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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
In the Court of Common Pleas

G. Thomas Cooper, Jr., Presiding Judge

Appellate 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,.....Respondent,

and

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

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STATEMENT OF ISSUES ON APPEAL

1. Should this Court overrule its eight-year-old precedent in *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 636 S.E.2d 598 (2006), which construed § 40-45-110(A)(1) of the Physical Therapy Practice Act to prohibit a physical therapist from working as an employee for a physician who refers patients to the physical therapist for services, when the Legislature has confirmed this Court's determination of its legislative intent by subsequent refusal to amend or repeal the statute?

2. Should this Court overrule *Sloan,* in which it decided that the referral restrictions in § 40-45-110(A)(1) do not violate the equal protection and due process clauses of the Constitutions of South Carolina and the United States?

3. Do Appellants have standing to challenge a 2011 position statement made by the South Carolina Board of Physical Therapy where: (a) the statement has no force of law; (b) Appellants do not face any current or threatened injury attributable to the statement; and (c) a judicial declaration invalidating the statement will not afford Appellants any relief?

4. Did the lower court correctly decide that the referral restrictions in § 40-45-110(A)(1) do not prohibit transitions in patient care from physical therapist to physical therapist and physical therapist to physical therapist assistant within group physical therapy practices?

5. In ruling on questions of statutory construction, did the lower court err in admitting the opinions of John P. Stearns—a licensed PT, MBA, and healthcare consultant—where his testimony was offered on background facts regarding the operation of physical therapy practices and the potential consequences in the operation of physical therapy practices if certain statutory interpretations advocated by Appellants were adopted?

STATEMENT OF THE CASE

Appellant physicians, Drs. Joseph and McCarthy, along with Dr. Joseph's wife, Kristin Joseph P.T., seek to overturn *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 636 S.E.2d 598 (2006), which held that § 40-45-110(A)(1) of the South Carolina Physical Therapy Practice Act ("PT Act") prohibits a physical therapist ("PT") from being employed by a physician who refers patients to the PT for services. In a

December 4, 2012 order, the circuit court dismissed Appellants' claims challenging *Sloan*, holding that, as a matter of law, it was bound by and had no authority to overrule this Court's long-standing decision. Appellants neither referenced the circuit court's December 4, 2012 order in their notice of appeal, nor attached it thereto, but nonetheless seek to overturn *Sloan* in this appeal.

Appellants also seek reversal of the circuit court's April 22, 2014 order dismissing their claims challenging a 2011 position statement from the South Carolina Board of Physical Therapy (the "Board"), which opined that a PT or physical therapist assistant ("PTA") seeing a patient at the request of another PT employed in the same group practice does not constitute a "referral" within the meaning of § 40-45-110(A)(1).

STATEMENT OF FACTS

The issues presented in this appeal stem from the 1998 amendments to the PT Act that regulates PTs and PTAs, the subsequent litigation over the construction of that Act in *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 636 S.E.2d 598 (2006), and the circuit court's recent order granting summary judgment in favor of the Respondents in this case, *see* Apr. 22, 2014 Order Granting Def.'s Mots. for Summ. J. ("Apr. 22, 2014 Order") (R. pp. 260-83).

The statutory provision at issue in *Sloan*, and at issue in the proceedings below, is South Carolina Code § 40-45-110(A)(1), which states:

> (A) In addition to the other grounds provided for in Section 40-1-110, the [Board], after notice and hearing, may restrict or refuse to renew the license of a licensed person, and may suspend, revoke, or otherwise restrict the license of a licensed person who:
>
> > (1) requests, receives, participates or engages 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, including, but not limited to, wages, an

> unearned commission, discount, or gratuity with a person who referred a patient, or with a relative or business associate of the referring person; . . .

S.C. Code Ann. § 40-45-110(A)(1).

Much of the history relevant here is recounted in *Sloan* and the circuit court's order. *See* Apr. 22, 2014 Order (R. pp. 261-67). In 2004, two state senators requested an opinion from the Attorney General regarding the scope and interpretation of § 40-45-110(A)(1). *Id.* at 2 (R. p. 262). Specifically, the senators inquired whether the statute prohibited a PT from working for pay for a physician employer when the physician refers patients to the PT for services. *Id.* The Attorney General issued an opinion concluding that the statute prohibited such employment relationships. *Id.*

In a position statement, the Board endorsed the Attorney General's opinion and announced that it would begin investigating complaints against PTs employed by referring physicians (the "2004 Position Statement"). *Id.* Following the Board's 2004 Position Statement, a physician, Allen Sloan, filed a lawsuit against the Board. *Id.* Dr. Sloan was eventually joined by the South Carolina Medical Association, Doctor's Care, P.A., Barry E. Fitch, Jerry O'Reilly, Oaktree Medical Centre, P.C., FirstChoice Healthcare, P.C., and Southern Orthopaedic Sports Medicine, LLC. *Id.* at 2-3 (R. pp. 262-63). The South Carolina Association of Medical Professionals, and the South Carolina Orthopaedic Association filed a separate suit against the Board, which was consolidated with the earlier action. *Id.* at 3 (R. p. 263). These plaintiffs sought declaratory judgment relief based upon their interpretation of § 40-45-110(A)(1)—namely that physicians could employ PTs and refer patients to those PTs without running afoul of the statute—as well as upon equal protection and due process grounds. *Id.* On

February 24, 2005, the circuit court granted summary judgment in favor of the Board on all of the issues and dismissed the plaintiffs' causes of action. *Id.*

In 2006, the South Carolina Supreme Court issued its opinion in *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 636 S.E.2d 598 (S.C. 2006), affirming the circuit court's decision. Among its rulings, this Court held:

(a) § 40-45-110(A)(1) prohibits a PT from working as an employee of a physician when the physician refers patients to the PT for services, *id.* at 609;

(b) the Board's 2004 Position Statement is "nothing more than a policy or guidance statement which does not have the force or effect of law in any individual case," *id.* at 610, and does "not constitute a new regulation that is void for failure to comply with the rule-making provisions of the APA," *id.* at 611;

(c) § 40-45-110(A)(1) does not violate the equal protection rights of PTs who wish to be employed by physicians, *id.* at 613-14; and

(d) § 40-45-110(A)(1) does not violate the substantive or procedural due process rights of PTs who wish to be employed by physicians, *id.* at 614-15.

Following the Court's decision in *Sloan*, two bills were introduced in the Legislature that attempted to overturn the statutory prohibition on PTs working for physicians, S. 1031 and H. 4329, 118th Session, 2009-2010. Apr. 22, 2014 Order at 4 (R. p. 264); *see also* Exs. A & B to Board's Mem. in Supp. of Mot. for Summ. J. (R. pp. 634-38). Despite the lobbying efforts of physicians and physician groups in favor of the two proposed bills, neither passed. *Id.*

On May 3, 2011, Robert Carpenter, a practicing PT, wrote a letter to the Board asking it to issue a position statement addressing the following two questions:

> (#1) Does S.C. Code Ann. § 40-45-110(A)(1) prohibit a physical therapist or a physical therapist assistant from working for pay for another physical therapist or physical therapist assistant or group of physical therapists

> when the physical therapist or physical therapist assistant refers a patient to another physical therapist or physical therapist assistant for physical therapy services?
>
> (#2) Does S.C. Code Ann. § 40-45-110(A)(1) prohibit a physical therapist or physical therapist assistant from working for pay for a professional corporation owned by one or more licensed physical therapists when a physical therapist owner or employee of the corporation refers a patient to the physical therapist for physical therapy services?

Id. The Chair of the Board responded to Mr. Carpenter by letter dated June 2, 2011, stating her view that the answer to the questions was "no." *Id.* At a subsequent Board meeting, the Board voted to accept the position stated in the Chair's letter, and a position statement (the "2011 Position Statement") was posted on the Board's website. *Id.* at 4-5 (R. pp. 264-65). The 2011 Position Statement stated as follows:

> In a group practice, a physical therapist or a physical therapist assistant providing services to a patient of that practice should not fall within this definition of a "referral". The physical therapist or physical therapist assistant seeing a patient at the request of another physical therapist in the same group does not constitute a "referral", but is rather a physical therapist or physical therapist assistant providing coverage either within the 30-day window or pursuant to the same referral from a physician or other member of the group.

The 2011 Position Statement thus rejected the notion that when a PT or PTA sees a patient at the request of another PT employed by the same practice, there is a prohibited "referral" within the meaning of § 40-45-110(A)(1). *Id.* at 5 (R. p. 265).

On April 12, 2012, Appellants filed a Declaratory Judgment Action/Complaint against the Board seeking, *inter alia*, a declaration that would allow PTs to be employed in practices owned by physicians. Appellants amended their complaint on July 11, 2013. *See generally* Am. Compl. (R. pp. 77-113). The Appellants are: Kristen Joseph, a PT working in a group physical therapy practice; her husband, Dr. Thomas Joseph, an

orthopedic surgeon; and Dr. William McCarthy, also an orthopedic surgeon.[1] Appellants' suit is funded by the South Carolina Orthopaedic Association, *see* T. Joseph Dep. 26:7-24 (R. p. 646); McCarthy Dep. 25:14-22 (R. p. 656), one of the parties in *Sloan*, *see* 370 S.C. at 466, 636 S.E.2d at 605, and a proponent of bills seeking to amend § 40-45-110(A)(1) after the *Sloan* decision. Apr. 22, 2014 Order at 5 n.1 (R. p. 265). Appellants state their goal plainly in their Amended Complaint: the PT plaintiff, Mrs. Joseph, wants to be able to work directly for physicians, like her husband Dr. Joseph, *see* Am. Compl. ¶ 1 (R. p. 77); the physician plaintiffs, Drs. Joseph and McCarthy, want to employ PTs, *id.* ¶¶ 2-3 (R. p. 78).

The Board moved to dismiss the case because, among other things, the Seventh through Ninth Causes of Action sought to "argue against precedent," namely *Sloan*. Apr. 22, 2014 Order at 5 (R. p. 265). The circuit court agreed, finding that, "[a]s a matter of law, this Court is bound by the Supreme Court's decision in *Sloan* and has no authority to overrule *Sloan*." Dec. 4, 2012 Order Granting Partial Summ. J. as to Causes of Action Seven Through Nine, at 12 (R. p. 17). The circuit court thus dismissed the Seventh through Ninth Causes of Action. *Id.* (converting motion to dismiss into one for partial summary judgment and granting same).[2]

On November 1, 2013, after the completion of discovery, the Appellants moved for summary judgment on their First through Sixth Causes of Action, which challenged the 2011 Position Statement. The Respondents also then moved for summary judgment

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[1] On May 2, 2013, a motion to intervene as party defendants was filed by South Carolina Chapter, American Physical Therapy Association ("SCAPTA"), Joseph M. McKowen, PT, Sabrina Queen Bridges, PTA, and Amalia W. Kirby, PTA. The other parties consented to the intervention, and the circuit court granted the motion.

