THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellant Case. No. 2014-001115

Kristin Joseph P.T., Thomas N. Joseph, M.D., and William G. McCarthy, M.D., ... Appellants,

v.

South Carolina Department of Labor, Licensing and Regulation, South Carolina Board of Physical Therapy, ... Respondents,

and

South Carolina Chapter, American Physical Therapy Association, Joseph M. McKowen, PT, Sabrina Queen Bridges, PTA, and Amalia W. Kirby, PTA, ... Respondents.

APPELLANTS' REPLY TO RESPONDENTS' INITIAL BRIEF AND DESIGNATION OF MATERIALS

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Appellants Kristin Joseph[1] P.T. ("PT Joseph"), Thomas N. Joseph, M.D. ("MD Joseph"), and William G. McCarthy, M.D. ("McCarthy") (collectively "Appellants") submit these arguments in reply to the Initial Brief of Respondents South Carolina Department of Labor, Licensing and Regulation, South Carolina Board of Physical Therapy ("Respondent Board"), the South Carolina Chapter, American Physical Therapy Association ("SCAPTA"), and three individuals: Joseph M. McKowen, PT, Sabrina Queen Bridges, PTA, and Amalia W. Kirby, PTA (collectively "Individual Respondents") (Board, SCAPTA and Individual Respondents are collectively referred to as "Respondents").

Regarding Respondents' Statement of Facts and their subsequent arguments, they misapprehend Appellants' alternative causes of action and allegations in their Amended Complaint. (Respondents' Br. 6) The Amended Complaint speaks for itself. R. ___ (Amended Complaint)

ARGUMENT

As discussed in Appellants' Brief, the PT Act regulates the practice of physical therapy in South Carolina. In essence, Respondents argue that this Court in Sloan v. South Carolina Board of Physical Therapy Examiners, 370 S.C. 452, 469, 636 S.E.2d 598 (2006) (herein after, this case is referred to as Sloan) was correctly argued because physicians and physician groups have the greatest opportunity as gatekeepers to profit from abuse of referrals of patients for PT services to employed PTs and Sloan properly

[1] The fact that the Josephs are married is irrelevant to this case. Respondents' repeated reference to PT Joseph as "Dr. Joseph's wife" (Br. P. 1), "her husband" (Br. P. 5) or "Mrs. Joseph" (Brief p. 29) is nothing more than a not-so-veiled attempt to diminish PT Joseph as a plaintiff in this case.

interpreted S.C. Code Ann. 40-45-110(A)(1) as supplementing the restrictions contained in the Provider Self-Referral Act, the federal Anti-Kickback and Stark laws "by eliminating the temptation for a gatekeeper physician to overuse physical therapy services by referring patients to PT employees." The purpose of the PT Act is not to regulate the employment relationship that has the "greatest" temptation to overuse or abuse PT services, but to prohibit fee for referral arrangement, no matter how great or small the temptation. This purpose holds true whether the "transfer" of the patient between a physician and a PT, or a PT and another PT, is called a referral, transfer, transitions (Respondents' Br. 32), "shared treatment" (Respondents' Br. 33) or, "handoff (R. __)(Ex. 39, ¶ 34.a, Stearns' Aff'd.).[2]

I. APPELLANTS HAVE STANDING TO BRING THIS CASE. Respondents' again argue that Appellants do not have standing to challenge the 2011 Position Statement. (Respondents' Br. 28-32) The lower court correctly determined that Appellants' have standing to bring this case. (R. __) (September 17, 2012 Order Denying Defendant's Motion to Dismiss and Granting Summary Judgment, pp. 9, ¶ 29 through 12, ¶ 37; April 22, 2014 Order Granting Defendants' Motions for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment, p. 22). Appellants have established that they are: 1) injured in fact; 2) there is a causal connection between Respondent Board's challenged actions, including the 2011 Position Statement; and 3) there is a likelihood

[2] These are the various names Respondents have used to seek not to use the word "referral" when a PT sends a patient to a PT and PTA.

that a favorable decision will give relief.[3] *See*: Sea Pines Ass'n for the Prot. Of Wildlife, Inc. v. S.C. Dep't of Natural Res., 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001).

Appellants' injury is the infringement on their ability to practice their chosen profession as discussed above. Appellants are being treated differently in that PTs can be employed by other PTs or PT groups and receive referrals under the guise of coverage. This injury is not "conjectural or hypothetical." It is concrete and particularized because the Appellants currently are unable to employ and be employed as they choose, a direct result of the PT Board's 2011 Position Statement interpretation of S.C. Code Ann. § 40-45-110(A)(1). Finally, a favorable decision by this Court will redress Appellants' injury by allowing them freely to practice their chosen, licensed profession or to employ licensed professionals to assist in the practice of their profession, while improving quality of care and patient outcomes. (R. __) (Ex. 11, Joseph Depo Tr., p. 42, l. 1 – p. 45, l. 25).

