

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

09 OCT 19 PM 2:48

BY RONALD R. CARPENTER

CLERK

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. KONTOGLANIS;  
ARTHUR E. THIEL; DAVID W. FISCHER; HEATHER L. PHIPPS;  
RODNEY KUMP; JAY WEST; and DOES 1 through 9

Respondents / Cross-Petitioners

---

AMICUS CURIAE BRIEF OF  
AMERICAN PHYSICAL THERAPY ASSOCIATION  
IN SUPPORT OF PETITIONER/CROSS-RESPONDENT

---

EDWARDS, SIEH, SMITH  
& GOODFRIEND, P.S.

By: Howard M. Goodfriend  
WSBA No. 14355

1109 First Avenue, Suite 500  
Seattle, WA 98101  
(206) 624-0974

AMERICAN PHYSICAL  
THERAPY ASSOCIATION

By: John J. Bennett  
General Counsel

1111 North Fairfax Street  
Alexandria, VA 22314  
(703) 706-3107

Attorneys for Amicus Curiae  
American Physical Therapy Association

ORIGINAL

FILED AS  
ATTACHMENT TO EMAIL

**TABLE OF CONTENTS**

I. STATEMENT OF ISSUE.....1

II. IDENTITY AND INTEREST OF AMICUS CURIAE.....1

III. STATEMENT OF THE CASE.....1

IV. ARGUMENT.....2

    A. Washington’s Professional Service Corporation Act  
    Does Not Modify Washington’s Common Law And  
    Statutory Prohibition Against The Practice Of  
    Physical Therapy By An Entity Owned And  
    Controlled By Licensed Medical Doctors.....2

        1. The Plain Language Of RCW 18.100.050(1)  
        Does Not Authorize The Practice Of  
        Physical Therapy By A Professional Service  
        Corporation Owned Solely By Physicians.....3

        2. RCW 18.100.050(2) and (5) Embody Policy  
        Decisions Regarding Which Professions  
        Should Be Allowed To Combine Into A  
        Single Practice – Decisions That Are Best  
        Made By State Legislatures. ....7

        3. The Policies Underlying Washington’s  
        Prohibition Against The Corporate Practice  
        Of Physical Therapy Are Applicable To  
        PSCs Owned Solely By MDs. ....12

    B. Neither RCW 74.09.240 Nor The Stark Law  
    Authorizes A PSC Owned Solely By MDs To  
    Practice Physical Therapy By Employing Licensed  
    PTs.....17

V. CONCLUSION.....20

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Goldfarb v. Virginia State Bar</i> , 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) .....	18
--	----

### STATE CASES

<i>Dot Foods, Inc. v. Washington Department of Revenue</i> , ___ Wn.2d ___, 215 P.3d 185 (2009) .....	4
<i>In the Matter of the Parentage of L.B.</i> , 155 Wn.2d 679, 122 P.3d 161 (2005), <i>cert. denied</i> , 547 U.S. 1143 (2006) .....	7
<i>Sedlacek v. Hillis</i> , 145 Wn.2d 379, 36 P.3d 1014 (2001) .....	7
<i>Sloan v. South Carolina Board of Physical Therapy Examiners</i> , 370 S.C. 452, 636 S.E.2d 598 (2006) .....	19
<i>Wright v. Jeckle</i> , 158 Wn.2d 375, 144 P.3d 301 (2006) .....	5

### FEDERAL STATUTES

42 U.S.C. § 1395nn .....	18
--------------------------	----

### STATE STATUES

Alabama Code § 10-4-383 .....	9, 10
Col. Rev. Stat. § 6-18-303(2)(a-c) .....	9
Col. Rev. Stat. § 12-41-124(5) .....	9
Delaware Code 24 § 2616(a)(8) .....	19
Gen. Laws. Mass. Chap. 156A, § 3 .....	9, 11
Georgia Code Annotated § 14-7-4(a) .....	9
Idaho Code 30-1304 .....	10
Iowa Code § 496C.4 .....	9, 11
Ky. Rev. Stat. § 274.015(1) .....	10
Missouri Rev. Stat. § 356.041 .....	9, 11

Missouri Rev. Stat. § 356.051.....	9, 11
Missouri Revised Statutes § 334.252 .....	19
Montana Code § 35-4-205 .....	9, 11
Nevada Rev. Stat. § 89.050.....	10
New Hampshire Stat. § 294-A:2.....	9, 10, 11
New Jersey Stat. § 14A:17-5(a).....	10
New Mexico Stat. § 53-6-5.....	9
New York Business Corp. Law, § 1503(a) .....	9, 10
North Carolina Gen. Stat. § 55B□14(a) .....	10
North Dakota Century Code § 10-31-04(1).....	10, 11
Ohio Rev. Code § 1701.03(B) .....	10
15 Pa.C.S.A. § 2903 .....	9, 11
RCW 74.09.240 .....	17, 18
RCW 18.74.160 .....	13
RCW 18.100.010 .....	6
RCW 18.100.030 .....	3
RCW 18.100.050 .....	3-9, 11
RCW 18.100.060 .....	6
RCW ch. 25.15 .....	2
RCW 25.15.045 .....	2
South Carolina Code § 33-19-110(a).....	10, 11
South Carolina Code Annotated § 40-45-110(A)(1) .....	19
Tennessee Code § 48-101-605(b).....	10, 11
11 Vermont Statutes § 804.....	9
Virginia Code § 13.1-543 .....	10

