defendants—forms part of the basis of Columbia’s Consumer Protection Act claim.

Defendants argue that Columbia has no standing to bring a Consumer Protection Act claim based on deceiving a consumer that results in unfairness to a competitor.<sup>7</sup> The trial court rejected this argument twice.<sup>8</sup>

Defendants also argue that Benton Franklin’s ownership falls “within the ‘specifically permitted’ exception” in the Consumer Protection Act (RCW § 19.86.170), that applies when a regulatory entity specifically permits certain behavior. The trial court also

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<sup>6</sup> Appendix B, transcript from court’s decision, page 3 (April 4, 2007).

<sup>7</sup> Cross Petitioner’s Motion for Discretionary Review at 4.

<sup>8</sup> Appendix A (trial court’s decision dated June 2, 2006 at 41-42); and Appendix B (trial court’s decision dated April 4, 2007 at 4).

rejected this argument, noting that Columbia's claims were not precluded by any regulatory jurisdiction over unprofessional conduct. Moreover, the trial court concluded that there is no evidence the regulatory entity "specifically permitted" the behavior challenged in this lawsuit. For example, in response to the first summary judgment motion, Judge Matheson stated:

I personally don't think that the action by the Department of Health [MQAC] is enough to bring the doctors under the exemption, because that's not really permitting operation. And it's like saying failing to charge somebody with a crime condones or authorizes their conduct just because they didn't have enough evidence to charge them with a crime.<sup>9</sup>

Nearly a year later at the second summary judgment hearing, Judge Yule stated:

...the claims asserted by plaintiffs with respect to unfair and deceptive practices I do not find to be exempt from the provisions of the Consumer Protection Act. They are not the equivalent of unprofessional conduct necessarily and are not precluded by any regulatory jurisdiction over unprofessional conduct.

If the claims were potentially exempt, I conclude that there is no evidence that the Medical Quality Assurance Commission permitted the claimed practices. The conclusion by the Commission based on its investigation that there was insufficient evidence to go forward is not, in the Court's view, the equivalent of an express regulatory permission that

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<sup>9</sup> Appendix A, at 41-42.

would wrest these claims from the jurisdiction of this Court.<sup>10</sup>

### III. ARGUMENT REGARDING THE ISSUES FOR REVIEW

Although Columbia agrees that review is justified and will help end this litigation, as noted above Columbia disagrees with Defendant's characterization of several issues. In some cases, the issues each party wants this Court to review are entirely different. For example, only Columbia seeks review of the trial court's decision to grant summary judgment on its Professional Limited Liability Company Act or Professional Services Corporation Act claim, and only Defendants seek review of the trial court's summary judgment decisions on Columbia's Consumer Protection Act claim.

The purpose of Columbia's motion and this response is not to argue the merits of the case, but merely to clarify the issues and help this Court determine which issues it should accept for review. And although some facts are in dispute, Columbia does not believe that resolving these facts is necessary to resolve this case—if the issues are properly characterized, the Court should enter judgment as a matter of law.

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<sup>10</sup> Appendix B, at 4.

**A. The Corporate Practice of Medicine Doctrine**

The corporate practice of medicine doctrine prohibits a company like Benton Franklin from engaging in a learned profession such as medicine or physical therapy through licensed employees without specific legislative authorization. See *e.g.*, *Morelli v. Ehsan*, 110 Wn.2d 555, 561, 756 P.2d 129 (1988). Benton Franklin provides physician and physical therapy services to the public through its licensed employees. There is no legislative authorization permitting one company to provide both these professional services to the public.

Defendants' issue statement regarding the corporate practice of medicine doctrine (issue 1) therefore fails to include an important fact—whether Benton Franklin can employ physical therapists *who provide their professional services to the public*.

The critical legal issue in this doctrine is whether the same company has legislative authority to provide both professional services to the public, not whether the same company can employ both physicians and physical therapists. Employment alone does not violate the doctrine, and Defendants' issue statement should be changed to reflect that.

**B. The Anti-Rebate Statute**

In some instances, Defendants' issue statements related to the Anti-Rebate statute (issues 2 through 2(e)) are misleading, argumentative, and fail to accurately describe the critical legal issue related to Columbia's claim: Does the Anti-Rebate statute prohibit a licensed physician from receiving a profit off the delivery of health care services by a physical therapist employed by a company the physician owns?

Defendants ask this Court to decide if a company owned by physicians violates the Anti-Rebate statute by "employing physical therapists" (issue 2). This incorrectly focuses only on the company's "employment" of physical therapists, but the Anti-Rebate statute prohibits physicians from *profiting* in connection with referral or treatment they do not provide. Employment of physical therapists alone does not violate the Anti-Rebate statute. Furthermore, because the defendant physicians do not employ the physical therapists (the company does), it would be impossible for the individual physicians or physical therapists to violate the Anti-Rebate statute pursuant to Defendants' statement of the issue, which is framed to focus solely on the company.