Respondents' brief herein does not address, much less argue against, the lower court's finding of standing based on this Court's long-standing holding that standing may be conferred when the matter is of great public importance and there is a need for future guidance.[4] "[S]tanding may be conferred upon a party 'when an issue is of such public importance as to require its resolution for future guidance.'" Sloan v. Wilkins, 362 S.C. at 436–37, 608 S.E.2d at 583 (quoting Baird v. Charleston County, 333 S.C. 519, 531, 511

[3] Appellants will file a motion, pursuant to Rules 217 and 240, SCACR, with this Court to be allowed to argue against the Sloan decision. There is no question but that Appellants have standing to argue against Sloan.

[4] Before the lower court, Respondents argued that: Plaintiffs' proposed interpretation would wreak havoc on the practice of physical therapy in South Carolina, harming PTs, PTA, and patients alike. ... This would force many PTs to become solo practitioners, drive PTAs out of the profession altogether, increase healthcare costs, and create barriers to care for patients across the State." (R.) (Defendant Intervenors' Memorandum in Support of Motion for Summary Judgment, p. 12) While Appellants disagree with Respondents' dire predictions, certainly the issues Respondents raise regarding the consequences of Appellants' interpretation of "refer" and "referring person" and whether a PT is a referring person within the meaning of S.C. Code Ann. § 40-45-110(A)(1) raise issues of significant public interest for which future guidance is needed.

S.E.2d 69, 75 (1999)); Sloan v. Department of Transp., 379 S.C. 160, 666 S.E. 2d, 236, 241 (2008). The lower court's determination of standing based on issues of great public importance is the law of the case.

II. *STARE DECISIS* SHOULD NOT BE APPLIED.[5] The doctrine of *stare decisis* is just that—a public policy doctrine, not a constitutional mandate that this Court is required blindly to follow. As the Court has repeatedly held: "*Stare decisis* should be used to foster stability and certainty in the law, but, not to perpetuate error and injustice." Fitzer v. Greater Greenville South Carolina Young Men's Christian Association, 277, S.C. 1, 4, 282 S.E.2d, 230, 231 (1981). In Helvering v. Hallock, 309 U.S. 106, 119, 60 S.Ct. 444, 451 (1940), the United States Supreme Court recognized *stare decisis* as an important social policy representing an element of continuity in the law, rooted in the psychological need for reasonable expectation in decisions. "But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, ..." *See also*: Payne v. Tenn., 501 U.S. 808, 827-828, 111 S.Ct. 2597, 2609-2610 (1991) (While *stare decisis* is the preferred course, "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.' *Stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision'.") (citations omitted) Court's decision in Sloan is unworkable and badly reasoned and should be overturned.

[5] Respondents still contend, as they did in their Memorandum in Opposition to Appellants' Motion to Certify, that Appellants failed to preserve their ability to argue against precedent. The SCACR, Rule 217, dictates the only method by which a party may seek to argue against precedent. Appellants will file timely a Motion to Argue against Precedent pursuant to SCACR 240. Causes of action seven through nine were Appellants' argument that Sloan was wrongly decided. The only court that can determine the Sloan decision was in error is this Court. Moreover, in an appeal, a party must demonstrate how the circuit court erred in its decision. No appeal is necessary here because the circuit court did not err in finding it could not overrule Sloan. Appeals cannot be frivolous and must be made in good faith. Rule 407, SCRPC, Rule 3.1. There is no legal ground upon which Appellants could, in good faith, appeal the grant of partial summary judgment regarding the dismissal of causes of action seven through nine.

In McLeod v. Starnes, 396 S.C. 647, 723 S.E.2d 198 (2012) this Court granted permission to argue against precedent, declined to follow the doctrine of *stare decisis* and overruled Webb v. Sowell, 387 S.C. 328, 692 S.E.2d 543 (2010), holding that Webb was wrongly decided. McLeod held that "stare decisis is not an inexorable command: 'There is no virtue in sinning against light or persisting in palpable error, for nothing is settled until it is settled right....There should be no blind adherence to a precedent which, if it is wrong, should be corrected at the first practical moment.'" (citations omitted) McLeod, 396 S.C. 654, 723 S.E.2d 202. Further, *stare decisis* is used to foster stability, not to perpetuate error and where there is a single case and not a line of cases, the Court cannot base its decision on stare decisis alone. *Id.*, 396 S.C. 655, 723 S.E.2d 203. As in McLeod, Respondents' argument instant argument for the Court to follow stare decisis rests only on one case—Sloan. Like McLeod, this appeal represents the first practicable moment that this Court has had to correct Sloan's erroneous determination that the PT Board's 2004 Position Statement did not violate the appellants' equal protection and due process rights.

