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No. 267024

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By mg

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III



COLUMBIA PHYSICAL THERAPY, INC., P.S.,

Petitioner,

v.

BENTON FRANKLIN ORTHOPEDIC ASSOCIATES, P.L.L.C.; BENTON
FRANKLIN PHYSICAL THERAPY, INC.; THOMAS R. BURGDORFF;
CHRISTOPHER A. KONTOGIANIS; ARTHUR E. THIEL; DAVID W. FISCHER;
HEATHER L. PHIPPS; RODNEY KUMP; JAY WEST; and DOES 1 through 9,

Respondents.

PETITIONER'S REPLY IN SUPPORT OF
MOTION FOR DISCRETIONARY REVIEW

Attorneys for Petitioner/Plaintiff

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ORIGINAL

I. SUMMARY OF REPLY

In their Response, the Respondent Defendants attempt to back away from their previous stipulation to the trial court and argue against or to limit discretionary review on two issues: 1) whether Defendants violate the corporate practice of medicine doctrine; and 2) whether Defendants fail as a matter of law to satisfy the “direct and immediate personal supervision” test. Defendants’ attempt to recharacterize its prior stipulation on these issues is without merit, and the court should reject it.

First, the distinction between the corporate practice of medicine doctrine and the corporate practice of a learned profession doctrine is a difference without legal significance. In fact, Columbia has used the terms interchangeably in pleadings and various motions since bringing the claim last June, and has repeatedly explained that the technical common law prohibition is against the corporate practice of a learned profession, but that in the health care context (such as this case) it is often referred to as the “corporate practice of medicine doctrine.” Although Defendants are correct that the word “medicine” typically applies to licensed physicians, the issue is whether the Defendants are violating the

common law doctrine that prevents Benton Franklin from practicing medicine and physical therapy through licensed employees without legislative authorization.

Regardless of how Defendants characterize Columbia's common law claim, the claim that Defendants are violating the common law must eventually be resolved. If it is not resolved now, this undermines the fundamental purpose of discretionary review, which is to help terminate the litigation.

Second, Defendants stipulated to discretionary review on whether Defendants, as a matter of law, fail to satisfy the *Day*¹ supervision requirements. To now claim otherwise is troubling. Specifically, on October 17, 2007, the parties stipulated, and the trial court certified, the following issue for discretionary review:

[T]he Court's decision that there is an issue of fact as to whether defendants' could satisfy the supervision requirement under RCW 19.68.040.²

For Defendants to now argue this issue should be rejected because it is an issue of fact is contrary to its previous stipulation. Therefore, Columbia asks the Court to reject Defendants' unexpected reversal and grant review on this issue, allowing the

¹ *Day v. Inland Empire Optical, Inc.*, 76 Wn.2d 407, 456 P.2d 1011 (1969).

² Columbia's Motion for Discretionary Review, Appendix A (Issue No. 3).

Court of Appeals to determine if there is an issue of fact, or if instead Columbia is entitled to judgment as a matter of law.

II. ARGUMENT REGARDING ISSUES FOR REVIEW

A. The Corporate Practice of Medicine Doctrine

There is no legal or material distinction between the corporate practice of medicine and the corporate practice of a learned profession. Under Washington's common law, a company cannot "engage in the practice of a learned profession through licensed employees unless legislatively authorized."³ In the health care context, this doctrine is often referred to as the corporate practice of medicine.

In June of 2007, Columbia amended its complaint alleging Defendants violated Washington's common law corporate practice of medicine doctrine. Specifically, the Complaint alleged:

Defendant BFOA and its physicians violate the corporate practice of medicine doctrine by engaging in the practice of a learned profession through licensed employees without legislative authorization. Defendant physical therapists violate this doctrine by performing professional services through a company without legislative authorization.⁴

In September of 2007, Columbia moved for summary judgment on this issue, and argued as follows:

³ *Morelli v. Ehsan*, 110 Wn.2d 555, 561, 756 P.2d 129 (1988).

Washington has strict common law prohibitions against the corporate practice of **medicine**. 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.* (emphasis added); 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**”).⁵

Thus, Defendants’ argument that Columbia’s corporate practice of a learned profession claim was not addressed at summary judgment is not correct. Columbia is not, as Defendants’ allege, raising this issue for the first time on review. As the record indicates, Columbia has consistently used the terms “corporate practice of learned profession” and “corporate practice of medicine” interchangeably in pleadings and before the trial court at oral argument. Likewise, Columbia has repeatedly explained that “this common law doctrine is sometimes referred to as the corporate practice of medicine doctrine when it is applied to the healing arts.”⁶

In fact, the headings in Columbia’s various summary judgment pleadings referred to the claim as “the Corporate Practice

⁴ Appendix A (Plaintiff’s Second Amended Complaint, p. 5).

⁵ Appendix B (Plaintiff’s Motion for Partial Summary Judgment, pp.8-9).

⁶ Appendix C (Plaintiff’s Reply in Support of Motion for Partial Summary Judgment, p. 6).

of a Learned Profession,”⁷ and Defendants never argued to the trial court that Columbia was seeking relief on a claim broader than what Columbia alleged in its complaint.

In any event, regardless of how Defendants choose to characterize Columbia’s claim, and regardless of the name of the doctrine the court eventually chooses, the issue that needs to be resolved is whether Defendants can practice medicine and physical therapy through licensed employees without legislative authorization.

Also, Defendants’ argument that Washington has no “general common law prohibition on corporations practicing learned professions” is without merit. This issue has been extensively briefed in this case, and indeed the state supreme court has expressly recognized that the “common law prohibits ‘the [corporate] practice of medicine, surgery, dentistry, or any of the limited healing arts.’”⁸

Columbia sought summary judgment on this issue, which the trial court denied, and now Columbia seeks review on this issue.