## OTHER AUTHORITIES

AAOS Now, Mar/Apr 2007, <i>Musculoskeletal education in medical schools: Are we making the cut?</i> , <a href="http://www.aaos.org">www.aaos.org</a> .....	15
Ancillary Care Solutions: <a href="http://www.ancillarycare.com/faq.html">http://www.ancillarycare.com/faq.html</a> .....	14
APTA House of Delegates, Financial Considerations in Practice (HOD P06-99-13-17), <a href="http://www.apta.org">www.apta.org</a> .....	1
APTA - Opposition to Physician Ownership of Physical Therapy Services (HOD P06-03-27-25), <a href="http://www.apta.org">www.apta.org</a> .....	1
Association of American Medical Colleges (“AAMC”) 2005 Report VII, <i>Contemporary Issues in Medicine: Musculoskeletal Medicine Education Medical School Objectives Project</i> .....	15
John D. Childs, PT, PhD, MBA, Julie M. Whitman, PT, DSc, Phillip S. Sizer, PT, PhD, Maria L. Pugia, PT, DPT, Timothy W. Flynn, PT, PhD, and Anthony Delitto, PT, PhD, FAPTA, <i>A description of physical therapists’ knowledge in managing musculoskeletal conditions</i> , BMC Musculoskeletal Disorders 2005, 6:32. ....	17
Delaware Attorney General Opinion of 10/10/2002, 2002 Del. AG LEXIS 21.....	19
Kevin B. Freedman, MD, Joseph Bernstein, MD, MS, <i>The Adequacy Of Medical School Education In Musculoskeletal Medicine</i> , J Bone Joint Surg.1998; 80-A (10).....	15, 17
Guide for Professional Conduct (“GPC”), Section 7.3, <a href="http://www.apta.org">www.apta.org</a> .....	13
Elizabeth Matzkin, MD, Major Eric L. Smith, MD, Captain David Freccero, MD and Allen B. Richardson, MD, <i>Adequacy of Education in Musculoskeletal Medicine</i> , J Bone Joint Surg. 2005;87.....	16

Missouri Attorney General Opinion Letter No. 104-95, 11/27/1995, 1995 Mo. AG LEXIS 24.....	19
Mitchell and Scott, “ <i>Physician Ownership of Physical Therapy Services: Effects on Charges, Utilization, Profits, and Service Characteristics,</i> ” Journal of the American Medical Association, 1992; 268(15).....	14
Model Business Corporation Act: <i>Official Text with Official Comment and Statutory Cross-References Revised through December 2007</i> .....	8
Model Professional Corporation Supplement § 11(a) .....	8, 9, 11
John E. Moyer, <i>The Law of Business Organizations</i> 214 (6 <sup>th</sup> Ed. 2005).....	8
Office of the Inspector General (OIG) of the U.S. Department of Health and Human Services, <i>Physical Therapy Billed by Physicians</i> (May 1, 2006).....	13
Physical Therapy - Physician Supervised: <a href="http://www.empiremedicaltraining.com/workshops/seminar_details.1istevents/33/Physical-Therapy--Physician-Supervised/">http://www. empiremedicaltraining.com/workshops/seminar_details.1 istevents/33/Physical-Therapy--Physician-Supervised/</a> .....	14
Policy 30-3 – Director’s Policy on the Corporate Practice of Physician-Owned Physical Therapy Clinics, <a href="http://www.dora.state.co.us/Physical-Therapy/Policy30-3.pdf">http://www.dora.state.co.us/Physical-Therapy/Policy30- 3.pdf</a> .....	9
South Carolina Attorney General Opinion of 03/30/2004, 2004 S.C. AG LEXIS 58.....	19
Substitute Senate Bill 6150, House Committee on Health Care, Majority Report .....	12
Swedlow, Johnson, Smithline and Milstein, “ <i>Increased Costs and Rates of Use in the California Workers’ Compensation System as a Result of Self-Referral by Physicians,</i> ” New England Journal of Medicine, 327(21) (1992).....	13
TheraSys, <a href="http://www.therasyspt.com">www.therasyspt.com</a> .....	14

Yale University School of Medicine Center for Continuing  
Medical Education, May 2009: [http://cme.yale.edu/conferences/conference\\_index.asp?ID=323](http://cme.yale.edu/conferences/conference_index.asp?ID=323).....16

## **I. STATEMENT OF ISSUE**

Whether the employment of licensed physical therapists by a professional limited liability company owned solely by licensed medical doctors is barred by the common law and statutory prohibitions against the practice of physical therapy by a corporation or other business entity?

## **II. IDENTITY AND INTEREST OF AMICUS CURIAE**

The American Physical Therapy Association (“APTA”) is the national organization for the physical therapy profession, with over 70,000 members, who are physical therapists, physical therapist assistants, and students. It has a chapter in each state. The APTA has long opposed on policy grounds arrangements in which physicians are tempted to profit from referring patients for physical therapy – a situation present whenever a medical doctor refers a patient to a licensed physical therapist employed by his/her business.<sup>1</sup>

## **III. STATEMENT OF THE CASE**

The APTA accepts the statement of the case of Columbia Physical Therapy, Inc., P.S. (“Columbia”) in the Brief of Petitioner.