Next, Defendants ask if there is a referral “*where* Benton Franklin’s physicians are giving their patients prescriptions for physical therapy *without actively directing the patients* to the physical therapists *they employ* at a separate location ...” (emphasis added) (issue 2(a)). As noted above, this issue is inaccurate because the physicians do not employ the physical therapists—the company does.

This characterization is also misleading and argumentative because it asks the Court to assume the physicians did not make a direct referral, an assumption that is neither required nor justified. This assumption is not required because Columbia’s claim does not rely on an alleged direct referral. Instead, it is based on a physician profiting off the treatment provided by a Benton Franklin physical therapist each time a physician “prescribes” physical therapy for a patient and that patient goes to Benton Franklin’s physical therapy clinic. In its claim, Columbia challenges the practice of physicians owning and profiting off care provided by physical therapists at a physical therapy clinic—care the physician does not provide, and in fact is not qualified or licensed to provide.

Moreover, this assumption is not justified because the Benton Franklin physicians did in fact actively direct their patients to

their physical therapy clinic. For example, in *Day* the court held that signs inviting patients to use either their own lab or another lab constituted a “direct referral” under the Anti-Rebate statute. In this case, it is undisputed that Benton Franklin provided at least some patients with a form inviting them to use their physical therapy clinic or another.<sup>11</sup> Notification is a direct referral pursuant to *Day*. If something more than notification is required, at trial Columbia will show that Benton Franklin physicians directed at least some patients to go to Benton Franklin’s physical therapy clinic for treatment, and in fact one physician testified that he formed the physical therapy clinic for the express purpose of treating his patients.

Columbia believes that as a matter of law this case involves physicians who are profiting in connection with referrals of patients. But even if there is a fact dispute about how “direct” the referral is, this dispute does not require resolution and should not prevent this Court from accepting review. Liability under the Anti-Rebate statute does not depend on a direct referral, but merely profit from a

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<sup>11</sup> See Appendix to Cross-Petitioner’s Motion at A-30 (Burgdorff Declaration, ¶ 5) (“Now when a BFOA physician refers a patient to physical therapy, the physician provides the patient with a list of 24 possible physical therapy sites, and specifically advises the patient of the physician’s ownership interest in Benton Franklin Physical Therapy.”).

referral. Furthermore, no referral is even necessary, because the Anti-Rebate statute prohibits a physician from receiving a profit off the “furnishing of care” the physician does not provide. See RCW 19.68.010(1) and 19.68.040.

Next, Defendants ask “does Benton Franklin’s *employment* of physical therapists fall within either (sic) the exception ... for services prescribed for medical, surgical, or dental diagnosis” (issue 2(b)). The trial court disposed of this “diagnostic” issue quickly, in part because the Defendant physicians prescribed physical therapy for treatment, not to obtain a medical diagnosis (like x-rays or blood work, for example). In fact, as noted above, the trial court concluded that Defendants’ argument “stretches the term diagnostic or diagnosis ... beyond any commonly accepted definition.”<sup>12</sup>

Furthermore, this issue should ask if the “referral” or “furnishing of care” is for a diagnostic service, not whether the “employment of physical therapists” falls within the exception, as Defendants have characterized the issue.

Next, Defendants ask if the Anti-Rebate statute prohibits a “...physician-owned professional ... company from earning profits

from the services provided by its employee physical therapists?” (Issue 2(d) (sic)). This issue is incorrect because the Anti-Rebate statute prohibits the physicians from receiving a profit, not the company.

Defendants’ statement distinguishing *Day* from this case to support their next issue is misleading because the one-company/two-company distinction is not significant. In *Day*, the physicians owned two businesses, and profited each time they referred patients for treatment by an employee of a business they owned. Here, defendant physicians originally owned two businesses and personally profited each time they referred patients to the employees of the physical therapy business. Then in 2005 Defendant physicians merged their physical therapy business with their orthopedic business and changed the name from Benton Franklin Physical Therapy, Inc. to Benton Franklin Orthopedic Associates d/b/a Benton Franklin Physical Therapy. Nevertheless, the relationship between the physicians and physical therapists has not changed: the physicians are still profiting each time they refer patients to an employee of a business they own. The physicians in *Day* did not employ the opticians in *Day*, and the physicians in this

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<sup>12</sup> *Supra*, FN 6.

case do not employ the physical therapists in this case. In both cases, the physicians own a business and profit from the referral as a result of their ownership of that business.