⁷ Appendix C and Appendix D (Plaintiff’s Response to Defendants’ Motion for Summary Judgment, p. 15).

⁸ *State ex rel. Standard Optical Co. v. Superior Court for Chelan County*, 17 Wn.2d 323, 329, 135 P.2d 839 (1943).

B. RCW 19.68.040

The parties stipulated, and the trial court certified, the following issue for discretionary review:

The Court's denial of Columbia's motion for summary judgment on its RCW Chapter 19.68 claim, specifically, the Court's apparent rejection of Columbia's argument that RCW 19.68.040 applies only to similarly licensed professionals, and the **Court's decision that there is an issue of fact as to whether defendants' could satisfy the supervision requirement under RCW 19.68.040.**⁹

As an initial matter, Columbia argues that the "employee exception" in RCW 19.68.040 does not apply in this case. Under RCW 19.68.040, "one licensee who employs another licensee" may profit from that employee's services. The statute's plain language indicates that the licensees must be similarly licensed, which is supported by the fact that the Professional Service Corporation Act permits only similarly-licensed professionals to render their services to the public through a single professional corporation.¹⁰ Accordingly, Columbia asks the Court to find that the employee exception under RCW 19.68.040 does not apply in this case as a matter of law.

⁹ Columbia's Motion for Discretionary Review, Appendix A.

¹⁰ Columbia's claims under the Professional Service Corporation Act, RCW Chapter 18.100 (as applied to Defendant through RCW 25.15), have also been stipulated to and certified for review.

If the Court concludes that the employee exception under RCW 19.68.040 applies in this case, Defendants must satisfy the statute's minimum supervision requirements as announced in *Day v. Inland Empire, supra*. Defendants challenge the trial court's finding that the *Day* supervision requirement applies in this case. Columbia challenges the trial court's finding that there is an issue of fact regarding whether Defendants can satisfy the supervision requirement.

Columbia does not believe there is a genuine issue of material fact that prevents summary judgment. A few brief comments about the *Day* standard will help explain why. As explained above, RCW 19.68.040 does not prohibit "one licensee who employs another licensee" from profiting from that employee's services. Accordingly, the statute expressly contemplates a direct employment relationship between the licensees. Here, defendant physicians do not employ the physical therapists; rather, the physical therapists are employed by a company owned by the physicians.¹¹ Therefore, the "employee exception" under RCW 19.68.040 does not strictly apply in this case.

¹¹ Cross-Petitioners' Motion for Discretionary Review, p. 3, ¶b.

Nevertheless, in these circumstances (i.e., where physicians do not directly employ the licensees but instead own the company that employs them) courts may look at the nature of the relationship between the licensees in order to determine whether there is an employer-employee relationship for purposes of RCW 19.68.040.¹² For example, as Defendants correctly argued to the trial court in their summary judgment pleadings, the *Day* Court concluded that RCW 19.68.040 requires “personal and immediate direction and supervision” when “the licensee to whom the referral is made is not employed by the referring doctor.”¹³

In *Day*, the defendant physicians owned an optical business that employed opticians. The physicians referred patients to these opticians, whose office was located downstairs from the physicians’ office. The *Day* Court concluded that the optician’s offices – just downstairs – were too physically separated from the physicians’ practice to satisfy the supervision requirements under RCW 19.68.040.

In this case, Defendant physicians own a business that employs physical therapists. The defendant physicians work in

¹² *Day*, 76 Wn.2d at 420.

different buildings – and sometimes different cities – from the defendant physical therapists. Indeed, their respective practices are so separated that defendant physicians admit they 1) never or only rarely visit the Benton Franklin Physical Therapy building,¹⁴ 2) provide no more supervision over patients who receive physical therapy treatment at Benton Franklin Physical Therapy than they do over their patients who are treated elsewhere,¹⁵ and 3) do not supervise BFOA physical therapists when the therapists are treating patients referred by non-BFOA physicians.¹⁶

Under the undisputed facts in this case, no reasonable fact finder could conclude that defendant physicians have “direct and immediate personal supervision” over defendant physical therapists. Accordingly, whether Defendants can satisfy this requirement may be resolved as a matter of law.

¹³ Appendix E (Defendants’ Response to Plaintiff’s Motion for Partial Summary Judgment, pp. 18 and 21).

¹⁴ Appendix F at 25-26 (Deposition Transcript of Defendant Phipps); Appendix G at 58-59 (Deposition Transcript of Defendant Fischer); Appendix H at 45-46 (Deposition Transcript of Defendant Thiel).

¹⁵ Appendix G at 59.

¹⁶ Appendix I at 8 (Defendants’ Motion for Summary Judgment).

For these reasons, Columbia seeks – and the trial court certified – review on whether Defendants satisfy the supervision requirements under RCW 19.68.040.

Respectfully submitted this 21st day of February, 2008.

STAFFORD FREY COOPER

By:

A handwritten signature in black ink, appearing to read "D. E. Bailey", with a long horizontal flourish extending to the right.

Darrin E. Bailey, WSBA #34955
Danford D. Grant, WSBA #26042
Attorneys for Petitioner/Plaintiff

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 a copy of this ***Reply in Support of Motion for Discretionary Review*** on the following individuals:

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

Attorneys for Respondents

VIA FACSIMILE
 VIA FIRST CLASS MAIL
 VIA FEDEX
 VIA MESSENGER

Dated this 21st day of February, 2008, at Seattle,
Washington.


