

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

Respondents / Cross-Petitioners

BRIEF OF PETITIONER
COLUMBIA PHYSICAL THERAPY, INC., P.S.

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Charles K. Wiggins, WSBA #6948
WIGGINS & MASTERS PLLC
241 Madison Avenue North
Bainbridge Island, WA 98110
Tel: (206) 780-5033
Fax: (206) 842-6356

Darrin E. Bailey, WSBA # 34955
Danford D. Grant, WSBA #26042
STAFFORD FREY COOPER
601 Union Street, Suite 3100
Seattle, WA 98101
Tel: (206) 623-9900
Fax: (206) 624-6885

Attorneys for Petitioner and Cross-Respondent

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	2
A. Assignments of Error.	2
B. Issues Pertaining to Assignments of Error.	2
III. STATEMENT OF THE CASE	3
A. The Parties.	3
B. Benton Franklin's Corporate History: The Physicians Form a Physical Therapy Clinic to Treat Their Patients,.....	4
C. Physicians and Physical Therapists Have Different Licenses Authorized by Different Statutes.	5
D. The Physicians Receive a Profit When the Physical Therapists Treat Their Patients.....	6
E. Most of the Patients Treated by BFOA-employed Physical Therapists Are Referred by a BFOA Physician.	6
F. Procedural History.	7
IV. SUMMARY OF ARGUMENT	10
V. ARGUMENT	12
A. Standard of Review.	12
B. The Problem with POPTS.....	13
C. The Corporate Practice Doctrine Prohibits a Corporation from Providing Professional Services which the State Permits only Individual Licensees to Practice, or When Those Services are Provided by Members of a "Learned Profession."	15

D.	The Washington Professional Services Corporation Act Prohibits a Single PLLC from Providing the Professional Services of Both Physicians and Physical therapists.....	24
1.	Corporations cannot provide physical therapy services to the public because the regulatory statutes permit only the licensing of individuals	17
2.	The PSCA Prohibits a PSC or PLLC from Providing Two Separate Professional Services.	25
E.	The Physicians Violate the Anti-Rebate Statute Because They Pay Others and Receive a Profit in Connection with Either the Referral of Patients to or the Furnishing of Care by Physical Therapists.....	31
1.	The physicians profit in connection with a referral to the BFOA physical therapists.....	34
2.	The physicians profit in connection with the furnishing of care by the physical therapists.	36
3.	Physical therapy is not a diagnostic service and therefore the exception under RCW 19.68.010(2) does not apply to this litigation.	37
4.	The employee exception under RCW 19.68.040 does not permit BFOA's business practices.....	39
a.	RCW 19.68.040 applies only to similarly licensed individuals.	42
b.	RCW 19.68.040 requires direct and immediate personal supervision in this case.	43
VI.	CONCLUSION	46

TABLE OF AUTHORITIES

Page

Cases

<i>Day v. Inland Empire Optical, Inc.</i> , 76 Wn.2d 407, 456 P.2d 1011 (1969).....	32-36, 44, 45
<i>Fallahzadeh v. Ghorbanian</i> , 119 Wn.App. 596, 82 P.3d 684 (2004).....	17
<i>In re Freeman's Estate</i> , 311 N.E.2d 480 (NY App. 1974).....	21
<i>Isles Wellness, Inc. v. Progressive Northern Ins. Co.</i> , 703 N.W.2d 513 (Minn. 2005).....	23
<i>Madden v. Pub. Util. Dist. No. 1</i> , 83 Wash.2d 219, 517 P.2d 585 (1973).....	25
<i>McNeal v. Allen</i> , 95 Wn.2d 265, 621 P.2d 1285 (1980)	25
<i>Miller v. All State</i> , 739 N.W.2d 675 (2007)	22, 23
<i>Morelli v. Ehsan</i> , 110 Wn.2d 555, 756 P.2d 129 (1988).....	15, 17, 25, 42
<i>Neilson v. Ruoti</i> , 45 Pa. D. & C. 4th 518 (1999).....	22, 23
<i>Phillips v. A Triangle Women's Health Clinic, Inc.</i> , 155 N.C. App. 372, 573 S.E.2d 600 (2002)	22
<i>Potter v. Washington State Patrol</i> , 165 Wn.2d 67, 196 P.3d 691 (2008).....	12, 25
<i>Sloan v. South Carolina Bd. of Physical Therapy Examiners</i> , 370 S.C. 452, 636 S.E.2d 598 (2006).....	14, 33
<i>Standard Optical Co. v. Superior Court</i> , 17 Wn.2d 323 P.2d 839 (1943).....	15, 16, 17, 21
<i>Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.</i> , 134 Wn.2d 692, 952 P.2d 590 (1998).....	13
<i>Wright v. Jeckle</i> , 158 Wn.2d 375, 144 P.3d 301 (2006).....	31, 32, 34, 35, 43

Statutes

32 CFR §199.4..... 37

42 CFR § 410.10..... 38

42 USC § 1395x(s)..... 38

RCW 4.04.010..... 25

RCW 18.100.....*passim*

RCW 18.100.030(1) 19

RCW 18.100.050(5)(a)..... 11, 16

RCW 18.100.050(5)(b)..... 19, 20, 27-29

RCW 18.130.040..... 23

RCW 18.74..... 5, 6, 19, 21-24, 38

RCW 18.74 *et seq.*..... 19

RCW 18.74.005..... 6, 19, 21

RCW 18.74.010..... 6

RCW 18.74.012..... 6

RCW 18.74.150(1) 6

RCW 19.68..... 2, 3, 31, 35

RCW 19.68.010..... 8, 11, 31, 32, 34, 36-38

RCW 19.68.010(2) 8

RCW 19.68.040..... 11, 12, 34, 39, 40-45

RCW 25.15..... 8

RCW 41.26.030(22)(b)(iii) 38

RCW 70.124.020(3) 15

WAC 246-915-030 22

WAC 246-915-085 22

WAC 246-915-100 22

WAC 246-915-190	32
WAC 246-915-190(3)	33
WAC 246-976-830	38
WAC 246-976-840	38
WAC 388-501-0060	38
WAC 388-501-0065	38

Other Authorities

61 Am. Jur. 2d, Physicians, Surgeons, Etc.	25
AGO 1975 No. 24.....	32, 36
BNA's Health Law & Business Series, The Corporate Practice of Medicine Prohibition in the Modern Era of Health Care, No. 2800, Document 49, Washington (Westlaw cite BNAHLB No. 2800 WP 49 at 1).....	26
Laws of 1969, Ch. 122 §4	28
Laws of 1996, Ch. 22 §1	30
Medical Profession – Anti-Kickback Statute, 45 Washington Law Rev. 838 (1970)	31
New York State Education Department, Corporate Practice of the Professions (1998).....	23
Structuring a Physical Therapy Practice, New Jersey Law Journal, Vol. CLXXXIX, No. 3 (July 16, 2007)	23

I. INTRODUCTION

The issue in this appeal is whether physicians can form a professional corporation which then employs physical therapists. The common law prohibited members of the learned professions from offering their services to the public as employees of a corporation. The legislature modified this prohibition when it enacted the Professional Services Corporation Act (“PSCA”). The legislature has amended the PSCA over the years, but to this day the PSCA treats physicians and physical therapists as different professions, and only the members of the same profession may be employed together by one PSC.

This case challenges a growing and disturbing trend in healthcare—the business practice of orthopedic physicians owning physical therapy clinics and then profiting from the treatment provided by physical therapists at those clinics. This business practice, which is referred to by many as “POPTS” (physician-owned physical therapy services), leads to inherent patient-provider conflicts of interest, unnecessary referrals, an over-utilization of health care services, increased health-care costs, and the diminished professional autonomy of two separately licensed professions (physicians and physical therapists).

Columbia Physical Therapy asks the Court to hold that a group of orthopedic physicians may not own and operate a physical therapy clinic and profit from the care provided by physical therapists who work at that clinic.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error.

1. The trial court erred when it did not grant Columbia's motion for summary judgment on its common law corporate practice of a learned profession claim. CP 41-43.

2. The trial court erred when it denied Columbia's motion for summary judgment on its RCW Chapter 18.100 claim, and granted BFOA's motion for summary judgment to dismiss Plaintiff's RCW Chapter 18.100 claim, by order entered on December 17, 2007. *Id.*

3. The trial court erred when it denied Columbia's motion for summary judgment on its Anti-Rebate Statute claim (RCW Chapter 19.68), by order entered on December 17, 2007. *Id.*

B. Issues Pertaining to Assignments of Error.

The issues on which this Court granted review may fairly be restated as follows:

1. Does Washington's corporate practice doctrine prohibit a corporation from providing physical therapy services to the public through licensed employees absent specific legislative authorization?

2. Does the Professional Service Corporation Act, RCW Chapter 18.100, permit one professional service corporation to provide the public with the professional services of both physicians and physical therapists?

3. Are defendants violating the Anti-rebate Statute, RCW Chapter 19.68, where 1) they are paying and/or receiving profit in connection with the referral for or furnishing of care; 2) physical therapy is not a diagnostic service; 3) physical therapists are not similarly licensed as physicians and therefore are not employees of them for purposes of the "employee exception"; and 4) physicians provide no meaningful supervision over the physical therapists?

III. STATEMENT OF THE CASE

A. The Parties.

Columbia Physical Therapy owns physical therapy clinics in Pasco, Richland, Kennewick, and several other locations in Washington, Idaho, and Oregon. CP 501. Licensed professional

physical therapists own and operate the company, and provide treatment to patients at the company's clinics.

Physicians Burgdorff, Kontogianis, Thiel, Fischer, and Phipps own Benton Franklin Orthopedic Associates, PLLC (BFOA), a company that includes a group of orthopedic clinics in Kennewick, Richland, and Pasco, and a physical therapy clinic in Kennewick. CP 437-439. The physical therapy clinic these physicians own operates under the name Benton Franklin Orthopedic Associates d/b/a Benton Franklin Physical Therapy (BFPT). CP 436.

Physical therapists Kump and West work at BFOA's physician-owned physical therapy clinic. CP 437-439. They are employees of the clinic, and are paid to treat physical therapy patients at the clinic. CP 502.

B. Benton Franklin's Corporate History: The Physicians Form a Physical Therapy Clinic to Treat Their Patients,

The corporate evolution of BFOA reveals that although BFOA was originally formed by physicians to provide orthopedic treatment to the public, it now also provides physical therapy to the public through licensed physical therapists. CP 502.

In November 1999, orthopedic physicians Kontogianis, Thiel, and Burgdorff, established Benton Franklin Orthopedic Associates,

LLC. CP 442-445. As originally organized, their entity was an LLC, but eventually became a PLLC. CP 502. Almost three years later in 2002, the physicians formed another company called Benton Franklin Physical Therapy, Inc. (BFPT). CP 446. According to Dr. Burgdorff, he formed the physical therapy clinic with Drs. Kontogianis and Thiel specifically for the purpose of providing physical therapy to their orthopedic patients. CP 446-447.

In 2004, the physicians stripped BFPT of its corporate status and made their physical therapy clinic part of BFOA, renaming the clinic "BFOA d/b/a BFPT." CP 447-448. The physician-owned physical therapy business was now part of BFOA, but nothing changed except the corporate structure—it was still run the same way, in the same location, with the same employees and owners. CP 450-452. Since then, Benton Franklin Orthopedic Associates PLLC has provided the public with the professional services of both physicians and physical therapists. CP 453-455.

C. Physicians and Physical Therapists Have Different Licenses Authorized by Different Statutes.

Physical therapists are licensed under RCW 18.74, the "Physical Therapy Act." Physical therapy has been a regulated healthcare profession in Washington since at least 1949. RCW

18.74.010. RCW 18.74 permits only individuals to be licensed to provide physical therapy. See e.g., RCW 18.74.005. Likewise, only individuals who are licensed under RCW 18.74 may provide physical therapy or hold themselves out to be physical therapists. RCW 18.74.150(1). Furthermore, physical therapists can treat patients directly without physician referral or supervision. RCW 18.74.012.