[2] The Amended Complaint was filed after the December 4, 2012 dismissal of the Seventh through Ninth Causes of Action, but the consent order granting leave to amend expressly states that the amendment "is not intended to nor shall it have any effect on ... the Order Granting Summary Judgment as to Causes of Action Seven through Nine..." July 1, 2013 Consent Order (R. pp. 73-74).

on those same causes of action. After extensive briefing, the circuit court heard argument on the cross-motions for summary judgment on January 16, 2014. On April 22, 2014, the circuit court entered an order granting Respondents' motion for summary judgment and denying Appellants' motion for summary judgment. In reaching this decision, the circuit court determined that:

(a) the "referrals" targeted by § 40-45-110(A)(1) are the "referrals of gatekeeping physicians," and Appellants' proposed interpretation applying that provision of the PT Act to restrict patient transitions within the group practice of physical therapy would "harm the practice of physical therapy in South Carolina without advancing the legislative purpose of the statute," Apr. 22, 2014 Order Granting Summ. J. at 9-17 (R. pp. 269-77) (First and Second Causes of Action);

(b) Appellants' requested "coverage" exception would impermissibly "declare conduct lawful that *Sloan* declared unlawful," *id.* at 18-19 (R. pp. 278-79) (Third Cause of Action);

(c) the 2011 Position Statement does not violate the Administrative Procedures Act ("APA") because "it is not a regulation or the equivalent of a regulation," *id.* at 19-20 (R. pp. 279-80) (Fourth Cause of Action); and

(d) the 2011 Position Statement does not violate Plaintiffs' equal protection or substantive due process rights, *id.* at 20-22 (R. pp. 280-81) (Fifth and Sixth Causes of Action).

(e) the opinions of Respondents' expert, John P. Stearns, were admissible, *id.* at 22-23 (R. pp. 282-83).

Appellants filed a motion to reconsider, alter, or amend on May 8, 2014. (R. pp. 284-91). The circuit court denied this motion, finding that it was "unable to discover any material fact or principle of law that either has been overlooked or disregarded." May 14, 2014 Order Denying Mot. to Recons. at 1 (R. p. 297).

Appellants filed a notice of appeal in the Court of Appeals on May 23, 2014. *See* Notice of Appeal (R. p. 298-300). Pursuant to the notice, Appellants are appealing the

circuit court's April 22, 2014 order granting summary judgment to the Respondents on the First through Sixth Causes of Action. *See id.* On August 6, 2014, the Supreme Court certified this case for review pursuant to Rule 204(b), SCACR. *See* Aug. 6, 2014 Order.

STATUTORY AND REGULATORY BACKGROUND

This case involves the interpretation of the PT Act, which created the Board to license both PTs and PTAs. S.C. Code Ann. § 40-45-10. In general, a PT may not evaluate or treat a patient unless a licensed medical doctor or dentist has made a "referral." The PT Act authorizes the Board to discipline a PT or PTA who:

> ... in the absence of a referral from a licensed medical doctor or dentist, provides physical therapy services beyond thirty days after the initial evaluation and/or treatment date without the referral of the patient to a licensed medical doctor or dentist;

Id. § 40-45-110(A)(4). The Board's regulations provide that a PT may not continue treatment of a patient after the initial 30-day window unless the PT has received "a referral orally or in writing by a licensed medical doctor or dentist." S.C. Code of Regulations R. 101-11.

The PT Act defines "physical therapist assistant" to mean "a person who is licensed by the [B]oard to assist a physical therapist in the practice of physical therapy and whose activities are supervised and directed by a physical therapist whose license is in good standing." *Id.* § 40-45-20(5). A PTA thus must function under the supervision and direction of a licensed PT. *Id.* The supervising PT is professionally and legally responsible for patient care given by a PTA. *Id.* § 40-45-300(A)-(B). The initial evaluation of a patient must be performed by a PT, and a PTA may perform duties only after the PT has conducted the initial evaluation. *Id.* The PT may delegate to a PTA and supervise selected acts, tasks, or procedures that fall within the practice of physical

therapy but that do not exceed the education or training of a PTA. *Id.* Any alteration of a patient plan of care must be approved in advance and in writing by a licensed PT. *Id.* Periodically, a PT must reevaluate every patient and reapprove the plan of care. *Id.*

ARGUMENT

Appellants want physicians to be able to employ PTs and refer patients to them for services. As the Court correctly determined in *Sloan*, this is prohibited by the referral restrictions in § 40-45-110(A)(1) of the PT Act, which prevent a licensed PT from receiving "wages" from a physician who refers patients to the PT for services. 370 S.C. at 469, 636 S.E.2d at 607. In *Sloan*, the Court determined that the Legislature's intent in passing § 40-45-110(A)(1) was to avoid "overuse of physical therapy services by physicians who, for their own financial gain rather than their patients' medical needs, refer patients to therapists employed by the physician who will generate additional fees for the physician." *Id.* at 482, 614; *see also id.* at 469, 607; *id.* at 479-80, 612-613. Here, the Appellants (funded by a physician group) ask the Court to allow physician-owned physical therapy practices ("POPTS"), even though the Legislature prohibited POPTS by enacting § 40-45-110(A)(1). *Id.* at 479-80, 612-613.

Since the *Sloan* decision in 2006, Appellants and their physician group allies have asked the Legislature to repeal the prohibition on PTs working for physicians in § 40-45-110(A)(1). Those efforts failed. Appellants now come to this Court asking it to reverse *Sloan* and, in effect, amend § 40-45-110(A)(1), even though the Legislature has been asked to do so and declined. There is no basis for the Court to reverse its own well-reasoned precedent, and certainly not to make a legislative determination on a health policy issue already thoroughly addressed by the General Assembly.

In their other claims regarding the Board's 2011 Position Statement, Appellants make a remarkable pivot. In seeking to overturn *Sloan*, they ask the Court for a narrow interpretation of § 40-45-110(A)(1)—one that would allow POPTS. Should that argument fail once again, Appellants argue alternatively for an absurd interpretation of § 40-45-110(A)(1)—one that would prevent PTs from practicing together and prevent PTs from supervising PTAs. Appellants' interpretation of the PT Act would thus effectively eliminate the group practice of physical therapy and the licensed position of PTA in this State. Presumably, Appellants believe that, if they cannot convince the Court to contravene the Legislature to allow POPTS directly, perhaps they can convince this Court to adopt an interpretation of § 40-45-110(A)(1) that harms the practice of physical therapy and the public. Then, presumably, physical therapist groups would be forced to join with physician groups in seeking the legislative repeal of § 40-45-110(A)(1), paving the way for POPTS.

Appellants frame their alternative request as a challenge to the Board's 2011 Position Statement, in which the Board opined that § 40-45-110(A)(1) does not prohibit patient care transitions from one PT to another PT or from PTs to PTAs working within the same group practice. Appellants claim that the transitions of patients from PT to PT occurring within a group physical therapy practice constitute prohibited "referrals" under § 40-45-110(A)(1). This strained interpretation of the term "referral" conflicts with the language and context of § 40-45-110(A)(1) within the PT Act, does nothing to advance the purpose of the statute, and would produce absurd and harmful results not intended by the Legislature.

Moreover, as the Court found with respect to the Board's 2004 Position Statement in *Sloan*, the 2011 Position Statement has no force of law. *See* 370 S.C. at 473-76, 636 S.E.2d at 609-11. The Board's 2011 Position Statement does not prevent the Appellants from doing anything or otherwise harm them in any way. A declaration invalidating the 2011 Position Statement would do nothing for the Appellants. Such a declaration would neither permit the physician plaintiffs to employ PTs, nor would it permit the PT plaintiff to work for a referring physician. Accordingly, Appellants are not only mistaken in their quarrel with the Board's interpretation of the PT Act in the 2011 Position Statement, but they also lack standing to bring such a legal challenge because the 2011 Position Statement does not prejudice them and their requested declaration invalidating the 2011 Position Statement affords them no relief.

For all these reasons, and as further addressed herein, the circuit court's judgment should be affirmed.

I. *Sloan* Should Not Be Overturned.

A. Appellants Offer No Reason for the Court to Reject *Stare Decisis* and Overturn *Sloan*, Particularly Where the Legislature Has Expressly Refused to Amend or Repeal the Statute at Issue.

Appellants urge this Court to overrule *Sloan,* but they offer no valid reason for the Court to do so. As a threshold matter, Appellants concede that they have not appealed the circuit court's order following *Sloan*, so they in effect admit that this Court lacks jurisdiction to consider the question on appeal.[3] More importantly, Appellants fail to

[3] Although this Brief addresses the challenge to *Sloan*, Appellants have failed to preserve their challenge for appeal. The circuit issued two summary judgment orders adverse to Appellants: the December 4, 2012 order that dismissed the Seventh through Ninth Causes of Action directly challenging *Sloan*; and the April 22, 2014 order dismissing the First through Sixth Causes of Action addressing the 2011 Position Statement. Appellants' notice of appeal mentions and attaches the 2014 order, but it *neither mentions nor attaches the 2012 order*. *See* Notice of Appeal (R. pp. 298-300). Only long after the 30-day period specified in Rule 203(b)(1) had expired did Appellants inform Respondents and this Court that they

address the fact that, if the Legislature believed *Sloan* misconstrued the PT Act, it has had ample opportunity to make a correction. Since *Sloan*, the Legislature has considered bills sought by Appellants and their physician group allies to amend § 40-45-110(A)(1) to eliminate the restriction on PTs working for physicians, and has rejected them. The Court should not disregard its own precedent on an issue where the Legislature has confirmed the Court's determination of its intent.

In considering challenges to its own precedent, this Court is guided by *stare decisis*—a doctrine that "exists to insure a quality of justice which results from certainty and stability." *State v. One Coin-Operated Video Game Mach.*, 321 S.C. 176, 181, 467 S.E.2d 443, 446 (1996) (adhering to prior precedent and stating that, "[although] [t]hat decision was a close one, with two justices dissenting, . . . we see no reason to revisit it"). "[*S*]*tare decisis* is especially applicable to decisions construing statutes because any desirable change may be readily accomplished by the legislature." *In re Layton*, 243 S.C. 421, 424, 134 S.E.2d 247, 248 (1964); *see also Wehle v. S.C. Ret. Sys.*, 363 S.C. 394,

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are seeking to challenge the 2012 circuit order and *Sloan*. Appellants attempt to justify their failure to notice an appeal of the 2012 order with the remarkable assertion that they may seek to overturn this Court's precedent *without filing an appeal*. They argue, "[t]here is no requirement that Appellants appeal a direct challenge to *Sloan*." Appellants' Reply to Resp'ts' Mem. in Opp'n to Mot. to Certify Case at 2. Appellants claim that Rule 217 "dictate[s] the only method by which a party may seek to argue against precedent." *Id.* Appellants reason that an adverse opinion by a circuit court based on Supreme Court precedent may not be appealed because a lower court does not err by following this Court's precedent. That said, the Appellants are asserting that the *Sloan* opinion and, therefore, the circuit court's 2012 summary judgment order that followed it, are erroneous on statutory and constitutional grounds. Appellants thus clearly were "aggrieved" by the 2012 order, which means that it was appealable. For this Court to entertain the Appellants' challenge to *Sloan* would be tantamount to saying that a party may obtain appellate review of any order applying Supreme Court precedent that the party wants overturned—without ever filing a Rule 203 notice of appeal—merely by filing a brief that alludes to Rule 217. But Rule 217 is a supplement to Rule 203, not a substitute for it. *See* Rule 217, SCACR; *see also* Rule 203(d)(1)(B)(ii), SCACR (notice of appeal must be accompanied by a "copy of the order(s) and judgment(s) to be challenged on appeal"). Rule 217 does not purport to dispense with the Rule 203 notice requirements. Rather, Rule 217 clearly presupposes the existence of an appeal, which, under the Rules, entails a notice of appeal that complies with Rule 203. Appellants may challenge the 2012 order, and *Sloan* opinion on which it rests, only by way of an appeal based on a proper Rule 203 notice, and not simply by pointing to Rule 217. Because their notice of appeal does not mention or attach the December 4, 2012 order, Appellants' challenge to *Sloan* in their Seventh though Ninth Causes of Action was not properly preserved for appeal.