MARY ANN BLACKLEDGE

APPENDICES

- Appendix A** Plaintiff's Second Amended Complaint, pp. 1, 5.
- Appendix B** Plaintiff's Motion for Partial Summary Judgment, pp. 1, 8, 9.
- Appendix C** Plaintiff's Reply in Support of Motion for Partial Summary Judgment, pp. 1, 6.
- Appendix D** Plaintiff's Response to Defendants' Motion for Summary Judgment, pp. 1, 15.
- Appendix E** Defendants' Response in Opposition to Plaintiff's Motion for Partial Summary Judgment, pp. 1, 18, 21.
- Appendix F** Deposition testimony of Heather Phipps, D.O., pp. 1, 25, 26.
- Appendix G** Deposition testimony of David Fischer, M.D., pp. 1, 58, 59.
- Appendix H** Deposition testimony of Arthur Thiel, M.D., pp. 1, 45, 46.
- Appendix I** Defendants' Memorandum in Support of Motion for Summary Judgment, pp. 1, 8.

APPENDIX A

The Honorable Dennis Yule

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SUPERIOR COURT OF WASHINGTON
IN AND FOR BENTON COUNTY

COLUMBIA PHYSICAL THERAPY, INC.,
P.S.,

Plaintiff,

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,

Defendants.

NO. 05-2-01909-1

PLAINTIFF'S SECOND AMENDED
COMPLAINT

Plaintiff Columbia Physical Therapy, Inc., P.S. (Columbia) avers:

I. PARTIES

1.1. Plaintiff Columbia is a Washington corporation doing business in the state of Washington. Columbia has satisfied all requisites to the maintenance of this lawsuit.

1.2. Defendant Benton Franklin Orthopedic Associates, P.L.L.C. (BFOA) is a Washington Professional Limited Liability Company doing business in the State of Washington as a medical office.

PLAINTIFF'S SECOND AMENDED COMPLAINT - 1
10268-027034 167656

COPY

A-53

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1 4.2. RCW 19.68.020 and RCW 18.130.180—unprofessional conduct.

2 Defendants' receipt of any profits or other valuable consideration resulting from its
3 ownership of BFPT and/or a physical therapy office constitutes unprofessional conduct
4 under RCW 19.68.020 and RCW 18.130.180.

5 4.3. RCW 19.86.020—Consumer Protection. Defendants' business practices

6 violate Washington's Consumer Protection Act. Specifically, Defendants engaged in
7 unfair acts and methods of competition when they created a physical therapy
8 corporation and/or opened a physical therapy office to which they could refer patients.
9 Defendants unlawfully refer patients to their own physical therapy office, thus unfairly
10 reducing the referrals to other area physical therapists, including Plaintiff Columbia.

11 4.4. RCW 18.100.010 et seq—Professional Services Corporation Act.

12 Defendant corporation and defendant physicians are engaged in business other than
13 the rendering of professional services for which their company was formed. Likewise,
14 Defendant physical therapists are not duly licensed to perform the same professional
15 services for which the company was formed.

16 4.5 Washington's Corporate Practice of Medicine Doctrine. Defendant BFOA

17 and its physicians violate the corporate practice of medicine doctrine by engaging in the
18 practice of a learned profession through licensed employees without legislative
19 authorization. Defendant physical therapists violate this doctrine by performing
20 professional services through a company without legislative authorization.

APPENDIX B

The Honorable Dennis D. Yule
Hearing Date: September 12, 2007
Hearing Time: 9:00 a.m.

SUPERIOR COURT OF WASHINGTON
IN AND FOR BENTON COUNTY

COLUMBIA PHYSICAL THERAPY, INC.,
P.S.,

Plaintiff,

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,

Defendants.

NO. 05-2-01909-1

PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT

I. INTRODUCTION

Defendants' business arrangement at Benton Franklin Orthopedic Associates (BFOA) violates the Washington Professional Services Corporation Act, the corporate practice of medicine doctrine, and the Washington Anti-Rebate Statute. Plaintiff seeks summary judgment on these three claims.

Defendants violate the Professional Services Corporation Act (RCW Chapter 18.100) (the "Act") and RCW 25.15.045 by providing physician services and physical

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY
JUDGMENT - 1
10268-027034 175768

COPY

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1 The legislature specifically defined which health care professionals provide the
2 same services and therefore may render their services through a single professional
3 corporation. RCW 18.100.050(5)(a)-(b). Under section (5)(a), the legislature grouped
4 twenty-one health care professionals that provide the "same professional services" for
5 purposes of the Act, including physicians.²³ RCW 18.100.050(5)(a). Notably, the
6 legislature excluded physical therapists (and occupational therapists) from this list, and
7 instead listed both physical therapists and occupational therapists under section (5)(b).
8 RCW 18.100.050(5)(b). Thus, physical therapists and physicians do not provide the
9 "same professional services" under the Act, and therefore cannot provide their
10 professional services through a single corporation. In fact, the Act specifically states
11 that physical therapists and occupational therapists may only render their professional
12 services through a professional corporation "formed for the sole purpose of providing
13 professional services within their respective scope of practice." RCW 18.100.050(5)(b).

14 "The intent of the Legislature to bar other than similarly licensed health care
15 professionals from involvement in professional services is amply delineated." See
16 *Morelli*, 110 Wn.2d at 559. Because the Legislature has specifically determined that
17 physicians and physical therapists are not similarly licensed professionals, a single
18 PLLC like BFOA cannot provide both of these professional services.

19 **B. The Corporate Practice of Medicine Doctrine prohibits physicians from**
20 **employing licensed physical therapists in a PLLC without legislative**
authorization.