D. The Physicians Receive a Profit When the Physical Therapists Treat Their Patients.

As a result of this business arrangement, the physician owners of BFOA profit each time a patient receives treatment at BFOA's physician-owned physical therapy clinic. CP 456-459.

E. Most of the Patients Treated by BFOA-employed Physical Therapists Are Referred by a BFOA Physician.

Most patients treated by the physical therapists at Benton Franklin's physician-owned physical therapy clinic were prescribed physical therapy at one of Benton Franklin's orthopedic clinics. CP 504. For example, both Dr. Burgdorff and BFOA physical therapist Melanie Hanson testified that most of BFOA's physical therapy patients come from a BFOA orthopedic clinic. CP 460-464. Defendant Kontogianis confirmed that the BFOA physical therapists mostly treat patients of the BFOA physicians:

Q. ... When you say, "We very rarely treat patients from other orthopedic surgeons" -- I think that's what you said?

A. Yes.

Q. ... Do you mean that most of the physical therapy patients at Benton Franklin Orthopedic Associates are being treated by Benton Franklin Orthopedic Associates physicians?

A. Yes.

CP 504. In fact, 85% of patients treated at BFOA's physician-owned physical therapy clinic are prescribed physical therapy by a BFOA physician. CP 468-477. When asked why so many patients treated at BFOA's physician-owned physical therapy clinic come from BFOA, Dr. Burgdorff testified that the whole point of their physician-owned physical therapy clinic was to treat their patients:

Quite simple. We set this up to help those patients of ours that needed help in specific areas. We have not set this up to target the general physical therapy population in the Tri-Cities.

CP 478-479.

F. Procedural History.

Columbia commenced this action in 2005, alleging that BFOA, BFPT, the physicians, and the employee physical therapists were violating the Anti-Rebate Statute when physicians at BFOA referred patients to physical therapists at BFPT and through their ownership of BFPT profited from the services rendered by the

physical therapists. Columbia also alleges the defendants are committing unprofessional acts and are violating the Consumer Protection Act (CPA). CP 1452-1456.

By this time, the physicians had stripped BFPT of its corporate status, but BFOA continued operating BFPT as a d/b/a of BFOA. CP 542. Columbia amended its complaint, adding claims for violation of the Professional Service Corporation Act, RCW Chapter 18.100, the corporate practice of medicine doctrine, and the Professional Limited Liability Company Act, RCW Chapter 25.15. CP 529, 545.

1. April 4, 2007 Summary Judgment Hearing.

In January, 2007, defendants filed a motion for summary judgment seeking to dismiss plaintiff's claims under the CPA and the Anti-Rebate statute. CP 1080-1081. The court, Hon. Dennis Yule, denied defendants' motion, and, with respect to plaintiff's Anti-Rebate claim, ruled that 1) there was an issue of fact relating to the physicians' supervision over the physical therapists; and 2) the diagnostic services exception in RCW 19.68.010(2) does not apply to physical therapy. CP 484-490.

2. September 12, 2007 Summary Judgment Hearing.

In August 2007, the parties filed cross-motions for summary judgment on plaintiff's claims under the Anti-Rebate statute, the PLLC Act, and the corporate practice of medicine doctrine. CP 499-517; CP 428-430. On the Anti-Rebate claim, the trial court denied both motions for summary judgment, finding that there was an issue of fact as to whether defendant physicians had direct and immediate supervision over defendant physical therapists. CP 38-43. On the Professional Services Claim, the trial court denied plaintiff's motion and granted defendants' motion, ruling that RCW 18.100 is primarily directed at incorporation and does not limit the types of professional healthcare services that can be provided by a professional services corporation. CP 41-43. The trial court refused to rule on the corporate practice claim, but noted it was not being dismissed. CP 41-43.

3. December 17, 2007 Order.

Initially, the parties neglected to reduce the court's oral decisions to a formal order. On December 17, 2007, the trial court issued two orders: one formally denying defendants' January 2007 motion for summary judgment; and the other granting in part and denying in part the parties' August 2007 cross-motions. CP 38-43.

The trial court also issued a stay of the trial proceedings and certified the two orders for review. CP 34-37.

IV. SUMMARY OF ARGUMENT

The issues here lie at the intersection of the common law corporate practice doctrine, the Professional Service Corporation Act,¹ and the Anti-Rebate Act. These doctrines are interrelated and all must be considered together in resolving this appeal. The Professional Service Corporation Act (“PSCA”) derogates from the common law corporate practice doctrine by allowing professionals to practice as a corporation; it must accordingly be strictly construed. An expansive interpretation of the PSCA would also undermine the public policies embodied in the Anti-Rebate Act.

The public policies of the common law and of these legislative statutes interact as follows. The common law corporate practice doctrine prevents defendant physicians from practicing together as a corporation unless the legislature has authorized that corporate practice. The PSCA allows physicians to practice in the same corporation with specific listed professionals, but this list does not include physical therapists. RCW 18.100.050(5)(a). Physical

¹ As noted *supra*, BFOA is actually a limited liability company, which is subject to the provisions of the Professional Corporation Act.

therapists may only practice with occupational therapists. *Id.* at (5)(b). BFOA is accordingly violating the corporate practice doctrine and the PSCA.

The Anti-Rebate Statute prohibits health care professionals from paying or receiving rebates or profits for referrals of patients or from profiting from another professional's provision of services to a patient. RCW 19.68.010. Two exceptions are important here: "copartners" may charge and collect compensation for professional services rendered by each other; and, "a licensee who employs another licensee" may charge and collect for the employee's services. RCW 19.68.040.

The Anti-Rebate Statute was passed in 1949, twenty years before the PSCA. The PSCA in turn expressly provides that it does not authorize any professional to take any action that would be illegal under the Anti-Rebate Statute. RCW 18.100.140. In reconciling these two statutory schemes, at least two alternatives are possible. First, the Court could simply hold that the exception of RCW 19.68.040 does not apply because members of a PSC are not "copartners" and that an employee of a PSC is not an employee of a "licensee." Under this alternative, BFOA and its members are violating the literal language of the Anti-Rebate Statute. Second,

the Court could attempt to harmonize the two statutory schemes by holding that the term “copartners” under RCW 19.68.040 includes stockholders in a PSC and that employees of a licensee include employees of a PSC. BFOA would still be in violation of the Anti-Rebate Statute because physicians and physical therapists cannot practice together in one PSC. Finally, this Court has interpreted the employee exception to the Anti-Rebate Statute to require direct and immediate personal supervision of the employee, which is lacking here.

The Court should reverse and remand for entry of partial summary judgments in favor of Columbia that BFOA is in violation of the Anti-Rebate Statute, the PSCA, the common law corporate practice doctrine, and for trial on the CPA claim and damages.

V. ARGUMENT

A. Standard of Review.

Summary judgment rulings are reviewed de novo. *Potter v. Washington State Patrol*, 165 Wn.2d 67, 196 P.3d 691, 696 (2008). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). All facts and reasonable inferences therefrom must be viewed in the light most favorable to the

nonmoving party. *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 698, 952 P.2d 590 (1998). Questions of law are reviewed de novo. *Id.* The reviewing court may affirm the trial court on "any theory established in the pleadings and supported by proof," even where the trial court did not rely on the theory. *Id.*

B. The Problem with POPTS.

In a case remarkably similar to ours, the Supreme Court of South Carolina described the growing problem of physician owned physical therapy services (in part by reference to a white paper provided by the American Physical Therapy Association):

The arrangement at issue, known within the medical profession as a physician-owned physical therapy service, or POPTS, has generated debate nationwide since the mid-1970s. The debate is driven in part by money, *i.e.*, whether physicians or physical therapists will primarily benefit from fees paid by therapy patients, and in part by ethical concerns about actual and potential conflicts of interest. The debate also implicates issues of control and prestige among medical professionals. Two position statements from leading organizations on both sides of the issue offer a beneficial summary of the concerns.

Physical therapy referral for profit describes a financial relationship in which a physician, podiatrist, or dentist refers a patient for physical therapy treatment and gains financially from the referral. A physician can achieve financial gains from referral by (a) having total or partial ownership of a physical therapy practice, (b) directly employing physical therapists, or (c) contracting with physical therapists. The most common form of referral for profit relationship in physical therapy is the physician-owned physical therapy

service, known by the acronym "POPTS." The problem of physician ownership of physical therapy services was first identified by the physical therapy profession in the journal *Physical Therapy* in 1976. While POPTS relationships were still limited in number in 1982, Charles Magistro, former APTA President, characterized POPTS as, "a cancer eating away at the ethical, moral and financial fiber of our profession."

For many years, the [APTA] has opposed referral for profit and physician ownership of physical therapy services, taking the position that such arrangements pose an inherent conflict of interest impeding both the autonomous practice of the physical therapist and the fiduciary relationship between the therapist and patient.... However, in recent years, facing pressures of decreasing revenues and increased costs of malpractice insurance premiums, and aided by weakening of federal antitrust legislation, physicians have accelerated the addition of POPTS to their practice. APTA's push to achieve autonomous practice and direct access are in conflict with the medical profession's renewed push to subsume physical therapy as an ancillary service for financial gain.

In its position statement, the APTA asserts that a physical therapist employed by a physician creates an inevitable conflict of interest, results in a loss of consumer choice in selecting a therapist, and drives up health care costs because physicians in self-referral relationships prescribe or continue therapy based more on financial gain than patient needs. "Having a financial interest in other services to which a physician refers a client may cloud the physician's judgment as to the need for the referral, as well as the length of treatment required. Similarly, the physical therapist employed by a physician may face pressure to evaluate and treat all patients referred by the physician, without regard to the patient's needs."

Sloan v. South Carolina Bd. of Physical Therapy Examiners, 370 S.C. 452, 477, 636 S.E.2d 598, 602-603 (2006).

C. The Corporate Practice Doctrine Prohibits a Corporation from Providing Professional Services which the State Permits only Individual Licensees to Practice, or When Those Services are Provided by Members of a “Learned Profession.”

Washington has strict common law prohibitions against the corporate practice of the learned professions. See, e.g., *Morelli v. Ehsan*, 110 Wn.2d 555, 561, 756 P.2d 129 (1988). Specifically, Washington corporations “cannot engage in the practice of a learned profession through licensed employees unless legislatively authorized.” *Id.*; see also *Standard Optical Co. v. Superior Court*, 17 Wn.2d 323, 135 P.2d 839 (1943) (“neither a corporation nor any unlicensed person or entity may engage, through licensed employees, in the practice of learned professions”). Within the healthcare context, the “common law prohibits ‘the [corporate] practice of medicine, surgery, dentistry, or any of the limited healing arts....’”² *Standard Optical*, 17 Wn.2d at 328 (*emphasis added*).

The longstanding rationale behind the corporate practice doctrine is rooted in the inherent conflicts of interest presented by the commercialization of the learned professions:

² Physical therapy is a “healing art.” See, e.g., RCW 70.124.020(3).

If such a course were sanctioned the logical result would be that corporations and business partnerships might practice law, medicine, dentistry or any other profession by the simple expedient of employing licensed agents. And if this were permitted professional standards would be practically destroyed, and professions requiring special training would be commercialized, to the public detriment. The ethics of any profession is based upon personal or individual responsibility. One who practices a profession is responsible directly to his patient or his client. Hence he cannot properly act in the practice of his vocation as an agent of a corporation or business partnership whose interests in the very nature of the case are commercial in character.

Standard Optical at 331-332.

