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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. KONTAGIANIS; ARTHUR E.
THIEL; DAVID W. FISCHER; HEATHER L. PHIPPS; RODNEY
KUMP; JAY WEST; AND DOES 1 through 9,

Respondents-Cross Petitioners.

**AMICI CURIAE BRIEF SUBMITTED BY AMERICAN
ASSOCIATION OF ORTHOPAEDIC SURGEONS, AMERICAN
COLLEGE OF SURGEONS, AMERICAN MEDICAL SOCIETY
FOR SPORTS MEDICINE, AND AMERICAN UROLOGICAL
ASSOCIATION**

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I. IDENTITY AND INTERESTS OF AMICI CURIAE

A. The American Association Of Orthopaedic Surgeons

The American Association of Orthopaedic Surgeons and its parallel organization the American Academy of Orthopaedic Surgeons (collectively "AAOS") represent more than 22,500 U.S. Board-certified orthopaedic surgeons. The mission of the AAOS is to serve the profession, champion the interests of patients, and advance the highest quality of musculoskeletal health. AAOS provides musculoskeletal education through its annual scientific meeting, continuing medical education courses, publications, and electronic media materials. In addition to education, AAOS provides practice management services to orthopaedic surgeons and allied healthcare professionals.

AAOS is a strong supporter of patient-centered care. Orthopaedic surgeons diagnose and treat patients with musculoskeletal diseases and conditions. They work with a number of health care professionals to provide follow-up care after an initial diagnosis has been made, including nurses, physician assistants, and physical therapists. Physical therapists have become an integral part of health care teams that improve patient outcomes.

AAOS is committed to providing patients with the best access to specialty care, including making high-quality physical therapy available to

musculoskeletal patients within our members' medical practices. The AAOS Position Statement on Physician-Owned Physical Therapy Services provides:

The AAOS also believes that Physician Owned Physical Therapy Services should continue to be an alternative for patients. Patients should be given the ability to choose the site of care. Physicians employing Physical Therapists should communicate to the patient their financial interest in any physical therapy practice prior to referring the patient to the site. The physician should also discuss possible alternate sites for physical therapy services.^[1]

Equally important, the Position Statement concludes: "In all instances, the AAOS believes that the best interest of the patient should be foremost when referring a patient for physical therapy services."²

B. The American College Of Surgeons

The American College of Surgeons ("ACS") is a voluntary, educational, and scientific organization devoted to the ethical and competent practice of surgery and to enhancing the quality of care provided to surgical patients. Since 1913, ACS has disseminated medical and surgical information to the profession and to the general public, and it has been deeply involved in establishing standards of practice. With over 77,000 members, nearly half of whom are general surgeons, ACS is the

¹ Position Statement 1166, American Academy of Orthopaedic Surgeons, December 2004.

² *Id.*

largest surgical association in the world. ACS supports timely and convenient access to care for surgical patients, including physical therapy services that may be provided through surgeons' practices.

C. The American Medical Society For Sports Medicine

The American Medical Society for Sports Medicine ("AMSSM") is the largest group of primary care sports medicine physicians in the world. There are over 1,500 members comprised of physicians from a primary care specialty (family medicine, internal medicine, pediatrics, emergency medicine, or physical medicine and rehabilitation), most of whom have additional fellowship training in the subspecialty of sports medicine. As non-operative sports medicine physicians, members of AMSSM have an interest in the ability to provide coordinated, convenient, and quality rehabilitation to patients that may include referral to a physical therapist.

Many members of AMSSM employ physical therapists within their practices, and their patients benefit from the close working relationship between physician and therapist. As primary care physicians, members of AMSSM are interested not only in the musculoskeletal concerns of patients but also on the greater impact of exercise on health and wellness in general. Keeping people of all ages active and exercising can have a positive health effect in terms of decreasing the incidence of obesity,

cardiovascular disease, diabetes and depression. AMSSM strongly believes that restricting physician-owned physical therapy practices does not serve the best interest of the patient.

D. The American Urological Association

The mission statement of the American Urological Association (“AUA”) is “[t]o promote the highest standards of urological clinical care through education, research and in the formulation of health care policy.” AUA agrees with the moving parties that prohibiting physician employment of physical therapists in Washington would undermine the ability of physicians to employ critical medical support personnel in their offices. AUA and its members believe that it is best for patients if they are able to receive care in a single location from a coordinated team of medical professionals. Forcing patients to look elsewhere for supportive treatment is not in the best interests of AUA, its members, or their patients, nor is it conducive to efficient and economical medical care.