21 ²³ These similarly-licensed individuals are: Acupuncturists, Mental Health Counselors/Marriage And
22 Family Therapists/Social Workers, Podiatric Medicine And Surgery, Chiropractors, Dental Hygienists,
23 Dispensing Opticians, Hearing And Speech Services, Naturopaths, Midwives, Optometrists, Ocularists,
Osteopaths, Osteopathic Physicians' Assistants, Pharmacists, Physicians, Physician Assistants, Nurses,
Psychologists, Respiratory Care Practitioners, Massage Practitioners, and Dieticians And Nutritionists.
RCW 18.100.050(5)(a). See also Bailey Decl. Ex. T for illustrative chart.

1 Washington has strict common law prohibitions against the corporate practice of
2 medicine. See, e.g., *Morelli v. Ehsan*, 110 Wn.2d 555, 561, 756 P.2d 129 (1988).
3 Specifically, Washington corporations "cannot engage in the practice of a learned
4 profession through licensed employees unless legislatively authorized." *Id.*; see also
5 *Standard Optical Co. v. Superior Court*, 17 Wn.2d 323, 135 P.2d 839 (1943) ("neither a
6 corporation nor any unlicensed person or entity may engage, through licensed
7 employees, in the practice of learned professions"). Applied to physicians, this
8 prohibition is generally referred to as the "corporate practice of medicine doctrine." *Id.*,
9 see also *Standard Optical*, 17 Wn.2d at 328. Therefore, a physician or physical
10 therapist cannot practice their professions through a corporation unless they are
11 specifically permitted to do so by statute.

12 Because defendant BFOA employs physicians and physical therapists,²⁴ it
13 engages "in the practice of a learned profession through licensed employees." See e.g.,
14 *Morelli* at 561. Thus, BFOA must be specifically authorized to perform the professional
15 services of physicians and physical therapists. Because BFOA is not legislatively
16 authorized to provide both physician services and physical therapy services²⁵ (i.e.,
17 because the two professions cannot practice together in a single PLLC as demonstrated
18 above) defendants violate the doctrine.

19 **C. Defendants violate the anti-rebate statute because they pay or receive a**
20 **profit in connection with either (1) the referral of patients or (2) the**
21 **furnishing of care.**

22 ²⁴ Bailey Decl., Ex. S (excerpt from Defendants' response to Plaintiff's interrogatory No. 9).

23 ²⁵ *Supra* Section III.A.

APPENDIX C

The Honorable Dennis D. Yule
September 12, 2007 at 9:00 AM

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SUPERIOR COURT OF WASHINGTON
IN AND FOR BENTON COUNTY

COLUMBIA PHYSICAL THERAPY, INC.,
P.S.,

Plaintiff,

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,

Defendants.

NO. 05-2-01909-1

PLAINTIFF'S REPLY IN SUPPORT
OF MOTION FOR PARTIAL
SUMMARY JUDGMENT

Defendants violate RCW Chapter 18.100 because the statute only permits
PLLCs (or corporations) to render the **same** professional service. Physician and
physical therapy services are not the same professional service.¹ Thus, RCW Chapter
18.100 prohibits the same PLLC (or corporation) from performing both physician and
physical therapy services.

¹ RCW 18.100.050(5)(a)-(b).

1 render the same professional service may render their service as part of the same
2 corporation.

3 Regardless, even if the requirements of RCW 18.100 depend on the common
4 law doctrine, summary judgment for Plaintiff is still appropriate because as explained
5 below the common law did prohibit physical therapists from forming corporations.

6 **B. Defendants have Violated the Corporate Practice of a Learned Profession
7 Doctrine¹⁰**

8 1. Physical therapy is a learned profession.

9 Washington's common law is strict and clear: corporations "cannot engage in the
10 practice of a learned profession through licensed employees unless legislatively
11 authorized."¹¹ Defendants seem to argue that because no published Washington case
12 has expressly dealt with physical therapists and decided that physical therapy is a
13 learned profession, the common law doctrine does not apply to physical therapists.¹²
14 Defendant's argument is without merit.

15 Washington courts and the legislature both recognize that the corporate practice
16 of a learned profession doctrine extends beyond the handful of published cases in
17 Washington.¹³ Moreover, Defendants cannot seriously dispute that physical therapy is

18 ¹⁰ As previously explained, this common law doctrine is sometimes referred to as the corporate
19 practice of medicine doctrine when it is applied to the healing arts.

20 ¹¹ See, e.g., *Morelli v. Ehsan*, 110 Wn.2d 555, 561, 756 P.2d 129 (1988) (emphasis added).

21 ¹² See Defendants' Memo. in Opposition to Plaintiff's Motion for Summary Judgment, p. 11.

22 ¹³ See e.g., RCW 18.100.030(1) (specifically noting learned professions are not limited to the
23 several common professions listed); *State ex rel. Standard Optical Co. v. Superior Court for
Chelan County*, 17 Wn.2d 323, 329, 135 P.2d 839 (1943) ("common law prohibits 'the
[corporate] practice of medicine, surgery, dentistry, or any of the limited healing arts....'"
(emphasis added) (quoting 41 Am.Jur., title 'Physicians and Surgeons,' p. 149, § 20). Physical
therapy is a "healing art." See RCW 70.124.020(3) (a practitioner of the healing arts includes a
individual licensed to practice "physical therapy").

APPENDIX D

The Honorable Dennis D. Yule
Hearing Date: September 12, 2007
Hearing Time: 8:30 a.m.

SUPERIOR COURT OF WASHINGTON
IN AND FOR BENTON COUNTY

COLUMBIA PHYSICAL THERAPY, INC.,
P.S.,

Plaintiff,

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,

Defendants.