---

<sup>1</sup> See the position adopted by the APTA House of Delegates, Financial Considerations in Practice (HOD P06-99-13-17), “The American Physical Therapy Association opposes . . . participation in services that is in any way linked to the financial gain of the referral source.” *See also* Opposition to Physician Ownership of Physical Therapy Services (HOD P06-03-27-25). These policies are accessible via the APTA website, [www.apta.org](http://www.apta.org).

#### IV. ARGUMENT

Under Washington law, a corporation or limited liability company (“LLC”) may not practice physical therapy by means of employing licensed physical therapists. The Professional Service Corporation Act (“PSCA”) carves out an exception for a professional service corporation (“PSC”) or professional limited liability company (“PLLC”)<sup>2</sup> owned solely by licensed physical therapists (“PTs”). However, the PSCA does not contain any exception for a PSC (or PLLC) owned solely by licensed medical doctors (“MDs”) to practice physical therapy. Likewise, nothing in Washington’s self-referral statute, RCW 74.09.240, or the federal Stark Law to which it is linked, authorizes an entity owned solely by MDs to practice physical therapy by hiring licensed PTs.

**A. Washington’s Professional Service Corporation Act Does Not Modify Washington’s Common Law And Statutory Prohibition Against The Practice Of Physical Therapy By An Entity Owned And Controlled By Licensed Medical Doctors.**

As petitioner has demonstrated, the general rule in Washington is that a corporation (or other business entity) may not employ licensed professionals to practice a profession, a prohibition with both a common

---

<sup>2</sup> A person licensed to render professional services may “organize and become a member or members of a professional limited liability company under the provisions of [RCW 25.15] for the purpose of rendering professional service.” RCW 25.15.045(1). Such a PLLC is subject to all the provisions of the PSCA that apply to a PSC.

law and statutory basis. (Pet. Br. at 15-24) The PSCA confirms the common law and statutory prohibition by acknowledging that physical therapists provide “professional service,” which means that physical therapy is a service “which prior to the passage of [the PSCA] and by reason of law could not be performed by a corporation.” RCW 18.100.030(1) (emphasis added). The Legislature in RCW 18.100.050(2) and (5) has specifically designated those combinations of professional services that may be performed by a single PSC. This Court should not, under the guise of statutory interpretation of RCW 18.100.050(1), make its own policy choices regarding which groups of professional services a single PSC may, or may not, offer to the public.

**1. The Plain Language Of RCW 18.100.050(1) Does Not Authorize The Practice Of Physical Therapy By A Professional Service Corporation Owned Solely By Physicians.**

This Court has made clear that the fundamental imperative of statutory interpretation is to follow the legislature’s intent based upon statutory language:

In reviewing a statute, we give effect to the legislature's intent, primarily derived from statutory language. Where statutory language is plain and unambiguous, we ascertain the meaning of the statute solely from its language. We read an unambiguous statute as a whole and must give effect to all of its language.

*Dot Foods, Inc. v. Washington Department of Revenue*, \_\_\_ Wn.2d \_\_\_, ¶ 10, 215 P.3d 185, 188 (2009).

The plain language of RCW 18.100.050(1), the statute's general clause, authorizes only an unmixed single-profession PSC, that is, one in which the employees or other agents who actually perform the professional services are licensed to practice the same profession as the one the shareholders are licensed to practice:

(1) An individual or group of individuals duly licensed or otherwise legally authorized to render the same professional services within this state may organize and become a shareholder or shareholders of a professional corporation for pecuniary profit under the provisions of Title 23B RCW for the purpose of rendering professional service. . . .

RCW 18.100.050(1). All parties agree that this provision – which is the only PSCA clause on which respondent Benton Franklin Orthopedic Associates, P.L.L.C. (“BFOA”) may rely – does not authorize any horizontal mixing of professions, i.e., ownership by members of different professions.

The dispute in this case is whether RCW 18.100.050(1) authorizes vertical mixing, i.e., an arrangement in which a PSC has any employee or other agent licensed to practice a profession that is different from that practiced by any one of the shareholders. Under respondent's

interpretation of RCW 18.100.050(1), a single PSC could perform any and all of the many professions referenced in the PSCA: “[T]he Professional Service Corporations Act **only limits who can own a professional service corporation, not who can be employed by such a corporation. . . .**” (Resp. Br. at 28-29 (emphasis added)) The trial court rejected this any-and-all approach, and instead interpreted RCW 18.100.050(1) as authorizing a single PSC owned by MDs to render some but not all of the professional services covered by the PSCA. In particular, the court reasoned that physicians “could not form a **professional service corporation and then** enter the accounting business, **hire accountants or hire attorneys or hire other non health-care professionals. . . .**” (emphasis added) (*quoted in* Resp. Br. at 29-30)<sup>3</sup>

This Court should reject the view that RCW 18.100.050(1) authorizes a PSC to perform some professional services that are different from those that the shareholders are licensed to perform. This interpretation directly conflicts with the PSCA’s express “legislative intent to provide for the incorporation of an individual or group of individuals **to render**

---

<sup>3</sup> Although respondent proclaims that the PSCA “does not contain one word about whom such a corporation may employ,” it disavows the notion that a PSC owned by MDs may employ lawyers or accountants – a manifestly absurd result, as the trial court recognized. (Resp. Br. at 29-30) This Court “avoid[s] readings of statutes that lead to strained or absurd results.” *Wright v. Jeckle*, 158 Wn.2d 375, 379-380, 144 P.3d 301, 304 (2006).

the same professional service to the public for which such individuals are required by law to be licensed or to obtain other legal authorization.” RCW 18.100.010 (emphasis added). Respondent avoids any mention of this authoritative declaration of the Legislature’s real intent.