Far from being some archaic legalism, the abiding vitality of the common law prohibition against the corporate practice of learned professions has been recognized by all three branches of state government. In 1969, the legislature codified the common law when it enacted the Professional Services Corporation Act, RCW 18.100, a narrow exception to the corporate practice doctrine permitting professional services corporations to render a specific professional service to the public.³ In 1997 Governor Gary Locke vetoed a bill that would have effectively abrogated the corporate practice doctrine for healthcare practitioners, citing as one concern

³ Over the last 40 years this Act has been amended numerous times to accommodate a continuously evolving healthcare system. See, e.g., RCW 18.100.050(3) (permitting HMOs); RCW 18.100.050(5)(a) (listing growing

that abrogation “would make it far easier for unscrupulous individuals to engage in insurance fraud, a growing problem in this state and nationally.” CP 70. Furthermore, our courts have recently invalidated contracts that were contrary to the corporate practice doctrine. See, e.g., *Morelli v. Ehsan*, 110 Wn.2d 555, 756 P.2d 129 (1988) (extending doctrine to partnerships and invalidating partnership between physician and non-physician); *Fallahzadeh v. Ghorbanian*, 119 Wn.App. 596, 82 P.3d 684 (2004) (invalidating relationship between dentist and non-dentist).

The issue before the Court is whether a corporation can provide physical therapy services to the public without specific legislative authorization. The vast weight of authority indicates it cannot.

1. Corporations cannot provide physical therapy services to the public because the regulatory statutes permit only the licensing of individuals.

As an initial matter, corporations cannot engage in the practice of a regulated healthcare profession where the profession’s practice act contemplates only the licensing of individuals. *Standard Optical*, 17 Wn.2d at 329. In *Standard*

number of health care professionals who can render their services through a single professional services corporation).

Optical, this Court was asked to decide whether a corporation could provide optometry services to the public. The Court reviewed the statutes regulating the practice of optometry to discern whether there was a legislative intent to limit the practice of optometry to individuals. Citing several statutes referring solely to individuals, the Court found that the optometry practice act contemplated only the licensing of individuals and therefore concluded the corporate practice of optometry was prohibited. The Court explained its decision as follows:

It is apparent from the [optometry practice act], that a corporation cannot, under the statute, be licensed to practice optometry. The legislative intent to place optometry in the same general category as the professions of law, medicine, and dentistry clearly appears. Beyond question, the practice of optometry affects the public health and welfare.

Id. at 328. Indeed, the concurring opinion proffers the clearest explication of this principle:

No one may practice optometry in this state without first obtaining a certificate of registration or other permit from the board of examiners. The practice of optometry or any other profession by a corporation may not be legally sanctioned. An individual who is not licensed and/or a corporation which can not be licensed to practice optometry may not engage in the practice of that profession by the expedient of employing a licensed optometrist. I therefore concur in the majority opinion.

Id. at 335-336 (Millard, J., *concurring*).

The Physical Therapy Act (RCW 18.74) similarly authorizes only the licensing of individuals. See RCW 18.74 *et seq.* For example, RCW 18.74.005 states:

The purpose of this chapter is to protect the public health, safety, and welfare, and to provide for state administrative control, supervision, licensure, and regulation of the practice of physical therapy. It is the intent of the legislature that only individuals who meet and maintain prescribed standards of competence and conduct be allowed to engage in the practice of physical therapy as defined and authorized by this chapter.

(*Emphasis added.*) Moreover, RCW 18.74.150(1) provides:

It is unlawful for any person to practice or in any manner hold himself or herself out to practice physical therapy or designate himself or herself as a physical therapist or physical therapist assistant, unless he or she is licensed in accordance with this chapter.

Furthermore, RCW 18.74.030 - .035 state the qualifications and examination criteria for individuals to be licensed as physical therapists.

The Legislature confirmed this corporate limitation when it identified physical therapy as a “professional service which, prior to the passage of [the PSCA] ... could not be performed by a corporation.” See RCW 18.100.030(1) and RCW 18.100.050(5)(b).

Now, under the PSCA, physical and occupational therapists may

own stock in and render their individual professional services through one professional service corporation formed for the

sole purpose of providing professional services within their respective scope of practice.

RCW 18.100.050(5)(b) (*emphasis added*). No other legislative authorization exists permitting corporations to provide physical therapy services to the public.

2. Physical therapy is a learned profession, and therefore corporations cannot provide physical therapy services absent specific legislative authorization.

In addition to the legislature's express designation of physical therapy as a professional service requiring incorporation under the PSCA, *supra*, there is ample additional authority confirming that physical therapy is a learned profession subject to the common law corporate practice doctrine.

A "professional" is "[a] person who belongs to a learned profession or whose occupation requires a high level of training and proficiency." *Black's Law Dictionary* 1246 (8th ed. 2004). New York's high court explained the essential attributes of a learned profession:

A profession ... is distinguished by the requirements of extensive formal training and learning, admission to practice by a qualifying licensure, a code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the marketplace, a system for discipline of its members for violation of the code of ethics, a duty to subordinate financial reward to social responsibility,

and, notably, an obligation on its members, even in non professional matters, to conduct themselves as members of a learned, disciplined, and honorable occupation.

In re Freeman's Estate, 311 N.E.2d 480, 483-484 (NY App. 1974).

In *Standard Optical*, this Court provided a test to distinguish a learned profession from a business or trade. *Standard Optical*, 17 Wn.2d 327-330. After the Court concluded that the corporate practice of optometry was prohibited because the statutes regulating optometry contemplated only the licensing of individuals, it then looked to see whether the legislature correctly treated optometry as a profession. *Id.* at 330. Answering this inquiry in the affirmative, the Court emphasized the fact that 1) optometry “affects the public health and welfare”; 2) optometrists must satisfy “certain educational requirements”; and 3) there was an apparent legislative intent to distinguish optometry from other businesses or trades.

Here, physical therapy satisfies all requirements of a learned profession. Physical therapy has been a regulated healthcare profession in Washington since at least 1949. See RCW 18.74.010. The Physical Therapy Practice Act contemplates only the licensing of individuals. See, e.g., RCW 18.74.005. Furthermore, physical therapists are required to go through extensive education and training to practice in Washington. See,

e.g., RCW 18.74.030 and 18.74.040. The minimum accredited physical therapy degree is a Masters degree, and all physical therapy programs in Washington (and 80% of programs across the country) culminate in a Doctor of Physical Therapy degree.⁴ Moreover, physical therapists must pass a written examination;⁵ they are subject to mandatory continuing education requirements;⁶ and their professional conduct is regulated by the Washington State Board of Physical Therapy.⁷ Accordingly, physical therapy has all the hallmarks a learned profession that the legislature sought to distinguish from mere businesses or trades.

Other jurisdictions routinely conclude that physical therapy is a learned profession. See e.g., *Neilson v. Ruoti*, 45 Pa. D. & C. 4th 518, 523 (1999) (physical therapy is a learned profession); *Miller v. All State*, 739 N.W.2d 675 (2007) (physical therapy is a professional service under state's Professional Service Corporation Act); cf. *Phillips v. A Triangle Women's Health Clinic, Inc.*, 155 N.C. App. 372, 378, 573 S.E.2d 600 (2002) ("learned professions")

⁴<http://www.apta.org/AM/Template.cfm?Section=Home&CONTENTID=33205&TEMPLATE=/CM/HTMLDisplay.cfm>. See also http://www.apta.org/AM/Template.cfm?section=PT_Programs&template=/aptaapps/accreditedschools/accschools_map.cfm&process=3&type=PT#Washington. See WAC 246-915-100.

⁵ See RCW 18.74.035; WAC 246-915-030.

⁶ WAC 246-915-085.

includes all “medical professionals”).⁸ Indeed, the *Nielson* court summarized its conclusion that physical therapists are learned professionals as follows:

Although physical therapists are not usually medical doctors, they are members of a learned profession. Physical therapists are specially trained practitioners of the healing arts, and must be licensed in order to practice in Pennsylvania... Like a doctor's, the physical therapist's practice is governed by medical and scientific principles. Furthermore, as in medicine, differences of professional or medical opinion sometimes arise in the physical therapy field regarding the proper procedure for remedying a given injury.

Neilson v. Ruoti, supra at 523 (*internal citation omitted*).

In fact, we know of only one court in the nation that held physical therapy is not a learned profession (and therefore did not fall under the corporate practice doctrine), but that ruling was based on a peculiarity of Minnesota law that does not apply in Washington. *Isles Wellness, Inc. v. Progressive Northern Ins. Co.*, 703 N.W.2d 513, 523 (Minn. 2005). The court, after commenting that it was a difficult decision, held that physical therapists in

⁷ RCW 18.74.020-023 and RCW 18.130.040.

⁸ See also New York State Education Department, Corporate Practice of the Professions (1998), http://www.op.nysed.gov/corp_practice.htm (physical therapy is a professional service prohibited from corporate practice under the common law); Structuring a Physical Therapy Practice, New Jersey Law Journal, Vol. CLXXXIX, No. 3 (July 16, 2007) (citing unpublished New Jersey decision holding physical therapy is a “professional service” prohibited by corporate practice of medicine doctrine); accord *Miller v. All State*, 2007 WL 1575507 (Mich. App.) at 2 (physical therapy is a professional service under state’s Professional Service Corporation Act).

Minnesota were not “professionals” because 1) Minnesota laws specifically prohibited physical therapists from treating patients without a referral and regular follow-up from a physician, and 2) Minnesota’s professional service corporation act excluded physical therapy. *Id.* In Washington, however, direct access to physical therapy without a referral is permitted, see e.g., RCW 18.74.012, and the Washington Professional Service Corporation Act expressly refers to physical therapists. Thus, even this Minnesota court would likely hold that Washington physical therapists are members of a learned profession under Washington law.

D. The Washington Professional Services Corporation Act Prohibits a Single PLLC from Providing the Professional Services of Both Physicians and Physical therapists.

1. The Professional Services Corporation Act is in derogation of the common law and therefore must be strictly construed.

In 1969, the legislature decided to part from the common law corporate practice doctrine and passed the Professional Services Corporation Act (the “PSCA”). RCW Chapter 18.100. The PSCA, like similar acts passed across the nation in the 1960s, was designed to allow professionals to avail themselves of the tax and other benefits associated with the corporate form while protecting the integrity of their professions. See, e.g., 61 Am. Jur. 2d,

Physicians, Surgeons, Etc. § 116; *Morelli v. Ehsan*, 110 Wn.2d 555, 558-59, 756 P.2d 129 (1988). The PSCA “is a narrow statutory exception to the common law rule that a corporation cannot engage in the practice of a learned profession through licensed employees unless legislatively authorized.” *Morelli*, 110 Wn.2d at 559.

In general, our state is governed by the common law to the extent the common law is not inconsistent with constitutional, federal, or state law. RCW 4.04.010. A law abrogates the common law when “the provisions of a ... statute are so inconsistent with and repugnant to the prior common law that both cannot simultaneously be in force.” *Potter, supra* at 77 (quoting *State ex rel. Madden v. Pub. Util. Dist. No. 1*, 83 Wash.2d 219, 222, 517 P.2d 585 (1973)). A statute in derogation of the common law “must be strictly construed and no intent to change that law will be found, unless it appears with clarity.” *Id.* at 77 (quoting *McNeal v. Allen*, 95 Wn.2d 265, 269, 621 P.2d 1285 (1980)).

2. The PSCA Prohibits a PSC or PLLC from Providing Two Separate Professional Services.

The PSCA authorizes professional service corporations to render a single professional service to the public:

It is the legislative intent to provide for the incorporation of an individual or group of individuals to render 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 18.100.010.⁹ Thus, a PSC can only “render the same professional service to the public” for which the professionals are licensed. And under RCW 18.100.080 the PSC may only render the same services for which it was formed:

No professional service corporation organized under this chapter shall engage in any business other than the rendering of the professional services for which it was incorporated ... PROVIDED, That nothing in this chapter or in any other provisions of existing law applicable to corporations shall be interpreted to prohibit such corporation from investing its funds in real estate, personal property, mortgages, stocks, bonds, insurance, or any other type of investments.

There are two consequences of these statutes that govern this case: a corporation may only be formed to practice the “same professional service” for which the incorporators are licensed; and, the corporation may only practice that profession, not a different profession. Thus, a corporation formed by physicians, such as BFOA, cannot engage physical therapy unless physicians and physical therapists render the “same professional service.”