NO. 05-2-01909-1

PLAINTIFF'S RESPONSE TO
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

I. INTRODUCTION

The Court should deny Defendants' Motion for Summary Judgment.

Defendant physicians are violating the Washington Anti-Rebate Statute because they are profiting from care provided by physical therapists and no exception to the Anti-Rebate Statute applies. Regardless of how poorly written the Anti-Rebate Statute is, the rule is clear: the Statute prohibits a health care professional from receiving profits from

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT - 1

10266-027034 163291

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1 In 1999, when the legislature added physical therapists and occupational
2 therapists in a new subsection (5)(b) the legislature had already acknowledged that
3 listing professionals in subsection (5)(b) distinguished professionals from those listed in
4 section 5(a), and that listing professionals in subsection (5)(a) was the appropriate
5 avenue to allow the professionals listed in 5(a) to render their professional services
6 together. In other words, the decision not to include physical therapists and
7 occupational therapists on the list in subsection (5)(a) indicates the legislature's intent to
8 exclude them from that list and thus prevent them from rendering professional services
9 through a corporation with professionals on that list.

10 The 2001 amendment drives this point home. In that amendment the legislature
11 allowed mental health counselors, marriage and family therapists, and social workers to
12 render professional services through a corporation with others listed in subsection
13 (5)(a), by simply adding them to the list in subsection (5)(a)¹⁵ instead of a new
14 subsection of their own. Because the legislature included physical therapists in a
15 separate section from physicians, the legislature intended to treat physical therapists
16 differently from health care providers listed in subsection 5(a), including physicians.

17 **C. Defendants Violate the Corporate Practice of a Learned Profession**

18 Under Washington's common law, corporations "cannot engage in the practice of
19 a learned profession through licensed employees unless legislatively authorized." See,
20 e.g., *Morelli v. Ehsan*, 110 Wn.2d 555, 561, 756 P.2d 129 (1988). Defendant BFOA
21 employs physicians and physical therapists, both of whom are licensed, and therefore

22 ¹⁵ Bailey Decl., Ex. D.

APPENDIX E

The Honorable Dennis Yule
Hearing Date: September 12, 2007
Hearing Time: 9:00 a.m.

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF BENTON

COLUMBIA PHYSICAL THERAPY, INC.,)
P.S.,)
Plaintiff,) NO. 05-2-01909-1
vs.) RESPONSE: MEMORANDUM IN
BENTON FRANKLIN ORTHOPEDIC) OPPOSITION TO PLAINTIFF'S
ASSOCIATES, P.L.L.C.; BENTON) MOTION FOR PARTIAL SUMMARY
FRANKLIN PHYSICAL THERAPY, INC.;) JUDGMENT
THOMAS R. BURGDORFF;)
CHRISTOPHER A. KONTOGIANIS;)
ARTHUR E. THIEL; DAVID W. FISCHER;)
HEATHER L. PHIPPS; RODNEY KUMP;)
JAY WEST; and DOES 1 through 9,)
Defendants.)

Defendant and Counterclaimant Benton Franklin Orthopedic Associates, P.L.L.C., and Defendants Benton Franklin Physical Therapy, Inc., Thomas R. Burgdorff, Christopher A. Kontogianis, Arthur E. Thiel, David W. Fischer, Heather L. Phipps, Rodney Kump, Jay West and Does 1 through 9, by and through their attorneys, Michael H. Church and Matthew T. Ries of Stamper Rubens, P.S., hereby file this Response Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment filed August 14, 2007.

I. INTRODUCTION

The Plaintiff and Defendants have filed cross-motions for summary judgment on the Plaintiff's new claims regarding the Washington Professional Services Corporation Act and the

RESPONSE MEMORANDUM
IN OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT: 1

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diagnosis. RCW § 19.68.010(2) therefore permits ownership of corporation providing that service.

1
2 **E. The Court has already ruled that there are disputed questions of material fact concerning the "immediate and direct supervision" standard set forth in Day.**

3
4 In addition to the specific exception for ownership in corporations providing diagnosis
5 services, Defendants also moved for summary judgment on the theory that RCW § 19.68.040
6 permitted the doctors' profiting from referrals to Benton Franklin Physical Therapy. RCW §
7 19.68.040 limits the application of RCW Chapter 19.68 by specifying that it does not prohibit
8 licensees (defined in RCW § 19.68.010 as "any person licensed by the state of Washington to
9 engage in the practice of medicine and surgery, drugless treatment in any form, dentistry, or
10 pharmacy") from charging or collecting "... compensation for professional services rendered by
11 the employee licensee."

12
13 As the Washington Supreme Court explained in Day, RCW § 19.68.040 not only permits
14 doctors from profiting from their direct employees, but also from licensees employed by a
15 separate corporation owned by the doctors as long as there is direct and immediate supervision of
16 the licensees. To briefly summarize Day, the defendant doctors in that case practiced
17 ophthalmology under a partnership called the Spokane Eye Clinic. Day v. Inland Empire Optical,
18 Inc., 76 Wn.2d 407, 410, 456 P.2d 1011 (1969). The doctors also owned all the capital stock of a
19 corporation called Inland Empire Optical Company which operated an optical dispensing
20 business on a lower floor. Id. Inland Empire Optical Company in turn employed licensed
21 opticians to dispense the eyeglasses and the doctors profited by virtue of being the sole
22 shareholders of Inland Empire Optical Company. Id. at 410-411.