E. AAOS, ACS, AMSSM, and AUA Have A Strong Interest In The Outcome Of This Proceeding.

Contrary to the strong interests of AAOS, ACS, AMSSM, and AUA, Petitioner Columbia Physical Therapy, Inc., P.S., would have the Court rule that physician employment of physical therapists is prohibited in the state of Washington under an array of theories that would deprive patients of the option of receiving physical therapy services within their

physicians' medical practices. Such a ruling is not only contrary to prevailing legal principles (as discussed by Benton Franklin and below), but would materially impact AAOS, ACS, AMSSM, AUA, and their members by interfering with their ability to provide alternate sites for physical therapy services and thereby provide the most comprehensive and cost-effective care for physical therapy patients in Washington.

For the foregoing reasons, and for the additional reasons set forth below, AAOS, ACS, AMSSM, and AUA join Respondents Benton Franklin Orthopaedic Associates, et al. (collectively "Benton Franklin") and *Amicus Curiae* Washington State Medical Association in asking the Court to rule that Benton Franklin physicians may continue to provide their patients with the services of the medical practice's employee-licensed physical therapists.

II. SUMMARY OF ARGUMENT

As noted above, Columbia Physical Therapy would have the Court rule that physician employment of physical therapists is prohibited in Washington under an array of legal theories. The ramifications of such a ruling are far reaching, potentially impacting patient care and significantly decreasing patients' options. Such a ruling would also needlessly impact the employment status of many physical therapists as well as future employment options available to students in physical therapy. Providing

patients with the choice to receive physical therapy in their own doctor's medical practice or in an independent facility, as well as providing physical therapists with the option of working in physicians' medical practices or in other settings, should not be overridden by Columbia Physical Therapy's desire to remove competitors from the marketplace. For these reasons, set forth in detail below, this Court should rule that Benton Franklin physicians may continue to provide their patients with the services of the medical practice's employee-licensed physical therapists.

III. ARGUMENT

A. Columbia Physical Therapy's Arguments Are Contrary To The National Trend, Which Continues Toward Physician-Provided Physical Therapy Services Through Employment Of Licensed Physical Therapists.

The rule that Columbia Physical Therapy asks this Court to adopt not only would push Washington toward a rule that other states have rejected (as discussed in Section III.B below) but is also contrary to the national trend. For several decades, there has been an increasing trend toward physicians owning an interest in separate physical therapy service facilities or – as is the case in this matter – providing the physical therapy services within physician-owned medical practices. Orthopaedic surgeons are the specialists most likely to provide physical therapy services within their practices due to the types and the number of musculoskeletal

conditions they treat.³ Providing patients with “[a]ccess to high-quality physical therapy care is just as important” as “access to high-quality diagnostic and surgical facilities to maximize their functional outcomes in a timely fashion.”⁴

Having such close proximity between the physical therapist and the physician is in the patient’s best interests for a number of reasons. The physician and physical therapist develop a working relationship, wherein each can provide the other frequent and immediate feedback on the patient’s condition, treatment, and progress, affording the patient coordinated services.⁵ Patients are more apt to follow through with recommended therapy treatments and can more easily schedule consecutive therapy and follow-up physician appointments. Additionally, the physician and the physical therapist each have complete access to the patient’s medical records, including test results, imaging films, operative reports, physician evaluations, and therapy progress reports. “The time needed to exchange this valuable information with an independent

³ Paul Duxbury PT, ATC/R, *The Physician-Owned Physical Therapy Department*, 39 ORTHOPEDIC CLINICS N. AM. 49 (2008).

⁴ *Id.*

⁵ Benjamin P. Falit, *Ancillary Service and Self-Referral Arrangements in the Medical and Legal Professions: Do Current Ethical, Legislative, and Regulatory Policies Adequately Serve the Interests of Patients and Clients?*, 58 WINTER S.C. L. REV. 371, 386-387 (2006).

provider would easily delay positive interventions for several days or more.”⁶

This trend is consistent with the federal government’s healthcare provider reimbursement policy, which permits reimbursement of physical therapy services provided by physician-employed physical therapists. As the U.S. Department of Health and Human Services explained in its Final Rule, dated December 31, 2002, employment of physical therapists by physicians “reflects actual practice patterns, will permit more flexible employment opportunities for therapists and will also increase beneficiaries’ access to therapy services, particularly in rural areas.”⁷ This Rule foretold the importance of another benefit found in the physician-employed physical therapist arrangement. Presently, there are a number of Washington physical therapists with gainful employment through physicians’ medical practices.

Benton Franklin has artfully pointed out that it is hardly seeking a monopoly on physical therapy services, as two-thirds of its own patients obtain physical therapy services at different facilities.⁸ Yet medical practices do provide viable employment opportunities for physical

⁶ Duxbury, *supra*, 39 ORTHOPEDIC CLINICS N. AM. 49.

⁷ U.S. Dep’t Health & Human Servs., Center for Medicare and Medicaid Servs., *ENROLLMENT OF PHYSICAL AND OCCUPATIONAL THERAPISTS AS THERAPISTS IN PRIVATE PRACTICE*, 67 Fed. Reg., No. 251 at 79987 (Dec. 31, 2002).

