

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM RICHLAND COUNTY **S.C. Supreme Court**
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2014-001115

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

v.

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

and

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

RECORD ON APPEAL
Volume I

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2012CP4002632

Kristin Joseph

SC Dept Of Labor Licensing And Regulation

Thomas N Joseph MD

South Carolina Board of Physical Therapy

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCIES OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk :

MOTION TO DISMISS - UNDER ADVICE

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code 2126Date 8-7-12

For Clerk of Court Office Use Only

This judgment was entered on and a copy mailed first class or placed in the appropriate attorney's box on this 4 day of Dec, 20 12 to attorneys of record or to parties (when appearing pro se) as follows:

Mary Elizabeth (Liz) Crum

Monteith Powell Todd

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DEC 10 2012

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

MCNAN LAW FIRM

Court Reporter

Clerk of Court, Jeanette McBride

SCANNED

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMONS PLEAS

COUNTY OF RICHLAND)

FOR THE FIFTH JUDICIAL CIRCUIT

Kristin Joseph, P.T., Thomas N. Joseph, M.D.,)
And William G. McCarthy, M.D.,)

C/A No. 2012-CP-40-2822

Plaintiffs,)

v.)

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

Defendant.)

**ORDER DENYING SCDLR
MOTION TO DISMISS AS TO
CAUSES OF ACTION ONE
THROUGH SIX AND GRANTING
PARTIAL SUMMARY JUDGMENT AS
TO CAUSES OF ACTION
SEVEN THROUGH NINE**

RICHLAND COUNTY
FILED
2012 DEC -4 PM 4:18
JEANETTE W. MCBRIDE
CLERK
RICHLAND COUNTY
FILED
2012 SEP 17 AM 10:16
JEANETTE W. MCBRIDE
CLERK

The South Carolina Department of Labor, Licensing and Regulation, South Carolina Board of Physical Therapy (PT Board or Defendant) filed a Motion to Dismiss (Motion) the Complaint of Plaintiffs Kristin Joseph, P.T. (PT Joseph), Thomas N. Joseph, M.D. (Joseph), and William G. McCarthy, M.D. (McCarthy) (collectively, Plaintiffs). Defendant moved to dismiss on the grounds that: 1) there is no justiciable controversy; 2) Plaintiffs lack standing; 3) the Complaint fails to state a claim as to the Seventh, Eighth and Ninth¹ Causes of Action; 4) the Complaint states no claim upon which relief can be granted; and 5) Plaintiffs' claims are not ripe. I heard the Motion on August 7, 2012. Monteith P. Todd, Esquire, and Robert E. Horner, Esquire, appeared for the Defendant and M. Elizabeth Crum, Esquire, and Ariail B. Kirk, Esquire, appeared for the Plaintiffs. Having reviewed the pleadings, Motion and memoranda in support and in opposition and the statutory and the case law, I find that the Motion should be denied in part and summary judgment granted in part.

¹ On July 20, 2012, Plaintiffs filed an "Errata to the Declaratory Judgment Action and Complaint" correcting the scrivener's error regarding the two Eighth Causes of Action. The second "Eighth Cause of Action" is now the Ninth Cause of Action and will be referred to thusly henceforward.

SCANNED

STANDARD OF REVIEW

A motion to dismiss pursuant to Rule 12(b)(6), SCRCP, may only be granted if based on the face of the pleadings, and in reading the pleading in the light most favorable to the nonmoving party, the pleading fails to state any valid claim. See Gentry v. Yonce, 337 S.C. 1, 2, 533 S.E.2d 137, 139 (1999). When considering a 12(b)(6) motion, a court must base its ruling “solely upon allegations set forth on the face of the [pleading].” Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999), (citing Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995)). The moving party bears a weighty burden, and a motion to dismiss only should be granted when the allegations in the pleading cannot be construed to state any valid claim whatsoever.

ALLEGATIONS ON THE FACE OF THE COMPLAINT

1. PT Joseph is a physical therapist (PT) licensed by the PT Board to practice physical therapy in South Carolina and she is bound by the requirements of S.C. Code Ann. § 40-45-5, *et seq.* (Rev. 2011) and the rules and regulations promulgated by the PT Board. (Complaint ¶ 1.) MD Joseph and MD McCarthy are physicians licensed to practice medicine and currently are practicing orthopedic surgery in South Carolina and seek the same right to employ PTs or physical therapy assistants that the PTs or PT groups currently have. (Complaint ¶¶ 2 and 3.)

2. Defendant PT Board is an agency of the State of South Carolina and can exercise only “those powers that are conferred expressly or by reasonable necessary implication, or are merely incidental to powers expressly granted.” Brooks v. S.C. State Bd. of Funeral Serv., 271 S.C. 457, 461, 247 S.E.2d 820, 822 (1978). As a state agency, the Defendant is

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possessed only with those powers that are specifically delineated in the Physical Therapy Act (PT Act).

3. Prior to the decision of the Supreme Court of South Carolina in Sloan v. South Carolina Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 636 S.E.2d 598 (2006), PTs and PT assistants could be employed by physician practices and physician practices could employ PTs or PT assistants without their being subject to disciplinary action by the PT Board. The PT Act² was amended in 1998. In 1998, the PT Board issued a Position Statement (1998 Position Statement), stating:

It is the Board's position that physical therapists and physical therapist assistants involved in the practice settings that comply with state and federal laws regarding physician or provider referral to practices in which they have an ownership interest should not be subject to discipline. The Board does have the intention to further clarify this section of the statute in regulation at a later date.

Sloan, 370 S.C. 465, 636 S.E.2d 604-605 (2006). (Complaint ¶ 16.)

4. Section 40-45-110(A)(1) (Rev. 2011) of the PT Act provides, in pertinent part:

(A). In addition to other grounds provided for in Section 40-1-110, the board, after notice and hearing, may restrict or refuse to grant a license to an applicant and may 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...

(Emphasis added). (Complaint ¶ 9.)

5. On March 30, 2004, the Attorney General of South Carolina (SCAG) issued an opinion responding to the following questions:

1. Does S.C. Code Ann. § 40-45-110(A)(1) prohibit a physical therapist from working for pay for a licensed physician or group of physicians when

² S.C. Code Ann. § 40-45-10, et seq. (Supp. 2011).

GC 3

the physician (or a member of the group) refers a patient to the physical therapist for physical therapy services?

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

2004 WL 736934 (S.C.A.G.), p. 1 (Complaint ¶ 17.)

6. The SCAG determined that the General Assembly's intention in enacting S.C. Code Ann. § 40-45-110(A)(1) was to prohibit PTs from accepting referrals from a licensed physician when a financial relationship, such as an employment relationship, existed and that a PT cannot work for pay for a licensed physician or group of physicians when the physician (or a member of the group) refers a patient to the PT for physical therapy services. The SCAG further found that S.C. Code Ann. § 40-45-110(A)(1) prohibited a PT from working for a professional corporation owned by one or more licensed physicians if a physician owner or employee referred patients to the PT for physical therapy services. (Complaint ¶ 18.)

7. The question of whether a PT's employment and referral prohibition also applied to a PT's or PT group's employment of and patient referrals to PTs was not addressed in the SCAG opinion request or opinion. (Complaint ¶ 20).

8. After receiving the SCAG opinion, the PT Board met and, without going through the South Carolina Administrative Procedures Act statutory requirements, adopted the SCAG opinion as its own position statement (2004 Position Statement). (Complaint ¶ 19.) The 2004 Position Statement prohibits a PT from working for pay for a physician, a group of physicians, or a corporation owned by physicians from whom the PT receives referrals. A declaratory judgment action challenging the PT Board's adoption of the SCAG opinion findings as its 2004 Position Statement was instituted. Complaint, ¶ 21-22.



9. The Supreme Court in Sloan concluded that “[Section] 40-45-110(A)(1) prohibits a physical therapist from receiving referrals from or dividing fees with a physician employer.” Sloan, 370 S.C. 469, 636 S.E.2d 607. (Complaint ¶ 21.)

10. The Court further found that the purpose of the 1998 amendment to Section 40-45-110(A)(1) was “to protect consumers as well as government-sponsored health care programs such as Medicare and Medicaid from actual and potential conflicts of interest which are likely to lead to overuse of medical services by physicians who, for their own financial gain rather than their patients’ medical needs, refer patients to entities in which the physicians hold a financial interest.” Sloan, 370 S.C. 469, 636 S.E.2d 607. (Complaint ¶ 22.)

11. PTs, like physicians, can enter into provider contracts with the Center for Medicare and Medicaid Services (CMS) to provide physical therapy services reimbursed under Medicare and can enter into contracts with the South Carolina Department of Health and Human Services (SCDHHS) to provide physical therapy services reimbursed under Medicaid. (Complaint ¶¶ 24-25.)