⁹ Under RCW 18.100 “a professional corporation may render only one type of professional service through individuals licensed to render the same professional service.” BNA’s Health Law & Business Series, The Corporate Practice of Medicine Prohibition in the Modern Era of Health Care, No. 2800, Document 49, Washington (Westlaw cite BNAHLB No. 2800 WP 49 at 1).

RCW 18.100.050 and its legislative history makes it clear that physicians and physical therapists do not render the “same professional services.” RCW 18.100.050(5)(a) lists 21 healthcare professionals—including physicians—who provide the “same professional services” for purposes of rendering their services through a single professional corporation:

Notwithstanding any other provision of this chapter, health care professionals who are licensed or certified pursuant to chapters 18.06 [acupuncture], 18.19 [counselors] , 18.22 [podiatry], 18.25 [chiropractic], 18.29 [dental hygienists], 18.34 [dispensing optician], 18.35 [hearing and speech services], 18.36A [naturopathy], 18.50 [midwifery], 18.53 [optometry], 18.55 [ocularists], **18.57 [osteopaths]**, 18.57A [osteopathic physicians assistant], 18.64 [pharmacists], **18.71 [physicians]**, 18.71A [physician assistants], 18.79 [nursing care], 18.83 [psychologists], 18.89 [respiratory care practitioners], 18.108 [massage practitioners], and 18.138 [dietitians and nutritionists] RCW may own stock in and render their individual professional services through one professional service corporation and are to be considered, for the purpose of forming a professional service corporation, as rendering the “same specific professional services” or “same professional services” or similar terms.¹⁰

The legislature lists occupational therapists and physical therapists separately under RCW 18.100.050(5)(b):

Notwithstanding any other provision of this chapter, health care professionals who are regulated under chapters 18.59 [occupational therapists] and **18.74 RCW [physical therapists]** may own stock in and render their individual professional services through one professional service

¹⁰ RCW 18.100.050(5)(a) (emphasis added).

corporation formed for the sole purpose of providing professional services within their respective scope of practice.¹¹

Therefore, the legislature has specifically identified which health care professionals provide the “same services” for purposes of rendering their services through a single professional corporation. RCW 18.100.050(5)(a)-(b). By excluding physical therapists and occupational therapists from (5)(a) and instead listing both physical therapists and occupational therapists under section (5)(b) the legislature determined that physical therapists and physicians do not provide the “same professional services.” And in fact, the Act specifically states that physical therapists and occupational therapists may only render their professional services through a professional corporation “formed for the sole purpose of providing professional services within their respective scope of practice.” RCW 18.100.050(5)(b).

The legislative history reinforces this point. When RCW 18.100.050 was adopted in 1969, it did not list any particular health care profession.¹² In 1983, section 050 was amended to allow all licensed health-care professionals to render their services together

¹¹ RCW 18.100.050(5)(b) (emphasis added).

¹² Laws of 1969, Ch. 122 §4, attached to Appendix as Ex. 1.

through an HMO.¹³ In 1995, a bill was introduced to allow *all* licensed health care professionals to render their services together in one corporation (thus permitting this beyond the context of just HMOs).¹⁴ The bill failed to pass.

One year later, in 1996, the legislature added subsection (5)(a) to RCW 18.100.050, which permitted 17 different health care professionals to practice together as if they were “rendering the ‘same specific professional service.’”¹⁵ Physicians and osteopaths, were listed separately in subsection (5)(b). See CP 51; see *also* CP 48-49.

In 1997, the legislature passed a bill abrogating the corporate practice doctrine. However, this section of the bill was vetoed by Governor Locke. CP 62, 123. The legislature also once again amended RCW 18.100.050(5), adding physicians and osteopaths to subsection 5(a) and deleting subsection (5)(b).

In 1999 the legislature added physical therapists and occupational therapists to a new subsection 5(b). CP 116. Finally, in 2001, the legislature added mental health counselors, marriage and family therapists, and social workers to the list of healthcare

¹³ Laws of 1983, Ch. 100 §1, attached to Appendix as Ex. 2.

¹⁴ SB 5289 (1995), attached to Appendix as Ex. 3.

professions in subsection (5)(a), bringing it to its present-day total of 21 healthcare professions that the legislature has determined render the “same professional services” for purposes of the Act.

Significantly, a bill was introduced in the legislature in 2004 that would have added physical therapy and occupational therapy to the list of professions permitted to practice together in subsection (5)(a).¹⁶ This bill did not pass, and at present physical therapists and occupational therapists are still listed separately in 5(b) from physicians and the other professionals listed under 5(a).

Thus, both the Act’s plain language and legislative history demonstrate the legislature’s intent to keep physical therapy separate from the other healthcare professions. BFOA’s corporate structure ignores this separation, and provides two separate professional services to the public through a single PLLC in violation of the Professional Services Corporation Act.

¹⁵ Laws of 1996, Ch. 22 §1, attached to Appendix as Ex. 4.

¹⁶ HB 3156 (2004), attached to Appendix as Ex. 5.

E. The Physicians Violate the Anti-Rebate Statute Because They Pay Others and Receive a Profit in Connection with Either the Referral of Patients to or the Furnishing of Care by Physical Therapists.

Defendants violate Washington's Anti-Rebate Statute, RCW Chapter 19.68, which prohibits licensed health care providers from paying or receiving rebates or profits in connection with a referral, as well as profiting from the furnishing of health care services by another provider, except as permitted under the terms of the Statute. This Court recently explained that anti-rebate statutes were enacted in Washington and other states in the late 1940s in response to the American Optical kickback scheme, in which American Optical paid rebates to doctors for referrals. *Wright v. Jeckle*, 158 Wn.2d 375, ¶11, 144 P.3d 301 (2006). The legislature's objectives were to protect the public from hidden rebates and charges, and to eliminate the motive to make unnecessary prescriptions. See Wash. Att'y Gen., Memorandum No. 651.¹⁷

RCW 19.68.010 provides:

It shall be unlawful for any person, firm, corporation or association, whether organized as a cooperative, or for profit or nonprofit, **to pay**, or offer to pay or allow, directly or

¹⁷ As cited in Medical Profession – Anti-Kickback Statute, 45 Washington Law Rev. 838, n.9 (1970).

indirectly, to any person licensed by the state of Washington to engage in the practice of medicine and surgery, drugless treatment in any form, dentistry, or pharmacy and it shall be unlawful for such person to request, receive or allow, directly or indirectly, a rebate, refund, commission, unearned discount or profit by means of a credit or other valuable consideration in connection with the referral of patients to any person, firm, corporation or association, or in connection with the furnishings of medical, surgical or dental care, diagnosis, treatment or service, on the sale, rental, furnishing or supplying of clinical laboratory supplies or services of any kind, drugs, medication, or medical supplies, or any other goods, services or supplies prescribed for medical diagnosis, care or treatment.

RCW 19.68.010(1) (*emphasis added*); see also WAC 246-915-190.

Thus, a licensed health care professional violates RCW 19.68.010 by paying or receiving a profit in connection with either 1) the referral of patients or 2) the furnishing of care to those patients. *Id.*, see also *Day v. Inland Empire Optical, Inc.*, 76 Wn.2d 407, 456 P.2d 1011 (1969); AGO 1975 No. 24 at 6-7 (“This statute thus addresses two subjects: ‘referral of patients’ and ‘furnishing’”). Here, defendant physicians and physical therapists violate both the referral and furnishing prongs of this statute.

In *Wright*, this Court noted that the Anti-Rebate Statute prohibits at least two things in connection with a referral: “The first clause prohibits paying anything of value in return for a referral. The second clause prohibits receiving anything of value in return for

referring patients.” *Id.* at ¶ 12. The Court concluded that the Statute was not violated where a physician profited by both prescribing and selling medication himself because only one care provider was involved.

This case raises a different question altogether, and one more akin to the situation in *Day v. Inland Empire Optical, Inc.*, 76 Wn.2d 407, 456 P.2d 1011 (1969): can a physician with an ownership interest in a company receive an unearned profit in connection with a referral to, or the furnishing of care by, a physical therapist employed by the company? The answer is “no.” *Id.*; see also WAC 246-915-190(3) (“There shall be no rebate to any health care practitioner who refers or authorizes physical therapy treatment or evaluation as prohibited by chapter 19.68 RCW”); accord *Sloan v. South Carolina Bd. of Physical Therapy Examiners*, 370 S.C. 452, 477, 636 S.E.2d 598 (2006) (interpreting a nearly identical South Carolina statute and holding that physicians may not employ physical therapists where the physicians refer patients to the physical therapist).

In *Day*, a group of ophthalmologists owned Inland Empire Optical, Inc. and referred patients to Inland, where their prescriptions were filled by opticians working for Inland. 76 Wn.2d

at 419. The ophthalmologists received a financial benefit from the referral and profited from the services of the optician/employees:

The accumulation of profits, increase in value of the common stock, growth in net worth, possible tax advantages, and right to a distribution of income from Inland Empire Optical accruing to the defendant doctors thus amounted to the receiving by them directly or indirectly of a rebate, refund, commission, unearned discount or profit or other valuable consideration in connection with the referral of their patients to Inland Empire Optical and the payment or allowance of same, directly or indirectly, by Inland Empire Optical to them – all as specifically prohibited by RCW 19.68.010 and 19.68.020.

Id. at 418-19. This Court noted, “In RCW 19.68.040, the legislature made it clear that physicians are authorized to charge their patients, or receive compensation, for professional services only if the professional services are actually rendered by the physician to his patient.” *Id.* at 419 (*emphasis added*); *accord Wright*, 158 Wn.2d at 382 (the statute does not prohibit “medical professionals from profiting off the goods and services that they themselves provide”).

1. The physicians profit in connection with a referral to the BFOA physical therapists.

In *Day*, patients given prescriptions for eyeglasses were informed, both orally and by signs posted conspicuously in their offices, that they could have their prescriptions filled at the doctor’s

own optical clinic or at the clinic of their choice. The court held that this business arrangement violated RCW Chapter 19.68, finding that 1) the signs indicating ownership amounted to a direct referral and 2) the doctor-owners profited when patients were treated at their clinic. *Day*, 76 Wn.2d at 418.

Admittedly, one difference between this case and *Day* is that in *Day*, the ophthalmologists and the opticians were not employed by the same corporation, whereas here, both defendant physicians and the physical therapists are all employed by BFOA.¹⁸ However, this is a distinction without a meaningful difference. In both cases, the physician was profiting in connection with the referral of their patients to a clinic in which they have an ownership interest. Unlike the physician in *Wright*, the BFOA physicians are profiting off care that they themselves do not provide.

As in *Day*, defendant physicians admit that they 1) own Benton Franklin Physical Therapy; 2) notify patients that they own the clinic;¹⁹ and 3) receive the profits generated by the treatment of

¹⁸ Of course as explained above, the corporate practice doctrine and the Professional Services Corporation Act do not allow physicians and physical therapists to practice within the same PSC. Accordingly, the physical therapists cannot be considered as true co-employees with the physicians.

¹⁹ Defendants claim that they tell all their patients needing physical therapy that they own their own physical therapy clinic. CP 891. Witness testimony indicated that this is not always true. CP 809-810. Regardless, providing notification of a

patients at that clinic. Consequently, like the ophthalmologists in *Day*, Defendants here violate the “referral” prong of RCW 19.68.010(1).

2. The physicians profit in connection with the furnishing of care by the physical therapists.

Defendants also violate the “furnishing” prong of RCW 19.68.010(1). “In addition to prohibiting a physician from receiving a profit as the result of a referral of a patient, RCW 19.68.010 also prohibits a physician from receiving a profit” in connection with the furnishing of treatment. AGO 1975 No. 24 at 6 (noting the *Day* court did not reach this issue). As noted by the attorney general:

“...a physician is not entitled to receive a financial benefit from the services or goods furnished to patients of an institution in which the physician holds some ownership interest when the physician prescribes the services or goods that the institution furnishes to the patient, or when the physician refers the patient to the institution.”