RCW 18.100.010 makes clear that the Legislature was concerned about both the identity of the shareholders and the identity and behavior of the PSC’s employees and other agents. *See* RCW 18.100.060(1) (no PSC “may render professional services except through individuals who are duly licensed or otherwise legally authorized to render such professional services.”). A PSC shareholder owns stock, votes for directors, and receives dividends, but in that capacity he/she does not provide professional services to the public. A corporation practices a profession only by way of the activities of its employees and other agents, individuals who may be shareholders but need not be. Indeed, under RCW 18.100.050(1) a PSC could be wholly owned by shareholders who do not provide any professional services on behalf of the PSC, provided they are members of the same profession as those individuals who do. The statutory language of the PSCA, taken as a whole, establishes that a PSC owned by licensed physicians is not authorized to engage in the practice of physical therapy through its employees.

**2. RCW 18.100.050(2) and (5) Embody Policy Decisions Regarding Which Professions Should Be Allowed To Combine Into A Single Practice – Decisions That Are Best Made By State Legislatures.**

The Legislature has determined, as a matter of public policy, which combinations of professions are authorized by the PSCA. In particular, RCW 18.100.050(5)(a) authorizes multi-disciplinary practice by members of not just one profession but of the many healthcare professions (not including physical therapy) that the Legislature deems to be the “same.” Respondent argues that its interpretation of RCW 18.100.050(1) to authorize a single PSC, owned by members of one profession, to provide some but not all of the many kinds of “professional service,” is based on “good public policy” and “just plain common sense.” (Resp. Br. at 3) To the contrary, such an interpretation requires the court to usurp for itself the Legislature’s authority to make policy:

[T]he Legislature is the fundamental source for the definition of this state's public policy and we must avoid stepping into the role of the Legislature by actively creating the public policy of Washington.

*Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001). *See also In the Matter of the Parentage of L.B.*, 155 Wn.2d 679, 718, 122 P.3d 161, 182 (2005) (separation of powers doctrine requires a court to “resist the temptation to rewrite an unambiguous statute to suits its notions of public policy.”), *cert. denied*, 547 U.S. 1143 (2006).

As reflected in the myriad ways in which states have treated PSCs, this Court would face complex and difficult policy choices were it to decide for itself which of the many possible combinations of health care professions should be authorized under the PSCA. Rather than basing an interpretation of RCW 18.100.050 on the language of the statute, respondent would have this Court make a policy decision about an issue – what mixing of professions should be authorized – on which no consensus has emerged among Washington’s sister states.<sup>4</sup>

The Washington PSCA, like the laws of many other states, begins with a clause that authorizes formation of a PSC for the purpose of performing only one kind of professional service – the kind all of the shareholders are licensed to practice. RCW 18.100.050(1). The statute goes on to authorize PSCs for the purpose of performing various combinations of two or more kinds of professional service. RCW

---

<sup>4</sup> The Committee on Corporate Laws of the Section of Business Law of the American Bar Association (“ABA”) formerly published the Model Professional Corporation Supplement (“MPCS”) as a supplement to the Model Business Corporation Act. However, the Committee has discontinued the MPCS. See *Model Business Corporation Act: Official Text with Official Comment and Statutory Cross-References Revised through December 2007*, p. ix fn. 3. No state has adopted the MPCS in its entirety. John E. Moye, *The Law of Business Organizations* 214 (6<sup>th</sup> Ed. 2005).

18.100.050(2) and (5). Most PSC statutes<sup>5</sup> like RCW 18.100.050, start with a single-profession authorization and then authorize certain multi-profession corporations.<sup>6</sup> However, the details of the regulatory schemes vary greatly. A number of statutes soften the single-profession limitation of the primary authorization by permitting services that are “ancillary” to those of the single profession.<sup>7</sup> Other states refer to services that are

---

<sup>5</sup> Not every state has one PSC statute applicable to all professions. Colorado, for instance, has multiple profession-specific statutes. Its physical therapy act prohibits a corporation from the practice of physical therapy, but contains an exception for the employment of PTs “by a certified or licensed hospital, licensed skilled nursing facility, certified home health agency, licensed hospice, certified comprehensive outpatient rehabilitation facility, certified rehabilitation agency, authorized health maintenance organization, accredited educational entity, or other entity wholly owned and operated by any governmental unit or agency.” Col. Rev. Stat. § 12-41-124(5)(b). This statute “does not recognize the employment of physical therapists at physician-owned physical therapy clinics.” Policy 30-3 – Director’s Policy on the Corporate Practice of Physician-Owned Physical Therapy Clinics, accessible at <http://www.dora.state.co.us/Physical-Therapy/Policy30-3.pdf>. The only recognized exemption is for a professional practicing in a “provider network” if various conditions are met, including a written contract protecting the independence of the licensee’s exercise of his/her professional judgment. Col. Rev. Stat. § 6-18-303(2)(a-c).