23
24 Noting that RCW § 19.68.040 permitted ophthalmologists to employ opticians, the court
25 established a test for deciding whether opticians could still be considered employees even if they
26 worked for a separate corporation owned by the doctors:

27
28 One test of the validity of such a relationship under RCW 19.68 is whether a
29 patient of ordinary understanding and reasonable prudence should reasonably
30 understand that eyeglasses dispensed by the ophthalmologist's dispensing optician
31 are in fact under not only the personal and immediate direction and supervision of
the ophthalmologist, but at his responsibility as well. If the circumstances are such
that the answer to this query is in the affirmative, then the ophthalmologist, we
think, is within his statutory rights under RCW 19.68. If, however, the
relationship between ophthalmologist and optician is so remote, indirect or distant

1 determine whether such nurses and other health care professionals employed by the infusion
2 therapy company could also be deemed "employees" of the physician practice. Id. at *5. The
3 Attorney General concluded that if the physician exercised "... actual and exclusive control over
4 the performance of the infusion company nurse's professional duties ... the nurse would be
5 deemed the physician's employee under the loaned servant doctrine." Id.

6 The Attorney General Opinion makes it clear, however, that the analysis of supervision
7 and control is applicable only when the licensee to whom the referral is made is not employed by
8 the referring doctor. This is consistent with the Washington Supreme Court's most recent ruling
9 in Wright v. Jeckle, 158 Wn.2d 375, (2006), addressed previously, which firmly holds that RCW
10 Chapter 19.68 is not concerned with referrals from a physician to his or her employed
11 professionals. In Wright, the Washington Supreme Court had its first opportunity since Day to
12 interpret RCW Chapter 19.68 and it took that opportunity to clarify that "the legislature intended
13 to prohibit kickbacks, not profits" when it enacted RCW Chapter 19.68. Wright, 158 Wn.2d at
14 377. The court concluded that the chapter was aimed at preventing profits earned from referrals
15 to third-parties, "... not profits from treating patients or providing goods or services." Id. at 382.
16 In the end, the court held that "[c]learly, the chapter is aimed at preventing kickbacks, not at
17 preventing medical professionals from profiting off the goods and services that they themselves
18 provide." Id.

19 In the present case, the all physical therapists have been employees of the physicians.
20 Any referrals by the orthopedic physicians are simply to their own employees within a single
21 practice entity. Therefore there are no third party payments, unearned profits, or kickbacks as
22 prohibited by Chapter 19.68 because any income received by the Defendants as a result of
23 patients' treatment by the practice's employed physical therapists are simply properly earned and
24 received profits of the practice entity. The Washington Supreme Court in Wright has made it
25 clear that is permissible and not in violation of RCW Chapter 19.68.

26 **G. The RCW 19.68.040 employee exception does not only apply to similarly licensed**
27 **individuals.**

28 Plaintiffs are once again attempting to make the argument that was already rejected by
29 the Court during the previous summary judgment hearing in April. The plain language of RCW
30 19.68.040 does not in any way indicate that the licensees have to be same licensees. As the
31 Court correctly pointed out during the previous summary judgment hearing, Day involved
ophthalmologists employing optometrists, and the Washington Supreme Court did not construe it

APPENDIX F

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF BENTON

5 COLUMBIA PHYSICAL THERAPY,)
 6 INC., P.S.,) No. 05-2-01909-1
 7)
 8 Plaintiff,)
 9)
 10 v.)
 11 BENTON FRANKLIN ORTHOPEDIC)
 12 ASSOCIATES, P.L.L.C; BENTON)
 13 FRANKLIN PHYSICAL THERAPY,)
 14 INC.; THOMAS R. BURGENDORFF;)
 15 CHRISTOPHER A. KONTOGIANIS;)
 16 ARTHUR E. THIEL; DAVID W.)
 17 FISCHER; HEATHER L. PHIPPS;)
 18 RODNEY KUMP; JAY WEST; AND)
 19 DOES 1 through 9,)
 20)
 21 Defendants.)

DEPOSITION UPON ORAL EXAMINATION
OF
HEATHER PHIPPS, D.O.

December 6, 2006
1:45 p.m.
1632 West Court Street
Pasco, Washington

JANICE L. TEGARDEN
CERTIFIED COURT REPORTER

1 A. No.

2 Q. Pretty much all the physical therapy needs that your
3 patients confront in your practice can be treated by the
4 physical therapists there at Benton Franklin Physical
5 Therapy?

6 A. Yes.

7 Q. Now, when your patients are referred to a physical
8 therapist that is not at Benton Franklin Physical Therapy,
9 are there any local therapists that cannot provide the
10 therapy they need?

11 A. Not to my knowledge.

12 Q. Okay. Once you refer a patient to a physical therapist are
13 you personally present when that therapy is provided?

14 A. No.

15 Q. So you don't personally supervise the therapy that the
16 therapist is providing?

17 MR. RIES: Object to the form.

18 Lack of foundation.

19 Go ahead.

20 A. No.

21 Q. (By Mr. Ries) In the course of the physical therapy that's
22 being delivered to the patients regarding whom you refer
23 for physical therapy, do you ever visit -- do you want me
24 to start over on that one?

25 A. No.

1 Q. Are you with me?

2 A. Uh-uh.

3 Q. Okay. -- do you ever visit those patients while they're
4 receiving the physical therapy?

5 A. No.

6 Q. Thanks for hanging with me on that one.

7 Now Benton Franklin Physical Therapy, that's a
8 different building than the one you have your office in?

9 A. Yeah.

10 Q. Where is your office? Address, please.

11 A. 911 South Washington Street, Kennewick, Washington.

12 Q. Do you, off the top of your head, know the address to the
13 Benton Franklin Physical Therapy?

14 A. No.

15 Q. What contact do you have with your patients that you have
16 once they've been referred off to physical therapy? Or I
17 may be prejudicing my own question.