402, 611 S.E.2d 240, 244 (2005) ("The doctrine of *stare decisis* enjoys particular efficacy in the context of challenges concerning the construction of statutes and determination of legislative intent."); *Scarborough v. Hodge*, 258 S.C. 229, 232, 187 S.E.2d 793, 794 (1972).

In *Powers v. Powers*, 239 S.C. 423, 427, 123 S.E.2d 646, 647 (1962), for instance, the plaintiff petitioned this Court to overrule one of its prior decisions that otherwise precluded his action. Although this Court noted that its prior decision was not unanimous, it declined to overrule it, stating that while the "majority and the dissenting opinions each lucidly states the divergent views of the members of the court as it was then constituted," the "prevailing opinion became the law of the case." *Id.* With "due regard to the salutary doctrine of stare decisis," this Court did not believe "it would be justified in overruling that case." *Id.* In reaching this conclusion, this Court noted that "[i]t is manifestly in the public interest that the law remain permanently settled," particularly with respect to the construction of statutes because, "if any change in the statutory law is desired, the General Assembly may readily accomplish it." *Id.*

The same is true here. The Legislature is presumed to be aware of this Court's interpretation of its statutes. *Wigfall v. Tideland Utils., Inc.*, 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003); *State v. 192 Coin-Operated Video Game Machs.*, 338 S.C. 176, 188, 525 S.E.2d 872, 879 (2000). If the Legislature thought the Court's interpretation of the PT Act in *Sloan* was wrong, it could easily have changed the statute. *See One Coin-Operated Video Game Mach.*, 321 S.C. at 181, 467 S.E.2d at 446 ("Because we are adhering to our earlier interpretation of a statute, the General Assembly is free to correct any misinterpretation on our part."). But despite the introduction of bills to overturn the

statutory prohibition on PTs working for physicians, supported by extensive lobbying from Appellants[4] and other physicians and physicians groups, the Legislature has declined to do so. This "inaction is evidence the Legislature agrees with this Court's interpretation." *Wigfall*, 354 S.C. at 111, 580 S.E.2d at 105. Appellants thus invite this Court to reverse not only its own decision, but also the post-*Sloan* decisions of the General Assembly rejecting bills to amend § 40-45-110(A)(1). As the Court has previously held, this is action the Court should not take. *See, e.g., Keyserling v. Beasley*, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) ("We do not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly."). For these reasons alone, *Sloan* should not be overturned.

B. This Court in *Sloan* Correctly Decided that the PT Act Prohibits a PT from Working as an Employee for a Physician who Refers Patients to the PT for Services.

Appellants argue that this Court's interpretation of § 40-45-110(A)(1) prohibiting a PT from working as an employee of a physician when the physician refers patients to the PT for services was incorrect, ignores the purpose of the statute, fails to properly read the PT Act *in pari materia* with the Self-Referral, Anti-Kickback and Stark laws, and creates an absurd situation. Appellants' Br. 9-17. These arguments lack merit.

1. The term "wages" was used in § 40-45-110(A)(1) to prohibit PTs from working as employees for referring physicians.

In *Sloan*, the Court correctly found that the Legislature intended to prevent PTs from sharing fees with referring physicians because "the statute specifically lists 'wages' as a form of valuable consideration by which a physical therapist may not, directly or

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[4] Two of the Appellants, Dr. McCarthy and Mrs. Joseph, testified in a legislative hearing on a proposed bill to amend the statute. *See* Board's Mem. in Supp. of Mot. for Summ. J. at 4, citing McCarthy Dep. 23-25, K. Joseph Dep. 52-54 (R. p. 185).

indirectly, divide, transfer, assign or refund professional fees." *Sloan*, 370 S.C. at 469, 636 S.E.2d at 607. Appellants contend that *Sloan* was wrong and the inclusion of the term "wages" does "not contemplate employment" relationships because wages can be paid on an "hourly, daily, or piecework basis." *See* Appellants' Br. 13. They argue that § 40-45-110(A)(1) was merely intended to prohibit "episodic or piecemeal" referral-for-pay arrangements that would result in PTs being paid more than the "fair market value of the services." *Id.* In essence, Appellants contend that § 40-45-110(A)(1) only prohibits PTs from receiving inflated compensation or kickbacks from referring physicians, but not from otherwise receiving wages from a referring physician who employs them. This strained argument ignores the ordinary meaning of "wages," and makes no sense given the law and industry practice with respect to physical therapy referrals.

As Appellants recognize, the term "wages" in its normal and customary usage means "payment for labor or services, usu[ally] based on time worked or quantity produced; specific[ally], compensation of an *employee* based on time worked or output of production." Appellants' Br. 12 (quoting Black's Law Dictionary, Eighth Ed., 1610 (2004) (emphasis added)). Even when paid on an hourly, daily, or piecemeal basis, wages are paid by employers to employees. *See, e.g.*, *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 318, 698 S.E.2d 773, 783 (2010) (stating that South Carolina Payment of Wages Act, which protects "*employees* from the unjustified and willful retention of wages by the *employer*" defines "wages" as "all amounts at which labor rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or commission basis, or other method of calculating the amount . . . due to an *employee under any employer policy or employment contract.*") (emphasis added)). As this Court

found in *Sloan*, the inclusion of the term "wages" was meant to prohibit the sharing of fees between a referring physician employer and a PT employee. *Sloan*, 370 S.C. at 469, 636 S.E.2d at 607.

Appellants contend that "wages" in § 40-45-110(A)(1) means only wages that are above "fair market value," but that is not what the statute says. Appellants also fail to explain how a PT would be able to extract above-market compensation from a referring physician. As addressed in more detail above and below,[5] by law and in practice, physicians are the gatekeepers for physical therapy services. PTs need referrals from physicians in order to practice, not vice versa. PTs are not in position to extract "above-market compensation" or obtain kickbacks from the physicians who refer patients to them. Apart from Appellants' bald contention, there is nothing that suggests that the term "wages" in § 40-45-110(A)(1) was aimed at preventing PTs from obtaining "above-market compensation" from referring physicians, nor any evidence that such inflated payment would ever occur.

Rather, the legislative intent of § 40-45-110(A)(1) is clear: the General Assembly sought to avoid the "overuse of physical therapy services by physicians who, for their own financial gain rather than their patients' medical needs, refer patients to therapists employed by the physician who will generate additional fees for the physician." *Sloan*, 370 S.C. at 482, 636 S.E.2d at 614; *see also id.* at 469, 607; *id.* at 479-80, 612-613. In other words, the Legislature wanted to prohibit relationships in which physicians could make money by making referrals to PTs. The use of the term "wages" was designed to include situations in which the physician could make money by referring patients to a PT employed by or with that physician. *See id.* at 469, 607. Appellants make no valid

[5] *See* Statutory and Regulatory Background, *supra.*, and Section II.B, *infra.*

argument—and present no evidence—that the Legislature's intention in enacting § 40-45-110(A)(1) was anything other than what the *Sloan* Court determined it to be. Again, if *Sloan* were wrong, the Legislature has had ample opportunity to correct the error, and it has not done so.

2. The referral prohibitions in the PT Act supplement the state Self-Referral Act and federal Anti-Kickback and Stark Laws.

Appellants also point to the Self-Referral Act and federal Stark and Anti-Kickback laws in making their argument that, contrary to the decision in *Sloan*, § 40-45-110(A)(1) does not prohibit an employment relationship between a referring physician and a PT. *See* Appellants' Br. 14-16. But the fact that the Legislature generally prohibited certain types of self-interested healthcare referrals in the Self-Referral Act[6] does not mean that it lacked the authority or intent to prohibit others—in this case, employer-employee physical therapy referrals—in the later-enacted § 40-45-110(A)(1). As this Court properly held in *Sloan*, "[t]he Legislature is free to further restrict such relationships regardless of a related state statute or federal laws, absent any issue of federal preemption, which is not implicated in the present case." 370 S.C. at 472, 636 S.E.2d at 608. Furthermore, if the referral restrictions in § 40-45-110(A)(1) simply reiterated already-existing referral restrictions in the 1993 Self-Referral Act (or existing federal Stark and Anti-Kickback laws), there would have been no need or reason for the Legislature to pass § 40-45-110(A)(1) in 1998. *See CFRE, LLC v. Greenville Cnty Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("... the General Assembly obviously intended the statute to have some efficacy, or the legislature would not have

[6] The Self-Referral Act applies to at least 18 different kinds of healthcare providers, *see* S.C. Code Ann. § 44-113-20(8), and relates to referrals for at least 12 different kinds of health service, *id.* at § 44-113-20(4).

enacted it into law."). As this Court correctly recognized in *Sloan*, the referral restrictions in the PT Act supplement the Self-Referral, Anti-Kickback, and Stark laws by eliminating the temptation for a gatekeeper physician to overuse physical therapy services by referring patients to PT employees. 370 S.C. at 469, 636 S.E.2d at 607; *see also id.* at 482, 614.

3. *Sloan* did not produce absurd results.

Appellants further contend that this Court's opinion in *Sloan* created an "absurd result" not intended by the Legislature. Appellants' Br. 16-17. This is plainly mistaken. *Sloan* has been the governing law of South Carolina for eight years. Because the practice of physical therapy is alive and well throughout the State, it is difficult to see how *Sloan* created any "absurd result." Appellants argue that the *Sloan* decision "creates an absurd situation where physician-physical therapist employment relationships are strictly verboten," claiming that the "Legislature did not intend to prohibit all employment relationships between physicians and physical therapist..." *Id.* at 17. To the contrary, that is exactly what the Legislature intended, as evidenced by its rejection of repeated attempts by physicians and physicians groups to amend § 40-45-110(A)(1) after *Sloan*. *See Wigfall*, 354 S.C. at 118, 580 S.E.2d at 109 ("Because the Legislature's intent is clear from the statute's language and the decision by the Legislature not to statutorily overturn *Singleton*, we affirm the [*Singleton*] rule . . . ."). For all these reasons, this Court in *Sloan* correctly held that the PT Act prohibits a PT from working as an employee for a physician who refers patients to the PT for services.