<sup>6</sup> The subsection headings in the Pennsylvania statute well illustrate the typical structure. They are: (a) General rule., (b) Legislative intent., (c) Single-purpose corporations., and (d) Multiple-purpose corporations. 15 Pa.C.S.A. § 2903(c). Other state statutes that have a single-purpose corporation category similar to RCW 18.100.050(1) include: Iowa Code § 496C.4; New Hampshire Stat. § 294-A:2, I; Official Code of Georgia Annotated § 14-7-4(a); Missouri Rev. Stat. § 356.041(1); New York Business Corp. Law, § 1503(a).

<sup>7</sup> See Model Professional Corporation Supplement § 11(a) (“solely for the purpose of rendering professional services (including services ancillary to them) and solely within a single profession”). Statutes that refer to “ancillary” services include: Alabama Code § 10-4-383; Gen. Laws. Mass. Chap. 156A, § 3(a); Missouri Rev. Stat. § 356.051; Montana Code § 35-4-205; New Mexico

“allied” or “related” to those of the single profession.<sup>8</sup> In authorizing PSCs to practice two or more different professions, some states list specific professions,<sup>9</sup> while others defer to the state’s partnership

---

Stat. § 53-6-5; North Carolina Gen. Stat. § 55B: 14(a); North Dakota Century Code § 10-31-04(1); South Carolina Code § 33-19-110(a); Tennessee § 48-101-605(a); and 11 Vermont Statutes § 804. While respondent uses the term “ancillary services,” (Resp. Brief, p. 32), RCW 18.100.050(1) does not use the term “ancillary.” Indeed, respondent quite accurately insists that the PSCA does not deal “with . . . whether ancillary services can be performed” by a PSC owned solely by MDs. (Resp. Brief, p. 32)

<sup>8</sup> See, e.g., Idaho Code 30-1304 (allied professional services); New Jersey Stat. § 14A:17-5(a) (closely allied professional service); Ky. Rev. Stat. § 274.015(1) (related professional services); Nevada Rev. Stat. § 89.050(1) (services reasonably related); New Hampshire Stat. § 294-A:2, I (necessary related services).

<sup>9</sup> See, e.g., Alabama Code § 10-4-383 (medical and dental); Nevada Rev. Stat. § 89.050(2)(a) (architecture, interior design, residential design, engineering and landscape architecture); Nevada Rev. Stat. § 89.050(2)(b) (medicine, homeopathy, and osteopathy); Nevada Rev. Stat. § 89.050(2)(c) (five different combinations of mental health services involving psychologists, clinical social workers, nurses, marriage and family therapists, and clinical professional counsellors); New York Business Corp. Law, § 1503(a) (professional engineering, architecture, landscape architecture, or land surveying); North Carolina § 55B: 14(b) (architectural, landscape architectural, engineering or land surveying, geological, and soil science services); North Carolina Gen. Stat. § 55B: 14(c)(1-9) (nine different combinations of various healthcare professionals); North Dakota Century Code § 10-31-04(1) (combination of architects, landscape architects, professional engineers, land surveyors, and combination of physical therapists and occupational therapists); Ohio Rev. Code § 1701.03(B) (architectural, landscape architectural, professional engineering, or surveying services; optometrists, chiropractors, psychologists, registered or licensed practical nurses, pharmacists, physical therapists, mechanotherapists, medical doctors, osteopaths, or podiatrists); Virginia Code § 13.1-543 (architects, professional engineers or land surveyors; any combination of practitioners of the healing arts, optometry, physical therapy, the behavioral science professions, and audiology or speech pathology).

law<sup>10</sup> or licensing law. Of those that look to licensing law, some states authorize mixing unless prohibited by specific licensing laws, while others authorize mixing only if the relevant licensing laws permit or expressly authorize such mixing.<sup>11</sup>

Further, any decision to re-structure Washington's PSCA based on the Court's particular view concerning wise regulation of the healthcare professions would necessarily affect professions in addition to physical therapy. The Legislature's frequent and numerous amendments reflect the dynamic economic and political forces shaping Washington health care policy. This Court should defer to the Legislature's policy choices in RCW 18.100.050.

---

<sup>10</sup> See Iowa Code § 496C.4 ("two or more specific professions which could lawfully be practiced in combination by a licensed individual or a partnership of licensed individuals"); 15 Pa.C.S.A. § 2903(d)(1)(i) ("render two or more specific kinds of professional services to the extent that: . . . the several shareholders of the professional corporation, if organized as a partnership, could conduct a combined practice of such specific kinds of professional services").

<sup>11</sup> The Model Professional Corporation Supplement, § 11(b), refers to the "purpose of rendering professional services within two or more professions . . . to the extent the combination of professional purposes . . . is authorized by the licensing law of this state applicable to each profession in the combination." Statutes that use similar language referring to state licensure law include: Gen. Laws. Mass. Chap. 156A, § 3(b); South Carolina Code § 33-19-110(b) (MPCS language); Tennessee Code § 48-101-605(b); Montana Code § 35-4-205; New Hampshire Stat. § 294-A:2(II); Missouri Rev. Stat. § 356.051; North Dakota Century Code § 10-31-04(1); 15 Pa.C.S.A. § 2903(d)(1)(ii).