12. The Sloan decision did not address whether a PT was a “person” like a physician for purposes of the financial relationship referral prohibition in Section 40-45-110(A)(1). In this declaratory judgment action, Plaintiffs contend that a PT is a “person” for purposes of the Section 40-45-110(A)(1) referral prohibition just as is a physician. (Complaint ¶¶ 10, 11, 34–38.)

13. On May 3, 2011, Defendant was asked to issue a position statement on how it interprets S.C. Code Ann. § 40-45-110(A)(1) regarding two (2) questions, namely:

(#1) Does S.C. Code Ann. § 40-45-110(A)(1) prohibit a physical therapist or 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 to 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 to a patient to the physical therapist for physical therapy services?

(Complaint ¶ 26.)

14. On June 2, 2011, the PT Board's Chairman issued a letter, adopted by Defendant in its July 14, 2011 meeting, that stated:

"[t]he purpose of Sec. 40-45-110(A)(1) is to 'protect consumers as well as government-sponsored health care programs such as Medicare and Medicaid from actual and potential conflicts of interest which are likely to lead to overuse of medical services by physicians who, for their own financial gain rather than their patient's medical needs, refer patients to entities in which the physicians hold financial interest.'" (sic)

(Complaint ¶ 27.)

15. On August 17, 2011, Defendant met, reconsidered the June 2, 2011 letter and adopted its 2011 Position Statement interpreting Section 40-45-110(A)(1) to allow PTs to be employed by other PTs or PT groups where one or more employees of the corporation refers a patient to the PT for physical therapy services. Defendant adopted its 2011 Position Statement concluding: "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."

(Complaint ¶ 31) (Emphasis added.) Exhibit 4, attached to the Complaint is a copy of the 2011 Position Statement.

16. PT and PT groups have the same "actual and potential conflicts of interest which are likely to lead to overuse of medical services by [physical therapists] who, for their own



financial gain rather than their patients' medical needs, refer patients to entities in which the [physical therapists] hold a financial interest." (Complaint, ¶ 41.)

17. The 2011 Position Statement does not address whether a PT was a "person" as defined in the PT Act for purposes of S.C. Code Ann. § 40-45-110(A)(1), and PTs are therefore subject to the same employment/referral prohibition from other PTs as they are with physicians under Sloan. Id. Complaint, ¶ 31.

18. The concept of "referral" and "coverage" are different and that the 2011 Position Statement's adoption of the "coverage" exception to the employment/referral prohibition is contrary to the plain meaning of Section 40-45-110(A)(1). Complaint, ¶ 47.

19. If the referral of a patient within a PT Group for PT services is coverage, then the referral of a patient within a physician group to a PT for PT services is also coverage. Complaint, ¶ 51.

20. Plaintiff PT Joseph alleges injury from the action of the Defendant in its adoption of the 2011 Position Statement, including that, as a licensed professional, she will be injured based upon her right to be employed by a person of her choosing (Complaint ¶ 1), the wellbeing of her patients and her economic, constitutional and contractual rights (Complaint ¶ 32), equal protection (Complaint ¶¶ 60, 62), and due process. (Complaint ¶ 68.)

21. Drs. Joseph and McCarthy allege injury from the action of the Defendant in its adoption of the 2011 Position Statement, including that, as licensed professionals, they will be injured based upon their right to employ persons of their choosing and persons who best meet the treatment needs of his patients (Complaint ¶¶ 2 and 3, respectively), the wellbeing of their patients and their economic, constitutional and contractual rights (Complaint ¶ 32), and equal protection (Complaint ¶ 61-62).

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FINDING OF FACTS AND CONCLUSIONS OF LAW

22. I find that on its face, Causes of Action One through Six of the Complaint allege facts, taken in the light most favorable to the Plaintiffs, that state valid causes of action.

23. In its 2011 Position Statement, the PT Board determined that in a PT group practice, a PT or PT assistant providing services to a patient of the group practice does not fall under the Sloan definition of "referral" because a PT or PT assistant seeing a patient at the request of another PT in the group practice is not receiving a "referral" but rather is providing "coverage." The Sloan case does not address the issues raised by Plaintiffs regarding the 2011 Position Statement in Causes of Action One through Six challenging the 2011 Position Statement and I so find.

24. In Sloan, the South Carolina Supreme Court held "the practices of medicine and physical therapy by properly licensed individuals undoubtedly are cognizable property interests rooted in state law." Sloan, 370 S.C. 484, 636 S.E.2d 615. See also Dantzler v. Callison, 230 S.C. 75, 92, 94 S.E.2d 177, 186 (1956); Ezell v. Ritholz, 188 S.C. 39, 198 S.E. 419 (1938). Plaintiffs each have a property interest in his/her respective license and have standing to bring this case and I so find.

25. The Sloan decision does not address the issue of whether a PT or PT group is a "person" from purposes of determining whether an illegal employment/referral arrangement exists and I so find.

26. The Sloan decision does not address the issue of whether S.C. Code Ann. § 40-45-110(A)(1) prohibits a PT from working as an employee of a PT or PT group when the PT or employee of the PT group refers patients to the PT for services. S.C. Code Ann. § 40-45-110(A)(1) (Rev. 2011) and I so find.



27. The Sloan decision does not define "coverage" for purposes of the employee/referral prohibition in S.C. Code Ann. § 40-45-110(A)(1) (Rev. 2011) and I so find.

28. I find that the first six causes of action raised by Plaintiffs were not issues raised before or decided by the Supreme Court in Sloan.

29. It is well-settled that courts only can adjudicate justiciable controversies. See Pee Dee Elec. Co-op., Inc. v. Carolina Power & Light Co., 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983); Tracy v. Tracy, 384 S.C. 91, 99, 682 S.E.2d 14, 18 (Ct. App. 2009); Sloan v. Greenville County, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003). Declaratory judgment actions are no exception. See Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 423, 593 S.E.2d 462, 465 (2004) ("To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy."). "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." Peoples Fed. Sav. & Loan Ass'n of S.C. v. Res. Planning Corp., 358 S.C. 460, 477, 596 S.E.2d 51, 60 (2004) (quoting Pee Dee Elec. Co-op., Inc., 279 S.C. at 66, 301 S.E.2d at 762). "Justiciability encompasses several doctrines, including ripeness, mootness, and standing." James v. Anne's Inc., 390 S.C. 188, 193, 701 S.E.2d 730, 732 (2010), reh'g denied (Dec. 1, 2010).

30. "The basic purpose of the [Declaratory Judgments] Act is to provide for declaratory judgments without awaiting a breach of existing rights." Sunset Cay, 357 S.C. at 424, 593 S.E.2d at 467. A declaratory judgment is proper "when there is an existing controversy or at least the ripening seeds of a controversy." Id., 357 S.C. 414, 423, 593 S.E.2d 462, 466. The Supreme Court held "a party is not required under the Declaratory Judgments Act to spend time



and money complying with what allegedly is an invalid or unconstitutional ordinance.” Id. I find that there is an existing controversy and this matter is ripe for hearing.

31. The PT Board has the statutory authority to suspend or revoke a PT’s license for violation of the PT Act. S.C. Code Ann. § 40-45-110(A) (Rev. 2011). In the instant case, I find that PT Joseph has to have been subject to a specific disciplinary action or proceeding before the PT Board or Joseph or McCarthy risk having their patient care disrupted by the PT Board subjecting the hired PTs to disciplinary action on the ground that the physician’s sending the patient to the PT for coverage on PT services was a referral and not coverage. This would defeat the very basic purpose of the Declaratory Judgments Act to provide access to the courts without having to wait for a breach of existing rights .

32. The Plaintiffs have alleged that the PT Board’s 2011 Position Statement is an unconstitutional application of the statute and affects their ability to employ and be employed as they choose within their chosen professions. The validity of the statute and “the parties’ rights under it as they presently exist will be resolved” by this Court’s decision. Sunset Cay, 357 S.C. at 424, 593 S.E.2d at 467. Plaintiffs have alleged a justiciable controversy.

33. In Baird v. Charleston County, the Supreme Court held: “[t]o have standing one must generally have a personal stake in the subject matter of the lawsuit, i.e., one must be a real party in interest. A real party in interest is one with a real, material, or substantial interest.” Baird v. Charleston Cnty., 333 S.C. 519, 530, 511 S.E.2d 69, 75 (1999) (citations and footnote omitted). In Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S. Ct. 2130 (1992), the United States Supreme Court enunciated a test for standing, which consists of the following three elements:

First, the Petitioners must have suffered an ‘injury in fact’— an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or

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imminent, not 'conjectural' or 'hypothetical'. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.” Third, it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’

Id. at 559–61, 112 S. Ct. at 2136 (internal citations omitted); see also Smiley v. S.C. Dept. of Health and Envtl. Control, 374 S.C. 326, 649 S.E.2d 31(2007); Beaufort Realty Co. v. S.C. Coastal Conservation League, 346 S.C. 298, 551 S.E.2d. 588 (Ct. App. 2001).