C. There Is No Reason to Reverse this Court's Rejection of Constitutional Challenges to the PT Act in *Sloan*.

This Court in *Sloan* ruled that § 40-45-110(A)(1) was constitutional and did not violate equal protection or due process. 370 S.C. at 480-484, 636 S.E.2d at 613-615. At the threshold, *stare decisis* stands in the way of Appellants' challenges to these eight-year-old rulings. *See One Coin-Operated Video Game Mach.*, 321 S.C. at 181, 467 S.E.2d at 446. In addition, the Court recognizes a strong presumption that the Legislature's statutes are constitutional. *State v. Nation*, 408 S.C. 474, 479, 759 S.E.2d 428, 431 (2014) ("A statute will not be declared unconstitutional unless its repugnance to the constitution is clear beyond a reasonable doubt."); *Emerson Elec. Co v. S.C. Dep't of Revenue*, 395 S.C. 481, 489, 719 S.E.2d 650, 654 (2011) ("When the issue is the constitutionality of a statute, every presumption will be made in favor of its validity and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution."); *Gary Concrete Prods., Inc. v. Riley*, 285 S.C. 498, 504, 331 S.E.2d 335, 338 (1985) (indicating that "a [legislative enactment] will be sustained against constitutional attack if there is any reasonable hypothesis to support it."). When this Court itself has already ruled that § 40-45-110(A)(1) is constitutional, it is hard to see how there could be "no doubt" that the same statute is instead unconstitutional. For these reasons, this Court's rejection of equal protection and due process challenges to § 40-45-110(A)(1) in *Sloan* should not be revisited, much less overturned.

Furthermore, as discussed below, the Court's rulings in *Sloan* on the constitutionality of § 40-45-110(A)(1) were correct.

1. Section 40-45-110(A)(1), as construed in *Sloan*, does not violate equal protection.

Appellants argue that the *Sloan* decision should be overturned because § 40-45-110(A)(1) violates the equal protection rights of PTs who wish to be employed by physicians who refer patients to them. *See* Appellants' Br. 18-23. Appellants' scattershot argument is erroneous and provides no reason to reverse *Sloan*.

Where, as here, a classification challenged on equal protection grounds does not implicate a suspect class or abridge any fundamental right, the classification must merely: (1) bear a reasonable relation to the legislative purpose sought to be achieved; (2) treat members of the class alike under similar circumstances; and (3) rest on some rational basis. *See Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 428, 593 S.E.2d 463, 469 (2004). Appellants main challenge to *Sloan* is on the "rational basis" part of the test, where they argue that this Court erred by interpreting the PT Act in a manner that treats PTs "differently from similarly situated health care professionals." Appellants' Br. 23.

a. *Sloan* correctly held that there was a rational basis to regulate PTs separately from other licensed health care providers.

There is no requirement that states regulate all professions in the same way. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955); *see also Ed Robinson Laundry & Dry Cleaning, Inc. v. S.C. Dep't of Revenue*, 356 S.C. 120, 124, 588 S.E.2d 97, 99 (2003) ("A class may be constitutionally confined to a particular trade."). The broad array of health care providers that Appellants reference in their brief, including physicians, speech therapists, occupational therapists, nurse practitioners, and audiologists, *id.*, cannot possibly be considered "similarly situated" for purposes of equal protection analysis. *See, e.g., Seabolt v. Tex. Bd. of Chiropractic Exam'rs*, 30 F. Supp.

2d 965, 969 (S.D. Tex. 1998) (holding that chiropractors are not similarly situated to medical doctors or osteopaths); *N.H. Podiatric Med. Ass'n v. N.H. Hosp. Ass'n*, 735 F. Supp. 448, 452 (D.N.H 1990) (holding that podiatrists are not similarly situated to physicians). These different classifications of health care providers provide different services, relate to patients, other providers, and payors in different ways, and are thus separately and differently licensed and regulated. *See, e.g.*, S.C. Code Ann. § 40-67-5 *et seq.* (separate regulations for speech therapists and audiologists); *id.* § 40-33-5 *et seq.* (separate regulations for nurse practitioners); *id.* § 40-47-5 *et seq.* (separate regulations for physicians).

The equal protection clause does not require that things that are different in fact be treated in the law as though they are the same. *Winter v. Pratt*, 258 S.C. 397, 408, 189 S.E.2d 7, 11 (1972); *Griffin v. Warden, C.C.I.*, 277 S.C. 288, 290, 286 S.E.2d 145, 146 (1982), *cert. denied*, 459 U.S. 942 (1982). The Legislature's decision to create different classes of licensed health care professionals subject to separate regulations tailored to each class is entitled to great deference. *See Sloan*, 370 S.C. at 480, 636 S.E.2d at 613 (stating that courts must give great deference to a legislative body's classification decisions because it presumably debated and weighed the advantages and disadvantages of the legislation at issue); *see also State ex rel. Medlock v. S.C. Family Farm Dev't Auth.*, 279 S.C. 316, 321, 306 S.E.2d 605, 609 (1983) (stating that the determination of whether a classification is reasonable is initially one for the legislature); *Gary Concrete Prods.*, 285 S.C. at 504, 331 S.E.2d at 338-39. As this Court decided in *Sloan*, there is plainly a rational basis for regulating PTs, including referrals to PTs, separately from other health care providers. 370 S.C. at 481, 636 S.E.2d at 613 (holding that the

Legislature had a rational basis for defining the pertinent class as the class of physical therapists and that "it would not be appropriate to hold that the Legislature must, for purposes of self-referral issues, treat all health care providers and allied health professionals as similarly situated").

While Appellants contend that PTs and physicians are similarly situated and should not be separately classified because "physical therapy is part of the practice of medicine" and the "provision of PT services is within a physician's scope of practice," Appellants' Br. 22, this argument should be rejected out of hand. First, Appellants rely on a Washington state case based on Washington law for the proposition that PTs can engage in a limited practice of medicine. *See id.* That is not the law here. PTs in South Carolina cannot practice medicine. *See* S.C. Code Ann. § 40-45-310 ("Nothing in this chapter may be construed as authorizing a licensed physical therapist or any other person to practice medicine . . . ."); *see also id.* § 40-45-110(A)(2).

Second, and more importantly, PTs and physicians are not the same. For example, and central to this case, PTs need referrals from physicians in order to treat patients beyond an initial 30-day window. S.C. Code § 40-45-110(A)(4); S.C. Code of Regulations R. 101-11. PTs are also subject to discipline if they modify "specific patient care instructions or protocols" established by a referring physician without the physician's approval. S.C. Code Ann. § 40-45-110(A)(5). Physicians, conversely, neither need referrals from PTs in order to practice, nor are they bound by instructions from PTs in treating their patients. So the law already treats PTs and physicians differently, including specifically with respect to referrals.

b. *Sloan* correctly determined that the referral restrictions in § 40-45-110(A)(1) bear a reasonable relation to the goal of avoiding the overuse of physical therapy services by referring physicians.

Sloan held that the prohibition on PTs sharing fees with referring physicians, including sharing fees through an employee-employer relationship, is reasonably related to the goal of reducing the "overuse of physical therapy services by physicians who, for their own financial gain, rather than their patients' medical needs, refer patients to therapists employed by the physician who will generate additional fees for the physician." *Sloan*, 370 S.C. at 482, 636 S.E.2d at 614.

Appellants challenge this Court's finding of a reasonable relationship, arguing that "[t]here are numerous other licensed health professionals that are employed by physicians and are dependent o[n] referrals from physicians to practice their chosen profession." Appellants' Br. 20. Those professions, however, are not regulated in the PT Act. Having made physicians the gatekeepers of physical therapy care by requiring PTs to have physician referrals in § 40-45-110(A)(4) of the PT Act, the Legislature sensibly enacted § 40-45-110(A)(1) to prevent physicians from making money from those statutorily-required referrals. The question is: do the referral restrictions in § 40-45-110(A)(1) bear a reasonable relation to the purpose of avoiding the overuse of physical therapy services by referring physicians who stand to profit from their referrals to PTs? Plainly they do. *See Sloan*, 370 S.C. at 482, 636 S.E.2d at 614.

c. Under *Sloan*, Section 40-45-110(A)(1) treats all PTs the same.

Appellants further argue that this Court erred in *Sloan* because "PTs are [not] barred from receiving referrals from all employers, only physician employers." Appellants' Br. 20. This confusing argument does not look at the class at issue, the class

of PTs. The statute treats all PTs the same; all PTs are prohibited from working as employees for referring physicians. *Sloan*, 370 S.C. at 482, 636 S.E.2d at 614.

For all of these reasons, Appellants' request to overturn the Court's equal protection decision in *Sloan* should be rejected.

2. Section 40-45-110(A)(1), as interpreted in *Sloan*, does not violate substantive due process.

Appellants argue that the *Sloan* decision should be overturned, and that § 40-45-110(A)(1) be deemed unconstitutional, because the statute supposedly violates Mrs. Joseph's substantive due process rights by arbitrarily and capriciously "restricting her right to be employed by the employer of her choosing." Appellants' Br. 23-26. This argument is baseless.

As a threshold matter, Mrs. Joseph does not work for a referring physician, and (unlike the PTs working for POPTS in *Sloan*) she is not facing any looming disciplinary action from the Board applying § 40-45-110(A)(1). Thus, any threat of potential harm she alleges is too contingent or remote to support a due process claim. *See Waters v. S.C. Land Resources Conservation Comm'n*, 321 S.C. 219, 227, 467 S.E.2d 913, 917-18 (1996) ("A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical, or abstract dispute.").

Even if her claims were justiciable, Mrs. Joseph would not be able to show that she was arbitrarily and capriciously deprived of a cognizable property interest. *See Sunset Cay*, 357 S.C. at 430, 593 S.E.2d at 470. Although an individual has a right to practice her chosen profession, the exercise of that right is subject to the Legislature's police power to enact statutes and regulations aimed at enhancing the public welfare. *See*

Dantzler v. Callison, 230 S.C. 75, 92-96, 94 S.E.2d 177, 186-88 (1956). Thus, where a restriction bears a reasonable relationship to any legitimate interest of government, substantive due process has not been violated. *See id.* Appellants suggest that this is not the standard, but they are wrong. Just last year, this Court reaffirmed that, "[i]n reviewing substantive due process challenges," courts must consider whether the legislation "bears a reasonable relationship to any legitimate interest of government." *Dunes West Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 296, 737 S.E.2d 601, 609 (2013).[7]

As this Court properly recognized in *Sloan*, "[t]he statute prohibiting employment relationships between physicians and physical therapists bears a reasonable relationship to a legitimate interest of government," namely to prevent "overuse of medical services." 370 S.C. at 479-80, 484, 636 S.E.2d at 612-13, 615. The Legislature was thus "within its power to regulate the practices of medicine and physical therapy" and "has not engaged in an arbitrary or wrongful act in enacting the statute." *Id.*

For all these reasons, there is no reason for the Court to overturn *Sloan*.

II. The Circuit Court's Dismissal of Appellants' Claims Challenging the 2011 Position Statement Should Be Affirmed.

This appeal makes a remarkable turn when it comes to the Appellants' claims regarding the Board's 2011 Position Statement, in which the Board stated its belief that

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[7] Appellants here, like the *Sloan* appellants, point to S.C. Code § 40-1-10 and argue that the Legislature improperly exercised its police power by enacting § 40-45-110(A)(1) because the referral restrictions therein are not "necessary for the preservation of the health, safety, and welfare of the public." Appellants' Br. 25. But Appellants cite no case, and Respondents are aware of none, where this *statute*, § 40-1-10, has been applied to alter this Court's *constitutional* analysis of a due process challenge to another statute passed by the Legislature. In any event, the Legislature determined that § 40-45-110(A)(1) was necessary to "avoid overuse of medical services." *Sloan*, 370 S.C. at 482-84, 636 S.E.2d at 614-15. As recognized in *Sloan*, this was a reasonable exercise of the Legislature's police power to "enact statutes and regulations aimed at enhancing the public welfare in the practice of medicine and related professions." *Id.*

§ 40-45-110(A)(1) does not prohibit the transition of patients from one PT to another PT or from PTs to PTAs working within the same group practice. In seeking to overturn *Sloan*, Appellants want § 40-45-110(A)(1) substantially narrowed—or eliminated altogether as unconstitutional—so that physicians can employ PTs. In challenging the 2011 Position Statement, the Appellants about-face and ask the Court to adopt an absurd interpretation of § 40-45-110(A)(1) that would prevent PTs from working together in group practice. Specifically, the Appellants seek a declaration that "the PT Board must discipline PTs for entering into employment arrangements with physical therapists and entities owned in whole or in part by a physical therapist." Am. Compl. ¶ 45 (R. p. 88); *see also id.* at ¶ 50 (R. p. 89); *id.* at 21, Relief Sought ¶ 3 (R. p. 97). Appellants offer no valid argument or evidence to suggest that the General Assembly enacted § 40-45-110(A)(1) in order to outlaw the group practice of physical therapy.