**3. The Policies Underlying Washington's Prohibition Against The Corporate Practice Of Physical Therapy Are Applicable To PSCs Owned Solely By MDs.**

Even were this Court free to make its own policy choices, each of the policies underlying the general prohibition against the corporate practice of a profession counsel against the vertical mixing of the practice of medicine and the practice of physical therapy. Those policy reasons, which were identified by the Legislature that enacted SSB 6150, include the limits of professional education across disciplines and the conflict of interest created when professional ethical obligations compete with the profit motive.

As respondent notes, the House Committee on Health Care identified three risks posed by corporate practice – “the potentiality of non-professional corporate control over professional judgment, divided loyalty of physician between patient and employer, and commercial exploitation of the medical practice.” (Resp. Br. at 32, from Majority Report of the House Committee on Health Care concerning Substitute Senate Bill 6150) Each of the three policy considerations favors the Legislature's decision not to allow MDs to own a PSC that offers physical therapy services.

The physical therapy practice act requires a PT to “adhere to the recognized standards of ethics” of the profession, RCW 18.74.160(3), one of which is that a PT must “disclose to the patient if the referring practitioner derives compensation from the provision of physical therapy.” Section 7.3 of the Guide for Professional Conduct (“GPC”), accessible at [www.apta.org](http://www.apta.org). Although the GPC does not prohibit a PT from working for an MD-owned PSC, the ethical obligation to make the financial disclosure to every patient obviously could put a PT at loggerheads with his/her employer.

It is intuitively obvious that MDs have a financial interest in keeping their PT employees busy. Several studies point toward high utilization of physical therapy services in situations where MDs are in a position to profit from their referrals.<sup>12</sup> A cadre of companies (the

---

<sup>12</sup> A May 1, 2006 report from the Office of the Inspector General (OIG) of the U.S. Department of Health and Human Services entitled “Physical Therapy Billed by Physicians” found that 91% of the physical therapy billed by physicians to Medicare did not meet program requirements, and 26% of the therapy was “not medically necessary.” A study published in the New England Journal of Medicine (“NEJM”) examining costs and rates of use in the California Workers’ Compensation system concluded that that “for every 1000 workers with musculoskeletal injuries, the costs incurred by the California workers’ compensation system would be \$143,672 (110 percent) higher if these injured workers were evaluated by self-referring rather than independently-referring practitioners.” Swedlow, Johnson, Smithline and Milstein, “*Increased Costs and Rates of Use in the California Workers’ Compensation System as a Result of Self-Referral by Physicians*,” New England Journal of Medicine, 327(21): 1502-1506 (1992). A study published in the Journal of the American Medical

“facilitators”) cater to MDs interested in enhancing their earnings by offering physical therapy.<sup>13</sup> New Stark Law regulations make MD-owned physical therapy more attractive, according to one facilitator’s marketing, because they “eliminate the requirement that physicians ‘directly supervise’ ancillary services.” See <http://www.ancillarycaresolutions.com/faq.html>. In other words, MDs can make money from physical therapy without having to be around patients.

The third risk cited by the House Committee report is that the owners of a PSC might have influence over the exercise of professional judgment by the employees/agents without having an adequate knowledge base. The risk is obvious where a PSC owned by MDs hires lawyers to

---

Association (“JAMA”) documented higher utilization rates and higher costs associated with services provided in physician-owned physical therapy services (referred to as joint venture clinics) in the state of Florida. Mitchell and Scott, “*Physician Ownership of Physical Therapy Services: Effects on Charges, Utilization, Profits, and Service Characteristics*,” *Journal of the American Medical Association*, 1992; 268(15):2055-2059. It concluded (p. 2057) that the average number of physical therapy visits per physical therapy patient was 39 percent higher in joint venture clinics.

<sup>13</sup> See the following testimonials at the TheraSys website [www.therasyspt.com](http://www.therasyspt.com): “We’ve added a very profitable ancillary service to our practice, and we’ve sidestepped the daily headaches of running a new business by having someone else manage our physical therapy,” and adding a physical therapy service will “create a passive revenue stream” for the MD. See also the advertising for the course Physical Therapy - Physician Supervised at [http://www.empiremedicaltraining.com/workshops/seminar\\_details.listevents/33/Physical-Therapy--Physician-Supervised/](http://www.empiremedicaltraining.com/workshops/seminar_details.listevents/33/Physical-Therapy--Physician-Supervised/).

practice law. The risk is less obvious, but still present, in a case where a PSC owned by MDs hires PTs to treat patients.

PTs devote much of their attention to musculoskeletal conditions, for which suitable interventions include therapeutic exercise, manual therapy (e.g., joint mobilization/ manipulation), and physical modalities (e.g., heat, electrical stimulation), all of which are interventions commonly used by PTs. While amicus does not suggest that the professional education of PTs is as extensive as that of MDs, who are educated to prescribe drugs and perform surgery, the American Academy of Orthopedic Surgeons (“AAOS”) notes that “most primary care physicians do not feel adequately prepared to address . . . patient complaints” of musculoskeletal (“MSK”) disorders, even though MSK-related complaints account for 10% to 28% of all primary care visits.<sup>14</sup> The AAMC