Finally, Defendants' last issue arising from the Anti-Rebate statute claim (issue 2(e) (sic)) is argumentative and mischaracterizes both the holding of *Day* and the issue related to "direct and immediate supervision." In *Day*, the court considered a statute (RCW Chapter 18.34) that permitted physicians to employ opticians under "personal supervision" (which otherwise would have been prohibited). RCW 19.68.040 states that a physician can only profit from services the physician provides, unless another licensee providing the services is an employee of the physician. The Court held that 19.68.040 requires "direct and immediate personal supervision," which is narrower than the supervision required by RCW 18.34. Thus, contrary to Defendants' issue statement, the "direct and immediate personal supervision" arises from the Anti-Rebate statute, not RCW Chapter 18.34.

**C. The Consumer Protection Act**

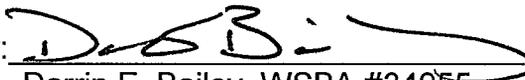
Defendants' issue regarding the CPA ignores the alleged

“deceptive act”<sup>13</sup> that forms part of Columbia’s CPA claim. The deceptiveness of Defendants’ conduct and resulting harm to Columbia and other area physical therapists is a disputed issue of fact.<sup>14</sup> Defendants’ formulation of issues arising from the CPA claim (issues 3 through 3(c) does not accurately capture the basis of the alleged claim.

Although Columbia has no specific problem with issues 3(a) and 3(b), Defendants mischaracterize the findings of the MQAC in issue 3(c). Specifically, Defendants state that “the Department of Health investigated the relationship between defendant physicians and physical therapists and concluded there was no violation ...” In fact, as explained above, the Department of Health merely concluded that there was insufficient evidence.

Respectfully submitted this 18<sup>th</sup> day of February, 2008.

STAFFORD FREY COOPER

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

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<sup>13</sup> The deceptive act is the physicians telling patients they must go to Benton Franklin for physical therapy treatment.

<sup>14</sup> Columbia’s CPA claim is also based on physician ownership of physical therapy clinics, which results in increased referrals and over-utilization of physical therapy.

**CERTIFICATE OF SERVICE**

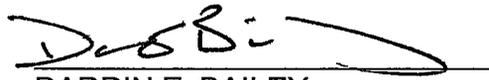
The undersigned certifies under the penalty of perjury according to the laws of the State of Washington that on this date I caused to be served in the manner noted below a copy of this ***Response to Cross-Motion for Discretionary Review*** on the following individuals:

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 FEDEX
- VIA MESSENGER

Dated this 18<sup>TH</sup> day of February, 2008, at Seattle,  
Washington.

  
DARRIN E. BAILEY

# APPENDICES

**Appendix A** Excerpts from trial court's June 2, 2006 summary judgment decision.

**Appendix B** Trial court's April 4, 2007 summary judgment decision.

# **APPENDIX A**

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

COLUMBIA PHYSICAL THERAPY, P.S.,	)	CAUSE NO. 05-2-01909-1
Plaintiff,	)	
vs	)	TRANSCRIPT
	)	MOTION TO CONTINUE/ MOTION TO COMPEL/ DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
BENTON FRANKLIN ORTHOPEDIC ASSOCIATES, et al.,	)	
Defendants.	)	

Proceedings had in the above-entitled cause before  
the Honorable CRAIG J. MATHESON, Superior Court Judge, at  
Kennewick, Washington.

DATE: June 2, 2006

APPEARANCES:

For the Plaintiff:  
DARRIN E. BAILEY  
Attorney at Law  
3100 Two Union Square  
601 Union Street  
Seattle, Washington 98101

For the Defendants:  
MATTHEW T. RIES  
Attorney at Law  
720 West Boone, Suite 200  
Spokane, Washington 99201

Court Reporter: Joseph D. King

June 2, 2006

Kennewick, Washington

18 briefing, and I'm sure you'll be back down here again. So  
19 that's where I am on it. I'm not really willing to put this  
20 issue out of its misery, but I'm certainly not anywhere near  
21 granting it at this time. And that's kind of a punt I know,  
22 but that's as good as I can do at this point.

23 MR. BAILEY: Your Honor, just for clarification, are  
24 there still issues regarding the standing? Or are we talking  
25 about more about whether the CPA or meeting those

MOTION FOR SUMMARY JUDGMENT  
RULING

page  
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June 2, 2006

1 requirements on showing deceptive or unfair?

2 THE COURT: I didn't -- no, I think if, you know, on  
3 a summary judgment basis I think that practice, if what you  
4 say is true, would be considered to be unfair, just at this  
5 point. And I don't know. The only thing I could think of on  
6 that is that whether or not the volume of that was such that  
7 it was -- if you have only one instance where somebody was  
8 discouraged, and there may be another explanation, but if you  
9 have a series of people that were, you know, you have more of  
10 a pattern of it, that would be an issue, and I think the  
11 discovery might answer that, and I think that's what I heard  
12 you saying. You look a little further there, but I think one  
13 gets you by summary judgment. I think it might not get you  
14 by trial, but it also might answer his question along those  
15 lines. I think the standing question is probably purely a  
16 legal question. And I think, you know, I accept -- I really  
17 kind of accept the argument that you made here today that it  
18 wasn't really precluded on these facts and under this  
19 particular statute.