Even a cursory reading of the statute makes it clear that the referral restrictions in § 40-45-110(A)(1) are aimed at the gatekeeping referrals of physicians and not at the PT-to-PT and PT-to-PTA hand-offs of patients that must routinely occur in the group practice of physical therapy. As discussed above and below, having given physicians the keys to physical therapy care in § 40-45-110(A)(4), the Legislature enacted § 40-45-110(A)(1) to prevent physicians from making money by making the statutorily required referrals, thereby limiting the potential for overuse of physical therapy services. *Sloan*, 370 S.C. at 469, 636 S.E.2d at 607; *see also id.* at 482, 614. Appellants provide no reason why the Legislature would have intended the referral restrictions in § 40-45-110(A)(1) to prohibit the group practice of physical therapy. To Respondents' knowledge, no state has ever enacted—or even considered—legislation to ban the group

practice of physical therapy. Nor do Appellants explain why, if it intended to ban the group practice of physical therapy, the Legislature did not say so directly.

In *Sloan*, this Court determined that § 40-45-110(A)(1) was enacted to limit overuse of physical therapy services. Preventing PTs and PTAs from working together in group practice would do nothing to further that purpose. Appellants have presented no evidence that PTs can wring more treatment (and thus more money) out of a patient just by handing the patient off to a PT colleague in their practice or their employ. There is no evidence that PTs send or direct patients to other PTs in their group in order to establish a new plan of care or create additional care. To the contrary, it is physicians—not PTs—who write the referrals and are the gatekeepers with respect to the breadth and frequency of physical therapy services.

This is not to say that PTs are somehow immune from the temptation to over-treat patients. Rather, there is simply no reason—and certainly no evidence—to believe that a patient going to a group physical therapy practice is any more likely to be over-treated than a patient going to a PT in solo practice. Appellants' proposed ban on the group practice of physical therapy thus does nothing to further the Legislature's goal of limiting the overuse of physical therapy services.

While Appellants' proposed interpretation of § 40-45-110(A)(1) does nothing to further the Legislature's goal, it would produce many harmful effects not intended by the Legislature. Forcing PTs to practice by themselves instead of in groups not only harms PTs, it also increases health care costs and restricts patient access to physical therapy services. Appellants' requested interpretation also would effectively legislate PTAs out of existence in South Carolina, eliminating a licensed position authorized in detail by the

PT Act. This result would not only devastate thousands of licensed PTAs, it would also further increase health care costs and restrict patient access to physical therapy services. Appellants' proposed interpretation of § 40-45-110(A)(1) thus would do nothing to advance legislative intent, but instead would produce absurd results that would harm PTs, PTAs, patients and taxpayers. Indeed, it appears that Appellants are seeking these harmful results intentionally and in furtherance of their efforts to get rid of § 40-45-110(A)(1) so as to allow POPTS.

The Appellants seek this harmful interpretation of the § 40-45-110(A)(1) by challenging the Board's 2011 Position Statement. As a threshold matter, the Appellants have no standing to bring legal claims with respect to the 2011 Position Statement, which has no force of law and does not affect Appellants. The 2011 Position Statement does not prevent the Appellants from doing anything, and a ruling invalidating the 2011 Position Statement would not provide the Appellants with any relief. To the contrary, the construction of the PT Act that actually has caused the Appellants their alleged harm was this Court's decision eight years ago in *Sloan*. For this reason, and as explained below, Appellants' claims challenging the 2011 Position Statement should be dismissed for lack of standing and the lower court's judgment affirmed.

A. Appellants Lack Standing to Challenge the 2011 Position Statement.

Although the circuit court denied Respondents' motions to dismiss for lack of standing,[8] standing is a question of law, subject to de novo review by this Court on appeal. *See Doe v. Bishop of Charleston*, 407 S.C. 128, 134, 754 S.E.2d 494, 497 (2014)

[8] Respondents sought dismissal for lack of standing both on motion to dismiss, *see* Board's Mem. in Supp. of Mot. to Dismiss 7-17 , and in their summary judgment motions, *see* Board's Mem. in Supp. of Mot. for Summ. J. 8-13 (R. pp. 189-94), Def.-Intervenors' Mem. in Supp. of Mot. for Summ. J. 9 n.4 (R. p. 168). The circuit court declined to dismiss Appellants' claims for lack of standing. *See* Dec. 4, 2012 Order (R. pp.16-17); Apr. 22, 2014 Order at 22 (R. p. 282).

("Questions of law are reviewed *de novo*."); *cf. Peterson v. Nat'l Telecomms. & Info. Admin.*, 478 F.3d 626, 631 (4th Cir. 2007) ("[S]tanding is a question of law that we review de novo."); *Covenant Media of S.C., L.L.C. v. City of N. Charleston*, 493 F.3d 421, 428 (4th Cir. 2007), *cert. denied*, 552 U.S. 1100 (2008) (applying de novo review to district court's legal conclusions regarding standing).[9]

The three required elements to establish standing are: an injury in fact, a causal connection, and likelihood that a favorable decision would give relief. *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); *see also ATC South, Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). These three elements create the "irreducible constitutional minimum of standing." *Sea Pines Ass'n*, 550 S.E.2d at 291. The party bringing suit bears the burden of demonstrating each of these three elements. *Id.*

Appellants have not—and cannot—meet any of these elements with respect to their claims challenging the 2011 Position Statement. Neither the PT Appellant, Mrs. Joseph, nor the physician Appellants, Drs. Joseph and McCarthy, face any current or threatened injury attributable to the 2011 Position Statement. Their real grievance is that, under the PT Act and *Sloan*, PTs may not be employed by physicians and physicians may not employ PTs. The 2011 Position Statement is not the source of this prohibition, and Appellants' challenges to it will neither enable Mrs. Joseph to work for a physician's

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[9] On appeal, this Court may affirm the circuit court's grant of summary judgment in favor of the Respondents on any basis appearing in the record. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); Rule 208(b)(2), SCACR ("Respondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)."); *see also State v. Byers*, 392 S.C. 438, 446, 710 S.E.2d 55, 59 n.1 (2011).

practice, nor enable Drs. Joseph and McCarthy to hire PTs. Appellants thus have no standing.

1. Appellants cannot establish any injury in fact.

To establish injury in fact, a plaintiff must have suffered an invasion of a legally-protected interest that is both (a) concrete and particularized, and (b) actual or imminent and not conjectural or hypothetical. *ATC South*, 669 S.E.2d at 339. With respect to challenges to governmental action, "[a] private person does not have standing unless *he has sustained, or is in immediate danger of sustaining, prejudice* from an executive or legislative action." *Sea Pines*, 550 S.E.2d at 291 (emphasis added); *see also ATC South*, 669 S.E.2d at 339. "Such imminent prejudice must be of a *personal nature to the party laying claim* to standing and not merely of general interest common to all members of the public." *Sea Pines*, 550 S.E.2d at 291 (emphasis added); *see also Freemantle v. Preston*, 398 S.C. 186, 193, 728 S.E.2d 40, 43 (2012) (no constitutional standing when party only suffered in "some indefinite way in common with people generally").

Here, Appellants face no imminent prejudice of a personal nature as a result of the 2011 Position Statement. Mrs. Joseph will not be punished or disciplined as a result of the Board's interpretation of the PT Act in the 2011 Position Statement. The statement does not prohibit her from doing anything. Indeed, Mrs. Joseph actually benefits from the interpretation of the PT Act in the 2011 Position Statement. At her deposition, Mrs. Joseph admitted that she works in a group physical therapy practice and sometimes treats patients sent to her by another PT in her group who is on vacation, which is precisely the kind of "coverage" that the Amended Complaint asserts is unlawful. *See* Def.-Intervenors' Resp. in Supp. of Mot. for Summ. J. at 2, citing K. Joseph Dep. 18:4-9,

26:10-15 (R. p. 212). The 2011 Position Statement's interpretation of the PT Act merely permits Mrs. Joseph to continue accepting compensation from her group practice without violating § 40-45-110(A)(1)—hardly an injury.

Drs. Joseph and McCarthy are neither PTs nor PTAs. The 2011 Position Statement does not apply to them and certainly causes them no imminent prejudice of a personal nature. Any purported prejudice the physician Appellants claim to have suffered would be akin to that of a member of the general public—a bystander—and thus not sufficiently "personal" to confer standing. *See Sea Pines*, 345 S.C. at 600-01, 550 S.E.2d at 291; *Freemantle*, 398 S.C. at 193, 728 S.E.2d at 43-44.

Further, none of the Appellants has any objection to PTs in a group practice covering for other PTs. *See* T. Joseph Dep. 58:8-24 (R. p. 649); McCarthy Dep. 28:15-22 (R. p. 657). Indeed, Mrs. Joseph admits she covers for other PTs (and vice versa) in her own group practice. *See* Board's Mem. in Supp. of Mot. for Summ. J. at 17, citing K. Joseph Dep. 42:2-8 (R. p. 198). Because they face no disciplinary action from the Board, have requested no disciplinary action from the Board, and have no complaint about PTs covering for other PTs, Appellants' issue with the 2011 Position Statement is purely abstract. Lacking injury, Appellants have no standing.

2. Appellants cannot establish any causal connection.

Appellants have made it clear that their real issue is with *Sloan*, not the 2011 Position Statement. It is the PT Act, as construed in *Sloan*, that prohibits Mrs. Joseph from working for physicians and prohibits Drs. Joseph and McCarthy from employing PTs, not the 2011 Position Statement. Appellants have not—and cannot—establish any causal connection between the 2011 Position Statement and their supposed injury. They

thus lack standing. *See, e.g., Bailey v. S.C. Dep't of Health*, 388 S.C. 1, 6-7, 693 S.E.2d 426, 429-30 (Ct. App. 2010) (affirming ruling that party lacked legal standing where there was no causal connection).