Respondents' rely on In re Layton, 243 S.C. 241, 134 S.E.2d 247 (1964), Wehle v. S.C. Ret. Sys., 363 S.C. 394, 611 S.E.2d 240 (2005) and Powers v. Powers, 239 S.E. 423, 123 S.E.2d 646 (1962) that "*[S]tare decisis* is especially applicable to decisions construing statute because any desirable change may be readily accomplished by the legislature." (Respondents' Br. 12) In Layton, the Court noted that the statute, as previously construed in Tate v. Brazier, 115 S.C. 283, 105 S.E. 413 (1920) had been the law for more than forty (40) years, the Legislature had codified the statute after Tate without significant change and there was a resulting presumption the legislature intended

to adopt such construction. Layton, 243 S.C. 247-248, 134 S.E.2d 425. The presumption is not an invariable rule but in that instance, "is strengthened by the passage of time and by an amendment and re-enactment of the statute in 1942." *Id.*

In 2010[6], companion bills were introduced in the S.C. House of Representatives and in the Senate—H. 4329 and S. 1031. (Respondents' Br. 4) Respondents' PT Board members and SCAPTA engaged in extensive and coordinated efforts to keep the legislation from passing. (R. __) (Ex. 27 (Stoker ex), pp. 82-83, 92-97, 100-123)[7]. Additionally, S.C. Code Ann. § 40-45-110(A)(1) was adopted as part of 1998 Acts and Joint Resolutions, Act 360, effective June 6, 1998. From its effective date, until the PT Board adopted the Attorney General's opinion on April 8, 2004, the PT Board did not interpret § 40-45-110(A)(1) to prohibit physician practices from employed PTs. After Sloan was decided, the physician PT employment relationship was banned effective 90 days from the vote: July 7, 2004. Sloan, 370 S.C. 452, 474, 636 S.E.2d 598, 610

Stare decisis should not be followed. Since the Sloan decision there has been no codification or re-codification of § 40-45-110(A)(1). Appellants challenged the decision at the first practicable moment[8] , and the Sloan decision is unworkable, its justification badly reasoned (Pearson v. Callahan, 555 U.S. 223, 234, 129 S.Ct. 808, 816-817 (2009)), and wrong. In this case, the Court is not bound by *stare decisis* to follow Sloan and should overrule it and reinstate the law in place prior to Sloan.

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[6] Respondents state that there have been "repeated attempts by physicians and physician groups" to amend § 40-45- 110(A)(1) after Sloan. (Respondents' Br. 18) This is not accurate. The only attempt after Sloan was in 2010.

[7] The PT Board and SCAPTA both opposed the bills (R. __), "packed the room" (R.__) at the hearing and the PT Board's statements were sent to and commented on by the president of SCAPTA prior to the Board's comments being submitted to the General Assembly (R.__).

[8] Appellants instituted their challenge to the 2011 Position Statement April 12, 2012.

III. SLOAN SHOULD BE OVERTURNED. The State cannot abridge the right of persons engaged in lawful professions or occupations except through a reasonable exercise of the police powers where it is clearly "necessary for the preservation of the health, safety and welfare of the public." S.C. Code Ann. § 40-1-10(A) (2011). Regulation of a lawful profession under Title 40 of the Code may only be imposed "for the exclusive purposes of protecting the public interest when the ... public is not effectively protected by other means." S.C. Code Ann. § 40-1-10(B) (2011) The PT Act (S.C. Code Ann. §§ 40-45-5, et seq. 2011) is part of Title 40 and its purpose is the protection of the public interest in the provision of physical therapy services by PTs and PTAs, being the only profession regulated by Chapter 40.

A. Wages. Respondents' arguments at pages 14-17 of their Brief misapprehend Appellants' argument regarding the Sloan majority's expansion of the statutory prohibition based solely on the word "wages." Section 40-45-110(A)(1) regulates the payment arrangement between a referral source and a PT, not whether the PT can be employed by the referral source. S.C. Code Ann. § 40-45-110(A)(1) allows the PT Board to discipline a licensed person who "requests, receives, participates, or engaged directly or indirectly in the dividing, transferring, assigning, rebating, or refunding of fees received for professional services or profits by means of a credit or other valuable consideration ...." This litany of activities describes compensation arrangements—how a licensed person is paid or profits, not by whom they are employed.