34. I find that Plaintiffs have standing to bring this case. Plaintiffs' injury is the infringement on their abilities to practice their chosen profession and the disparate treatment under the 2011 Position Statement in allowing PTs or PT groups to refer patients for PT services to employed PTs under the guise of “coverage” and not allowing physicians or physician groups to refer patients for PT services to employed PTs under the guise of “coverage.”

35. I find that this injury is not “conjectural or hypothetical.” It is concrete and particularized because the Plaintiffs currently are unable to employ and be employed as they choose, a direct result of Defendant's 2011 Position Statement interpretation of South Carolina Code Ann. § 40-45-110(A)(1).. The Court's decision will determine whether the PT Board's 2011 Position Statement violates the plain meaning of the statute, exceeds the PT Board's authority or is applying the statute unconstitutionally. The judgment here will have a practical effect on the controversy and will determine the parties' rights under the statute at issue, namely the Plaintiffs' rights to be employed by or to employ licensed professionals of their choosing and the Defendant's right to discipline any PT so employed.

36. Further, the South Carolina Supreme Court has recognized that “standing may be conferred upon a party ‘when an issue is of such public importance as to require its resolution for future guidance.’” Sloan v. Wilkins, 362 S.C. 430, 436–37, 608 S.E.2d 579, 583 (2005) (quoting

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Baird v. Charleston Cnty., 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999)); Sloan v. Department of Transp., 379 S.C. 160, 666 S.E. 2d, 236, 241 (2008).

37. The 2011 Position Statement recognizes that the purpose of S.C. Code Ann. § 45-110(A)(1) was to protect the public and government-sponsored health care programs from actual and potential conflicts of interest which are likely to lead to overuse of medical services by physicians who, for their own financial gain rather than their patients' medical needs, refer patients to entities in which the physicians hold a financial interest." The public has an equal interest in being protected from overuse of medical services by PTs who, for their own financial gain rather than their patients' medical needs, refer patients to entities in which the PTs hold a financial interest and I so find.

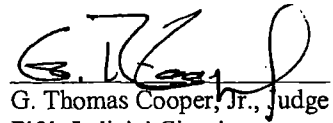
38. Defendant relies on ATC South, Inc. v. Charleston Cnty., in contending that Plaintiffs do not have standing because they are mere competitors. Defendant cites to the Supreme Court's holding that "where ... the potential injury or prejudice is only an increase in business competition, such injury or prejudice is insufficient to confer standing." 380 S.C. 191, 198, 669 S.E.2d 337, 340 (2008). I find that the potential injury or prejudice in this matter is not just an increase in business competition. ATC South is not applicable to this case.

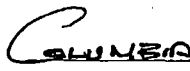
39. Defendant contends that Causes of Action Seven through Nine fail to state claims upon which relief can be granted. Counsel for Plaintiffs during argument stated that these causes of action were raised for issue preservation purposes. As a matter of law, this Court is bound by the Supreme Court's decision in Sloan and has no authority to overrule Sloan. Therefore, as a matter of law, this Court cannot grant the relief sought by Plaintiffs and converts the Motion as to the Seventh, Eighth and Ninth Causes of Action into one for Partial Summary Judgment and grants the same.

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For these reasons it is ordered that the Motion to Dismiss Pursuant to Rule 12(b)(6), SCRCF is denied as to Causes of Action One through Six. I convert the Motion to Dismiss to a Motion for Summary Judgment and grant the Motion as to Causes of Action Seven through Nine.

AND IT IS SO ORDERED


G. Thomas Cooper, Jr., Judge
Fifth Judicial Circuit

 _____, South Carolina
SEPTEMBER 17, 2012

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Kristin Joseph, PT, Thomas N. Joseph, MD,
and William G. McCarthy, MD,

Civil Action No. 12-CP-40-2632

Plaintiffs,

MOTION TO RECONSIDER

v.

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

Defendant.

Pursuant to Rule 59, SCRPC, the Defendant South Carolina Department of Labor, Licensing and Regulation, South Carolina Board of Physical Therapy moves for reconsideration of the Court's Order denying its Motion to Dismiss the Plaintiffs' Complaint.

The grounds for this Motion for Reconsideration are as follows:

First, the Court erred in concluding that the Plaintiffs have stated a valid cause of action upon which relief can be granted.

Although the 2011 Position Statement which permits physical therapists to practice in conjunction with, and treat the patients of, other physical therapists had not been issued when Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 636 S.E.2d 598 (2006) was decided, the 2011 Position Statement has *nothing* to do with the relief sought in the lawsuit brought by the Plaintiffs. Rather, the 2011 Position Statement is a red herring used by the Plaintiffs in an effort to reinvigorate the Sloan case before this Court.

Accordingly, the Plaintiffs failed to state a valid cause of action arising out of the Board's 2011 Position Statement.

The Supreme Court in Sloan concluded that § 40-45-110(4)(1) prohibits a physical therapist from working as an employee of a physician when the physician refers patients to the physical therapist for services. Sloan, 635 S.E.2d at 609. Stated more simply, the statute and the Sloan opinion's interpretation of the statute prohibits physical therapists from working as an employee of a physician who offers patients to that physical therapist.

The Complaint in this case states the relief sought has nothing to do with the 2011 Position Statement and everything to do with the Sloan opinion. The Complaint states that Kristen Joseph filed this lawsuit because she seeks the right to be employed by a physician or in a physician's practice. Complaint, ¶ 1. Thomas N. Joseph seeks to employ physical therapists in his practice, as physicians were previously allowed to do *before* the Sloan decision. Complaint, ¶ 2. William G. McCarthy seeks to employ physical therapists in his practice, as he claims physicians were allowed to do *before* Sloan. Complaint, ¶ 3.

Each of the allegations made by the Plaintiffs as to the relief sought by them admits that the relief sought by them is precluded by Sloan. None of the Plaintiffs alleges that the relief sought by them, *a return to physician-owned PT practices*, is precluded by, barred by, or has been impacted by the 2011 Position Statement. Each of them admits in the Complaint that they seek a return to the law pre-Sloan, a result this Court is without authority to give them. Accordingly, the Court erred in concluding that the Plaintiffs had

alleged a justifiable controversy arising out of the 2011 Position Statement and erred in not dismissing their Complaint pursuant to Rule 12(b)(6), SCRCP.

Second, the Court erred in concluding that the Plaintiffs have standing.

"The three required elements to establish standing are: an injury in fact, a causal connection, and likelihood that a favorable decision would give relief." Charleston Trident Home Builders, Inc. v. Town Council, 632 S.E.2d 864, 866 (S.C. 2006).

The 2011 Position Statement allows physical therapists to practice with other physical therapists in the same practice and see each other's patients. This Position Statement by the Board *does not prohibit* Kristin Joseph from practicing physical therapy with physicians. S.C. Code Ann. § 40-45-110(A)(1), as interpreted in the Sloan opinion, does. The Court's Order denying the motion to dismiss states that Joseph should not have to wait to face disciplinary action before bringing this action. Kristin Joseph faces potential disciplinary action if she becomes employed by a physician who refers her cases, but that disciplinary action is permitted by the Sloan opinion's interpretation of the relevant statute. Because Kristin Joseph will not be punished or disciplined under the 2011 Position Statement (because it does not prohibit her from doing anything) she does not have standing to challenge its interpretation. She has not, and cannot, suffer any injury from the Board's 2011 interpretation of the statute, as the interpretation actually inures to her benefit. See Fuman Univ. v. Livingston, 136 S.E.2d 256 (S.C. 1964) (holding person with no financial interest in taxes erroneously collected had no standing to sue for refund); Davis v. Hearn, 387 S.E.2d 676 (S.C. Ct. App. 1989) (former stockholder of a corporation had no standing to sue a current officer or director for breach of fiduciary duty).

In addition, the Plaintiff physicians (Joseph and McCarthy) have not, and cannot, suffer any harm from the 2011 Position Statement. South Carolina Code section 40-45-110(A)(1) does not discipline physicians. Likewise, the 2011 Position Statement does not discipline, injure, or harm the Plaintiff physicians in any way. The 2011 Position Statement merely allows physical therapists to practice with physical therapists and treat each other's patients. A physical therapist's inability to work for a physician without potential discipline was decided in Sloan.

The idea that the Plaintiff physicians have standing to challenge the Physical Therapy Board's position statement on whether physical therapists can practice and treat in conjunction with other physical therapists is without merit. To hold that the Plaintiff physicians have standing does not merely erode the concept of standing in this state, but eliminates it. Plaintiff physicians cannot, as a matter of law, establish any injury from the 2011 Position Statement governing physical therapists and cannot show a causal connection between any alleged injury and the Board's position. Additionally, because the relief sought by the Plaintiff physicians is barred by the Sloan decision

For the reasons set forth herein, the Defendant respectfully asks the Court to reconsider its prior Order and grant Defendant South Carolina Department of Labor, Licensing and Regulation, South Carolina Board of Physical Therapy's Motion to Dismiss.