Id. at 7 (*emphasis added*).

Thus, defendant physicians cannot receive a financial benefit when they prescribe any of the services or treatment

financial interest in a facility amounts to a “direct referral” under *Day* and is prohibited. RCW 19.68.010 prohibits Defendant physicians from notifying patients that they own their own physical therapy clinic. See *Day*, 76 Wn.2d at 418.

furnished by the physical therapists at BFOA.²⁰ And in fact, the plain language of the statute prohibits defendant physicians from profiting from any care furnished at their physical therapy clinic regardless of who prescribed it.

3. Physical therapy is not a diagnostic service and therefore the exception under RCW 19.68.010(2) does not apply to this litigation.

In RCW 19.68.010(2), the legislature specifically carved out a narrow exception to RCW 19.68.010(1) to permit physicians to own diagnostic services. Specifically, RCW 19.86.010(2) provides, in relevant part:

Ownership of a financial interest in any firm, corporation or association which furnishes any kind of **clinical laboratory or other services prescribed for medical, surgical, or dental diagnosis** shall not be prohibited under this section... .

(Emphasis added.)

Physical therapy is not a diagnostic service. “Diagnostic service” is a term of art describing specific clinical and laboratory services prescribed by a physician to assist the physician in arriving at a medical diagnosis. See, e.g., 32 CFR §199.4 (“Diagnostic services. Includes clinical laboratory examinations, x-ray

²⁰ At the very least, defendant physicians are prohibited from profiting off the furnishing of care to 80-85% of its patients receiving a prescription for physical therapy from a BFOA physician. CP 468-477.

examinations, pathological examinations, and machine tests that produce hard-copy results. Also includes CT scanning under certain limited conditions.”). In fact, the universe of authority—state and federal, statutory and administrative—all specifically distinguish physical therapy from “diagnostic services.”²¹

Furthermore, RCW 19.68.010(2) must be read in conjunction with the rest of RCW 19.68, which consistently distinguishes between services prescribed for diagnosis, care, or treatment. For example, under RCW 19.68.010(1):

It shall be unlawful for any person ... to ... receive ... valuable consideration ... in connection with the furnishings of medical, surgical or dental care, diagnosis, treatment or service, on the sale, rental, furnishing or supplying of clinical laboratory supplies or services of any kind, drugs, medication, or medical supplies, or any other goods, services or supplies prescribed for medical diagnosis, care or treatment.

(*Emphasis added.*) Similarly, RCW 19.68.030 applies to “services or supplies prescribed for medical diagnosis, care or treatment...”

²¹ See, e.g., 42 USC § 1395x(s) (distinguishing “diagnostic services” from “outpatient physical therapy” under definition of “medical and other health services”); 42 CFR § 410.10 (distinguishing “diagnostic services” distinctly from “outpatient physical therapy services”); WAC 388-501-0065 (defining healthcare categories and differentiating diagnostic services from physical therapy); WAC 388-501-0060 (same); WAC 246-976-830 (listing specific diagnostic services and distinguishing them from listed rehabilitation services); WAC 246-976-840 (same); RCW 41.26.030(22)(b)(iii) (separating diagnostic x-ray and laboratory examinations from physical therapy services); cf. RCW 18.74.010 (stating physical therapy does not include use of Roentgen rays and radium for diagnostic purposes).

The words used by the Legislature are presumed to have meaning. If the Legislature had intended to include prescriptions for “treatment” within this exception it would have done so.

As the trial court concluded at summary judgment:

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

CP 486.

4. The employee exception under RCW 19.68.040 does not permit BFOA’s business practices.

RCW 19.68.040 provides that the legislature did not intend to prohibit a healthcare licensee from profiting from the care he or she actually provides, or from care that is provided by a copartner or licensed employee. Specifically, RCW 19.68.040 provides:

It is the intent of this chapter, and this chapter shall be so construed, that persons so licensed shall only be authorized by law to charge or receive compensation for professional services rendered if such services are actually rendered by the licensee and not otherwise: PROVIDED, HOWEVER, That it is not intended to prohibit two or more licensees who practice their profession as copartners to charge or collect compensation for any professional services by any member of the firm, or to prohibit a licensee who employs another licensee to charge or collect compensation for professional services rendered by the employee licensee.

(Emphasis added.)

When the legislature enacted RCW 19.68 in 1947, the common law prohibited corporations from rendering professional services to the public through licensed employees. *Supra*. Therefore, the only business arrangements RCW 19.68 contemplated were non-corporate entities where licensees partnered with or directly employed similarly licensed individuals. See, e.g., RCW 19.68.040; RCW 18.100.010. Then in 1969 the legislature passed the PSCA, which carved out a narrow exception to the common law permitting professional corporations to provide a single professional service to the public.²² Now, under RCW 18.100.050(5)(a), a single professional corporation may provide the services of 21 health professionals as if they rendered the same professional service.

When the legislature enacted RCW Chapter 18.100, the legislature expressly recognized that professional corporations must comply with the anti-rebate statute:

Nothing in this chapter shall authorize a director, officer, shareholder, agent or employee of a corporation organized under this chapter, or a corporation itself organized under this chapter, to do or perform any act which would be illegal,

²² *Supra*, § V(C)(2).

unethical or unauthorized conduct under the provisions of the following acts: ... (2) anti-rebating act, chapter 19.68 RCW; . . .

RCW 18.100.140 (emphasis added).

In reconciling these two statutory schemes, at least two alternatives are possible. First, the Court could simply hold that the exception of RCW 19.68.040 does not apply because members of a PSC are not “copartners” and that an employee of a PSC is not an employee of a “licensee.” Under this analysis, BFOA and its members are violating the literal language of the Anti-Rebate Statute.

Second, the Court could attempt to harmonize the two statutory schemes by holding that the term “copartners” under RCW 19.68.040 includes stockholders in a PSC and that employees of a licensee include employees of a PSC. BFOA would still be in violation of the Anti-Rebate Statute because physicians and physical therapists cannot practice together in one PSC. Finally, this Court has interpreted the employee exception to the Anti-Rebate Statute to require direct and immediate personal supervision of the employee, which is lacking here.

a. RCW 19.68.040 applies only to similarly licensed individuals.

The proviso in RCW 19.68.040 (“...not intended to prohibit a licensee who employs another licensee...”) applies only to similarly-licensed individuals. To rule otherwise would run contrary to Washington’s statutory and common law prohibitions governing which health care licensees may work together to render their services. As explained above, the PSCA permits only similarly licensed individuals to render their services through a single corporation. RCW 18.100.010; see *Morelli*, 110 Wn.2d at 559 (“The intent of the Legislature to bar other than **similarly licensed** health care professionals from involvement in professional services is amply delineated.”) (*emphasis added*). Because only similarly licensed professionals can be employees, the “employee” exception under RCW 19.68.040 must be read to apply only in situations where licensees partner with or employ **similarly licensed** individuals.

Moreover, even ignoring the requirements of RCW 18.100, the plain language of RCW 19.68.040 indicates that the legislature intended the “employee” exception to apply only in situations where a licensee employs **similarly licensed** individuals. RCW 19.68.040

states that the intent of RCW 19.68 is to prohibit licensees from profiting off professional services that they themselves do not actually render, and the proviso states that it “is not intended to prohibit two or more licensees who practice their profession as copartners or to prohibit a licensee who employs another licensee...” (*emphasis added*). As this court said in *Wright*, “context matters.” *Wright*, 158 Wn.2d at 380. Under the statutory interpretation doctrine of *noscitur a sociis*, “a word is known by the company it keeps.” *Id.* Accordingly, the employment exception must be read in the context of the words “their profession.” Thus, this exception applies in those situations where a physician (or other licensee) “employs another” physician (or similar such licensee).

b. RCW 19.68.040 requires direct and immediate personal supervision in this case.

As noted above, on its face, RCW 19.68.040 literally applies only where one licensee “employs another licensee.” Here, defendant physicians do not employ the defendant physical therapists; rather, they own the corporation that employs the physical therapists. Thus, under our facts, the plain language of this section does not apply. If it does apply in this context,

however, the *Day* analysis provides a mechanism for ensuring supervision in cases like this, where the employment relationship is indirect (i.e., where the physical therapists are employed by a company and not by the physicians, and where their practice is geographically separated from the practice of the physicians).

In *Day*, the court analyzed the relationship between the ophthalmology statute (RCW Chapter 18.34), which requires “personal supervision,” and the employee exception under the Anti-Rebate Statute (RCW 19.68.040). The Court narrowed the “personal supervision” requirement under the ophthalmology statute to “direct and immediate personal supervision,” and concluded that the opticians in *Day* did not qualify as employees pursuant to the Anti-Rebate Statute:

The two sections of the statute must be reconciled so that, when read in *pari materia*, maximum possible effect will be given to both. RCW 19.68.040 requires the chapter (RCW 19.68) to be construed so that licensed medical practitioners charge and receive compensation only for professional services actually performed. RCW 18.34.010 authorizes, *Inter alia*, a licensed optometrist to work for and under the personal supervision of a licensed physician and a licensed physician to have a licensed optometrist working for him under his personal supervision, and the proviso to RCW 19.68.040 authorizes the ophthalmologist to collect compensation for professional services rendered by a licensed optician working under his direct and immediate personal supervision. Thus, it appears that the legislature intended, in situations similar to those before us, to allow

licensed ophthalmologists to employ or associate with them in their offices a licensed optician under the immediate and direct supervision of the ophthalmologist.

Day, 76 Wn.2d at 419-420 (emphasis added).

The *Day* court considered the nature of the relationship between the ophthalmologists [the physician licensees] and the opticians [the employee licensees]:

One test of the validity of such a relationship under RCW 19.68 is whether a patient of ordinary understanding and reasonable prudence should reasonably understand that eyeglasses dispensed by the ophthalmologist's dispensing optician are in fact under not only the personal and immediate direction and supervision of the ophthalmologist, but at his responsibility as well.

Day, 76 Wn.2d at 420.

In both the *Day* case and ours, the physicians refer patients to (or profit off the delivery of care by) licensees employed by a company the physicians own. Thus, determining whether a health care licensee employed by a company is the employee of "another licensee" under RCW 19.68.040 depends upon the level of direct and immediate personal supervision the supervising licensee exercises over the employee licensee. Because the BFOA orthopedic surgeons provide no direct or immediate personal supervision over the physical therapists, the employee exception in

RCW 19.68.040 does not apply, and the physicians cannot profit from services rendered by the physical therapists.

VI. CONCLUSION

For the reasons explained above, the Court should conclude that BFOA is in violation of the Anti-Rebate Statute, the PSCA, and the common law corporate practice doctrine, and therefore reverse and remand for entry of partial summary judgments in favor of Columbia and for trial on the CPA claim.

RESPECTFULLY SUBMITTED this 30th day of January, 2009.

WIGGINS & MASTERS PLLC

By: 
Charles K. Wiggins, WSBA #6948

STAFFORD FREY COOPER

By: 
Darrin E. Bailey, WSBA # 34955
Danford D. Grant, WSBA #26042

*Attorneys for Petitioner and
Cross-Respondent
Columbia Physical Therapy, Inc., P.S.*

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury according to the laws of the State of Washington that on this date I caused to be served in the manner noted below true and correct copies of ***Brief of Petitioner Columbia Physical Therapy, Inc.***

P.S. on the following individuals:

Howard R. Rubin
Kenneth J. Pfaehler
Christopher L. Harlow
Sonnenschein Nath & Rosenthal LLP
1301 K Street, N.W., Suite 600
Washington, DC 20005

Attorneys for Respondents

Michael H. Church
Matthew T. Ries
Stamper Rubens, PS
720 West Boone Avenue, Suite 200
Spokane, WA 99201

Attorneys for Respondents

- Via Facsimile
- Via First Class Mail
- Via Messenger
- Via Email

Dated this 30th day of January, 2009, at Seattle, Washington.