⁸ Resp. Br. 43.

therapists. According to government statistics, the national unemployment rate in September 2009 was 9.8%, the highest in more than 26 years.⁹ If Washington State orthopaedic surgeons could no longer employ physical therapists, patients are not the only ones who will experience loss. Students graduating from physical therapy programs will lose employment options in an already slow job market. A significant number of physical therapists who are currently employed by physicians will become unemployed at a time when finding another job may take months or years.¹⁰ What awaits these physical therapists may well be long periods of unemployment, catch-as-you-can part-time employment, or being forced out of Washington or out of physical therapy altogether to find a job.

These employer-employee relationships between physicians and physical therapists are allowed in virtually every state across the country and by the federal government. As structured, the relationship benefits patients, enhances patient care, and provides viable and needed employment options for physical therapists. Contrary to Columbia Physical Therapy's argument, and as properly advocated by Benton Franklin, this Court should not adopt a rule that would interfere with this

⁹ U.S. Dep't of Labor, Bureau of Labor Statistics, data.bls.gov, last retrieved Oct. 9, 2009.

¹⁰ Emily Dagostino, *Court Forces Therapists To Scramble*, The Spartansburg (S.C.) Herald Journal, Jan. 3, 2007.

growing trend toward physician-provided physical therapy services through employment of licensed physical therapists.

B. Columbia Physical Therapy's Arguments Are Also Contrary To The Law In Nearly Every State Allowing In-Practice Referrals.

In addition to a national policy in support of the option of physician employment of physical therapists, nearly all states allow physicians to refer patients to physical therapists who they employ. A small number of states have no specific statutes addressing such referrals, but authorize payment for services provided by physician-employed physical therapists under state Medicaid statutes. For this reason as well, as set forth in detail below, the Court should reject the position advocated in this matter by Columbia Physical Therapy.

Although five states have statutes that could potentially prohibit Benton Franklin physicians from referring their patients to Benton Franklin-employed physical therapists, each one of those statutes has exceptions that allow such a referral under specific circumstances.¹¹ The controlling statute in North Carolina, for example, allows orthopaedic

¹¹ Florida – Patient Self-Referral Act of 1992, Fla. Stat. § 456.053; Illinois – Health Care Worker Self-Referral Act, 225 Ill. Comp. Stat. 47/1, *et seq.*; Maine – Health Care Practitioner Self-Referral Act, Me. Rev. Stat. Ann. tit.22, § 2081, *et seq.* and 02-031-870 Me. Code R.; Missouri – Mo. Rev. Stat. § 334.100.2(21), § 287.140.11 and Mo. Code Regs. Ann. tit. 20 § 2150-5.030; and North Carolina – N.C. Gen. Stat. § 90-405, *et seq.*

surgeons to refer patients to a physical therapist so long as the surgeons supervise those services and provide certain required disclosures.¹²

In only one state has a court ever ruled that referrals for physical therapy services within the same medical practice are prohibited. In South Carolina, the state Supreme Court ruled in 2006 that physical therapists cannot work in physicians' offices or provide physicians' patients with services through referrals within their medical practices.¹³ But unlike the laws in Washington, the South Carolina Physical Therapy Act prohibits physicians from paying salaries to physical therapists.

Under the laws of 19 states, a physician referral for physical therapy services to a facility in which he/she has a financial interest, which would include a referral within a physician-owned medical practice, is allowed as long as the physician discloses the interest.¹⁴ These states

¹² N.C. Gen. Stat. § 90-408(c).

¹³ *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 636 S.E.2d 598 (S.C. 2006)

¹⁴ Arizona – Ariz. Rev. Stat. Ann. § 32-1401-27(ff); Arkansas – Ark. Code Ann. § 17-93-308; California – Cal. Bus. & Prof. Code § 650.02 and Cal. Labor Code § 139.31; Colorado – Colo. Rev. Stat. § 25.5-4-414 (disclosure made to state department); Connecticut – Conn. Gen. Stat. § 20-7a(c); Georgia – Ga. Code Ann. § 43-1B-1, *et seq.*; Hawaii – Haw. Rev. Stat. § 431:10C-308.7(c), (d); Idaho – Idaho Code Ann. § 54-4603(1)(p), (6); Indiana – Ind. Code § 25-22.5-11-1, *et seq.*; Kentucky – Ky. Rev. Stat. Ann. §§ 342.020(9), 205.8477; Massachusetts – Mass. Gen. Laws ch. 112, § 12AA; Montana – Mont. Code Ann. §§ 39-71-1108, 39-71-315; Nevada – Nev. Rev. Stat. § 439B.425; New Jersey – N.J. Stat. Ann. §§ 45:9-22.4 to 45:9-22.8 and N.J. Admin. Code § 13:35-6.17; New York – N.Y. Pub. Health Law § 238, *et seq.*; Pennsylvania – 34 Pa. Code § 127.301(c); Rhode Island – R.I. Gen. Laws § 5-37-22(e), (f) and R.I. Code R. 14-140-031; South Dakota – S.D. Codified Laws §§ 36-2-18 to 36-2-19; Texas – Tex. Occ. Code Ann. § 105.002 and 28 Tex. Admin. Code § 180.24; Utah – Utah Code Ann. §§ 58-67-801, 58-68-801.