Signature on Next Page

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McNAIR LAW FIRM

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMONS PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

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

Plaintiffs,

v.

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

Defendant.

C/A No. 2012-CN-40-282

ORDER DENYING SCOTUS
MOTION TO DISMISS AS TO
CAUSES OF ACTION ONE
THROUGH SIX AND GRANTING
PARTIAL SUMMARY JUDGMENT AS
TO CAUSES OF ACTION
SEVEN THROUGH NINE

The South Carolina Department of Labor, Licensing and Regulation, South Carolina Board of Physical Therapy (PT Board or Defendant) filed a Motion to Dismiss (Motion) the Complaint of Plaintiffs Kristin Joseph, P.T. (PT Joseph), Thomas N. Joseph, M.D. (Joseph), and William G. McCarthy, M.D. (McCarthy) (collectively, Plaintiffs). Defendant moved to dismiss on the grounds that: 1) there is no justiciable controversy; 2) Plaintiffs lack standing; 3) the Complaint fails to state a claim as to the Seventh, Eighth and Ninth¹ Causes of Action; 4) the Complaint states no claim upon which relief can be granted; and 5) Plaintiffs' claims are not ripe. I heard the Motion on August 7, 2012. Monteith F. Todd, Esquire, and Robert E. Horner, Esquire, appeared for the Defendant and M. Elizabeth Crum, Esquire, and Ariell D. Kirk, Esquire, appeared for the Plaintiffs. Having reviewed the pleadings, Motion and memoranda in support and in opposition and the statutory and the case law, I find that the Motion should be denied in part and summary judgment granted in part.

¹ On July 20, 2012, Plaintiffs filed an "Errata to the Declaratory Judgment Action and Complaint" correcting the scrivener's error regarding the two Eighth Causes of Action. The second "Eighth Cause of Action" is now the Ninth Cause of Action and will be referred to thusly henceforward.

STANDARD OF REVIEW

A motion to dismiss pursuant to Rule 12(b)(6), SCRCP, may only be granted if based on the face of the pleadings, and in reading the pleading in the light most favorable to the nonmoving party, the pleading fails to state any valid claim. See Gentry v. Yoncos, 337 S.C. 1, 2, 533 S.E.2d 137, 139 (1999). When considering a 12(b)(6) motion, a court must base its ruling "solely upon allegations set forth on the face of the [pleading]." Smith v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 60, 73 (1999), (citing Stiles v. Oconee, 319 S.C. 297, 457 S.E.2d 501 (1995)). The moving party bears a weighty burden, and a motion to dismiss only should be granted when the allegations in the pleading cannot be construed to state any valid claim whatsoever.

ALLEGATIONS ON THE FACE OF THE COMPLAINT

1. PT Joseph is a physical therapist (PT) licensed by the PT Board to provide physical therapy in South Carolina and she is bound by the requirements of S.C. Code Ann. § 40-65-5, *et seq.* (Rev. 2011) and the rules and regulations promulgated by the PT Board. (Complaint ¶ 1.) MD Joseph and MD McCarthy are physicians licensed to practice medicine and currently are practicing orthopedic surgery in South Carolina and seek the same right to employ PTs as physical therapy assistants that the PTs or PT groups currently have. (Complaint ¶¶ 2 and 3.)

2. Defendant PT Board is an agency of the State of South Carolina and can exercise only "those powers that are conferred expressly or by reasonable necessary implication, or are merely incidental to powers expressly granted." Brooke v. S.C. State Bd. of Funeral Serv., 271 S.C. 459, 461, 247 S.E.2d 826, 832 (1978). As a state agency, the Defendant is

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possessed only with those powers that are specifically delineated in the Physical Therapy Act (PT Act).

3. Prior to the decision of the Supreme Court of South Carolina in Sloan v. South Carolina Bd. of Physical Therapy Examiners, 370 S.C. 432, 636 S.E.2d 598 (2006), PTs and PT assistants could be employed by physician practices and physician practices could employ PTs or PT assistants without their being subject to disciplinary action by the PT Board. The PT Act² was amended in 1998. In 1998, the PT Board issued a Position Statement (1998 Position Statement), stating:

It is the Board's position that physical therapists and physical therapist assistants involved in the practice settings that comply with state and federal laws regarding physician or provider referral to practices in which they have an ownership interest should not be subject to discipline. The Board does have the intention to further clarify this section of the statute in regulation at a later date.

Sloan, 370 S.C. 405, 636 S.E.2d 604-605 (2006). (Complaint ¶ 16.)

4. Section 40-45-110(A)(1) (Rev. 2011) of the PT Act provides, in pertinent part:

(A) In addition to other grounds provided for in Section 40-45-110, the board, after notice and hearing, may restrict or refuse to grant a license to an applicant and may 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, relating, 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;...

(Emphasis added). (Complaint ¶ 9.)

5. On March 30, 2004, the Attorney General of South Carolina (SCAG) issued an opinion responding to the following questions:

1. Does S.C. Code Ann. § 40-45-110(A)(1) prohibit a physical therapist from working for pay for a licensed physician or group of physicians when

² S.C. Code Ann. § 40-45-10, et seq. (Supp. 2011).

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the physician (or a member of the group) refers a patient to the physical therapist for physical therapy services?

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

2004 WL 736934 (S.C.A.G.), p. 1 (Complaint ¶ 17.)

6. The SCAG determined that the General Assembly's intention in enacting S.C. Code Ann. § 40-45-110(A)(1) was to prohibit PTs from accepting referrals from a licensed physician when a financial relationship, such as an employment relationship, existed and that a PT cannot work for pay for a licensed physician or group of physicians when the physician (or a member of the group) refers a patient to the PT for physical therapy services. The SCAG further found that S.C. Code Ann. § 40-45-110(A)(1) prohibited a PT from working for a professional corporation owned by one or more licensed physicians if a physician owner or employee referred patients to the PT for physical therapy services. (Complaint ¶ 18.)

7. The question of whether a PT's employment and referral prohibition also applied to a PT's or PT group's employment of and patient referrals to PTs was not addressed in the SCAG opinion request or opinion. (Complaint ¶ 20.)

8. After receiving the SCAG opinion, the PT Board met and, without going through the South Carolina Administrative Procedures Act statutory requirements, adopted the SCAG opinion as its own position statement (2004 Position Statement). (Complaint ¶ 19.) The 2004 Position Statement prohibits a PT from working for pay for a physician, a group of physicians, or a corporation owned by physicians from whom the PT receives referrals. A declaratory judgment action challenging the PT Board's adoption of the SCAG opinion findings as its 2004 Position Statement was instituted. Complaint, ¶ 21-22.

SCAG

9. The Supreme Court in Sloan concluded that "[Section] 40-45-110(A)(1) prohibits a physical therapist from receiving referrals from or dividing fees with a physician employee." Sloan, 370 S.C. 469, 636 S.E.2d 607. (Complaint ¶ 21.)

10. The Court further found that the purpose of the 1998 amendment to Section 40-45-110(A)(1) was "to protect consumers as well as government-sponsored health care programs such as Medicare and Medicaid from actual and potential conflicts of interest which are likely to lead to overuse of medical services by physicians who, for their own financial gain rather than their patients' medical needs, refer patients to entities in which the physicians hold a financial interest." Sloan, 370 S.C. 469, 636 S.E.2d 607. (Complaint ¶ 22.)

11. PTs, like physicians, can enter into provider contracts with the Center for Medicare and Medicaid Services (CMS) to provide physical therapy services reimbursed under Medicare and can enter into contracts with the South Carolina Department of Health and Human Services (SCDHHS) to provide physical therapy services reimbursed under Medicaid. (Complaint ¶¶ 24-25.)

12. The Sloan decision did not address whether a PT was a "person" like a physician for purposes of the financial relationship referral prohibition in Section 40-45-110(A)(1). In this declaratory judgment action, Plaintiffs contend that a PT is a "person" for purposes of the Section 40-45-110(A)(1) referral prohibition just as is a physician. (Complaint ¶¶ 16, 11, 34-38.)

13. On May 3, 2011, Defendant was asked to issue a position statement on how it interprets S.C. Code Ann. § 40-45-110(A)(1) regarding two (2) questions, namely:

(#1) Does S.C. Code Ann. § 40-45-110(A)(1) prohibit a physical therapist or 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 to a patient to another physical therapist or physical therapist assistant for physical therapy services?

(g2) 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 to a patient to the physical therapist for physical therapy services?

(Complaint ¶ 26.)

14. On June 2, 2011, the PT Board's Chairman issued a letter, adopted by Defendant in its July 14, 2011 meeting, that stated:

"[t]he purpose of Sec. 40-45-110(A)(1) is to 'protect consumers as well as government-sponsored health care programs such as Medicare and Medicaid from actual and potential conflicts of interest which are likely to lead to overuse of medical services by physicians who, for their own financial gain rather than their patient's medical needs, refer patients to entities in which the physicians hold financial interest.'" (sic)

(Complaint ¶ 27.)