Contrary to Respondents' assertions, there are numerous schemes that PTs can engage in to "extract" increased wages from "gatekeeper" physicians. For example, patients have direct access to PTs for up to 30 days. If the patient needs treatment

beyond 30 days, the PT must refer the patient to a physician or be in violation of S.C. Code Ann. § 40-45-110(A)(4). Another example is the PT could simply have an arrangement with the physician or group that he would be paid a greater than fair market wage to send patients to the employing physician after the 30 day period. Yet another example is a PT, for higher wages could develop a Plan of Care ("POC") that was longer and indicated more expensive procedures than medically necessary and be paid higher wages based on the greater income generated by the POC. Simply put, if a physician, as Respondents' suggest, is going to refer patients for PT services to an employed PT just to make more money, the overpayment schemes the PT and physician can concoct to increase the PT's wages, while increasing the physicians reimbursement are myriad.

B. State Provider Self-Referral, and federal Anti-Kick-Back and Stark Laws. None of these three statutes[9] prohibit employment[10] of licensed health care personnel. Rather, the statutes regulate the employment and other compensation arrangements, such as *bona fide*[11] employment arrangements. Section 40-45-110(A)(1) also does not prohibit employment between referring persons and licensed persons, but, , regulates the compensation arrangements between employers and employees just as the Provider Self-referral and federal Anti-Kickback and Stark laws do. As discussed in Appellants' brief, if the General Assembly wanted to prohibit only physician/PTs employment in fee-for-referral arrangements, it could have done so by using the word "doctor" as it did in

[9] Each of the three statutes is designed to regulate compensation and ownership arrangements that which protect consumers and government-sponsored health care plans from fraud and abuse by providers attempting to profit based on referrals,

[10] South Carolina, Delaware and Missouri are the only states in the Union that prohibit physician employment of PTs. The remaining 47 states allow it.

[11] 42 C.F.R. § 1001.952(i).

other parts of the Act, including within § 40-45-110. Instead, the Legislature used the word "person."

Respondents contend that if Appellants' interpretation regarding "already[existing referral restrictions" (Respondents' Br. 17) is correct, there would have been no need to pass § 40-45-110(A)(1). In fact, § 40-45-110(A)(1) is necessary to delineate the penalties the PT Board may impose on a licensed person for violation of either the PT Act.

C. Absurd result. Respondents argue the Sloan case was properly decided because PTs must have a referral[12] from a physician[13] in order to practice[14]—thus physicians are the "gatekeepers[15]". (Respondents' Br. 16, 18, 23, 27, 34, 42, 44, 46 and 47) Ironically, while relying on the absence of direct referral after thirty (30), the SCAPTA and APTA were attempting to have the PT Act amended to allow patients direct access to PTs without the necessity of a physician or dentist order. (R. ___) (Ex 27, Stoker Ex. 2, pp. 000074—78). In a March 26, 2013 letter to LLR in response to a request to "submit comments on laws and regulations that are an undue burden to the delivery of services to the citizens of South Carolina," SCAPTA wrote:

> Reasoning The current 30-day restriction tied to physical therapy treatment without referral is capricious and arbitrary; it is not based on any scientific or clinical reasoning or evidence. The 30-day restriction is burdensome to consumers, providers and the healthcare system by creating additional, unnecessary, expenses to the consumer and healthcare system. The consumer must absorb the expense of time and travel in addition to the expense of additional, unnecessary medical visits, many of which require extremely high co-pays. The burden and expense

[12] Respondents' expert, Mr. Stearns, testified that the word "referral" and the word "order" are interchangeable. (Ex. 21, Stoker depo pp. 38-39) A physician's order is necessary for a PT to treat a patient beyond the thirty (30) day access period.

[13] The PT Act is clear that a dentist also can order PTs services. S.C. Code Ann. § 11-45-110(A)(2) and (4);

[14] Patients have "direct access" (without a physician order) to PTs for up to thirty (30) day ("direct access period). S.C. Code Ann. § 40-45-110(A)(4).

[15] It is equally true that PTAs must have a referral from a PT for PTA to be able to treat patients.

> is magnified in the many rural and underserved areas of South Carolina, The provider s ability to deliver the most cost effective, efficient, evidence-based practice is interrupted causing unnecessary delays in patient recovery and fragmentation of care[16].
>
> The intent of the statute is consumer protection. The consumers of South Carolina are protected through the existing language found under part 2 of Section 40-45-110 that requires a physical therapist to refer any patient to a licensed medical doctor or dentist whose medical condition should have been determined at the time of evaluation or treatment to be beyond the scope of practice of a physical therapist.