3. Appellants cannot obtain any relief from a declaration regarding the 2011 Position Statement.

Similarly, no judicial declaration regarding the 2011 Position Statement or the interpretation of the PT Act therein will give Appellants relief from the legal restriction of which they complain—namely that PTs may not work for referring physicians. Even if the Court issued the requested declaration invalidating the 2011 Position Statement, the PT Act still would prohibit Mrs. Joseph from working for physicians or physician groups, and the PT Act still would prohibit the physician Appellants from employing PTs. The only foreseeable consequence for Appellants of a ruling in their favor on their claims regarding the 2011 Position Statement would be that Mrs. Joseph would lose her job in her group physical therapy practice, which hardly would constitute "relief." Because the requested judicial declaration concerning the 2011 Position Statement would not provide the Appellants with any actual relief,[10] Appellants have presented a purely abstract dispute—one that they lack standing to bring. *See Pee Dee Elec. Co-op., Inc. v. Carolina Power & Light Co.*, 279 S.C. 64, 66, 301 S.E.2d 761 (1983).

B. The Circuit Court Properly Held That Appellants' Proposed Interpretation of "Referral" Contravenes Legislative Intent and Would Produce Damaging and Unintended Results.

Even if Appellants had standing to challenge the 2011 Position Statement, their challenges would be futile. Appellants contend that transitions in the treatment of

[10] While Appellants may be unhappy with the Board's interpretation of the PT Act, this, in and of itself, does not amount to a justiciable controversy. *See Tourism Expenditure Review Comm. v. City of Myrtle Beach*, 403 S.C. 76, 82, 742 S.E.2d 371, 374 (2013).

patients from PT to PT occurring within a group physical therapy practice constitute prohibited "referrals" under § 40-45-110(A)(1), and that the 2011 Position Statement thus misinterpreted the PT Act. The lower court granted summary judgment to the Respondents on these claims, finding that, as a matter of law, Appellants' proposed interpretation of the PT Act was inconsistent with the language and context of § 40-45-110(A)(1) in the PT Act, and would "harm the practice of physical therapy in South Carolina without advancing the legislative purpose of the statute." Apr. 22, 2014 Order at 9-11 (R. pp. 269-71). This decision should be affirmed.

It is well settled that the "cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Barton v. S.C. Dep't of Probation Parole & Pardon Servs.*, 404 S.C. 395, 414, 745 S.E.2d 110, 120 (2013). As a result, a statute "must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." *Sloan*, 370 S.C. at 468, 636 S.E.2d at 606. Where faced with an undefined statutory term, a court should thus consider the word and its meaning "in conjunction with the purpose of the whole statute and the policy of the law." *Whitner v. State*, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997). Further, courts should "not construe a statute in a way which leads to an absurd result or renders it meaningless." *Barton,* 404 S.C. at 415, 745 S.E.2d at 121.

Appellants initially argued that this appeal centered on whether a PT is a "person" within the meaning of § 40-45-110(A)(1). *See* Appellants' Mot. to Certify at 5-8. As this issue has never been in dispute (PTs are, of course, persons), Appellants now appear to concede that the key question on the claims involving the 2011 Position Statement is whether the shared treatment of patients by PTs and PTAs working together in group

practice somehow involves "referrals" intended to be prohibited by § 40-45-110(A)(1). In answering that question, it is important to examine it within the statutory, regulatory, and industry framework within which PTs and PTAs practice in South Carolina. Fundamental points framing the analysis are:

Physicians are the gatekeepers for physical therapy services. Under the law and in practice, physicians are the gatekeepers for physical therapy services. By law, PTs need a referral from a physician in order to treat patients beyond an initial 30-day window. S.C. Code Ann. § 40-45-110(A)(4); *see also* S.C. Code of Regulations R. 101-11. Under the conditions for reimbursement imposed by government and commercial health insurers, PTs ordinarily cannot obtain payment for treatment that is not authorized by a physician. Affidavit of John Stearns ("Stearns Aff.") ¶¶ 20, 22 (R. p. 673). The physician referral thus gives the PT the legal authorization to provide care, and it enables the PT to obtain payment for that care from government and commercial insurers.

PTAs must practice under the supervision and direction of a PT. By law, a PTA can work only under the supervision and direction of a licensed PT. *See* S.C. Code Ann. § 40-45-20(5); *id.* § 40-45-300(A)-(B). Furthermore, PTAs cannot submit reimbursement requests to obtain payment for physical therapy services from government and private health insurers. *See* Junkins Dep. 15:3-8 (R. p. 736) (cannot independently bill as a PTA; the PT is actually billing); Stearns Aff. ¶¶ 18(c), 21 (R. p. 673). As a practical matter, this means that PTAs cannot work on their own, but rather must work in a setting where (1) a PT can supervise and direct them, and (2) a PT can submit reimbursement requests for their services to government and private payors. Stearns Aff. ¶ 37(c) (R. p. 680).

No new care is authorized when patients move from PT to PT or PT to PTA in a group practice. In most instances, a patient will be seen by more than one PT in a group practice as a function of scheduling or patient convenience. *See* Stearns Aff. ¶ 34(a) (R. p. 677). In all instances, the transition of a patient's treatment from one PT to another PT in a group practice does not authorize additional care—only a physician can do that. *See* S.C. Code Ann. § 40-45-110(A)(2)-(5) ("licensed medical doctor or dentist" must authorize additional care through a "referral"). Similarly, PTs direct patients to PTAs, and supervise and direct their treatment, in order to provide quality care at the most cost-effective and convenient level. *See* Stearns Aff. ¶¶ 36(a), 38(a) (R. pp. 679-80). No new physical therapy services are authorized when a PT directs a patient to a PTA for supervised treatment. *See id.* ¶ 36(b) (R. p. 679); *see also* S.C. Code Ann. § 40-45-110(A)(2)-(5).

Against this backdrop, and as addressed below, it is clear that the Legislature did not intend for § 40-45-110(A)(1) to prohibit as "referrals" either the transitions of patients from one PT to another in a group practice or the PT-to-PTA handoff of patients that typically occurs in the course of most physical therapy care.

1. Prohibiting patient transitions occurring in the group practice of physical therapy would ignore the context of the word "refer" in § 40-45-110(A), not advance legislative intent, and create absurd results.

To give effect to legislative intent, an undefined term in a statute must be interpreted by taking into account: (1) the context in which the term is used, (2) whether the proposed interpretation would advance the legislative intent, and (3) whether the interpretation would produce an absurd result. *See* Appellants' Br. 30; *cf. Barton*, 404 S.C. at 414-19, 745 S.E.2d at 120-23. Applying this test, the transitions of patients from

PT to PT and PT to PTA occurring with the group practice of physical therapy cannot be deemed "referrals" prohibited by § 40-45-110(A)(1), and this Court should not interpret the PT Act to outlaw the group practice of physical therapy.

First, when looking at the context in which the term "refer" is used in § 40-45-110(A), and the PT Act as a whole, it is clear that the referral being referenced in § 40-45-110(A)(1) is the same gatekeeping referral from the physician referenced in § 40-45-110(A)(4), the referral that PTs are required to have in order to provide physical therapy services to any patient beyond an initial 30-day window. *See* Apr. 22, 2014 Order at 11-12 (R. pp. 271-72). Indeed, if the Legislature's intent were to outlaw the group practice of physical therapy, as Appellants contend, the Legislature could have done so far more directly and explicitly in the PT Act. *See Hinton v. S.C. Dep't of Probation, Parole & Pardon Servs.*, 592 S.E.2d 335, 342 (S.C. Ct. App. 2004) ("We find little evidence that [this] was the intent of our legislature for this particular statute, for if it had been, such an intent would have been made more overt[.]").

Second, prohibiting patient transitions occurring in the group practice of physical therapy would not advance legislative intent. *See* Apr. 22, 2014 Order at 12-13 (R. pp. 272-73). The argument that the statute's purpose is to prevent transitions in patient care within physical therapy groups finds absolutely no support in *Sloan*, which describes the purpose of the law not once but three times as the avoidance of "overuse" of services "by physicians" who refer patients to PTs for the physicians' "own financial gain" or to "generate additional fees for the physician." *Sloan*, 370 S.C. at 469, 479-80, 482, 636 S.E.2d at 607, 612, 614. This Court did not mention any intent to address overuse of services "by physical therapists" attributable to their directing patients to other PTs or to

PTAs in the same group practice. Appellants thus invite this Court to discover a purpose in § 40-45-110(A)(1) that the *Sloan* opinion did not mention once in its three descriptions of the Legislature's intent. Appellants' attempt to expand the scope of the statute should be rejected. *See Carolina Alliance for Fair Emp't v. S.C. Dep't of Labor, Licensing, and Regulation*, 337 S.C. 476, 490, 523 S.E.2d 795, 802 (Ct. App. 1999) ("The court may not resort to subtle or forced construction to . . . expand a statute's operation.").

Third, the lower court correctly ruled that Appellants' requested interpretation of the PT Act would create unintended results. *See* Apr. 22, 2014 Order at 13-15 (R. pp. 273-75). Under Appellants' interpretation, § 40-45-110(A)(1) would prohibit PTs and PTAs from working not only with the physicians from whom they receive referrals, but also from working with any human being who "sends or directs" a patient to them for treatment.

If that proposition were correct, then § 40-45-110(A)(1) would prevent two or more PTs from practicing together unless they refrained from ever caring for the same patient—an absurd result that would force PTs to operate as solo practitioners. Stearns Aff. ¶ 35(a) (R. p. 678). Requiring every PT to practice in isolation would create terrible inefficiencies, increase the cost of care, lower the quality of care, and produce patient inconvenience throughout the State. *Id.*

Collaboration among PTs, including the ability to share facilities, personnel, and other resources, is critical to the economic viability of physical therapy practices, as well as the quality of care that they can provide.[11] Even assuming *arguendo* that solo practice

[11] *Id.*; *see also* Stearns Dep. 85:12-14 (R. p. 700) ("[T]here's great value to the quality of care by having a group practice."); Stoker Dep. 41:6-12 (R. p. 712) ("We try to consult with each other at any point in time to provide the best patient care that we can . . . . Many times we would actually co-treat, work

was economically viable for all PTs, many PTs would not want to assume the administrative burden of becoming a small business owner.[12] Under Appellants' proposed interpretation of the statute, many PTs would be forced to change careers, resulting in a scarcity of PTs in South Carolina. Stearns Aff. ¶ 35(c) (R. p. 678). This, in turn, would create a barrier to care for patients, resulting in restricted access to healthcare across the State. Surely these consequences were not the intended result of § 40-45-110(A)(1).

Further, the availability of more than one PT in a practice eases the challenge of scheduling and enhances patient convenience.[13] Appellants have acknowledged as much in their depositions, agreeing that PTs should be allowed to direct patients to other PTs where necessary for purposes of patient convenience.[14] The Legislature plainly did not enact § 40-45-110(A)(1) in order to make it harder for patients to schedule treatment.

In addition, Appellants' interpretation of § 40-45-110(A)(1) would eliminate the jobs of PTAs in South Carolina. If patient transitions among "licensed persons" within a

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together."); Ervin Dep. 23:3-5 (R. p. 722) ("And I think it's sometimes good to have another set of eyes as a physical therapist, I may have missed something.").

[12] Stearns Aff. ¶ 35(b) (R. p. 678); *see also* Stearns Dep. 84:18-24 (R. p. 699) ("And there are a significant percentage of [PTs], in my opinion, that would not want to be sole business owners or small business owners and open up their own practice. They, quite frankly, don't want the administrative headaches and all the management that comes with owning a practice.").