18 Do you have any further contact with patients once
19 they're referred to physical therapy?

20 A. Yes.

21 Q. What type of contact do you have with them?

22 A. They come back for follow-up visits.

23 Q. So it's conceivable that you would do a referral for three
24 sessions a week for three months at the end of which you
25 would expect them to come back to you? And poke holes in

APPENDIX G

SUPERIOR COURT OF WASHINGTON

IN AND FOR BENTON COUNTY

4 COLUMBIA PHYSICAL THERAPY,)
 5 INC., P.S.,)
 6)
 7 Plaintiff,)
 8) No. 05-2-01909-1
 9 v.)
 10)
 11 BENTON FRANKLIN ORTHOPEDIC)
 12 ASSOCIATES, P.L.L.C.; BENTON)
 13 FRANKLIN PHYSICAL THERAPY,)
 14 INC.; THOMAS R. BURGENDORFF;)
 15 CHRISTOPHER A. KONTOGIANIS;)
 16 ARTHUR E. THIEL; DAVID W.)
 17 FISCHER; HEATHER L. PHIPPS;)
 18 RODNEY KUMP; JAY WEST; and)
 19 DOES 1 through 9,)
 20)
 21 Defendants.)

DEPOSITION UPON ORAL EXAMINATION

OF

DAVID FISCHER, M.D.

December 14, 2006

9:50 a.m.

1632 West Court

Pasco, Washington

REBECCA J. WAITE

CERTIFIED COURT REPORTER

1 Q. And, do you know, is there a test that they're required to
2 take in order to get a license?

3 A. There is a test, and whether it's a State test, I'm
4 unclear. I believe it to be a national test, but that's
5 speculating.

6 Q. Have you ever been present in Benton Franklin Physical
7 Therapy to supervise the treatment of one of your
8 patients?

9 MR. RIES: Object to the form.

10 A. With the electronic medical record, we can supervise
11 without being there.

12 Q. [By Mr. Grant] Have you ever been physically present at
13 Benton Franklin Physical Therapy at the same time --

14 A. No.

15 Q. -- one of your patients was receiving treatment?

16 A. No.

17 Q. Have you ever given one of your physical therapists at
18 Benton Franklin Physical Therapy specific treatment
19 instructions outside of any instructions you may have
20 given on that electronic form you mentioned earlier?

21 A. On the rare occasion I've spoken on the phone to them for
22 clarification or modification of treatment.

23 Q. And have you also had an occasion to speak on the phone
24 regarding treatment and treatment modifications to
25 physical therapists that do not work at Benton Franklin

1 Physical Therapy?

2 A. Yes, and I've physically gone to different therapy places
3 when the patient's being treated.

4 Q. In other words, you've actually physically been present
5 during treatment of one of your patients by a physical
6 therapist at some facility other than Benton Franklin
7 Physical Therapy?

8 A. Yes.

9 Q. And who did that physical therapist work for?

10 A. I've gone to a number over the years.

11 Q. Do you supervise the treatment of physical therapists at
12 physical therapy clinics other than Benton Franklin
13 Physical Therapy?

14 A. I believe that I supervise all my patients who go to
15 physical therapy wherever they go.

16 Q. Is there some supervision that you provide regarding
17 patient care for the patients that go to Benton Franklin
18 Physical Therapy that you do not provide for the patients
19 that go elsewhere?

20 A. No.

21 Q. Do you treat Medicare-Medicaid patients?

22 A. I treat anybody that has an appointment with me.

23 Q. Okay. And so that would also include L & I patients?

24 A. Yes.

25 Q. And insured patients?

APPENDIX H

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF BENTON

5 COLUMBIA PHYSICAL THERAPY,)
 6 INC., P.S.,) No. 05-2-01909-1
 7)
 8 Plaintiff,)
 9 v.)
 10 BENTON FRANKLIN ORTHOPEDIC)
 11 ASSOCIATES, P.L.L.C; BENTON)
 12 FRANKLIN PHYSICAL THERAPY,)
 13 INC.; THOMAS R. BURGDORFF;)
 14 CHRISTOPHER A. KONTOGIANIS;)
 15 ARTHUR E. THIEL; DAVID W.)
 16 FISCHER; HEATHER L. PHIPPS;)
 17 RODNEY KUMP; JAY WEST; AND)
 18 DOES 1 through 9,)
 19)
 20 Defendants.)

DEPOSITION UPON ORAL EXAMINATION
OF
ARTHUR THIEL, M.D.

December 7, 2006
1:30 p.m.
1632 West Court Street
Pasco, Washington

JANICE L. TEGARDEN
CERTIFIED COURT REPORTER

1 days? Leaving out the rest of the details about what's
2 actually going on in that therapy, but is that realistic?

3 A. That's a frequent -- frequency chosen for physical therapy
4 for some injuries.

5 Q. So if you did refer a patient for physical therapy to
6 receive therapy three times a week for thirty days, how
7 often would you be meeting with the patient during that
8 thirty days?

9 A. It depends on where they are from the onset of injury or
10 surgery.

11 Q. So you may meet with them weekly in certain circumstances?

12 A. Correct.

13 Q. And in some circumstances you may wait to the end of the
14 month?

15 A. Correct.

16 Q. How often or do you ever visit a patient while the
17 patient's receiving physical therapy at a physical therapy
18 clinic?

19 A. Do I ever? If that's the question, the answer's yes.

20 Q. Okay. In what circumstances do you visit the clinic while
21 your patient is receiving physical therapy?

22 A. At the request of the patient or the therapist.

23 Q. Since you started Benton Franklin Orthopedic Associates
24 have you ever visited Benton Franklin Physical Therapy
25 while a patient is receiving physical therapy?