(R. __) (ID. p. 000077-78).

Respondents' misapprehend Appellants' argument. It is unquestioned that the word "person" is used in § 40-45-110(A). Respondents' argument inserts the work "physician" for "person.". Following Sloan to its logical conclusion, employing the clear statutory phase "person referring", no individual or relative or business of the individual could employ, refer patients and pay wages to a PT for the provision of PT services without the PT being subject to sanctions.

D. As interpreted, § 40-45-110(A)(1) is unconstitutional. Appellants content that the PT Board's 2004 Position Statement interpretation of S.C. Code Ann. § 40-45-110(A)(1) adopted by the Sloan majority is unconstitutional and on that basis, Sloan should be overruled. Again, on its face, the statute used the phrase "person referring", not "physician referring." Further, while the Legislature has certainly created different classes of licensed health care providers, the State has the same interest in avoiding and prohibiting the overuse of health care services by billing health care providers, regardless of licensure classification, who, for their own financial gain rather than their patients' medical needs, referred patients to an employed licensed health care provider. The evil sought to be avoided by § 40-45-110(A)(1) is a fee for referral scheme. For equal

[16] The concern regarding "fragmentation of care" is most concerning where patients are not permitted to receive PT services at their treating physician's office to ensure continuity of care.

protection purposes, the classification should be all licensed health care professionals who, as employees, are in a position to be referred a patient for treatment and whose referring employer is in a position to benefit from the referral. The variations and nuances of different medical profession does not impact a "fee for referral" scheme.

Substantive due process prohibits the State from depriving a person of a property right for arbitrary reasons. The stated reason in Sloan is that employing physicians have a greater temptation to overuse the referral process to PTs for the physician's own profit. As discussed above, there is the same "greater temptation" to overuse the referral process when a physician refers a patient to any allied health professional he/she employees. As stated in the Sloan decent, arbitrarily placing an "employment restriction upon physical therapists while preserving those employment relationships for all other health care providers and allied health professionals" (Sloan, 370 S.C. 452, 493, 636 S.E.2d 598, 620) is a denial of substantive due process.

IV. COURT ERRONEOUSLY DISMISSED APPELLANTS' CLAIMS. Respondent PT Board's 2011 Position Statement, at the creation and urging of SCAPTA, created the theory of "coverage" for intra-professional transfer of patients from one PT in a PT group to another PT within the group to avoid the plain language of S.C. Code Ann. § 40-45-110(A)(1) which, according to Sloan, prohibits a "referring person" from paying wages to an employed PT. As the Board Chair and Mr. Stearns both stated, with regard to PT referrals, they were not familiar with the terms "inter-professional" and "intra-professional" referrals prior to the 2011 Position Statement. (R. ___) (Stearns Depo Tr., p. 27, 11. 16-23) There is the same risk for overuse or abuse of physical therapy services whether the service is provided in an inter-professional setting or an intra-professional

setting. There is always an owner who might profit from overuse or abuse of physical therapy services.

In support of their contentions that physician owned physical therapy practices ("POPTS") are a greater threat to over utilize PT services for their own profit, Respondents rely on 1992 publications that are outdated for the proposition that POPTS have higher utilization of PT services because the gatekeeper has an ownership interest in the group. (Respondents' Br. 43) The 1992 Mitchell and Scott article cited by Respondents specifically states that the study was of joint ventures owned by physicians who referred to the facility but did not practice at the facility and that "[p]hysician practices offering physical therapy services within the practice [POPTS] were not surveyed." (R. __) (Respd. Ex. Q. to Defendant-Intervenors' Response in Support of its Motion for Summary Judgment. pp. 2055-2056)[17] The Swedlow, Johnson, Smithline and Milstein articles relied upon by Respondents in their brief studied workers compensation patients from October 1, 1990 through June 30, 1991[18]. Both studies predate the vigorous enforcement of the Anti-Kickback and Stark laws. It is telling that Respondents rely on twenty-two (22) year old data to support their contention that there is a greater probability that POPTS rather that PTOGs will engage in fee for referral arrangements.[19]

A. Context of "Referral" in §40-45-110(A)(1). Appellants contend that a referral is sending a patient to a licensed health care provider for medical treatment and it does not matter whether the patient is sent within a practice group or from one practice group

[17] This type ownership/referral practice was outlawed in SC in 1993 with the Provider Self-Referral Act and is illegal under the federal Anti-Kickback and Stark laws.

[18] While the Swedlow article found that there were more referrals by physicians owning independent PT, MRI and psychiatric facilities, the mean cost per PT case was significantly lower for self-referral groups that in independent-referral groups.