Mary Ann Blackledge

APPENDIX

EXHIBIT 1

ministration bond redemption fund, as aforesaid, and received from the project for which the bonds were issued. Such rentals shall be pledged by the state for such purpose.

NEW SECTION. Sec. 3. This act is necessary for the immediate preservation of the public peace, health and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

Passed the Senate February 26, 1969
Passed the House March 10, 1969
Approved by the Governor March 25, 1969
Filed in office of Secretary of State March 25, 1969

CHAPTER 122
[Engrossed Senate Bill No. 109]
PROFESSIONAL SERVICE CORPORATIONS

AN ACT Relating to professional service corporations as herein defined; authorizing the incorporation and organization thereof; providing special provisions, conditions and regulations; and prescribing certain powers, duties, liabilities and restrictions.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. Section 1. It is the legislative intent to provide for the incorporation of an individual or group of individuals to render the same professional service to the public for which such individuals are required by law to be licensed or to obtain other legal authorization.

NEW SECTION. Sec. 2. This act may be cited as "the professional service corporation act."

NEW SECTION. Sec. 3. As used in this act the following words shall have the meaning indicated:

(1) The term "professional service" shall mean any type of personal service to the public which requires as a condition precedent to the rendering of such service the obtaining of a license or other legal authorization and which prior to the passage of this act and by reason of law could not be performed by a corporation, including, but not by way of limitation, certified public accountants,

chiropractors, dentists, osteopaths, physicians, pediatricists, chiropractists, architects, veterinarians and attorneys at law.

(2) The term "professional corporation" means a corporation which is organized under this act for the purpose of rendering professional service and which has as its shareholder or shareholders only individuals who themselves are duly licensed or otherwise legally authorized within this state to render the same professional service as the corporation.

NEW SECTION. Sec. 4. This act shall not apply to any individuals or groups of individuals within this state who prior to the passage of this act were permitted to organize a corporation and perform personal services to the public by means of a corporation, and this act shall not apply to any corporation organized by such individual or group of individuals prior to the passage of this act: PROVIDED, That any such individual or group of individuals or any such corporation may bring themselves and such corporation within the provisions of this act by amending the articles of incorporation in such a manner so as to be consistent with all the provisions of this act and by affirmatively stating in the amended articles of incorporation that the shareholders have elected to bring the corporation within the provisions of this act.

NEW SECTION. Sec. 5. 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 23A RCW for the purpose of rendering professional service: PROVIDED, That one or more of such legally authorized individuals shall be the incorporators of such professional corporation: PROVIDED FURTHER, That notwithstanding any other provision of this act, registered architects and registered engineers may own stock in and render their individual professional services through one professional service corporation.

NEW SECTION. Sec. 6. No corporation organized and incorpora-

ted under this act may render professional services except through its directors, officers, employees or agents all of whom must be duly licensed or otherwise legally authorized to render such professional services within this state: PROVIDED, That said term "employees" shall not be interpreted to mean clerks, secretaries, bookkeepers, technicians and other assistants who are not usually and ordinarily considered by custom and practice to be rendering professional services to the public for which a license or other legal authorization is required.

NEW SECTION. Sec. 7. Nothing contained in this act shall be interpreted to abolish, repeal, modify, restrict or limit the law now in effect in this state applicable to the professional relationship and liabilities between the person furnishing the professional services and the person receiving such professional service and the standards for professional conduct. Any director, officer, shareholder, agent or employee of a corporation organized under this act shall remain personally and fully liable and accountable for any negligent or wrongful acts or misconduct committed by him or by any person under his direct supervision and control, while rendering professional services on behalf of the corporation to the person for whom such professional services were being rendered. The corporation shall be liable for any negligent or wrongful acts of misconduct committed by any of its directors, officers, shareholders, agents or employees while they are engaged on behalf of the corporation, in the rendering of professional services.

NEW SECTION. Sec. 8. No professional service corporation organized under this act shall engage in any business other than the rendering of the professional services for which it was incorporated: PROVIDED, That nothing in this act or in any other provisions of existing law applicable to corporations shall be interpreted to prohibit such corporation from investing its funds in real estate, personal property, mortgages, stocks, bonds, insurance, or any other type of investments.

NEW SECTION. Sec. 9. No professional service corporation organized under the provisions of this act may issue any of its capital stock to anyone other than an individual who is duly licensed or otherwise legally authorized to render the same specific professional services as those for which the corporation was incorporated. No shareholder of a corporation organized under this act shall enter into a voting trust agreement or any other type agreement vesting another person with the authority to exercise the voting power of any or all of his stock.

NEW SECTION. Sec. 10. If any director, officer, shareholder, agent or employee of a corporation organized under this act who has been rendering professional service to the public becomes legally disqualified to render such professional services within this state, he shall sever all employment with, and financial interests in, such corporation forthwith. A corporation's failure to require compliance with this provision shall constitute a ground for the forfeiture of its articles of incorporation and its dissolution. When a corporation's failure to comply with this provision is brought to the attention of the office of the secretary of state, the secretary of state forthwith shall certify that fact to the attorney general for appropriate action to dissolve the corporation.

NEW SECTION. Sec. 11. No shareholder of a corporation organized as a professional service corporation may sell or transfer his shares in such corporation except to another individual who is eligible to be a shareholder of such corporation. The articles of incorporation of a professional service corporation shall require that each shareholder in the corporation provide for a redemption or cancellation of all shares which are transferred to any person or entity ineligible to be a shareholder, whether such transfer be voluntary, involuntary or by operation of law.

NEW SECTION. Sec. 12. Corporations organized pursuant to this act shall render professional service and exercise its authorized powers under a name permitted by law and the professional ethics

of the profession in which the corporation is so engaged. In the event that the words "company", "corporation" or "incorporated" or any other word, abbreviation, affix or prefix indicating that it is a corporation shall be used, it shall be accompanied with the abbreviation "P.S." With the filing of its first annual report and any filings thereafter, professional service corporation shall list its then shareholders: PROVIDED, That notwithstanding the foregoing provisions of this section, the corporate name of a corporation organized to render dental services shall contain the full names or surnames of all shareholders and no other word than "chartered" or the words "professional services" or the abbreviation "P.S."

NEW SECTION. Sec. 13. The provisions of Title 23A RCW shall be applicable to a corporation organized pursuant to this act except to the extent that any of the provisions of this act are interpreted to be in conflict with the provisions thereof, and in such event the provisions and sections of this act shall take precedence with respect to a corporation organized pursuant to the provisions of this act. A professional corporation organized under this act shall consolidate or merge only with another domestic professional corporation organized under this act to render the same specific professional service and a merger or consolidation with any foreign corporation is prohibited.

NEW SECTION. Sec. 14. Nothing in this act shall authorize a director, officer, shareholder, agent or employee of a corporation organized under this act, or a corporation itself organized under this act, to do or perform any act which would be illegal, unethical or unauthorized conduct under the provisions of the following acts: (1) Medical Disciplinary Act, chapter 18.72 RCW; (2) Anti-Rebating Act, chapter 19.68 RCW; (3) State Bar Act, chapter 2.48 RCW; (4) Professional Accounting Act, chapter 18.04 RCW; (5) Professional Architects Act, chapter 18.08 RCW; (6) Professional Auctioneers Act, chapter 18.11 RCW; (7) Barbers, chapter 18.15 RCW; (8) Beauty Culturists Act, chapter 18.18 RCW; (9) Boarding Homes Act, chapter 18.20

RCW; (10) Chiropraxy, chapter 18.22 RCW; (11) Chiropractic Act, chapter 18.25 RCW; (12) Registration of Contractors, chapter 18.27 RCW; (13) Debt Adjusting Act, chapter 18.28 RCW; (14) Dental Hygienist Act, chapter 18.29 RCW; (15) Dentistry, chapter 18.32 RCW; (16) Dispensing Opticians, chapter 18.34 RCW; (17) Drugless Healing, chapter 18.36 RCW; (18) Embalmers and Funeral Directors, chapter 18.39 RCW; (19) Engineers and Land Surveyors, chapter 18.43 RCW; (20) Escrow Agents Registration Act, chapter 18.44 RCW; (21) Furniture and Bedding Industry, chapter 18.45 RCW; (22) Maternity Homes, chapter 18.46 RCW; (23) Midwifery, chapter 18.50 RCW; (24) Nursing Homes, chapter 18.51 RCW; (25) Optometry, chapter 18.53 RCW; (26) Osteopathy, chapter 18.57 RCW; (27) Patent Medicine Peddlers, chapter 18.60 RCW; (28) Pharmacists, chapter 18.64 RCW; (29) Pharmacy Owners and Wholesale Druggists, chapter 18.67 RCW; (30) Physical Therapy, chapter 18.74 RCW; (31) Practical Nurses, chapter 18.78 RCW; (32) Prophylactic Vendors, chapter 18.81 RCW; (33) Proprietary Schools, chapter 18.82 RCW; (34) Psychologists, chapter 18.83 RCW; (35) Real Estate Brokers and Salesmen, chapter 18.85 RCW; (36) Registered Professional Nurses, chapter 18.88 RCW; (37) Sanitarians, chapter 18.90 RCW; (38) Veterinarians, chapter 18.92 RCW.

Passed the Senate March 6, 1969

Passed the House March 11, 1969

Approved by the Governor March 25, 1969

Filed in office of Secretary of State March 25, 1969

CHAPTER 123
[Engrossed Senate Bill No. 138]
POLICE BENEFITS--
FIRST CLASS CITIES

AN ACT Relating to police benefits in first class cities; amending section 4, chapter 39, Laws of 1909, as last amended by section 1, chapter 191, Laws of 1961, and RCW 41.20.050; amending section 5, chapter 39, Laws of 1909, as last amended by section 2, chapter 191, Laws of 1961, and RCW 41.20.060; amending section 4, chapter 69, Laws of 1955 and RCW 41.20.150; and adding a new section to chapter 41.20 RCW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

EXHIBIT 2

Nothing in this subsection prohibits a city or town from reducing its rates by amounts greater than the amounts required in this subsection.

Voter approved rate increases under subsection (1) of this section shall not be included in the computations under this subsection.

NEW SECTION. Sec. 6. There is added to chapter 35.21 RCW a new section to read as follows:

Every city and town first imposing a business and occupation tax or increasing the rate of the tax after the effective date of this section shall provide for a referendum procedure to apply to an ordinance imposing the tax or increasing the rate of the tax. This referendum procedure shall specify that a referendum petition may be filed within seven days of passage of the ordinance with a filing officer, as identified in the ordinance. Within ten days, the filing officer shall confer with the petitioner concerning form and style of the petition, issue the petition an identification number, and secure an accurate, concise, and positive ballot title from the designated local official. The petitioner shall have thirty days in which to secure the signatures of not less than fifteen percent of the registered voters of the city, as of the last municipal general election, upon petition forms which contain the ballot title and the full text of the measure to be referred. The filing officer shall verify the sufficiency of the signatures on the petition and, if sufficient valid signatures are properly submitted, shall certify the referendum measure to the next election ballot within the city or at a special election ballot as provided pursuant to RCW 35.17.260(2).

This referendum procedure shall be exclusive in all instances for any city ordinance imposing a business and occupation tax or increasing the rate of the tax and shall supersede the procedures provided under chapters 35.17 and 35A.11 RCW and all other statutory or charter provisions for initiative or referendum which might otherwise apply.