15. On August 17, 2011, Defendant met, reconsidered the June 2, 2011 letter and adopted its 2011 Position Statement interpreting Section 40-45-110(A)(1) to allow PTs to be employed by other PTs or PT groups where one or more employees of the corporation refers a patient to the PT for physical therapy services. Defendant adopted its 2011 Position Statement concluding: "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."

(Complaint ¶ 31) (Emphasis added.) Exhibit 4, attached to the Complaint is a copy of the 2011 Position Statement.

16. PT and PT groups have the same "actual and potential conflicts of interest which are likely to lead to overuse of medical services by [physical therapists] who, for their own

financial gain rather than their patients' medical needs, refer patients to entities in which the (physical therapists) hold a financial interest." (Complaint, ¶ 41.)

17. The 2011 Position Statement does not address whether a PT was a "person" as defined in the PT Act for purposes of S.C. Code Ann. § 40-45-110(A)(1), and PTs are therefore subject to the same employment/referral prohibition from other PTs as they are with physicians under Section 1d. Complaint, ¶ 31.

18. The concept of "referral" and "coverage" are different and that the 2011 Position Statement's adoption of the "coverage" exception to the employment/referral prohibition is contrary to the plain meaning of Section 40-45-110(A)(1). Complaint, ¶ 47.

19. If the referral of a patient within a PT Group for PT services is coverage, then the referral of a patient within a physician group to a PT for PT services is also coverage. Complaint, ¶ 51.

20. Plaintiff PT Joseph alleges injury from the action of the Defendant in its adoption of the 2011 Position Statement, including that, as a licensed professional, she will be injured based upon her right to be employed by a person of her choosing (Complaint ¶ 1), the wellbeing of her patients and her economic, constitutional and contractual rights (Complaint ¶ 32), equal protection (Complaint ¶¶ 60, 62), and due process. (Complaint ¶ 68.)

21. Drs. Joseph and McCarthy allege injury from the action of the Defendant in its adoption of the 2011 Position Statement, including that, as licensed professionals, they will be injured based upon their right to employ persons of their choosing and persons who best meet the treatment needs of his patients (Complaint ¶¶ 2 and 3, respectively), the wellbeing of their patients and their economic, constitutional and contractual rights (Complaint ¶ 32), and equal protection (Complaint ¶ 61-62).

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FINDING OF FACTS AND CONCLUSIONS OF LAW

22. I find that on its face, Causes of Action One through Six of the Complaint allege facts, taken in the light most favorable to the Plaintiffs, that state valid causes of action.

23. In its 2011 Position Statement, the PT Board determined that in a PT group practice, a PT or PT assistant providing services to a patient of the group practice does not fall under the Sloan definition of "referral" because a PT or PT assistant seeing a patient at the request of another PT in the group practice is not receiving a "referral" but rather is providing "coverage." The Sloan case does not address the issues raised by Plaintiffs regarding the 2011 Position Statement in Causes of Action One through Six challenging the 2011 Position Statement and I so find.

24. In Sloan, the South Carolina Supreme Court held "the practices of medicine and physical therapy by properly licensed individuals undoubtedly are cognizable property interests rooted in state law." Sloan, 370 S.C. 484, 636 S.E.2d 615. See also Denteler v. Callahan, 230 S.C. 75, 92, 94 S.E.2d 177, 186 (1956); Exell v. Rillings, 185 S.C. 39, 193 S.E. 419 (1938). Plaintiffs each have a property interest in his/her respective license and have standing to bring this case and I so find.

25. The Sloan decision does not address the issue of whether a PT or PT group is a "person" from purposes of determining whether an illegal employment/referral arrangement exists and I so find.

26. The Sloan decision does not address the issue of whether S.C. Code Ann. § 40-45-110(A)(1) prohibits a PT from working as an employee of a PT or PT group when the PT or employee of the PT group refers patients to the PT for services. S.C. Code Ann. § 40-45-110(A)(1) (Rev. 2011) and I so find.

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27. The Sloan decision does not define "coverage" for purposes of the employee/referral prohibition in S.C. Code Ann. § 40-45-110(A)(1) (Rev. 2011) and I so find.

28. I find that the first six causes of action raised by Plaintiffs were not issues raised before or decided by the Supreme Court in Sloan.

29. It is well-settled that courts only can adjudicate justiciable controversies. See Pee Dee Elec. Co-op., Inc. v. Carolina Power & Light Co., 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983); Tracy v. Tracy, 384 S.C. 91, 99, 682 S.E.2d 14, 18 (Ct. App. 2009); Sloan v. Greenville County, 358 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003). Declaratory judgment actions are no exception. See Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 423, 593 S.E.2d 462, 465 (2004) ("To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy."). "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." Peoples Fed. Sav. & Loan Ass'n of S.C. v. Reg. Planning Com., 358 S.C. 460, 477, 596 S.E.2d 51, 60 (2004) (quoting Pee Dee Elec. Co-op., Inc., 279 S.C. at 66, 301 S.E.2d at 762). "Justiciability encompasses several doctrines, including ripeness, mootness, and standing." James V. Anne's Inc., 390 S.C. 188, 191, 701 S.E.2d 730, 732 (2010), *rehy denied* (Dec. 1, 2010).

30. "The basic purpose of the [Declaratory Judgments] Act is to provide for declaratory judgments without awaiting a breach of existing rights." Sunset Cay, 357 S.C. at 424, 593 S.E.2d at 467. A declaratory judgment is proper "when there is an existing controversy or at least the ripening seeds of a controversy." *Id.*, 357 S.C. 414, 423, 593 S.E.2d 462, 466. The Supreme Court held "a party is not required under the Declaratory Judgments Act to spend time

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and money complying with what allegedly is an invalid or unconstitutional ordinance." Id. I find that there is an existing controversy and this matter is ripe for hearing.

31. The PT Board has the statutory authority to suspend or revoke a PT's license for violation of the PT Act, S.C. Code Ann. § 40-45-110(4) (Rev. 2011). In the instant case, I find that PT Joseph has to have been subject to a specific disciplinary action or proceeding before the PT Board or Joseph or McCarthy risk having their patient care disrupted by the PT Board subjecting the hired PTs to disciplinary action on the ground that the physician's sending the patient to the PT for coverage on PT services was a referral and not coverage. This would defeat the very basic purpose of the Declaratory Judgments Act to provide access to the courts without having to wait for a breach of existing rights.

32. The Plaintiffs have alleged that the PT Board's 2011 Position Statement is an unconstitutional application of the statute and affects their ability to employ and be employed as they choose within their chosen professions. The validity of the statute and "the parties' rights under it as they presently exist will be resolved" by this Court's decision. Sunset Cay, 357 S.C. at 424, 593 S.E.2d at 467. Plaintiffs have alleged a justiciable controversy.

33. In Baird v. Charleston County, the Supreme Court held: "[t]o have standing one must generally have a personal stake in the subject matter of the lawsuit, i.e., one must be a real party in interest. A real party in interest is one with a real, material, or substantial interest." Baird v. Charleston Cnty., 393 S.C. 519, 550, 511 S.E.2d 69, 75 (1997) (citations and footnote omitted). In Idaho v. Defenders of Wildlife, 504 U.S. 555, 112 S. Ct. 2130 (1992), the United States Supreme Court enunciated a test for standing, which consists of the following three elements:

First, the Petitioners must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or

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imminent, not 'conjectural' or 'hypothetical'. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . traceable] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'

Id. at 559–61, 112 S. Ct. at 2136 (internal citations omitted); *see also* Smiley v. S.C. Dept. of Health and Hygiene Control, 374 S.C. 326, 649 S.E.2d 31 (2007); Beaufort Realty Co. v. S.C. Coastal Conservation League, 346 S.C. 298, 551 S.E.2d 588 (Ct. App. 2001).

34. I find that Plaintiffs have standing to bring this case. Plaintiffs' injury is the infringement on their abilities to practice their chosen profession and the disparate treatment under the 2011 Position Statement in allowing PTs or PT groups to refer patients for PT services to employed PTs under the guise of "coverage" and not allowing physicians or physician groups to refer patients for PT services to employed PTs under the guise of "coverage."

35. I find that this injury is not "conjectural or hypothetical." It is concrete and particularized because the Plaintiffs currently are unable to employ and be employed as they choose, a direct result of Defendant's 2011 Position Statement interpretation of South Carolina Code Ann. § 40-43-110(A)(1). The Court's decision will determine whether the PT Board's 2011 Position Statement violates the plain meaning of the statute, exceeds the PT Board's authority or is applying the statute unconstitutionally. The judgment here will have a practical effect on the controversy and will determine the parties' rights under the statute at issue, namely the Plaintiffs' rights to be employed by or to employ licensed professionals of their choosing and the Defendant's right to discipline any PT so employed.

