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SUPREME COURT
OF THE STATE OF WASHINGTON

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

Respondents.

AMICUS CURIAE BRIEF SUBMITTED BY
THE WASHINGTON AMBULATORY SURGERY CENTER
ASSOCIATION

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I. INTRODUCTION

The Washington Ambulatory Surgery Center Association (“WASCA”) is a nonprofit association representing the interests of those who own, operate and seek the services of ambulatory surgery centers in the State of Washington.¹ Ambulatory surgery centers include “ambulatory surgical facilities” licensed pursuant to Chapter 70.230 RCW and other entities that operate for the primary purpose of providing specialty or multispecialty outpatient surgical services in which patients are admitted to and discharged from the facility within 24 hours and do not require inpatient hospitalization.

WASCA was established in 1991. It currently represents approximately 120 ambulatory surgery centers as well as the professionals who provide services and the patients who seek care at these centers. Ambulatory surgery centers play a central role in creating a modern, innovative healthcare delivery system by offering efficient and quality care at lower costs. They are a critical point of access for important screening benefits and other nondiscretionary services. Last year,

¹ All references hereafter to “ambulatory surgery centers” will mean both facilities licensed as “ambulatory surgical facilities” pursuant to Chapter 70.230 RCW and other entities that operate for the primary purpose of providing specialty or multispecialty outpatient surgical services in which patients are admitted to and discharged from the facility within 24 hours and do not require inpatient hospitalization.

approximately 5,300 ambulatory surgery centers provided five million outpatient surgeries nationwide.

WASCA is dedicated to promoting the well-being of Washington's residents and preserving their access to efficient and quality care. The delivery of healthcare in the State of Washington is subject to complex and often inconsistent state and federal laws and regulations. Surgeons and others carefully structure the manner in which they deliver healthcare to ensure compliance with these laws and regulations, which impose administrative, civil and criminal penalties for noncompliance. Among these laws is Washington's Anti-Rebating Statute, Chapter 19.68 RCW.

The petitioner in this case, Columbia Physical Therapy, Inc., P.S. ("Columbia"), seeks to establish that Respondents Benton Franklin Orthopedic Associates, P.L.L.C., et al. ("Benton Franklin Orthopedic Associates") have violated Washington's Anti-Rebating Statute, among other things. A provision of the Anti-Rebating Statute permits ownership of a financial interest in an entity which furnishes services prescribed pursuant to a medical, surgical, or dental diagnosis where a disclosure of the interest is made. This provision is commonly referred to as an exception from the Anti-Rebating Statute and is set forth at RCW 19.68.010(2). Of specific concern to WASCA is Columbia's argument that, as a physician-owned professional entity, Benton Franklin

Orthopedic Associates has violated RCW 19.68.010(1) by employing physical therapists (the “arrangement”) and that the arrangement does not qualify for the exception from the Anti-Rebating Statute set forth at RCW 19.68.010(2).

Respondents do not rely on the exception for any aspect of their case and therefore do not address the exception in the briefing they submitted to the Court. WASCA is concerned that, if the Court were to issue a judicial interpretation of the exception without benefit of full briefing from the parties, existing business relationships would be thrown into disorder and commonly accepted and long-standing arrangements among surgeons and others in the healthcare delivery system would be criminalized. This would diminish access to efficient and quality healthcare across the state and drive up healthcare costs. Since the Respondents do not rely on the exception, WASCA urges the Court to refrain from ruling on its scope.

II. ARGUMENT

Columbia seeks to establish that Benton Franklin Orthopedic Associates has violated Washington’s Anti-Rebating Statute. Specifically, it seeks to establish 1) that, as a physician-owned professional entity, Benton Franklin Orthopedic Associates has violated RCW 19.68.010(1) by employing physical therapists; 2) that the arrangement does not qualify

for the exception from the Anti-Rebating Statute set forth at RCW 19.68.010(2); and 3) that the arrangement does not qualify for the exclusion from the Anti-Rebating Statute set forth at RCW 19.68.040.

Benton Franklin Orthopedic Associates does not rely on the exception set forth at RCW 19.68.010(2). It does not assert that the exception applies. It does not even address the exception in the briefing it submitted to the Court.

Consequently, no party (or *amicus curiae*) has meaningfully addressed 1) the statutory language of the exception, 2) the legislature's intent when drafting the exception in 1973 or when amending it in 1993 or 2003, or 3) Washington case law as it relates to the exception. Moreover, no party (or *amicus curiae*) has addressed the possible effects of any particular judicial interpretation of the exception on the healthcare delivery system in the State of Washington.

WASCA is concerned that a judicial interpretation of the exception without the advantage of adequate briefing could have unintended and unwanted consequences on access to and the delivery of healthcare across the state. If the Court accepts Columbia's interpretation of the exception, the immediate result will be the elimination of the well-established practice of physicians employing and practicing with physical therapists. However, this is only one example of the fragmentation of Washington's

healthcare delivery system that will result. Because Benton Franklin Orthopedic Associates does not rely on the exception, it is unnecessary and premature to determine its applicability in the instant case or in general. Accordingly, WASCA urges the Court to decline the Petitioner's invitation to do so.

A. THE APPLICABILITY OF THE EXCEPTION FROM WASHINGTON'S ANTI-REBATING STATUTE AT RCW 19.68.010(2) IS NOT PROPERLY BEFORE THE COURT.