[13] Stearns Aff. ¶ 35(a) (R. p. 678); *see also* Stoker Aff. ¶ 7 (R. p. 725) ("PTs often coordinate in a group practice setting to accommodate their patients' scheduling needs and/or to enable patients to obtain services at a more convenient location."); McKowen Aff. ¶ 7 (R. p. 728) ("On occasion, physical therapists in my practice send or direct a patient to another physical therapist in the practice who is located in an office more convenient for the patient or whose schedule better accommodates the patient's schedule."); K. Joseph Dep. 20:4-9 (R. p. 664) (scheduling "depends on which therapist is available, who has an open slot"); Stoker Dep. 41:17-23 (R. p. 712) (patients do not always see the same PT "primarily because of the patient's scheduling"; scheduling is based on "when they're available and what's [] available on our schedule"); Swygert Dep. 26:19-27:2 (R. p. 717-18) (patients are assigned to a physical therapist based on the "patient's needs" in terms of scheduling; the office administrative staff calls the patient and "schedules them according to . . . the opening [] that best suits their time").

[14] *See* T. Joseph Dep. 58:12-24 (R. p. 649) (admitting that if PTs could not cover for another PT while that PT was away on vacation or called away for a sick child, this would "inconvenience patients"); McCarthy Dep. 28:15-22 (R. p. 657) (conceding that, when a PT is called away to tend to a sick child or attend a funeral, he has no problem with another PT seeing that patient).

group physical therapy practice are considered "referrals" for purposes of § 40-45-110(A)(1), as Appellants contend, then PTAs would not be able to work for PTs or in a group practice where they receive supervision and direction from a PT. But PTAs are required by the PT Act to be "supervised and directed" by a PT. *See* S.C. Code Ann. § 40-45-20(5). Under Appellants' interpretation, the PT Act would require PTAs to work only under the supervision and direction of PTs, but nonetheless prohibit them from being employed by those same PTs supervising and directing them—an absurd Catch-22.[15] As a practical matter, if PTAs cannot work for PTs or in a group physical therapy practice, they cannot work. *See* Stearns Aff. ¶ 37(a) (R. p. 679). The Appellants' interpretation of § 40-45-110(A)(1) would therefore eliminate the livelihood of thousands of PTAs across the State. In addition, PTAs provide cost-efficient services and, as a result, PTs across the state depend heavily on PTAs. *See id.* ¶ 38(a) (R. p. 680) (noting that PTA wages are, on average, 32% less costly than a PT wages). Sidelining PTAs would thus also threaten the economic viability of existing physical therapy practices, increase healthcare costs and create barriers to care for patients.

The atomization of the PT practice and the potential elimination of the licensed PTA position are absurd results—ones that would hurt PTs, eliminate PTAs, increase the cost of physical therapy services, and erect barriers to patient convenience and care—that could not possibly have been intended by the Legislature when enacting § 40-45-110(A)(1).

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[15] Caught in this absurdity, Appellants argue that PTAs are somehow "exempt" from the referral restrictions in § 40-45-110(A), because of other provisions in the PT Act, *see* Appellants Br. 37 (citing S.C. Code Ann. § 40-45-300(B)). This is wrong. Section § 40-45-110(A) clearly applies to "licensed persons," which includes both PTs and PTAs, *see* S.C. Code Ann. § 40-45-20(4)-(5), *id.* § 40-45-30. As the lower court recognized, § 40-45-300(B), which regulates clinical practice, is not intrinsically more "specific" than § 40-45-110(A), which lists potential grounds for discipline. *See* Apr. 22, 2014 Order at 15 (R. p. 275). Section 40-45-300(B) thus provides no basis to read PTAs out of the referral restrictions in § 40-45-110(A)(1). *Id.*

2. Appellants' arguments based on the definitions of "referral" cited in *Sloan* are misguided.

In their attempt to expand the operation of the referral restrictions in § 40-45-110(A)(1) to prohibit the group practice of physical therapy, Appellants lean heavily on the Webster's dictionary definition of "referral" cited in *Sloan,* without taking into account statutory context, legislative intent, and common sense. *See* Appellants' Br. 30-31 (citing Webster's definition referenced in *Sloan*: "to send or direct for treatment, aid, information, [or] decision [e.g.] a patient to a specialist"). Under the letter of the Webster's definition championed by Appellants, an unlicensed member of a practice's administrative staff who schedules a patient to see a PT has made a "referral." The Webster's definition imposes no limitation on the individuals who make "referrals" by "sending or directing" a patient to a PT for treatment. Consequently, under Appellants' literal reading, PTs could not share fees in the form of wages with (i.e., hire) administrative staff to coordinate their relations with patients. *See* Stearns Aff. ¶ 26 (R. p. 674). Surely the Legislature did not intend § 40-45-110(A)(1) to prohibit PTs from hiring staff to answer their phones, make patient appointments, and direct patients within their offices.

Appellants also refer to the Self-Referral Act, likewise cited in *Sloan*, which defines "referrals" as the "forwarding" of patients by "health care providers". Appellants' Br. 31. This definition likewise provides no basis to expand the referral restrictions in § 40-45-110(A)(1) beyond physician referrals. The Self-Referral Act applies across numerous licensed professions, *see* S.C. Code Ann. § 44-113-20(8), *id.* at § 44-113-20(4), so obviously its definition of referral is not going to be limited to the referrals that PTs need from physicians in order to treat patients under § 40-45-110(A)(4).

Conversely, the PT Act applies only to PTs, and the referrals referenced in § 40-45-110(A)(1) are the physician referrals required by that same subsection in § 40-45-110(A)(4). *See Skinner v. Westinghouse Elec. Corp.*, 394 S.C. 428, 433, 716 S.E.2d 443, 445 (2011) ("specific laws prevail over general laws . . . ."). Appellants' arguments based on the "referral" definitions cited in *Sloan* are therefore unavailing—the referrals subject to the restrictions in § 40-45-110(A)(1) are the gatekeeping referrals of physicians required by § 40-45-110(A)(4).

3. Appellants' interpretation of § 40-45-110(A)(1) does nothing to prevent fraud or overuse of physical therapy services.

Appellants assert that the Court should extend the application of § 40-45-110(A)(1) to prohibit the group practice of physical therapy because PTs and PT groups are supposedly more likely to be guilty of "fraud, waste, and abuse" than physicians and physician groups. Appellants' Br. 31-35. Appellants present no evidence to support this assertion. The publications that Appellants cite,[16] which focus on questionable billing practices and outright fraud throughout the national healthcare industry, do not distinguish between physician-owned and other outpatient physical therapy practices. *See* Stearns Supp. Aff. ¶ 14 (R. p. 747). As a result, there is no way of determining whether the reported overutilization occurred in PT group practices or resulted from physician referrals to their PT employees (a practice which is still legal in many states, including Florida, on which the OIG report focused). *Id.* at ¶¶ 14-15, 20, 26-27, 29 (R. pp. 747-51). Nor is there any way of telling whether the reported abuse was the result of

[16] These publications include reports from the Centers for Medicare and Medicaid Services ("CMS"), the Office of Inspector General ("OIG"), and the State Department of Health and Human Services ("SCDHHS"). *See* Appellants' Br. 33-34.

outright fraud, which referral prohibitions do nothing to combat, as opposed to overutilization. *Id.* at ¶ 20 (R. p. 749).

More importantly, even if there is a temptation for PTs to provide excessive treatment, Appellants have provided no evidence that this risk is increased by the shared treatment of patients by PTs in group practice. Appellants note that, in reevaluating patients and preparing progress reports, PTs "could be tempted simply to determine that the patient had not progressed sufficiently and extend the treatment, even if it is not medically necessary..." Appellants' Br. 33. But PTs working together in group practice and PTs working separately in solo practice have these same incentives and opportunities to over-treat patients. Prohibiting group physical therapy practice would do nothing to prevent these potential abuses.

Similarly, while Appellants note that PTs develop a plan of care, *see id.* at 32, this occurs every time a PT treats a patient, whether the PT is in a group or solo practice. Furthermore, the development of a plan of care does not mean that PTs are allowed to *create* any additional care. To the contrary, physicians, not PTs, write the referrals and are the gatekeepers with respect to the breadth and frequency of physical therapy services. Appellants present no valid argument, much less evidence, that PTs in group practice have any greater opportunity or incentive to develop excessive care plans than PTs in solo practice.

There is no reason to believe—and no evidence from Appellants—that a patient going to a group physical therapy practice is any more likely to be over-treated than a patient going to a PT in a solo practice. Appellants ask this Court to discover legislative intent to outlaw the group practice of physical therapy in order to tackle a problem—

overutilization caused by handoffs within physical therapy group practice—that does not exist.

In contrast, research into the patterns of utilization between POPTS and other outpatient physical therapy practices confirms what common sense would suggest: that utilization is higher when the gatekeeping physicians have a financial interest in referring patients for physical therapy. For example, when the Legislature enacted § 40-45-110(A)(1) in 1998, it could have looked to research by Dr. Jean Mitchell and Dr. Elton Scott published in the Journal of the American Medical Association, concluding that "utilization, charges per patient, and profits are higher when physical therapy and rehabilitation facilities are owned by referring physicians." Jean M. Mitchell & Elton Scott, *Physician Ownership of Physical Therapy Services: Effects on Charges, Utilization, Profits and Service Characteristics*, 268 JAMA 2055-59 (1992) (R. pp. 754-58); *see also* Alex Swedlow et al., *Increased Costs and Rates of Use in the California Workers' Compensation System as a Result of Self-Referral by Physicians*, 327 New Eng. J. Med. 1502-06 (1992) (R. pp. 759-63) (finding that physical therapy was initiated 2.3 times more often when a physician engaged in "self-referral"—*i.e.*, where the physician referred patients for physical therapy services to an entity owned by the referring physician).

In sum, there is ample evidence to support the wisdom of the Legislature's intent to prohibit referring physicians from employing PTs. On the other hand, Respondents are not aware of any research—and Appellants still have not pointed to any—that would support an expansion of the scope of § 40-45-110(A)(1) beyond physician referrals to prohibit PTs from working together in group practice. Indeed, while some states have

taken action to specifically address problems of overuse of physical therapy services, none has adopted the solution that Appellants propose, which instead of addressing problems of overuse, would only hurt PTs, effectively eliminate PTAs, hinder patient access, and increase health care costs. If the Appellants have any evidence to support a policy decision to outlaw the group practice of physical therapy, they should present that evidence—and their concerns—directly to the Legislature.

For all these reasons, the lower court correctly ruled that Appellants' requested interpretation of the PT Act would create unintended consequences, which can be avoided by properly "limiting the application of § 40-45-110(A)(1) to the 'referrals' of gatekeeper physicians, consistent with the rest of [the statute] and the intent of the Legislature as determined in *Sloan*." Apr. 22, 2014 Order at 15 (R. p. 275).

C. The Circuit Court Properly Rejected Appellants' Requested "Coverage" Exception.

Appellants make the alternative argument that, if the Board's 2011 Position Statement properly interpreted the PT Act, PTs should be able to work for referring physicians, because their treatment of referred patients would merely be "coverage" for the referring physician. *See* Appellants' Br. 37-40; *see also* Am. Compl. ¶ 54 (R. p. 90). This is a blatant attempt to evade the PT Act's prohibition on POPTS, which was decided in *Sloan*. The 2011 Position Statement, which merely interprets the PT Act to allow PTs and PTAs to work together, provides no factual circumstance, much less legal justification, to revisit the *Sloan* decision, as the lower court properly recognized. *See* Apr. 22, 2014 Order at 19 (R. p. 279) ("Neither this Court nor the Board has authority to declare conduct lawful that *Sloan* declared unlawful. Under the PT Act, as decided in *Sloan*, PTs cannot work for or with the physicians who refer patients to them.").