36. Further, the South Carolina Supreme Court has recognized that "standing may be conferred upon a party 'when an issue is of such public importance as to require its resolution for future guidance.'" Sloan v. Wilkins, 362 S.C. 430, 436–37, 608 S.E.2d 579, 583 (2005) (quoting

GP # 11

Baird v. Charleston Cnty., 333 S.C. 519, 521, 511 S.E.2d 69, 75 (1999)); Sloan v. Department of Transp., 379 S.C. 169, 666 S.E. 2d, 236, 241 (2008).

37. The 2011 Position Statement recognizes that the purpose of S.C. Code Ann. § 45-110(A)(1) was to protect the public and government-sponsored health care programs from actual and potential conflicts of interest which are likely to lead to overuse of medical services by physicians who, for their own financial gain rather than their patients' medical needs, refer patients to entities in which the physicians hold a financial interest." The public has an equal interest in being protected from overuse of medical services by PTs who, for their own financial gain rather than their patients' medical needs, refer patients to entities in which the PTs hold a financial interest and I so find.

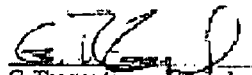
38. Defendant relies on ATC Smith, Inc. v. Charleston Cnty. in contending that Plaintiffs do not have standing because they are mere competitors. Defendant cites to the Supreme Court's holding that "where ... the potential injury or prejudice is only an increase in business competition, such injury or prejudice is insufficient to confer standing." 380 S.C. 191, 198, 659 S.E.2d 337, 340 (2008). I find that the potential injury or prejudice in this matter is not just an increase in business competition. ATC Smith is not applicable in this case.

39. Defendant contends that Causes of Action Seven through Nine fail to state claims upon which relief can be granted. Counsel for Plaintiffs during argument stated that these causes of action were raised for issue preservation purposes. As a matter of law, this Court is bound by the Supreme Court's decision in Sloan and has no authority to overrule Sloan. Therefore, as a matter of law, this Court cannot grant the relief sought by Plaintiffs and converts the Motion as to the Seventh, Eighth, and Ninth Causes of Action into one for Partial Summary Judgment and grants the same.

CH 612

For these reasons it is ordered that the Motion to Dismiss Pursuant to Rule 12(b)(6), SCROP is denied as to Causes of Action One through Six. I convert the Motion to Dismiss to a Motion for Summary Judgment and grant the Motion as to Causes of Action Seven through Nine.

AND IT IS SO ORDERED


G. Thomas Cooper, Jr., Judge
Fifth Judicial Circuit

 South Carolina
September 17, 2012

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGM T IN A CIVIL CASE

CASE NUMBER: 2012CP4002632

Kristin Joseph

SC Dept Of Labor Licensing And Regulation

Thomas N Joseph MD

South Carolina Board of Physical Therapy

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litrant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Voluntary Dismissal); ☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 9 January 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Mary Elizabeth (Liz) Crum

Monteith Powell Todd

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

RECEIVED

JAN 14 2013

SCRPC Form 4C (10/2011)

McNAIR LAW FIRM

SCANNER

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Kristin Joseph, PT, Thomas N. Joseph, MD,)
And William G. McCarthy, MD)

Plaintiff,)

vs.)

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

Defendants.)

IN THE COURT OF COMMON PLEAS

Civil Action No. 12-CP-40-02632

**ORDER DENYING MOTION TO
RECONSIDER**

RICHLAND COUNTY
FILED
2013 JAN -9 AM 9:09
JEANETTE W. McBRIDE
C.C.P. & G.S.

This matter comes before the Court by way of Defendant's Motion to Reconsider pursuant to Rules 52 and 59, SCRCP. Specifically, Defendant asks this Court to reconsider its Order entered in favor of the Plaintiffs denying SCDLLR's Motion to Dismiss as to Causes of Action One Through Six and Granting Partial Summary Judgment as to Causes of Action Seven through Nine on September 17, 2012.

After careful consideration of the record in this case and the submissions of counsel, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby DENIES Defendant's Motion pursuant to Rules 52 and 59(e) SCRCP to Alter or Amend Judgment of this Court's Order entered on or about December 17, 2012. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

AND IT IS SO ORDERED.

January 8, 2013
Columbia, South Carolina

G. Thomas Cooper, Jr.
G. Thomas Cooper, Jr.
Judge, Fifth Judicial Circuit

SCANNED

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
Kristin Joseph, PT, Thomas N. Joseph, MD,	)	Civil Action No. 12-CP-40-2632
and William G. McCarthy, MD,	)	
	)	
Plaintiffs,	)	
v.	)	NOTICE OF MOTION AND
	)	MOTION TO INTERVENE
South Carolina Department of Labor,	)	
Licensing and Regulation, South	)	
Carolina Board of Physical Therapy,	)	
	)	
Defendant.	)	

TO: PLAINTIFFS KRISTIN JOSEPH, PT, THOMAS N. JOSEPH, MD, AND WILLIAM G. MCCARTHY, MD

PLEASE TAKE NOTICE that the South Carolina Chapter, American Physical Therapy Association ("SCAPTA"), and Joseph M. McKowen, PT, Sabrina Queen Bridges, PTA, and Amalia W. Kirby, PTA ("Individual Movants") (collectively, the "Movants"), hereby move the Court, pursuant to Rule 24 of the South Carolina Rules of Civil Procedure and the Uniform Declaratory Judgments Act, S.C. Code Ann. § 15-53-80, for leave to intervene in this action. This lawsuit seeks a judicial decree regarding the meaning and scope of provisions of South Carolina's Physical Therapy Practice Act, S.C. Code Ann. §§ 40-45-10, *et seq.* (the "PT Act"), as well as the ruling of the South Carolina Supreme Court in *Sloan v. South Carolina Board of Physical Therapy Examiners*, 370 S.C. 452, 636 S.E.2d 598 (2006), where the Court held that the PT Act prohibits physical therapists ("PTs") from working as an employee of a physician when the physician refers patients to the PT for services. By this motion, as well as the attached affidavits in support hereof, the Movants seek to intervene to assure that the interests of PTs and

physical therapist assistants ("PTAs") across the State—which would undoubtedly be affected by the outcome of this case—will be heard.

BACKGROUND

***Sloan* Litigation**

In 2004, the Attorney General issued an opinion construing the PT Act to prohibit physician ownership of physical therapy services. Affidavit of Jim Stoker ("Stoker Aff.") ¶ 5. Shortly thereafter, the South Carolina Board of Physical Therapy (the "Board") adopted the Attorney General's position and issued a statement admonishing PTs to modify or terminate arrangements with referring physicians that were in violation of the statute.

Allen Sloan, a physician, sued the Board, seeking a declaratory judgment that he could employ a PT and refer patients to that PT. SCAPTA moved to intervene, and the circuit court granted its motion. *Id.* ¶ 6.

On February 24, 2005, the circuit court granted summary judgment in favor of the defendants and dismissed Sloan's case. On appeal, the South Carolina Supreme Court affirmed the circuit court's decision, holding that the PT Act prohibits a PT from working as an employee of a physician when the physician refers patients to the PT for services. *Sloan*, 636 S.E.2d at 609.

Plaintiffs in *Joseph* Litigation

Plaintiff Kristin Joseph is a PT who currently practices at First Physical Therapy in Camden, South Carolina, but seeks to be employed by a physician or in a physician's practice. Compl. ¶ 1. Plaintiffs Thomas N. Joseph, M.D., and William G. McCarthy, M.D., are medical doctors who seek to employ PTs in their respective practices. *Id.* ¶¶ 2-3. According to Drs. Joseph and McCarthy, they "seek[] the same right to employ PTs as part of [their] practice and

treatment for [their] patients as PTs and physical therapy groups currently enjoy and that physicians and physician groups enjoyed prior to the case of *Sloan v. South Carolina Board of Physical Therapy Examiners*, 370 S.C. 452, 636 S.E.2d 598 (2006), where the Supreme Court interpreted the [PT Act] to prohibit physicians from referring patients to PTs or [PTAs] . . . they or their groups employed.” *Id.*

On April 12, 2012, Plaintiffs Kristin Joseph, Dr. Thomas N. Joseph, and Dr. William G. McCarthy (collectively “Plaintiffs”), filed an action for declaratory judgment requesting that this Court determine that a 2011 Position Statement adopted by Defendant South Carolina Board of Physical Therapy Examiners (the “Board”)—which indicated that PTs and PTAs are not prohibited from working for pay for another PT or PTA who directs patients to them for services—violates the PT Act. *Id.* ¶ 43 (“This Court should declare that . . . a physical therapist or physical therapy group is subject to the same referral prohibition as is a physician or physician group when [physical therapists] are employed and patients referred for physical therapy services[.]”). “Alternatively,” Plaintiffs also requested that this Court overrule *Sloan* by declaring that the Supreme Court misinterpreted the PT Act. *Id.* ¶¶ 77-85.