Sec. 7. Section 6, chapter 134, Laws of 1972 ex. sess. as last amended by section 7, chapter 49, Laws of 1982 1st ex. sess. and RCW 35.21.710 are each amended to read as follows:

Any city which imposes a license fee or tax upon business activities consisting of the making of retail sales of tangible personal property which are measured by gross receipts or gross income from such sales, shall impose such tax at a single uniform rate upon all such business activities. The taxing authority granted to cities for taxes upon business activities measured by gross receipts or gross income from sales shall not exceed a rate of 0020; except that any city with an adopted ordinance at a higher rate, as of January 1, 1982 shall be limited to a maximum increase of ten percent of the January 1982 rate, not to exceed an annual incremental increase of two percent of current rate: **PROVIDED**, That any adopted ordinance which classifies according to different types of business or services shall be subject to both the ten percent and the two percent annual incremental increase limitation on each tax rate: **PROVIDED FURTHER**, That all surtaxes on

business and occupation classifications in effect as of January 1, 1982, shall expire no later than December 31, 1982, or by expiration date established by local ordinance. Cities which impose a license fee or tax upon business activities consisting of the making of retail sales of tangible personal property which are measured by gross receipts or gross income from such sales shall be required to submit an annual report to the ~~(department of revenue)~~ state auditor identifying the rate established and the revenues received from each fee or tax. This section shall not apply to any business activities subject to the tax imposed by chapter 82.16 RCW. For purposes of this section, the providing to consumers of competitive telephone service, as defined in RCW 82.16.010, shall be deemed to be the retail sale of tangible personal property.

NEW SECTION. Sec. 8. The following acts or parts of acts are each repealed:

(1) Section 9, chapter 49, Laws of 1982 1st ex. sess. and RCW 35.21.705;

(2) Section 19, chapter 49, Laws of 1982 1st ex. sess. and RCW 82.14.035; and

(3) Section 12, chapter 49, Laws of 1982 1st ex. sess. and RCW 82.46.020.

NEW SECTION. Sec. 9. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

NEW SECTION. Sec. 10. If any provision of this act or chapter 49, Laws of 1982 1st ex. sess. or their application to any person or circumstance is held invalid, the remainder of these acts or the application of the provision to other persons or circumstances is not affected.

Passed the House March 10, 1983.

Passed the Senate April 13, 1983.

Approved by the Governor April 22, 1983.

Filed in Office of Secretary of State April 22, 1983.

CHAPTER 100

[Engrossed House Bill No. 305]

PROFESSIONAL SERVICE CORPORATIONS—HEALTH CARE PROFESSIONALS

AN ACT Relating to professional service corporations; and amending section 5, chapter 122, Laws of 1969 and RCW 18.100.050.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. Section 5, chapter 122, Laws of 1969 and RCW 18.100.050 are each amended to read as follows:

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 23A RCW for the purpose of rendering professional service: PROVIDED, That one or more of such legally authorized individuals shall be the incorporators of such professional corporation: PROVIDED FURTHER, That notwithstanding any other provision of this chapter, registered architects and registered engineers may own stock in and render their individual professional services through one professional service corporation: AND PROVIDED FURTHER, That licensed health care professionals, providing services to enrolled participants either directly or through arrangements with a health maintenance organization registered under chapter 48.46 RCW or federally qualified health maintenance organization, may own stock in and render their individual professional services through one professional service corporation.

Passed the House March 29, 1983.

Passed the Senate April 15, 1983.

Approved by the Governor April 22, 1983.

Filed in Office of Secretary of State April 22, 1983.

CHAPTER 101

[Substitute House Bill No. 323]

PUBLIC UTILITY DISTRICTS—TERRITORY ANNEXATION

AN ACT Relating to annexation by public utility districts; and adding a new section to chapter 54.04 RCW.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. There is added to chapter 54.04 RCW a new section to read as follows:

In addition to other powers authorized in Title 54 RCW, public utility districts may annex territory as provided in this section.

The boundaries of a public utility district may be enlarged and new contiguous territory added pursuant to the procedures for annexation by cities and towns provided in RCW 35.13.015 through 35.13.160. The provisions of these sections concerning community municipal corporations, review boards, and comprehensive plans, however, do not apply to public utility district annexations. For purposes of conforming with such procedures, the public utility district is deemed to be the city or town and the board of commissioners is deemed to be the city or town legislative body.

Annexation procedures provided in this section may only be used to annex territory, not located in another public utility district, that is: both: (1) Contiguous to the annexing public utility district; and (2) located within the service area of the annexing public utility district. As used in this section, a

public utility district's "service area" means those areas located outside of the annexing public utility district's boundaries that are generally served with electrical energy by the annexing public utility district. Such service area may, or may not, be recognized in an agreement made under chapter 54.48 RCW, but such service area shall not be provided with electrical energy by another public utility as defined in RCW 54.48.010. An area proposed to be annexed may be located in the same or a different county as the annexing public utility district.

Passed the House March 22, 1983.

Passed the Senate April 13, 1983.

Approved by the Governor April 22, 1983.

Filed in Office of Secretary of State April 22, 1983.

CHAPTER 102

[Engrossed House Bill No. 357]

ANIMAL TECHNICIANS—BOARD OF VETERINARY GOVERNORS—DUTIES

AN ACT Relating to the board of veterinary governors and animal technicians; amending section 21, chapter 71, Laws of 1941 as last amended by section 71, chapter 158, Laws of 1979 and RCW 18.92.015; amending section 4, chapter 71, Laws of 1941 as last amended by section 2, chapter 134, Laws of 1982 and RCW 18.92.030; amending section 13, chapter 124, Laws of 1907 as last amended by section 53, chapter 34, Laws of 1975-76 and RCW 18.92.040; amending section 6, chapter 44, Laws of 1974 ex. sess. 2nd ex. sess. and RCW 18.92.125; amending section 16, chapter 71, Laws of 1941 and RCW 18.92.140; amending section 19, chapter 71, Laws of 1941 as last amended by section 84, chapter 30, Laws of 1975 1st ex. sess. and RCW 18.92.145; amending section 13, chapter 71, Laws of 1941 as last amended by section 7, chapter 44, Laws of 1974 ex. sess. and RCW 18.92.160; amending section 14, chapter 71, Laws of 1941 as last amended by section 24, chapter 67, Laws of 1981 and RCW 18.92.180; adding a new section to chapter 18.92 RCW; repealing section 17, chapter 71, Laws of 1941, section 83, chapter 30, Laws of 1975 1st ex. sess. and RCW 18.92.142; and repealing section 2, chapter 31, Laws of 1979 ex. sess. (unmodified).

Be it enacted by the Legislature of the State of Washington:

Sec. 1. Section 21, chapter 71, Laws of 1941 as last amended by section 71, chapter 158, Laws of 1979 and RCW 18.92.015 are each amended to read as follows:

The term "board" used in this chapter shall mean the Washington state veterinary board of governors; and the term "director" shall mean the director of licensing of the state of Washington. "Animal technician" shall mean a person who has successfully completed an examination administered by the board and who has either successfully completed a post high school course approved by the board(~~(; in consultation with the coordinating committee for occupational education;))~~) in the care and treatment of animals, or a person who has had five years practical experience acceptable to the board with a licensed veterinarian (~~(and who has successfully completed an examination administered by the board)~~).

EXHIBIT 3

S-0542.2

SENATE BILL 5298

State of Washington 54th Legislature 1995 Regular Session

By Senators C. Anderson, Deccio, Franklin and Palmer

Read first time 01/18/95. Referred to Committee on Law & Justice.

AN ACT Relating to health care professionals doing business as professional service corporations or limited liability companies; and amending RCW 18.100.050 and 25.15.045.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. RCW 18.100.050 and 1991 c 72 s 3 are each amended to read as follows:

(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(~~(. PROVIDED, That)~~). One or more of such legally authorized individuals shall be the incorporators of such professional corporation(~~(. PROVIDED FURTHER, That)~~).

(2) Notwithstanding any other provision of this chapter, registered architects and registered engineers may own stock in and render their individual professional services through one professional service corporation(~~(. PROVIDED FURTHER, That licensed)~~).

(3) Notwithstanding any other provision of this chapter, health care professionals(~~(, providing services to enrolled participants either directly or through arrangements with a health maintenance organization registered under chapter 48.46 RCW or federally qualified health maintenance organization,)~~) who are licensed or certified under this title may own stock in and render their individual professional services through one professional service corporation(~~(. AND PROVIDED FURTHER, That)~~) without regard to whether such corporation includes, as shareholders, directors, officers or employees, health care professionals licensed or certified under different chapters of Title 18 RCW. For purposes of this exemption, references to "same specific professional services" or "same

professional services" or similar words shall mean professional services rendered by a licensed or certified health care professional.

(4) Professionals may organize a nonprofit nonstock corporation under this chapter and chapter 24.03 RCW to provide professional services, and the provisions of this chapter relating to stock and referring to Title 23B RCW (~~shall~~) do not apply to any such corporation.

Sec. 2. RCW 25.15.045 and 1994 c 211 s 109 are each amended to read as follows:

(1) A person or group of persons licensed or otherwise legally authorized to render professional services within this state may organize and become a member or members of a professional limited liability company under the provisions of this chapter for the purposes of rendering professional service. A "professional limited liability company" is subject to all the provisions of chapter 18.100 RCW that apply to a professional corporation, and its managers, members, agents, and employees shall be subject to all the provisions of chapter 18.100 RCW that apply to the directors, officers, shareholders, agents, or employees of a professional corporation, except as provided otherwise in this section. Nothing in this section prohibits a person duly licensed or otherwise legally authorized to render professional services in any jurisdiction other than this state from becoming a member of a professional limited liability company organized for the purpose of rendering the same professional services. Nothing in this section prohibits a professional limited liability company from rendering professional services outside this state through individuals who are not duly licensed or otherwise legally authorized to render such professional services within this state. Notwithstanding RCW 18.100.065, persons engaged in a profession and otherwise meeting the requirements of this chapter may operate under this chapter as a professional limited liability company so long as:

(a) At least one manager of the company is duly licensed or otherwise legally authorized to practice the profession in this state; and

(b) Each resident manager or member in charge of an office of the company in this state and each resident manager or member personally engaged in this state in the practice of the profession is duly licensed or otherwise legally authorized to practice the profession in this state.

(2) If the company's members are required to be licensed to practice such profession, and the company fails to maintain for itself and for its members practicing in this state a policy of professional liability insurance, bond, or other evidence of financial responsibility of a kind designated by rule by the

state insurance commissioner and in the amount of at least one million dollars or such greater amount as the state insurance commissioner may establish by rule for a licensed profession or for any specialty within a profession, taking into account the nature and size of the business, then the company's members shall be personally liable to the extent that, had such insurance, bond, or other evidence of responsibility been maintained, it would have covered the liability in question.

(3) For purposes of applying the provisions of chapter 18.100 RCW to a professional limited liability company, the terms "director" or "officer" shall mean manager, "shareholder" shall mean member, "corporation" shall mean professional limited liability company, "articles of incorporation" shall mean certificate of formation, "shares" or "capital stock" shall mean a limited liability company interest, "incorporator" shall mean the person who executes the certificate of formation, and "bylaws" shall mean the limited liability company agreement.

(4) The name of a professional limited liability company must contain either the words "Professional Limited Liability Company," or the words "Professional Limited Liability" and the abbreviation "Co.," or the abbreviation "P.L.L.C." provided that the name of a professional limited liability company organized to render dental services shall contain the full names or surnames of all members and no other word than "chartered" or the words "professional services" or the abbreviation "P.L.L.C."

(5) Subject to the provisions in article VII of this chapter, the following may be a member of a professional limited liability company and may be the transferee of the interest of an ineligible person or deceased member of the professional limited liability company:

(a) A professional corporation, if its shareholders, directors, and its officers other than the secretary and the treasurer, are licensed or otherwise legally authorized to render the same specific professional services as the professional limited liability company; and

(b) Another professional limited liability company, if the managers and members of both professional limited liability companies are licensed or otherwise legally authorized to render the same specific professional services.

(6) Notwithstanding any other provision of this chapter, health care professionals who are licensed or certified under this title may own stock in and render their individual professional services through one limited liability company without regard to whether such company includes, as managers, members, agents, or employees, health care professionals licensed or certified under different chapters

of Title 18 RCW. For purposes of this exemption, references to "same specific professional services" or "same professional services" or similar words shall mean professional services rendered by a licensed or certified health care professional.