---

<sup>14</sup> AAOS Now, Mar/Apr 2007, *Musculoskeletal education in medical schools: Are we making the cut?*, accessible via [www.aaos.org](http://www.aaos.org). (“[O]nly 51 of 122 US medical schools have a dedicated preclinical MSK course, and only 25 schools require a clinical course in MSK medicine (rheumatology, orthopaedics, or physical medicine and rehabilitation); 57 schools require neither a preclinical nor a clinical MSK course.”) This article cited a landmark 1998 study, Kevin B. Freedman, MD, Joseph Bernstein, MD, MS, *The Adequacy Of Medical School Education In Musculoskeletal Medicine*, *J Bone Joint Surg.*1998; 80-A (10): 1421-1427(82% of incoming residents lacked basic knowledge of MSK disorders). The 1998 study was cited by the Association of American Medical Colleges (“AAMC”) in its 2005 Report VII, *Contemporary Issues in Medicine: Musculoskeletal Medicine Education Medical School Objectives Project* (“It appears that practicing physicians do not appreciate fully the importance of common musculoskeletal conditions. . . .”). A 2005 study reported a similar

convened a panel of experts to develop learning objectives to remedy the deficiency in medical school MSK education.<sup>15</sup> Providers of continuing medical education are attempting to address the problem for MDs who already have graduated.<sup>16</sup> Although MDs who specialize in orthopaedics perform better than other MDs on the validated MSK competency examination cited in the notes, a decision to re-write the PSCA to

---

failure rate (79%) on a validated MSK cognitive examination administered to 334 medical students, residents, and staff physicians. Elizabeth Matzkin, MD, Major Eric L. Smith, MD, Captain David Freccero, MD and Allen B. Richardson, MD, *Adequacy of Education in Musculoskeletal Medicine*, J Bone Joint Surg. 2005;87:310-314.

<sup>15</sup> The members of U.S. Bone and Joint Decade (“USBJD”), organized to target the care of people with MSK conditions, include the AAOS, the American Academy of Osteopathy, the American Academy of Pediatrics, the American Academy of Physical Medicine and Rehabilitation, and the APTA, among others. The USBJD has initiated “Project 100,” which is designed to incorporate dedicated musculoskeletal education into the core curriculum of each of the 122 U.S. medical schools.

<sup>16</sup> For example, Yale University School of Medicine's Center for Continuing Medical Education (“YaleCME”) in May of 2009 offered a musculoskeletal review course for primary care providers “[b]ecause of the high incidence of musculoskeletal conditions in the patient population seen by primary care providers . . . and the identified lack of confidence of primary care providers to treat these conditions . . .” it is important to conduct an educational activity to meet these needs.” See [http://cme.yale.edu/conferences/conference\\_index.asp?ID=323](http://cme.yale.edu/conferences/conference_index.asp?ID=323).

authorize MD-owned PSCs to practice physical therapy would open the door to all MDs, not just the specialists.<sup>17</sup>

In the end, regardless whether the policy choice made by the Legislature is the one this Court would make, it is clearly a rational one. This Court should reject respondent's invitation to reformulate that decision on its own.

**B. Neither RCW 74.09.240 Nor The Stark Law Authorizes A PSC Owned Solely By MDs To Practice Physical Therapy By Employing Licensed PTs.**

Neither RCW 74.09.240 nor the federal Stark Law authorizes a group of MDs to engage in the corporate practice of physical therapy. RCW 74.09.240 is a self-referral provision in Washington's law relating to medical assistance (including Medicaid). The state law prohibits physicians from making self-interested referrals for physical therapy

---

<sup>17</sup> In one study a group of 174 PT students and 182 experienced PTs took "the identical examination originally developed by Freedman and Bernstein to assess knowledge in musculoskeletal medicine among physician interns, and more recently administered to medical students, residents, and a variety of physician specialists" (citing the 1998 and 2005 articles from the *Journal of Bone and Joint Surgery* noted above). The abstract reported, "Experienced physical therapists had higher levels of knowledge in managing musculoskeletal conditions than medical students, physician interns and residents, and all physician specialists except for orthopaedists." John D. Childs, PT, PhD, MBA, Julie M. Whitman, PT, DSc, Phillip S. Sizer, PT, PhD, Maria L. Pugia, PT, DPT, Timothy W. Flynn, PT, PhD, and Anthony Delitto, PT, PhD, FAPTA, *A description of physical therapists' knowledge in managing musculoskeletal conditions*, *BMC Musculoskeletal Disorders* 2005, 6:32.

services, but it grants an exception keyed to the provision in the federal Medicare statute known as the Stark Law.

The Stark Law, like the state law, prohibits certain self-interested physician referrals but grants various exceptions to the prohibition.<sup>18</sup> The fact that Congress chose not to prohibit referrals within the exception for in-office ancillary services does not mean that Congress authorized any MD or any PSC owned by MDs to violate a prohibition of state law. Both RCW 74.09.240 and the Stark Law involve the financing of health care services, and their prohibitions reflect the policy considerations relevant to that governmental project, not the regulation of professions, in which the state's interests are paramount. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792, 95 S.Ct. 2004, 2016, 44 L.Ed.2d 572 (1975) (“the States have a compelling interest in the practice of professions within their boundaries . . .”).