The Board

Plaintiffs named the Board as the sole defendant in their Complaint. Under the administration of the South Carolina Department of Labor, Licensing and Regulation, the Board licenses PTs and PTAs in the State. The Board consists of eleven members appointed by the Governor, seven of whom must be PTs, two of whom must be PTAs, and two from the general public. The purpose of the Board is to “protect the *public*” by regulating “professionals who identify, assess, and provide treatment for individuals with physical disabilities[.]” S.C. Code Ann. § 40-45-10 (emphasis added).

Notably, the Board has recognized in its motion to dismiss the *Joseph* case that SCAPTA was previously granted leave to intervene in *Sloan*. See Def.'s Memo. in Support of Motion to Dismiss at 4.

LEGAL STANDARD

Rule 24(a) of the South Carolina Rules of Civil Procedure provides that a motion to intervene *shall* be granted "when the applicant claims an interest relating to the property or transaction which is the subject of the action and [] is so situated that the disposition of the action may as a practical matter impair or impede [its] ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." S.C. R. Civ. P. 24(a)(2). Even if intervention is not mandated by subsection (a) of Rule 24, intervention should nonetheless be permitted under subsection (b) of the Rule "when an applicant's claim or defense and the main action have a question of law or fact in common." S.C. R. Civ. P. 24(b).

Intervention should be liberally granted, particularly where judicial economy would be promoted by the declaration of rights of all parties who may be affected. See *Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant*, 394 S.E.2d 712, 714 (S.C. 1990). Indeed, the legislature has indicated that, when declaratory relief is sought, "all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." S.C. Code Ann. § 15-53-80.

INTEREST OF INTERVENORS

As recognized in *Sloan*, where SCAPTA was previously allowed to intervene, the interest that the Movants have in the subject matter of this action is evident and important. The Plaintiffs urge the Court to adopt an absurdly expansive interpretation of the prohibition of S.C. Code Ann. § 40-45-110(A), which would cover not only situations in which a physician sends a patient to a

PT, but also situations in which a PT directs a patient to another PT employed by the same practice or to a PTA employed by the same practice. In the alternative, the Plaintiffs argue "against precedent," in effect inviting this Court to recommend to the Supreme Court that it reverse the *Sloan* decision. The Court should grant the motion to intervene under Rule 24(a)(2) because the disposition of this action in favor of the Plaintiffs, as a practical matter, would impair or impede the Movants' ability to protect their interests, and these interests are not adequately represented by the existing parties.

A. The Chapter and the Individual Movants Have Important Interests at Stake.

The Chapter and the Individual Movants have important interests that are at stake in this lawsuit. SCAPTA is the South Carolina chapter of the American Physical Therapy Association (the "APTA"). The APTA and SCAPTA represent and promote the profession of physical therapy and seek to further the profession's role in the prevention, diagnosis, and treatment of movement dysfunctions in order to enhance the physical health and functional abilities of the public. *Stoker Aff.* ¶ 2. The APTA has more than 85,000 members throughout the United States, including PTs, PTAs, and students. *Id.* ¶ 3. SCAPTA's membership includes over 700 PTs, over 100 PTAs, and over 200 PT or PTA students. *Id.* SCAPTA is the only professional organization in South Carolina that represents PTs and PTAs. SCAPTA's members, all of whom live or work in the State, account for about 24% of all licensed PTs, including those South Carolina licensees who live and work in other states. *Id.*

SCAPTA's mission is to represent the very real, direct, and unique interest that PTs and PTAs in South Carolina have in the interpretation and application of laws concerning their profession. See *Med. Ass'n of State of Ala. v. Schoemake*, 656 So.2d 863, 868 (Ala. Civ. App. 1995) (Alabama association of physicians had standing to challenge a rule prohibiting PTs from

being employed by, or from otherwise participating in a professional financial arrangement with, a referring physician); *see also S.C. Wildlife Fed'n v. S.C.*, 371 S.E. 2d 521, 523 (S.C. 1988) (holding that organization had standing based on assertion of its members' injury from a potential ruling against them). The Individual Movants, who are licensed to practice as PTs and PTAs in the State, share with SCAPTA this interest in the interpretation of the PT Act. At bottom, the issue raised by this case—and the outcome of it—will affect the delivery, costs, and quality of physical therapy services in the State for years to come.

B. If the Expansive and Erroneous Interpretation of the PT Act Advanced by the Plaintiffs Were Adopted, the Interests of the Chapter and its Members Would Be Prejudiced.

The Chapter's ability to protect the interests of its members could be impaired by the disposition of this action for a number of reasons.

Many SCAPTA members are physical therapists who are employed by businesses that employ two or more PTs. Such PTs, in the course of treating patients, sometimes send or direct patients to other PTs employed by the same employer. A common reason for a PT to send or direct a patient to another PT employed by the same employer is to accommodate the scheduling needs of the patient. *Stoker Aff.* ¶ 7. Another common reason is to enable the patient to obtain services at a more convenient location. *Id.* Under the interpretation of the PT Act advanced by the Plaintiffs, SCAPTA members who are PTs would be unable to practice in association with one or more other PTs unless they scrupulously avoided ever treating the same patient.

Many SCAPTA members are PTs who are employed by businesses that employ PTAs. Such PTs, in the course of treating patients, sometimes send or direct patients to PTAs employed by the entity. *Id.* ¶ 11. Under the interpretation of the PT Act advanced by the Plaintiffs, however, SCAPTA members would be unable to work as PTAs in South Carolina because

compliance with their obligation to work only under the direction and supervision of a PT would place them in violation of the statutory prohibition in S.C. Code Ann. § 40-45-110(A). Accordingly, PTs could not send or direct their patients to PTAs.

Many SCAPTA members are PTAs. Under the PT Act, their activities must be supervised and directed by a licensed PT. *Id.* ¶ 12. However, under the interpretation of the Act advanced by the Plaintiffs, PTAs would be unable to comply with this requirement without violating the prohibition in S.C. Code Ann. § 40-45-110(A).

SCAPTA has members who take advantage of the South Carolina Professional Corporation Supplement, which allows PTs to form a professional corporation for the purpose of rendering physical therapy services and which allows such a professional corporation to provide such services through two or more licensed individuals. *See* S.C. Code Ann. § 33-19-101, *et seq.*; *Stoker Aff.* ¶ 10. Under the interpretation of the PT Act advanced by the Plaintiffs, SCAPTA members who are PTs would be unable, as a practical matter, to provide physical therapy services through two or more licensees employed by a professional corporation.

In sum, the Chapter and its members clearly have interests relating to the interpretation of the PT Act with regard to physical therapy practices that employ two or more PTs or that employ one or more PTAs. The Chapter's position is that—contrary to the assertions of the Complaint—interactions between PTs and PTAs of the kind mentioned above are not subject to the prohibition in S.C. Code Ann. § 40-45-110(A). For this reason, the Court's disposition of this action without the Chapter's participation could, as a practical matter, impair or impede the Chapter's ability to protect its interests and those of its members.

C. The Expansive and Erroneous Interpretation of the PT Act Advanced By Plaintiffs Threatens the Interests (and Livelihood) of Individual Movants.

The disposition of this action could also impair or impede the interests of the Individual Movants. Indeed, each of the Individual Movants has a tremendous stake in this litigation because the interpretation of the PT Act advanced by the Plaintiffs threatens their livelihood and well-being.

Movant McKowen is a PT and the sole owner of a practice that employs both PTs and PTAs. Affidavit of Joseph M. McKowen, PT ("McKowen Aff.") ¶¶ 2-3. The PTs he employs, in the course of treating patients, sometimes send or direct patients to other PTs employed by his business. *See id.* ¶ 7. A common reason for a PT to send or direct a patient to another PT employed by his business is to accommodate the scheduling needs of the patient. *Id.* Another common reason is to enable the patient to obtain services at a more convenient location. *Id.* The PTs employed by Movant McKowen regularly examine and evaluate a patient, develop a suitable plan of care, and then send or direct the patient to a PTA, who carries out physical therapy interventions under the direction and supervision of the PT. *See id.* ¶¶ 4-5.

Movants Bridges and Kirby are licensed PTAs. Affidavit of Sabrina Queen Bridges, PTA ("Bridges Aff.") ¶ 1; Affidavit of Amalia W. Kirby, PTA ("Kirby Aff.") ¶ 1. By definition, a physical therapist assistant is "a person who is licensed by the board to assist a physical therapist in the practice of physical therapy and whose activities are supervised and directed by a physical therapist." S.C. Code Ann. § 40-45-20(5). Consistent with the statutory restriction, both Movant Bridges and Kirby work under the direction and supervision of a licensed PT. Bridges Aff. ¶ 3; Kirby Aff. ¶ 3. The PTs who send or direct patients to Movants Bridges and Kirby are employed and paid by the same employer that employs and pays the Movants. *See* Bridges Aff. ¶ 3; Kirby Aff. ¶ 3.