[19] See Appellants' discussion of the newer CMS/OIG report *supra, pages16-17.*

to another. As noted in Appellants Brief, Sloan opinion did not address whether a PT was a person and whether a PT was prohibited from referring a patient to an employed PT. The lower court erred in relying on Sloan as dispositive of issues not addressed therein. In arguing that there is no "referral" between PTs and PTs or PTAs in a PT owned practice group ("PTOG") Respondents again revert to their "gatekeeper" argument. Clearly, a PT has to have a physician's order to treat a patient beyond thirty days. However, a PT can be and is paid for the initial thirty day (30) treatment period, either through a private insurance program or through self-pay. (R. ___) (Pope, Ex. 16, pp. 10-11. Just because a physician has to write an order for a PT to be reimbursed for a PT to treat a patient under Medicare and Medicaid and certain insurance companies has nothing to do with whether a PT sending a patient to another PT within the PTOG is referring the patient under § 40-45-110(A)(1).

Respondents argue that it is clear the "person referring" being referenced in § 40-45-110(A)(1) is a physician since § 40-45-110(A)(4) uses "physician" in prohibiting PT treatment beyond 30 days without a physician referral. (Respondents' Br. 36) To the contrary, the rules of construction are clear. If the Legislature used the general word "person" in 110(A)(1) and then the specific word "physician" in 110(A)(4), it is presumed to know the difference between the words, intended to use the word "person" in 110(A)(1) and would have used the specific work "physician" in 110(A)(1) if it had intended to limit the referral prohibition to physicians only.[20]

[20] Under the doctrine of *ejustem generis,* " [w]hen the Legislature uses words of particular and specific meaning followed by general words, the general words are construed to embrace only persons or things of the same general kind or class as those enumerated. Citation omitted. (Emphasis added). *Shepard v. City of Orangeburg*, 442 S.E.2d 601, ___ (1994) Here, the Legislature used a general word and then followed it with a specific limiting word.

Respondents again rely on the Sloan majority holding that the purpose of the law was to prevent the overuse of services by physicians who refer patients to employed PTs for financial gain. Again, the issue of whether a PT was a person who refers was not an issue. The question is whether any other "person" is prohibited by § 40-45-110(A)(1) from employing a PT and referring patients to the PT for financial gain. The purpose of the PT Act is broader than just prohibiting physicians from employing PTs, it is to protect the public, including protecting it from financial abuse by PTs in their practice. Respondents contend that Appellants have presented no evidence over overuse or abuse of PT services by PTs. However, Respondents' brief admits that there has be overuse or abuse of services by PTs. At page 43, Respondents state: "while some states have taken action to specifically (sic) address problems of overuse of physical therapy services, none has adopted the solution that Appellants propose, ..." *See also:* Fed. Reg., Vol. 76, No. 22, Feb. 2, 2011, p. 5867, discussed further below.

Finally, Respondents argue "that an unlicensed member of a practice's administrative staff who schedules a patient to see a PT has made a "referral." (Respondents' Br. 40) While Webster's may not impose a limitation on individuals who make referrals, section 40-45-110(A)(1) does. For the referral to be prohibited, the PT must receive wages from the person

Contrary to Respondents' arguments, applying the phrase "person referring" to PT will not do away with the PTOG's. It will, instead, promote continuity of care, *i.e.* the patient will be supervised by the same PT or PTA and will be seen by the same PT from beginning to end of treatment. This will foster quality of care since the PT making the initial assessment and writing the POC with be the same PT observing the patient

throughout his/her treatment. Obviously, on PT can request a consult with another PT in the PTOG.

B. "Coverage" and the 2011 Position Statement. Respondents again erroneously contend that Sloan decided the coverage issue raised by Appellants. Sloan only addressed the "referral" issue vis a vis physicians—not any other "person". As the PT Board emphasized in the 2011 Position Statement, in a PTOG, whether PTs can send patents to employed PT for treatment does not constitute a "referral" but "coverage". (R. ____) (Ex. 1, 2011 Position Statement) ("In a group practice, a [PT or PTA] providing services to a patient of that practice should not fall within this definition of a "referral". The [PT or PTA] seeing a patient at the request of another [PT] in the same group does not constitute a 'referral', but is rather a [PT or PTA] providing coverage either within the 30-day window or pursuant to the same referral from a physician or other member of the group." Respondents also argue that the 2011 Position Statement only interpreted the PT Act but provided "no factual circumstance much less legal justification, to revisit the Sloan decision, ..." (Respondents' Br. 44) To the contrary, the 2011 Position Statement relies on Sloan for the proposition that the "referral" prohibition does not apply to PTs and does not apply to "intro-professional" relationships. *Id.*