---

<sup>18</sup> The Stark Law is § 1877 of the Social Security Act (“SSA”), 42 U.S.C. § 1395nn (Limitation on certain physician referrals), a provision of the Medicare statute that prohibits a physician from making a referral for the furnishing of “designated health services” to an entity in which he/she (or an immediate family member) has a “financial relationship.” The category “designated health services” includes physical therapy services. SSA §1877(h)(6)(B), 42 U.S.C. § 1395nn(h)(6)(B). The statute contains an exception for in-office ancillary services, set forth in SSA § 1877(b)(2), 42 U.S.C. §1395nn(b)(2). (*See Resp. Reply Br.* at 12-13) The Stark Law does not impose criminal penalties for making a prohibited self-referral, but it does impose civil sanctions including denial of payment for service and civil money penalties. *See* SSA §1877(g), 42 U.S.C. § 1395nn(g).

In enacting the Stark Law, Congress did not purport to strip the states of their authority to regulate the business arrangements of individuals licensed to practice professions. Washington's version of the corporate practice doctrine is only one method by which a state may prohibit interactions between MDs and PTs that are "permitted" by the Stark Law (which means merely "not prohibited"). For instance, Delaware and South Carolina prevent a licensed PT from working for a referring MD by providing for licensing action against PTs who share with the referring MD in the revenue derived from the referral.<sup>19</sup> Missouri prevents an MD from referring a patient for physical therapy to any entity with which he/she has a financial relationship, a prohibition that covers an MD's referring a patient to a PT employed by the physician's PSC.<sup>20</sup> Just as the Stark Law does not authorize PTs and MDs to violate Washington common law and statutory prohibitions against the corporate practice of physical therapy, it provides no authority for the violation of state regulatory law in Delaware, Missouri, and South Carolina.

---

<sup>19</sup> See Title 24 Delaware Code § 2616(a)(8); Delaware Attorney General Opinion of 10/10/2002, 2002 Del. AG LEXIS 21; South Carolina Code Annotated § 40-45-110(A)(1); South Carolina Attorney General Opinion of 03/30/2004, 2004 S.C. AG LEXIS 58; *Sloan v. South Carolina Board of Physical Therapy Examiners*, 370 S.C. 452, 636 S.E.2d 598 (2006).

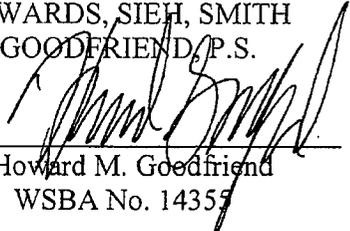
<sup>20</sup> See Missouri Revised Statutes § 334.252; Missouri Attorney General Opinion Letter No. 104-95, 11/27/1995, 1995 Mo. AG LEXIS 24.

V. CONCLUSION

Amicus respectfully requests that the Court hold that Washington law prohibits a professional service corporation owned by licensed physicians from engaging in the practice of physical therapy through its licensed physical therapist employees.

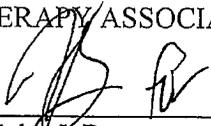
Respectfully submitted this 19th day of October, 2009.

EDWARDS, SIEH, SMITH  
& GOODFRIEND, P.S.

By: 

Howard M. Goedfriend  
WSBA No. 14355

AMERICAN PHYSICAL  
THERAPY ASSOCIATION

By: 

John J. Bennett  
General Counsel

Attorneys for Amicus Curiae  
American Physical Therapy Association

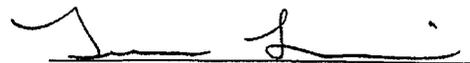
**DECLARATION OF SERVICE**

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

That on October 19, 2009 I arranged for service of the foregoing Amicus Curiae Brief of American Physical Therapy Association in Support of Petitioner/Cross-Respondent, to the court and to the parties to this action as follows:

Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Michael H. Church Stamper Rubens, P.S. 720 West Boone, Suite 200 Spokane, WA 99201 99201mchurch@stamperlaw.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Darrin E. Bailey Stafford Frey Cooper 601 Union Street, Suite 3100 Seattle WA 98101 khobbs@staffordfrey.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Howard R. Rubin Sonnenschein Nath Rosenthal LLP 1301 K Street, N.W. Suite 600, East Tower Washington, D.C. 20005 hrubin@sonnenschein.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Charles Wiggins Wiggins & Masters, P.L.L.C. 241 Madison Avenue N Bainbridge Island, WA 98110-1811 charlie@appeal-law.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

**DATED** at Seattle, Washington this 19th day of October, 2009.

  
Tara D. Friesen

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

09 OCT 19 PM 2:48

**DECLARATION OF SERVICE**

BY RONALD R. CARPENTER

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

CLERK

That on October 19, 2009 I arranged for service of the foregoing Motion for Leave to File Amicus Curiae Brief, to the court and to the parties to this action as follows:

Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Michael H. Church Stamper Rubens, P.S. 720 West Boone, Suite 200 Spokane, WA 99201 99201mchurch@stamperlaw.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Darrin E. Bailey Stafford Frey Cooper 601 Union Street, Suite 3100 Seattle WA 98101 khobbs@staffordfrey.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Howard R. Rubin Sonnenschein Nath Rosenthal LLP 1301 K Street, N.W. Suite 600, East Tower Washington, D.C. 20005 hrubin@sonnenschein.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Charles Wiggins Wiggins & Masters, P.L.L.C. 241 Madison Avenue N Bainbridge Island, WA 98110-1811 charlie@appeal-law.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

DATED at Seattle, Washington this 19th day of October, 2009.

  
Tara D. Friesen

ORIGINAL

FILED AS  
ATTACHMENT TO FILING