In addition to being foreclosed by *Sloan*, Appellants' argument is wrong. Appellants first cite court cases defining "coverage" as one physician covering for another physician. Appellants' Br. 38. They then note that PTs can provide "coverage" for one another. *Id.* Finally, they make the conclusory and circular contention that "coverage is coverage" to support their claim that PTs working for referring physicians would merely be providing "coverage" for those physicians. *Id.* at 39-40. It is this last step at which Appellants' train of logic derails. Appellants ignore the law that prohibits PTs from practicing medicine. *See* S.C. Code Ann. § 40-45-310; *see also id.* § 40-45-110(A)(2). There is no basis for the notion that PTs can "cover" for physicians. For these reasons, the lower court correctly granted summary judgment to the Respondents on Appellants' Third Cause of Action, which improperly sought to "create a backdoor around *Sloan*" under the guise of a "coverage" argument with "no legal or factual support." *See* Apr. 22, 2014 Order at 18-19 & n.4 (R. pp. 278-79).

D. The Circuit Court Properly Held That The 2011 Position Statement Does Not Violate the APA.

Appellants argue that the 2011 Position Statement is "intended to have the force of law," constitutes a "binding norm," will be applied by the Board as a regulation, and that this supposed regulation was not promulgated in compliance with the Administrative Procedures Act ("APA"). Appellants' Br. 40-42. This argument is mistaken, as explained in *Sloan*, which Appellants improperly omit from their analysis. In *Sloan*, this Court held that the earlier 2004 Position Statement of the Board similarly interpreting § 40-45-110(A)(1)—the exact same provision at issue in this case—was "not a regulation or the equivalent of a regulation," but a mere "policy or guidance statement which does not have the force or effect of law in any individual case." 370 S.C. at 474, 636 S.E.2d at

610. This holding applies equally here. The 2011 Position Statement "did not implement or prescribe the law or practice requirements for physical therapists in any more detail than set forth by statute; the pronouncement simply adopted an interpretation of the statute . . . ." *Id.* at 474-75, 610. For this reason, the lower court properly granted summary judgment in Respondents' favor with respect to Appellants' APA claim.

E. The Circuit Court Properly Held That *Sloan* Forecloses Appellants' Equal Protection and Due Process Claims.

Appellants contend that the 2011 Position Statement violates their constitutional rights to equal protection and due process by allowing PTs to be employed by other PTs or physical therapy groups when *Sloan* does not allow PTs to be employed by a physician or physician group that refers patients to them for services. *See* Appellants' Br. 42-48. As the lower court properly recognized, these claims are baseless.

First, Appellants' equal protection claim—premised on the notion that there is no legitimate government purpose or rational basis for "segregating PT owned physical therapy services" from POPTS, *see* Appellants' Br. 46—is foreclosed by this Court's decision in *Sloan*. There, this Court rejected the argument that there is no rational basis for treating physicians and PTs differently under the law. *Sloan*, 370 S.C. at 480-82, 636 S.E.2d at 613-14. As discussed above, there is no merit to the argument that physicians and PTs are similarly situated and must be treated the same for purposes of § 40-45-110(A)(1), particularly when physicians—and not PTs—act as the legal gatekeepers for physical therapy services.

As this Court ruled in *Sloan*, the prohibition on POPTS bears a reasonable relation to the legislative purpose of avoiding overuse of physical therapy services. 370 S.C. at 482, 636 S.E.2d at 614. Appellants do not contest that this is the legislative purpose of

§ 40-45-110(A)(1), but argue that this same legislative purpose compels the prohibition of coverage, co-treatment, and other PT-to-PT and PT-to-PTA patient hand-offs occurring in physical therapy group practices. Appellants Br. 42-46. As previously explained, a PT directing a patient to another PT or a PTA within the same group practice is not like a "referral" from a gatekeeper physician to a PT. No new course of treatment or additional care is authorized by such PT-to-PT and PT-to-PTA handoffs. Preventing PT-to-PT and PT-to-PTA patient transitions occurring within a group practice does nothing to further the purpose of § 40-45-110(A)(1), which is to curb the potential overutilization of physical therapy services driven by the financial self-interest of referring physicians.

On the other hand, outlawing the group practice of physical therapy and eliminating the PTA profession is certainly not what the Legislature intended in adopting § 40-45-110(A)(1). Prohibiting PTs and PTAs from working together in a group practice would bear no relation to the legislative purpose behind § 40-45-110(A)(1), and would not serve the interests of "equal protection." Indeed, both *Sloan* and the 2011 Position Statement treat all physicians the same as all other physicians, and all PTs the same as all other PTs. They prohibit physicians from associating with PTs in a group practice, but they allow physicians to associate with other physicians and PTs to associate with other PTs. In contrast, under Appellants' proposed interpretation, PTs and physicians would not be treated the same. PTs would be prohibiting from practicing together with other PTs. Physicians would not be prohibited from practicing with other physicians. As such, there is no logic, much less merit, to Appellants' equal protection challenge to the 2011 Position Statement, which was properly rejected by the lower court.

Second, Appellants' due process challenge to the 2011 Position Statement similarly warranted dismissal. Appellants acknowledge that, to prove a denial of substantive due process, a party must show that it had a cognizable property interest. *See* Appellants' Br. 47 (citing cases). But the 2011 Position Statement, as explained in detail above, does not prohibit Mrs. Joseph from doing anything. To the contrary, it merely permits her to continue associating with other PTs in her group practice.[17] The 2011 Position Statement thus does not deprive Mrs. Joseph of any property right, with or without due process. Appellants' argument that there is no rational basis to prohibit PTs from being employed by a physician or physician group that refers patients to them for services, *see* Appellants' Br. 47-48, was already rejected by this Court in *Sloan*. *See* 370 S.C. at 484, 636 S.E.2d at 615 (holding that prohibition on physician employment of PTs is based on legitimate government interest in "enhancing the public welfare in the practice of medicine and related professions"). For the reasons addressed above, there is no reason for the Court to revisit this correctly decided issue.

III. The Circuit Court Did Not Err in Admitting the Opinions of John P. Stearns.

Last, Appellants contend that the lower court erred in admitting the opinions of Respondents' expert, John P. Stearns. *See* Appellants' Br. 48-50. Like Appellants' other arguments, this one also fails. This 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. Rather, the Respondents offered Mr. Stearns' testimony on background facts regarding the operation of physical therapy practices and

[17] *See* K. Joseph Dep. 15:13-16 (R. p. 662); *see also* Board's Resp. in Supp. of Mot. for Summ. J. at 2, citing K. Joseph Dep. 18:7-8, 26:13-15, 42:2-10 (R. p. 224).

the potential consequences for the operation of physical therapy practices if certain statutory interpretations advocated by Appellants are adopted.

Appellants are mistaken in their argument that Mr. Stearns lacked the requisite "scientific, technical, or other specialized knowledge" to qualify as an expert witness. *See* Appellants' Br. 48. Mr. Stearns' resume reveals a broad range of experience and education in the field of healthcare operations and management, as well as the practice of physical therapy. *See* Stearns Aff., App'x A (R. pp. 683-88). He has been a licensed physical therapist since 1985, and has obtained a Masters of Business Administration degree. *See* Stearns Aff. ¶¶ 3, 5 (R. p. 667). Mr. Stearns possesses knowledge, based on extensive training and experience, of the operation and management of physical therapy practices (both physician-owned and non-physician-owned), as well as the operation and management of other types of healthcare facilities—qualifications Appellants cannot deny. *See, e.g.*, Appellants' Br. 49 (noting that Mr. Stearns has "personal experience as a physical therapist" and consulting engagements).

Appellants argue that Mr. Stearns does not have certain credentials, "degree programs, certifications, and continuing education programs" that might further "assist" in developing relevant expertise. *Id.* at 49-50. But the issues that Appellants raise regarding qualifications go to the weight of Mr. Stearns' testimony, not to its admissibility. *See Peterson v. Nat'l R.R. Passenger Corp.*, 365 S.C. 391, 399, 618 S.E.2d 903, 907 (2005) ("Defects in an expert witness' education and experience go to the weight, not the admissibility, of the expert's testimony."); *State v. Henry*, 329 S.C. 266, 274, 495 S.E.2d 463, 467 (Ct. App. 1997) (similar).

Similarly, there is no merit to Appellants' argument that Mr. Stearns' affidavits should be excluded because his opinions are not "reliable," are "not based on accepted methodology," have "not been subjected to peer review or publication," and have "not been generally accepted within any relevant scientific community." Appellants' Br. 50. Mr. Stearns is not offering scientific evidence. *Cf. Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655-56 (2012) (standards for admission of scientific testimony do not apply to nonscientific evidence). To the contrary, Mr. Stearns provided expert testimony on the operation and management of physical therapy practices. Mr. Stearns' testimony—based on his own extensive education, training, and experience with physical therapy practices, as well as numerous other sources, *see* Stearns Aff., App'x A & B (R. pp. 683-90)—has more than sufficient indicia of reliability. For the foregoing reasons, the lower court did not err in admitting Mr. Stearns' opinions.

CONCLUSION

For all the foregoing reasons, this Court's decision in *Sloan* should not be overruled, and the lower court's decision granting summary judgment in favor of the Respondents should be affirmed.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
In the Court of Common Pleas

G. Thomas Cooper, Jr., Presiding Judge

Appellate Case No. 2014-001115

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

v.

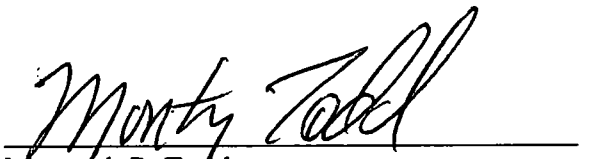
South Carolina Department of Labor, Licensing
and Regulation, South Carolina Board of Physical
Therapy,.....Respondent,

and

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

CERTIFICATE OF COUNSEL

I certify that this Final Brief of Respondents South Carolina Department of Labor, Licensing and Regulation, South Carolina Board of Physical Therapy; South Carolina Chapter, American Physical Therapy Association; and Joseph M. McKowen, P.T., Sabrina Queen Bridges, PTA, and Amalia W. Kirby, PTA, complies with Rule 211(b), SCACR.

By: 

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PROOF OF SERVICE

I certify that I have served the Final Brief of Respondents on Appellants by depositing a copy of same in the United States Mail, postage prepaid, on October 27, 2014, addressed to attorneys of record as follows:

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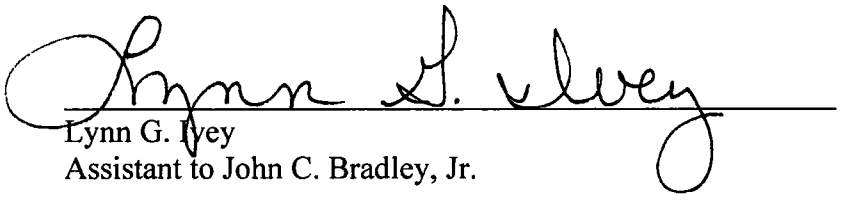

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