The 2011 Position Statement misapplies the accepted medical industry definition of coverage and Respondents misapprehend Appellants arguments regarding coverage. Respondents, while agreeing with PT Joseph's concept of "coverage", argue that PT Joseph participates in "coverage" in her practice (she sometimes sees patients sent by a fellow PT employee who is on vacation), "is precisely the kind of 'coverage' that Amended Complaint asserts is unlawful." (R. __) (Amended Complaint, ¶¶ 49 and 50)

Appellants agree with PT Joseph's definition that "coverage" is treating another patient when the treating health care provider is temporarily unavailable because of vacation or illness, for example. Johnson v. Ward, 288 S.C. 603,610=11, 344 S.E.2d 166 (1986). The definition of "coverage" propounded in the 2011 Position Statement, argued by Respondents and erroneously adopted by the lower court does not embrace the concept of temporary unavailability but treatment based on ease of scheduling and convenience. (R. __), (April 22, 2014 Order)

Appellants further contend that if PTOG's can employ PT and send patients for treatment under the rubric of "coverage"[21], the physicians and physician groups should be allowed to do the same thing. Respondents' can point to no language in the PT Act that authorizes the PT Board to distinguish the between sending patients for treatment based upon an "intra-professional" versus and "inter-professional" relationship. This intra- versus inter- professional distinction was suggested to the PT Board by the general counsel for APTA (R. __) (Ex. 27, Stoker Depo Tr. Ex.2) through the Carpenter Letter (R. __) (Ex. 3, Carpenter Letter Dated May 3, 2011, p.1). Further, allowing PTs to provide "coverage" in the provision of PT services is not the practice of medicine but the provision of PT services that the physician could otherwise provide and bill for (R, __)(Ex. 37, Stearns Depo Tr. p. 88, ll. 21-25)

C. Appellants' Interpretation of S.C. Code Ann. §40-45-110(A)(1) Prevents Fraud and Abuse. One of the purposes of § 40-45-110(A)(1) is to protect the public from

[21] The 2011 Position Statement discusses "Intra-professional interactions" where the intent is for PT being sent the patient to assume responsibility to provide on-going medical treatment from "a referral from a physician or other member of the group." (R. __, Emphasis added, Ex. __, 2011 Position Statement). The Statement actually says "or other member of the same group." The "group" being discussed is the PT Group. The 2011 Position Statement admits a referral can come from a member of the same PT group, yet Respondents are arguing a referral is not possible within a PT group. Respondents cannot have it both ways.

fee for referrals—overuse or abuse of PT services for profit and to prevent schemes that foster fee for services. *Cf.* Sloan, 370 S.C. 452, 473, 636 S.E.2d 598, 609. Respondents question the efficacy of a report from the Center for Medicare and Medicaid Services ("CMS") and the Office of Inspector General ("OIG") (*See* Fed. Reg., Vol. 76, No. 22, Feb. 2, 2011, p. 5867) and S.C. DHHS Bulletin (R.__) (Ex 36, SCDHHS Bulletin) on the ground that the CMS/OIG December 2010 report studied Florida providers of PT services and "did not "distinguish between physician-owned and other outpatient physical therapy practices." (Respondents' Br. 41) The fact remains that CMS has listed PTs and PT groups as moderate risk for fraud, waste, and abuse. *Id.,* p. 5895. The determination that PTs and PT groups are in a moderate risk for engaging question billing practices while physicians and physician groups were in a low risk "of fraud, waste, and abuse ...." is codified in the provider screening requirements of 42 C.F.R. §424.518(b)(vii). See also, Fed. Reg., Vol. 76, No. 22, Feb. 2, 2011, p. 5867.

Further, Respondents argue that physicians[22] are the gatekeepers with regard to the breadth and frequency of PT services. (Respondents' Br. 42) However, physicians rely on the PT to report the patient's progress. A PT's POC or report to the physician can clearly lengthen the treatment by simply understating the patient recovery or exaggerating the symptoms. This is the potential that CMS was attempting to avoid when it adopted 42 C.F.R. §424.518(b)(vii). If a PT could be employed by a physician or physician group, the physician would have the opportunity to observe the patient him or herself and see the patient's true condition. Finally, Respondents cite twenty-two (22) year old studies, while refusing to recognize the CMS, OIG and SC DHHS fraud, waste

[22] As discuss in Appellants' brief p. 32, physicians may simply provide a diagnosis to the PT and state "physical therapy."

and abuse risk determinations, to say that there is a great risk of fraud where physicians employ PTs.

