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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: AMJ

No. 267024

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

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**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. KONTOGLIANIS; 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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**RESPONDENTS' RESPONSE TO PETITIONER'S MOTION FOR  
DISCRETIONARY REVIEW**

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Benton Franklin Orthopedic Associates, P.L.L.C., and Defendants Benton Franklin Physical Therapy, Inc., Thomas R. Burgdorff, Christopher A. Kontogianis, Arthur E. Thiel, David W. Fischer, Heather L. Phipps, Rodney Kump, Jay West and Does 1 through 9 (collectively referred to hereinafter as "Benton Franklin"), by and through their attorneys, Michael H. Church and Matthew T. Ries of Stamper Rubens, P.S., ask this Court to partially deny Petitioner Columbia Physical Therapy, Inc. P.S.' (referred to hereinafter as "Columbia") Motion for Discretionary Review.

A. **INTRODUCTION**

On October 17, 2007, Benton Franklin and Columbia stipulated that discretionary review was appropriate in this matter and both parties subsequently filed notices of discretionary review and motions for discretionary review. After reviewing Columbia's motion for discretionary review, however, Benton Franklin would like to clarify the basis and scope of its stipulation for discretionary review with regard to two issues.

First, whereas the parties agreed that the issue of whether the common law corporate practice of medicine doctrine should apply, Columbia has asked this court to decide whether Benton Franklin is violating "the common law prohibition against the corporate practice of a learned profession." This broader issue was not pled by Columbia in its

amended complaints. Further, the cases in Washington State have applied the common law doctrine to the practice of medicine in the context of practicing medicine. It is for these reasons that the stipulated order for discretionary review pertains to the corporate practice of medicine doctrine as opposed to the corporate practice of learned profession doctrine. On appeal, the issue should be therefore limited to whether the corporate practice of medicine doctrine has been violated.

Secondly, Columbia's last issue it wishes to present for review is whether the facts satisfy the "direct and immediate supervision" test under Day v. Inland Empire Optical, Inc., 76 Wn.2d 407, 456 P.2d 1011 (1969). Benton Franklin, however, by stipulating to appeal the trial court's ruling on the issue is by no means conceding that if the "direct and immediate supervision" test applies, that it can be determined as a matter of law by the Court of Appeals. As set out in its motion for discretionary review, Benton Franklin believes the trial court incorrectly ruled that the "direct and immediate supervision" test even applies to this case, and thus it was appropriate for the Court of Appeals to address this legal question. Nevertheless, if this Court rules that the test does apply, due to the factual nature of the technology and interaction between the physicians and the physical therapists, the jury must be allowed to consider those facts and apply them to the test outlined in Day.

**B. LEGAL ARGUMENT**

**1. Columbia should not be allowed to broaden its common law corporate practice of medicine doctrine claim on appeal**

In Columbia's second and third amended complaints, filed June 5 and July 17, 2007, it specifically alleged that Benton Franklin was violating Washington's corporate practice of medicine doctrine. See Benton Franklin's Appendix, at pp. A-57 and A-64, attached to its Cross-Motion for Discretionary Review. Both parties subsequently addressed this added claim in their cross-motions for summary judgment which the trial court denied. In its motion for discretionary review, Columbia is now attempting to broaden the issue by incorrectly asserting that Washington has a general common law prohibition on corporations practicing learned professions.

In Washington, several professions have statutory prohibitions against providing professional services through corporations with unlicensed shareholders. See e.g., RCW § 2.48.180(2) (defining the unlawful practice of law). As far as a common law prohibition, however, Washington courts have only applied it to physicians, dentists, and optometrists. See Deaton v. Lawson, 40 Wash. 486, 82 P. 879 (1905); State ex rel. Standard Optical Co. v. Superior Court for Chelan County, 17 Wn.2d 323, 135 P.2d 839 (1943) (optometrists); Kalez v. Miller, 20

Wn.2d 362, 147 P.2d 506 (1944) (physicians); State v. Boren, 36 Wn.2d 522, 219 P.2d 566 (1950) (dentists); Prichard v. Conway, 39 Wn.2d 117, 234 P.2d 872 (1951) (dentists); Morelli v. Ehsan, 110 Wn.2d 555, 756 P.2d 129 (1988) (physicians); Fallahzadeh v. Ghorbanian, 119 Wn. App. 596, 82 P.2d 684 (2004) (dentists).

As Benton Franklin argued to the trial court, physical therapists, like occupational therapists and massage therapists, are licensed by the State of Washington and are professionals in the medical field. However, merely being licensed by the State is not enough to apply the common law corporate practice of medicine. In fact, Benton Franklin could find no reported decision by any court in any jurisdiction which had ever found that a physical therapy practice violated the corporate practice of medicine doctrine.