1. Benton Franklin Orthopedic Associates Does Not Rely on the Exception.

Columbia seeks to establish that Benton Franklin Orthopedic Associates has violated RCW 19.68.010(1) by employing physical therapists. To that end, it argues that the arrangement does not qualify for the exception from the Anti-Rebating Statute set forth at RCW 19.68.010(2). Benton Franklin Orthopedic Associates does not assert that the exception applies to the arrangement or even address the exception in the briefing it submitted to the Court.²

² It is unnecessary for the Court to address the exception set forth at RCW 19.68.010(2). As Respondents argue, Petitioner cannot state a claim that Benton Franklin Orthopedic Associates violated Washington's Anti-Rebating Statute by employing physical therapists and having the therapists provide care to its patients. Such an arrangement does not involve a rebate, and it is permitted under RCW 19.68.040.

2. The Scope of the Exception Turns on Technical Definitions of Terms Not Addressed by Any Party or *Amicus Curiae*.

As the Court and others recognize, the Anti-Rebating Statute is “not a model of clarity by any means.”³

The scope of the exception turns on the meaning of terms of art that have technical definitions specific to the healthcare industry. These terms are several and include “referral,” “diagnosis,” “prescribed,” “medical, surgical or dental ... services,” among others. The meaning of these terms has not been addressed by any party or *amicus curiae*.

The Anti-Rebating Statute fails to define the terms “referral,” “diagnosis,” “prescribed” and “medical, surgical or dental ... services.” When a statute fails to define a term, the Court looks to the regular dictionary definition if a term has a well-accepted, ordinary meaning.⁴ However, if an otherwise common word is given “a distinct meaning in the technical dictionary or other technical reference” and has “a well-

³ *Wright v. Jeckle*, 158 Wn.2d 375, 381, 144 P.3d 301 (2006). See also Op.Atty.Gen. 1992, No. 30 (“this statute is no model of clarity”); Op.Atty.Gen. 1988, No. 28 (“this statute is not an example of clarity”).

⁴ *Whidbey General Hosp. v. State*, 143 Wn. App. 620, 628-29, 180 P.3d 796 (2008) (quoting *City of Spokane ex rel. Wastewater Management Dept. v. Washington State Dept. of Revenue*, 145 Wn.2d 445, 454, 38 P.3d 1010 (2002)).

accepted meaning within a particular industry,” the Court turns to the technical dictionary or reference to resolve the word’s definition.⁵

The terms “referral,” “diagnosis,” “prescribed” and “medical, surgical or dental ... services” as used in Washington’s Anti-Rebating Statute are technical terms and should be given their technical meaning within the healthcare industry. The meaning of these terms has not been addressed in any brief filed by a party or an *amicus curiae*. Accordingly, WASCA urges the Court to decline Petitioner’s invitation to opine on the scope of the exception set forth at RCW 19.68.010(2).

3. Judicial Interpretation of the Exception Could Fragment Washington’s Healthcare Delivery System.

Columbia asks the Court to grant a monopoly on rendering physical therapy services to independent physical therapy clinics. To achieve this end, Columbia argues that the Anti-Rebating Statute requires segregation of orthopedic and physical therapy services. However, accepting Columbia’s argument would result in the segregation of almost

⁵ *Id.* Washington courts have turned to the technical definition of a term of art even where a common definition is available. See e.g., *Hickle v. Whitney Farms, Inc.*, 107 Wn. App. 934, 945, 29 P.3d 50 (2001) (adopting technical definition of the term “designate” in the context of designated dangerous wastes); *Blue Mountain Memorial Gardens v. Dep’t of Licensing*, 94 Wn. App. 38, 42, 971 P.2d 75 (1999) (adopting technical definition of the term “vault” in the context of the burial industry); *San Juan County v. Ayer*, 24 Wn. App. 852, 854, 604 P.2d 1304 (1979) (adopting the technical definition of the term “obliterated” in the context of the surveying industry).

all branches of the healing arts, leading to the fragmentation of Washington's healthcare delivery system. Those who work in that system – and those who regulate it – recognize that effectiveness and efficiency are enhanced with an integrated, multi-disciplinary approach to care. It is clear that such an approach reduces costs. If the Court were to accept Columbia's analysis of Washington's Anti-Rebating Statute, including its narrow and unnatural interpretation of the exception set forth at RCW 19.68.010(2), it certainly would change the provision of physical therapy services. More importantly, however, it would disorder and criminalize unrelated, well-established methods of delivering healthcare across the state, leaving its residents with a fragmented healthcare delivery system that is less effective and more expensive. It would disorder and criminalize arrangements the Legislature did not even consider when enacting or amending the statute.

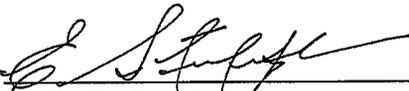
III. CONCLUSION

It is unnecessary and premature to determine the applicability of the exception set forth at RCW 19.68.010(2) in the instant case or in general. Benton Franklin Orthopedic Associates does not rely on exception, and no party or *amicus curiae* has meaningfully addressed it. Moreover, judicial interpretation of the exception could disorder or criminalize commonly accepted and long-standing arrangements within

the healthcare delivery system, while diminishing access to efficient and quality healthcare care for Washington residents. For these reasons, WASCA urges the Court to decline the Petitioner's invitation to do so.

RESPECTFULLY SUBMITTED this 15 day of October, 2009.

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