generally require the physician to disclose his/her financial interest to the patient at the time of the referral with a written disclosure form. The physician generally must obtain a signed disclosure form from the patient, which contains the name, address of the facility to which the physician is referring the patient, and the patient's right to obtain services from another facility.¹⁵ One state, Arizona, requires the physical therapist – as opposed to the physician – to provide a disclosure upon receiving the referral, including the fact that the referring physician may benefit from the physical therapy referral.¹⁶

There are seven additional states where referrals for physical therapy within physician-owned practices do not require disclosure of the physician's financial interests. For instance, Kansas physicians are required to disclose only “a significant investment interest in the health care entity.”¹⁷ Maryland also excludes from the disclosure requirement intra-practice referrals by physicians.¹⁸ Similarly, Louisiana physicians are not required to disclose a financial interest when referring patients for

¹⁵ See, e.g., Georgia's Patient Self-Referral Act of 1993, Ga. Code Ann. § 43-1B-1, *et seq.*

¹⁶ See, e.g., Ariz. Rev. Stat. Ann. § 32-2051(3)(C).

¹⁷ Kan. Stat. Ann. § 65-2837(29), (33)(g).

¹⁸ Md. Code Ann., Health Occ. § 1-303(c)(2).

services within their own practices.¹⁹ Numerous other states likewise allow physician-owned practice referrals without required disclosures, including New Hampshire,²⁰ Ohio,²¹ Tennessee,²² and Virginia.²³

Much the same is true in Alabama. That state's licensing and regulation statutes for physical therapists expressly allow physical therapists to seek employment with physicians, as well as to receive physician-owned practice referrals for physical therapy services.²⁴ Thus, under Alabama's physical therapy licensing laws, Benton Franklin physical therapists could be employees of Benton Franklin orthopaedic surgeons and provide Benton Franklin patients the convenience of physical therapy services within their own physicians' practices.²⁵

In sum, physicians across the entire country, including physicians in Washington, are currently able to provide patients with a continuity of care and convenience that Columbia Physical Therapy now asks this Court to prohibit. Removing this option would deprive patients of the freedom

¹⁹ La. Rev. Stat. Ann. § 37:1744(B); *see also* La. Admin. Code tit. 46, pt. XLV, § 4211, *et seq.*

²⁰ N.H. Rev. Stat. Ann. § 125:25-a, -b, -c.

²¹ Ohio Rev. Code Ann. §§ 4731.65, *et seq.*, 4731.225.

²² Tenn. Code Ann. § 63-6-601, *et seq.*

²³ Va. Code Ann. § 54.1-2401, *et seq.*, § 54.1-2964.

²⁴ Ala. Code § 34-24-217(b).

²⁵ Thirteen other states (Alaska, Michigan, Minnesota, Nebraska, Nevada, North Dakota, Oregon, Vermont, West Virginia, Wisconsin, Iowa, Oklahoma, and Wyoming) have no statutes that specifically address physical therapy referrals to physician-owned medical practices one way or the other, although some (such as Michigan and Nevada) specifically incorporate the federal Stark rules. *See* Mich. Comp. Laws Ann. § 333.16221(e)(iv), (v); Nev. Rev. S. § 439B.425.

to choose where to receive physical therapy services. Patients in Washington, unlike in other states, will not be able to receive coordinated care, including frequent and immediate communication between physicians and physical therapists who have immediate access to patient medical records. As this Court recently noted in an analogous context, such a change should be made – if at all – by the legislature and not by judicial fiat.²⁶

IV. CONCLUSION

For the foregoing reasons, the Court should rule that Benton Franklin physicians may continue to provide their patients with the services of the medical practice's employee-licensed physical therapists.

DATED this 16th day of October 2009.

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²⁶ See, e.g., *Abbey Road Group, LLC v. City of Bonney Lake*, ___ Wn.2d ___, No. 80878-3, 2009 WL 3210388, at *8 (Oct. 8, 2009) (“broad reforms . . . better suited to the legislature”).

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The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

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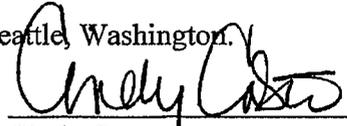
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DATED this 16th day of October 2009, at Seattle, Washington.


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