--- END ---

p. SB 5298

SB 5298 p.

EXHIBIT 4

CHAPTER 22

[Substitute Senate Bill 6150]

HEALTH CARE PROFESSIONALS—PROFESSIONAL SERVICE CORPORATIONS
AND LIMITED LIABILITY COMPANIES—COMPOSITION

AN ACT Relating to health care professionals doing business as professional service corporations or limited liability companies; and amending RCW 18.100.050 and 25.15.045. Be it enacted by the Legislature of the State of Washington:

Sec. 1. RCW 18.100.050 and 1991 c 72 s 3 are each amended to read as follows:

(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(~~—PROVIDED, That~~). One or more of ((sueh)) the legally authorized individuals shall be the incorporators of ((sueh)) the professional corporation((—PROVIDED FURTHER, That)).

(2) Notwithstanding any other provision of this chapter, registered architects and registered engineers may own stock in and render their individual professional services through one professional service corporation((~~—PROVIDED FURTHER, That~~)).

(3) Licensed health care professionals, providing services to enrolled participants either directly or through arrangements with a health maintenance organization registered under chapter 48.46 RCW or federally qualified health maintenance organization, may own stock in and render their individual professional services through one professional service corporation((~~—AND PROVIDED FURTHER, That~~)).

(4) Professionals may organize a nonprofit nonstock corporation under this chapter and chapter 24.03 RCW to provide professional services, and the provisions of this chapter relating to stock and referring to Title 23B RCW shall not apply to any such corporation.

(5)(a) Notwithstanding any other provision of this chapter, health care professionals who are licensed or certified pursuant to chapters 18.06, 18.19, 18.22, 18.25, 18.29, 18.34, 18.35, 18.36A, 18.50, 18.53, 18.55, 18.64, 18.79, 18.83, 18.89, 18.108, and 18.138 RCW may own stock in and render their individual professional services through one professional service corporation and are to be considered, for the purpose of forming a professional service corporation, as rendering the "same specific professional services" or "same professional services" or similar terms.

(b) Notwithstanding any other provision of this chapter, health care professionals who are licensed pursuant to chapters 18.57 and 18.71 RCW may own stock in and render their individual professional services through one professional service corporation and are to be considered, for the purpose of forming a professional service corporation, as rendering the "same specific professional services" or "same professional services" or similar terms.

(c) Formation of a professional service corporation under this subsection does not restrict the application of the uniform disciplinary act under chapter 18.130 RCW, or applicable health care professional statutes under Title 18 RCW, including but not limited to restrictions on persons practicing a health profession without being appropriately credentialed and persons practicing beyond the scope of their credential.

Sec. 2. RCW 25.15.045 and 1995 c 337 s 14 are each amended to read as follows:

(1) A person or group of persons licensed or otherwise legally authorized to render professional services within this state may organize and become a member or members of a professional limited liability company under the provisions of this chapter for the purposes of rendering professional service. A "professional limited liability company" is subject to all the provisions of chapter 18.100 RCW that apply to a professional corporation, and its managers, members, agents, and employees shall be subject to all the provisions of chapter 18.100 RCW that apply to the directors, officers, shareholders, agents, or employees of a professional corporation, except as provided otherwise in this section. Nothing in this section prohibits a person duly licensed or otherwise legally authorized to render professional services in any jurisdiction other than this state from becoming a member of a professional limited liability company organized for the purpose of rendering the same professional services. Nothing in this section prohibits a professional limited liability company from rendering professional services outside this state through individuals who are not duly licensed or otherwise legally authorized to render such professional services within this state. Notwithstanding RCW 18.100.065, persons engaged in a profession and otherwise meeting the requirements of this chapter may operate under this chapter as a professional limited liability company so long as each member personally engaged in the practice of the profession in this state is duly licensed or otherwise legally authorized to practice the profession in this state and:

(a) At least one manager of the company is duly licensed or otherwise legally authorized to practice the profession in this state; or

(b) Each member in charge of an office of the company in this state is duly licensed or otherwise legally authorized to practice the profession in this state.

(2) If the company's members are required to be licensed to practice such profession, and the company fails to maintain for itself and for its members practicing in this state a policy of professional liability insurance, bond, or other evidence of financial responsibility of a kind designated by rule by the state insurance commissioner and in the amount of at least one million dollars or ((sueh)) a greater amount as the state insurance commissioner may establish by rule for a licensed profession or for any specialty within a profession, taking into account the nature and size of the business, then the company's members ((~~shall be~~)) are personally liable to the extent that, had ((sueh)) the insurance,

bond, or other evidence of responsibility been maintained, it would have covered the liability in question.

(3) For purposes of applying the provisions of chapter 18.100 RCW to a professional limited liability company, the terms "director" or "officer" ((s#att)) means manager, "shareholder" ((s#att)) means member, "corporation" ((s#att)) means professional limited liability company, "articles of incorporation" ((s#att)) means certificate of formation, "shares" or "capital stock" ((s#att)) means a limited liability company interest, "incorporator" ((s#att)) means the person who executes the certificate of formation, and "bylaws" ((s#att)) means the limited liability company agreement.

(4) The name of a professional limited liability company must contain either the words "Professional Limited Liability Company," or the words "Professional Limited Liability" and the abbreviation "Co.," or the abbreviation "P.L.L.C." provided that the name of a professional limited liability company organized to render dental services shall contain the full names or surnames of all members and no other word than "chartered" or the words "professional services" or the abbreviation "P.L.L.C."

(5) Subject to the provisions in article VII of this chapter, the following may be a member of a professional limited liability company and may be the transferee of the interest of an ineligible person or deceased member of the professional limited liability company:

(a) A professional corporation, if its shareholders, directors, and its officers other than the secretary and the treasurer, are licensed or otherwise legally authorized to render the same specific professional services as the professional limited liability company; and

(b) Another professional limited liability company, if the managers and members of both professional limited liability companies are licensed or otherwise legally authorized to render the same specific professional services.

(6)(a) Notwithstanding any other provision of this chapter, health care professionals who are licensed or certified pursuant to chapters 18.06, 18.19, 18.22, 18.25, 18.29, 18.34, 18.35, 18.36A, 18.50, 18.53, 18.55, 18.64, 18.79, 18.83, 18.89, 18.108, and 18.138 RCW may own membership interests in and render their individual professional services through one limited liability company and are to be considered, for the purpose of forming a limited liability company, as rendering the "same specific professional services" or "same professional services" or similar terms.

(b) Notwithstanding any other provision of this chapter, health care professionals who are licensed pursuant to chapters 18.57 and 18.71 RCW may own membership interests in and render their individual professional services through one limited liability company and are to be considered, for the purpose of forming a limited liability company, as rendering the "same specific professional services" or "same professional services" or similar terms.

(c) Formation of a limited liability company under this subsection does not restrict the application of the uniform disciplinary act under chapter 18.130

RCW, or any applicable health care professional statutes under Title 18 RCW, including but not limited to restrictions on persons practicing a health profession without being appropriately credentialed and persons practicing beyond the scope of their credential.

Passed the Senate February 8, 1996.

Passed the House February 27, 1996.

Approved by the Governor March 7, 1996.

Filed in Office of Secretary of State March 7, 1996.

CHAPTER 23

[Senate Bill 6167]

PETITIONS FOR DISSOLUTION OF MARRIAGE—JURISDICTION

AN ACT Relating to jurisdiction of petitions for dissolution of marriage; and amending RCW 26.09.030.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. RCW 26.09.030 and 1973 1st ex.s. c 157 s 3 are each amended to read as follows:

When a party who (1) is a resident of this state, or ((w#e)) (2) is a member of the armed forces and is stationed in this state, or (3) is married to a party who is a resident of this state or who is a member of the armed forces and is stationed in this state, petitions for a dissolution of marriage, and alleges that the marriage is irretrievably broken and when ninety days have elapsed since the petition was filed and from the date when service of summons was made upon the respondent or the first publication of summons was made, the court shall proceed as follows:

(1) If the other party joins in the petition or does not deny that the marriage is irretrievably broken, the court shall enter a decree of dissolution.

(2) If the other party alleges that the petitioner was induced to file the petition by fraud, or coercion, the court shall make a finding as to that allegation and, if it so finds shall dismiss the petition.

(3) If the other party denies that the marriage is irretrievably broken the court shall consider all relevant factors, including the circumstances that gave rise to the filing of the petition and the prospects for reconciliation and shall:

(a) Make a finding that the marriage is irretrievably broken and enter a decree of dissolution of the marriage; or

(b) At the request of either party or on its own motion, transfer the cause to the family court, refer them to another counseling service of their choice, and request a report back from the counseling service within sixty days, or continue the matter for not more than sixty days for hearing. If the cause is returned from the family court or at the adjourned hearing, the court shall:

(i) Find that the parties have agreed to reconciliation and dismiss the petition; or

EXHIBIT 5

HOUSE BILL 3156

State of Washington 58th Legislature 2004 Regular Session

By Representatives Campbell and Cody

Read first time 01/30/2004. Referred to Committee on Health Care.

1 AN ACT Relating to professional service corporations; and amending
2 RCW 18.100.050.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 **Sec. 1.** RCW 18.100.050 and 2001 c 251 s 29 are each amended to
5 read as follows:

6 (1) An individual or group of individuals duly licensed or
7 otherwise legally authorized to render the same professional services
8 within this state may organize and become a shareholder or shareholders
9 of a professional corporation for pecuniary profit under the provisions
10 of Title 23B RCW for the purpose of rendering professional service.
11 One or more of the legally authorized individuals shall be the
12 incorporators of the professional corporation.

13 (2) Notwithstanding any other provision of this chapter, registered
14 architects and registered engineers may own stock in and render their
15 individual professional services through one professional service
16 corporation.

17 (3) Licensed health care professionals, providing services to
18 enrolled participants either directly or through arrangements with a
19 health maintenance organization registered under chapter 48.46 RCW or

1 federally qualified health maintenance organization, may own stock in
2 and render their individual professional services through one
3 professional service corporation.

4 (4) Professionals may organize a nonprofit nonstock corporation
5 under this chapter and chapter 24.03 RCW to provide professional
6 services, and the provisions of this chapter relating to stock and
7 referring to Title 23B RCW shall not apply to any such corporation.

8 (5) (a) Notwithstanding any other provision of this chapter, health
9 care professionals who are licensed or certified pursuant to chapters
10 18.06, 18.225, 18.22, 18.25, 18.29, 18.34, 18.35, 18.36A, 18.50, 18.53,
11 18.55, 18.57, 18.57A, 18.59, 18.64, 18.71, 18.71A, 18.74, 18.79, 18.83,
12 18.89, 18.108, and 18.138 RCW may own stock in and render their
13 individual professional services through one professional service
14 corporation and are to be considered, for the purpose of forming a
15 professional service corporation, as rendering the "same specific
16 professional services" or "same professional services" or similar
17 terms.

18 (b) (~~Notwithstanding any other provision of this chapter, health~~
19 ~~care professionals who are regulated under chapters 18.59 and 18.74 RCW~~
20 ~~may own stock in and render their individual professional services~~
21 ~~through one professional service corporation formed for the sole~~
22 ~~purpose of providing professional services within their respective~~
23 ~~scope of practice.~~

24 (e)) Formation of a professional service corporation under this
25 subsection does not restrict the application of the uniform
26 disciplinary act under chapter 18.130 RCW, or applicable health care
27 professional statutes under Title 18 RCW, including but not limited to
28 restrictions on persons practicing a health profession without being
29 appropriately credentialed and persons practicing beyond the scope of
30 their credential.

--- END ---

3156

Sponsor(s): Representatives Campbell and Cody

Brief Description: Concerning the formation of professional service corporations.

HB 3156 - DIGEST

Amends RCW 18.100.050 relating to professional service corporations.