1 A. I don't recall.

2 Q. Are you aware of whether there are any physical therapists
3 who bill under your provider number?

4 A. I don't know exactly.

5 Q. So they may or may not, you just don't know?

6 A. That's correct.

7 Q. Does that matter to you?

8 A. It matters extremely to me that it be done appropriately,
9 and my manager handles that.

10 Q. Who is your manager?

11 A. Mike Neitzel.

12 Q. To your understanding what's Mike Neitzel's position at
13 Benton Franklin Orthopedic Associates?

14 A. He's our manager.

15 Q. What does that mean, what does he do? I mean, I heard the
16 word "manager" to describe him so I want to find out what
17 your knowledge is of what he does there.

18 A. He runs our business meetings; he handles the personnel
19 management, hiring and firing; he oversees the financial
20 statements, accounts receivables, bills payables, payroll;
21 he handles -- or oversees the appropriate compliance with
22 safety standards and education of our staff and the
23 physicians for Benton Franklin Orthopedic Associates as
24 well as for Benton Franklin Physical Therapy.

25 Q. Do you trust him to do his job correctly?

APPENDIX I

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SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF BENTON

COLUMBIA PHYSICAL THERAPY, INC.,
P.S.,

Plaintiff,

NO. 05-2-01909-1

vs.

MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

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,

Defendants.

I. INTRODUCTION

Defendants, 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, by and through their attorneys, Randall L. Stamper and Matthew T. Ries of Stamper Rubens, P.S., hereby file this Memorandum in Support of their Motion for Summary Judgment to have this Court dismiss the claims filed by Plaintiff Columbia Physical Therapy, Inc., P.S. ("Columbia").

Columbia has brought this lawsuit against the Defendants claiming that they have violated chapter 19.68 RCW which generally prohibits practicing physicians from obtaining rebates, refunds, commissions, unearned discounts and profits in connection with the referral of patients to others engaged in the medial arts. These statutes have rarely been interpreted by Washington courts. While Defendants deny there has been any violation of chapter 19.68 RCW,

LAW OFFICES OF
STAMPER RUBENS, P.S.

720 WEST BOONE, SUITE 200
SPOKANE, WA 99201
TELEFAX (509) 326-4891
TELEPHONE (509) 326-4800

1 licensee]'s practice from patients referred directly, indirectly or inferentially by
2 the [employer licensee] to the [employee licensee].

3 The general prohibition is against referrals "to any person licensed by the state of Washington to
4 engage in the practice of medicine and surgery, drugless treatment in any form, dentistry, or
5 pharmacy." RCW 19.86.010. Thus, a "licensee" is a person licensed with the state of
6 Washington who performs "drugless treatment." Physical therapists are a "licensee" within this
7 definition since they are licensed by the State, and practice drugless treatment. See RCW
8 18.74.010 et seq.

9 It is undisputed that BFOA and its managing physicians, Dr. Burgdorff, Dr. Kontogianis,
10 Dr. Thiel, Dr. Fischer, and Dr. Phipps supervise the services performed by BFPT. According to
11 Rodney Kump, BFOA physical therapists, while patients who are referred by non-BFOA
12 physicians are under the care and supervision of the non-BFOA referring physician, all patients
13 referred by BFOA physicians are under the care and supervision of BFOA. (See [Kump, page
14 13] of Declaration of Randall L. Stamper). The BFOA physician maintain this supervision
15 through electronic medical records, which are only accessible electronically within the BFOA
16 organization, as well as through review patient records, notes, charts, interaction with the
17 physical therapists about the patient's therapy, and observation of therapy by the physician when
18 necessary. (See [Kump, page 32-33, 37] of Declaration of Randall L. Stamper).

19 Jay West, another BFOA physical therapist, similarly testified that the BFOA physicians
20 supervise his patient care of BFOA patients in a number of different ways, including
21 prescriptions of the physician's desired physical therapy for the patient, communications
22 regarding patient care, direct accessibility to therapy notes and records in the BFOA electronic
23 medical records, on-call BFOA physicians, and direct observation of therapy by the physician
24 when necessary. (See [West, page 14, 22-24, 29, 33] of Declaration of Randall L. Stamper).
25 This access to information and supervision "helps in terms of treatment" and "continuity of
26 care." (See [West, page 25] of Declaration of Randall L. Stamper).

27 The BFOA physicians further confirmed this supervision. (See [Fischer, page 56, 58] of
28 Declaration of Randall L. Stamper; Thiel, page 42-44 of Declaration of Randall L. Stamper).
29 More importantly, the patients confirmed the supervision by BFOA physicians of the care
30 provided by BFPT. (See [Douglas, page 35-36] of Declaration of Randall L. Stamper; Lunders,
31 page 31-32 of Declaration of Randall L. Stamper).

STAFFORD FREY COOPER

PROFESSIONAL CORPORATION

601 Union Street, Suite 3100 Seattle, WA 98101-1374 TEL (206) 623-9900 FAX (206) 624-6885

FILED

FEB 22 2008

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

February 21, 2008

Via FedEx

Renee S. Townsley
Clerk of the Court
Washington Court of Appeals
500 N. Cedar Street
Spokane WA 99201

Re: Columbia PT, Inc. v. Benton Franklin Orthopedic Associates
Cause No.: 267024
Our File No. 10268-027034

Dear Ms. Townsley:

Enclosed please find the original and one copy of Petitioner's Reply in Support of Motion for Discretionary Review. We ask that you file the original and copy and return the enclosed face sheet conformed copy in the envelope provided.

Thank you for your attention to this request.

Very truly yours,



Mary Ann Blackledge
Legal Assistant to Darrin E. Bailey

Enclosures