D. The 2011 Position Statement Adoption Violated the APA. The Carpenter Letter requests a determination regarding the legality of a PTOG employing PTs and referring patients to employed PTs and PTA. (R. __) (Ex. 3, Carpenter Letter dated May 3, 2011) The PT Board intended for Carpenter and the PT Community to rely on the 2011 Position Statement to continue to practice in PTOG's without fear of violating S.C. Code Ann. § 40-45-110(A)(1). 42 C.F.R. §424.518(b)(vii). By creating the "coverage" exception to S.C. Code Ann. § 40-45-110(A)(1), contrary to Respondents' contention (Respondents' Br. 46), prescribed the law for PTs in more detail than set forth by statues.

E. Sloan Does not Foreclose Appellants' Equal Protection and Substantive Due Process Arguments as to the 2011 Position Statement. Again, Respondents cannot have it both ways. Regarding equal protection, neither the issue of overuse of PT services by PTOGs nor the concept of transition of patients under a "coverage" theory were before the Sloan Court. Respondents have not articulated a rational relationship between the prohibition of "fee-for-referral" in an intra-professional versus an "inter-professional" relationship.

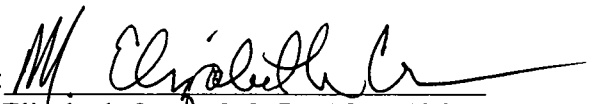
As to substantive due process, by creating an artificial distinction between "intra-professional" and inter-professional" relationships and not extending the "coverage" exception to physicians and physicians groups, PT Joseph is deprived of her right to provide "coverage" to PT patients in the setting in which she is most comfortable in practicing.

F. Stearns' Affidavit. Respondents' argue that "[t]his is a case of statutory construction involving questions of law. Respondents did not offer opinion testimony from Mr. Stearns on the ultimate questions of law at issue." (Respondents' Br. 48) In fact, Respondents' did offer Mr. Stearns Affidavit, in part, on questions of law at issue herein. (R. __) (Ex. 39, ¶12(c) (a PT is not making a referral to a PTA), ¶12(e) (a PT cannot "cover" for a physician), ¶17 (his understanding of the PT Act), ¶34 (transition of patient for one PT to another does not constitute a referral), ¶36 (within PTOG, PTA assigned patient treatment, handoff from PT to PTA not a referral), and ¶39 (a PT cannot provide coverage for a physician). Each of these "opinions" rendered by Mr. Stearns go directly to ultimate questions of law before this Court. The Court should not rely on Mr. Stearns' affidavit as to the ultimate questions of law before it.

CONCLUSIONS

The Court should reverse its decision in Sloan, find that majority erred in its interpretation of S.C. Code Ann. § 40-45-110(A)(1) in upholding the 2004 Position Statement and reinstate the law in place prior to the Sloan decision. Alternatively, this Court should determine that the fee-for-service referral prohibition in S.C. Code Ann. § 40-45-110(A)(1) is equally applicable to PTOG and PTs cannot employ PTs and refer patients to them for PT treatment. Alternatively, if the Court determines that PTOG's can employ PTs and transfer patients under the rubric of "coverage", physicians or groups may also employ PTs and transfer patients to PTs for the limited purpose of providing PT services under the rubric of coverage.

Respectfully submitted,

By: 

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September 22, 2014

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Richland County
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2014-001115

Kristin Joseph P.T., Thomas N. Joseph, M.D., and
William G. McCarthy, M.D., ... Appellants,

v.

South Carolina Department of Labor, Licensing and Regulation,
South Carolina Board of Physical Therapy, ... Respondents,

and

South Carolina Chapter, American Physical Therapy Association,
Joseph M. McKowen, PT, Sabrina Queen Bridges, PTA, and
Amalia W. Kirby, (PTA), ... Respondents.

CERTIFICATE OF SERVICE

I do hereby certify that I have this date served one (1) copy of Appellants' Reply to Respondents' Initial Brief and Designation of Matter upon the following counsel of record by United States Mail, First Class, postage prepaid, to the following addresses:

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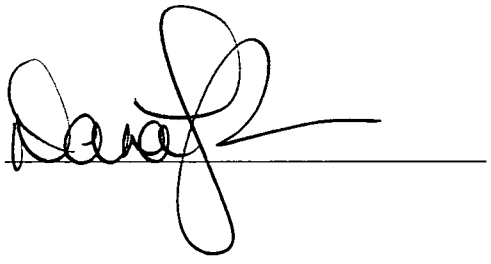

September 22, 2014
Columbia, South Carolina