Furthermore, as the record shows, the issue Columbia raised in its amended complaint, and which the parties addressed before the trial court, was whether or not the corporate practice of medicine doctrine should apply to physical therapists. This is also reflected in the trial court's Stipulation and Order to Certify Summary Judgment Decisions for Discretionary Review. Cross-Petitioners' Appendix at p. A-75. The issue was not, as Columbia now asserts, whether corporations should be prohibited from engaging in learned professions. The court should

therefore appropriately narrow Columbia's issue for appeal on this point.

2. **Benton Franklin stipulates that it is a legal question of whether Day's "direct and immediate supervision" test applies, but if it does apply, it remains a factual question for the jury as to whether Benton Franklin can satisfy the test.**

Because it is the primary case interpreting RCW Chapter 19.68, Columbia has relied heavily on the Washington Supreme Court's holding in Day. One of the key holdings in Day was that the defendant ophthalmologists could earn profits from their employed opticians as long as the opticians were under the "direct and immediate supervision" of the ophthalmologists. In the parties' respective summary judgment pleadings, Columbia argued that this test should apply to the present situation of orthopedic physicians employing physical therapists whereas Benton Franklin argued that Day only created the "direct and immediate supervision" test in order to reconcile RCW § 19.68.040, which allowed the ophthalmologists to collect compensation for the services provided by employee opticians, with RCW § 18.34.010, which provides that if a licensed optician is dispensing eyeglasses under the "personal supervision" of an ophthalmologist then the doctor is considered to be lawfully dispensing eyeglasses.

As seen in Benton Franklin's cross-motion for discretionary review, it believes that this purely legal question is appropriate for

discretionary review. Benton Franklin does not believe, however, that the secondary question of whether Benton Franklin can satisfy this test is appropriate for review because there are disputed questions of material fact on that issue.

Some of the material facts that Benton Franklin relied on in its summary judgment briefing to show that it could satisfy the test, should the “direct and immediate supervision test” apply, included:

1. Testimony from Rodney Kump and Jay West, defendant physical therapists, that the defendant physicians supervised the treatment provided by the physical therapists in several ways including: reviewing patient records, notes, charts, and interacting with the physical therapists about the patient’s therapy; by direct observation of therapy by the physician when necessary; and by reviewing electronic medical records which are only accessible within the Benton Franklin organization;

2. Testimony from defendant physicians and patients confirming that the physicians were supervising patients’ physical therapy; and

3. Testimony from defendant physicians that Benton Franklin’s office manager, Mike Nietzel, has administrative control over both the medical and physical therapy offices including: handling personnel issues; managing finances; and compliance with safety and education requirements.

As seen in the transcript of Judge Yule’s April 14, 2007, summary judgment ruling, after hearing the evidence on this issue the trial court concluded that there were questions of fact concerning the “degree and

nature” of the supervision of the defendant physical therapists. Cross-Petitioners’ Appendix at p. A-68.

On August 14, 2007, Columbia moved for partial summary judgment on this same issue – but taking the position that the mere fact that Benton Franklin’s physical therapy and physician offices are in separate buildings is enough to show that Benton Franklin cannot satisfy the “direct and immediate supervision” test. The trial court disagreed and similarly denied Columbia’s summary judgment motion on this issue. Cross-Petitioner’s Appendix at p. A-3.

Similar to Benton Franklin’s cross-motion for discretionary review, Columbia relies solely on RAP 2.3(b)(4) to argue that discretionary review is appropriate because a reviewable order involves a controlling question of law. Here, that controlling question of law is whether Day’s “direct and immediate supervision” test applies. The question Columbia is seeking to appeal, however – whether or not Benton Franklin can satisfy the test – is clearly not a question of law but rather a question of fact. As Benton Franklin has shown, the two offices may be geographically separated but through technology and direct supervision, geographic separation alone is not a dispositive fact. Therefore, should the court determine that the “direct and immediate supervision” test applies, whether or not Benton Franklin can satisfy that test must be left for a trier

of fact to determine.

**C. CONCLUSION**

For the reasons state above, Benton Franklin respectfully requests that this court accept discretionary review, but that it: 1) deny Columbia's attempt to establish a corporate practice of learned professions doctrine; and 2) deny Columbia's request that the Appellate Court rule as a matter of law the highly factual question as to whether or not Benton Franklin can satisfy the "direct and immediate supervision" test.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of February 2008.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 15<sup>th</sup> day of February, 2008, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

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