20 And the exemption, I'm just frankly not sure on the  
21 exemption where, how that applies. I personally don't think  
22 that that action by the Department of Health is enough to  
23 bring the doctors under the exemption, because that's not  
24 really permitting operation. And it's like saying failing to  
25 charge somebody with a crime condones or authorizes their

MOTION FOR SUMMARY JUDGMENT  
COLLOQUY

page  
42

June 2, 2006

1 conduct just because they didn't have enough evidence to  
2 charge them with a crime. It doesn't really permit or  
3 authorize their conduct. And so maybe there's a more clear  
4 case or I missed something on that, but I don't see the  
5 exemption. I'm not willing to throw it out on standing. You  
6 convinced me at this point, but I would look at it again.

7 It's really so new to me, and really when I came in my  
8 own initial reaction to the question was: Gee, how does this  
9 person have standing to bring this action, because they're  
10 not a consumer? But, in listening to your argument, you  
11 persuaded me the other way. So I've kind of gone over the  
12 fence with it, and this is just one of those situations where  
13 I'm not willing to throw it out at this stage, and that's why  
14 I'm letting it settle down a little bit, and maybe it'll  
15 clarify itself with more discovery, and I'm willing to look  
16 at it another time or let somebody else look at it. You may  
17 not be able to get back in front of a particular judge down  
18 here, depending on your schedules. I wouldn't have a  
19 problem if you brought it in front of somebody else.

20 I wonder if this case is complex enough we should get  
21 preassigned judge on it so you don't have to keep reeducating

2 STATE OF WASHINGTON ) 153288  
3 COUNTY OF BENTON ) SS:

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

14 SIGNED and DATED this \_\_\_\_ day of \_\_\_\_\_,  
15 2007.

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

Page 9

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

Page 7

7 TO: STAFFORD FREY COOPER 153288  
8  
9 \_\_\_\_\_  
10 CASE: COLUMBIA PHYSICAL THERAPY, INC., P.S. v. BENTON  
11 FRANKLIN ORTHOPEDIC ASSOCIATES, P.L.L.C., et al  
12 CAUSE NO. 05-2-01909-1  
13 Transcript of the Verbatim Report of Proceedings had on April  
14 4, 2007 .  
15 original and one copy  
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17 7 pages  
18 TOTAL DUE.....\$35.00  
19 \*PAYMENT DUE UPON RECEIPT PLEASE  
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22 THANK YOU!!!  
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# **APPENDIX B**

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
2 IN AND FOR THE COUNTY OF BENTON  
3 COLUMBIA PHYSICAL THERAPY, )  
4 INC., P.S., )  
5 Plaintiff, ) CAUSE NO. 05-2-01909-1  
6 vs. ) (Motions for Summary Judgment)  
7 BENTON FRANKLIN ORTHOPEDIC ) (Judge's Decision)  
8 ASSOCIATES, P.L.L.C; BENTON )  
9 FRANKLIN PHYSICAL THERAPY, )  
10 INC.; THOMAS R. BURGDORFF; )  
11 CHRISTOPHER A. KONTOGIANIS; )  
12 ARTHUR E. THIEL; DAVID W. )  
13 FISCHER; HEATHER L. PHIPPS; )  
14 RODNEY KUMP; JAY WEST; and )  
15 DOES 1 through 9, )  
16 Defendants. ) VERBATIM REPORT OF  
17 ) PROCEEDINGS  
18 )  
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TRANSCRIPT

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

APPEARANCES:

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

On Behalf of the Plaintiff

(Continued on next page...)

Lisa S. Lang - Official Court Reporter

APPEARANCES: (continuation)

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

153288

Suite 200 Post Place  
720 West Boone  
Spokane, Washington 99201

On Behalf of the Defendants

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Page 3

1 April 4, 2007

2 Kennewick, Washington

3 PROCEEDINGS

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

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

Page 2

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

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

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

Page 4

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

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

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

Page 3

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

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

Page 5

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

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

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

Page 4

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

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1           Motion to Strike, is denied as well.

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

6                       MR. BAILEY: Yes, Your Honor.

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

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

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

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

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

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

5 MR. BAILEY: May 21st.

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

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

9 MR. RIES: Thank you, Your Honor.

10 MR. BAILEY: Thank you, Your Honor.

11 THE COURT: Thank you again very much.

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13 (Whereupon court adjourned.)

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REPORTER'S CERTIFICATE