Movant McKowen has vital interests relating to the interpretation of the PT Act with regard to the physical therapy practice that he owns. In particular, if the Court disposes of this case by adopting the interpretation of the statute advanced by the Plaintiffs, the consequences for his business would be dire. In such an event, the PTs he employs would be precluded from sending or directing a patient to another PT employed by him for reasons such as accommodating the patient's scheduling needs or commuting convenience. More importantly, such a decision by the Court would preclude Movant McKowen from utilizing any PTAs in his business, since the PT Act allows a PTA to work only under the direction and supervision of a PT. As a practical matter, such a decision by the Court could be a death knell for his business. *See McKowen Aff.* ¶ 6.

Movants Bridges and Kirby also have critical interests relating to the interpretation of the PT Act. In South Carolina, a PTA is defined by statute as "a person who is licensed by the board 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." S.C. Code Ann. § 40-45-20(5); *see APTA, Today's Physical Therapist: A Comprehensive Review of a 21st-Century Health Care Profession* (2011) (hereinafter "*Today's Physical Therapist*") at 5 ("Physical therapist assistants work under the direction and supervision of the physical therapist with the scope of work and supervision requirements defined by the physical therapy practice act in each state."). Under the plain terms of the statute, South Carolina PTAs do not have the option of practicing on their own. *See Bridges Aff.* ¶ 2; *Kirby Aff.* ¶ 2. The issue of whether the PT Act prohibits a PT from sending or directing a patient to a PTA thus determines whether it is possible for a physical therapist assistant to care for any patient in South Carolina without violating the law. This, in turn, will decide whether the jobs of PTAs—which otherwise have

been repeatedly ranked as one of the most "recession-proof," see *Today's Physical Therapist*, *supra*, at 45—are in jeopardy in the State of South Carolina.¹

D. The Chapter and the Individual Movants Have an Interest in Avoiding Re-Litigation of *Sloan*.

The Court granted SCAPTA's motion to intervene in the *Sloan* case. For the same reasons, the Court should permit SCAPTA and the Individual Movants (who likewise have important interests at stake), to intervene in this case, in which the Plaintiffs are seeking to overturn *Sloan*.

To the extent Plaintiffs seek to "argue against precedent" and invite this Court to recommend overruling the *Sloan* opinion, this case has far-reaching implications for the physical therapy profession as a whole. The degree of professional autonomy that PTs possess has been linked, for example, to the quality, frequency, attentiveness, and propriety of care that patients receive. Because patients would be increasingly likely, and perhaps required, to utilize a PT employed by the referring physician if *Sloan* were overruled, PTs, third-party payers, and patients alike would likely be negatively impacted. See *Stoker Aff.* ¶ 4. In light of these concerns, the Movants—who represent the interests of PTs and PTAs throughout South Carolina—should be heard in this attempt by Plaintiffs to drag this Court into re-litigating the issues that the Supreme Court definitively resolved in *Sloan*.

E. The Movants Have Voices that Should Be Heard in Addition to the Board.

While the Board and the Movants share a common interest in opposition to the Plaintiffs' interpretation of the PT Act and its request to overturn *Sloan*, the Movants' interests in this action are not adequately represented by the Board. The Movants do not disagree with the

¹ Because PTAs "benefit the employer's bottom line," see *Today's Physical Therapist*, *supra*, at 45, the elimination of the use of PTAs could also jeopardize the stability of the entire physical therapy profession. See also *McKowen Aff.* ¶ 6.

conclusion reached by the Board in its 2011 Position Statement. However, the Movants have objections to the interpretation of the PT Act advanced by the Plaintiffs that are different from the Board's analysis set forth in the 2011 Position Statement. For example, the 2011 Position Statement does not focus at all on the implications of the Plaintiffs' interpretation for physical therapy businesses that wish to employ PTAs or for PTAs who wish to continue to work as PTAs in South Carolina.

For this reason, the Movants will bring to this case, and provide to this Court, knowledge, experience, and perspective that is unlike that provided by any other party. *See Berkeley Elec.*, 394 S.E.2d at 715. Such information and insight should be considered by the Court in entering its ruling, which will be one of grave importance to PTs and PTAs across the State. Because Movants will be directly and dramatically affected by the outcome of this action, their interests should be heard now.² *See S.C. Code Ann. § 15-53-80* (when declaratory relief is sought, "all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding").

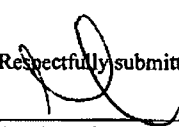
CONCLUSION

For the foregoing reasons, the Movants respectfully request that their motion to intervene be granted, and that the Court grant such further relief as it deems just and proper.

² Notably, if this case were to proceed to a conclusion without due consideration of the interests that the Movants represent, it would also be difficult for the Movants to obtain another realistic opportunity to be heard. For this reason too, their motion should be granted. *See Berkeley Elec.*, 394 S.E.2d at 715 (holding that company was entitled to intervene where it "would be extremely difficult . . . to collaterally attack any ruling adverse to them if not made a party to the original action").

By:

Respectfully submitted,


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ebparkinson@devlinparkinson.com

Counsel for Individual Movants

DATE: May 2, 2013

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
Kristin Joseph, PT, Thomas N. Joseph, MD,	)	
and William G. McCarthy, MD,	)	Civil Action No. 12-CP-40-2632
	)	
Plaintiffs,	)	
	)	AFFIDAVIT
v.	)	
	)	
South Carolina Department of Labor,	)	
Licensing and Regulation, South	)	
Carolina Board of Physical Therapy,	)	
	)	
Defendant.	)	

COMES NOW Applicant for Intervention Jim Stoker as representative for the South Carolina Chapter, American Physical Therapy Association, who swears and affirms as follows:

1. I am the Legislative Chair of the South Carolina Chapter, American Physical Therapy Association ("SCAPTA"), and as such I am authorized to act on SCAPTA's behalf and submit this affidavit to this Court.

2. The American Physical Therapy Association ("APTA") is the national professional organization that represents physical therapists ("PTs") and physical therapist assistants ("PTAs"). SCAPTA is the APTA's affiliated chapter for the State of South Carolina. The APTA and SCAPTA represent and promote the profession of physical therapy and seek to further the profession's role in the prevention, diagnosis, and treatment of movement dysfunctions in order to enhance the physical health and functional abilities of the public.

3. The APTA has more than 85,000 members throughout the United States. SCAPTA's membership includes over 700 PTs, over 100 PTAs, and over 200 physical therapy

students. SCAPTA's PT members, all of whom either live or work in South Carolina, account for about 24% of the licensed PTs in the State. SCAPTA is the only representative organization for PTs and PTAs in the State.

4. In 2003, serious concerns expressed over physician-owned physical therapy practices prompted the unanimous passage of a resolution opposing physician ownership of physical therapy services by the APTA House of Delegates.

5. In 2004, the Attorney General issued an opinion regarding the meaning of the existing statute prohibiting physician ownership of physical therapy services.

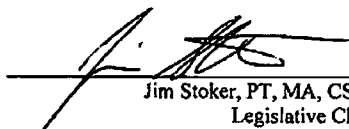
6. In *Sloan v. South Carolina Board of Physical Therapy Examiners*, 370 S.C. 452, 636 S.E.2d 598 (2006), SCAPTA moved to intervene and the circuit court granted SCAPTA's motion.

7. 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.

8. Many SCAPTA members are PTs who employ, or are employed by businesses that employ, PTAs to whom they sometimes send or direct patients.

9. PTAs are required by statute to work under the direction and supervision of PTs.

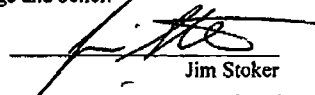
10. SCAPTA has members who take advantage of the South Carolina Professional Corporation Supplement, which allows PTs to form a professional corporation for the purpose of rendering physical therapy services and which allows such a professional corporation to provide such services through two or more licensed individuals.


Jim Stoker, PT, MA, CSCS
Legislative Chair
South Carolina Chapter
American Physical Therapy Association

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

SUBSCRIBED AND SWORN

Being first duly sworn on April 24, 2013, Jim Stoker swears and affirms that the facts stated herein are true and correct to the best of her knowledge and belief.


Jim Stoker

Personally appeared before me: Melissa A. Kelley


Notary Public

My commission expires:

9/25/2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
 Kristin Joseph, PT, Thomas N. Joseph, MD,) and William G. McCarthy, MD,)	)	Civil Action No. 12-CP-40-2632
Plaintiffs,	)	
	)	AFFIDAVIT OF SABRINA QUEEN
	)	BRIDGES
v.	)	
	)	
South Carolina Department of Labor,	)	
Licensing and Regulation, South	)	
Carolina Board of Physical Therapy.	)	
Defendant.	)	

COMES NOW Applicant for Intervention Sabrina Queen Bridges, PTA, who swears and affirms as follows:

1. I am a physical therapist assistant licensed by the South Carolina Board of Physical Therapy Examiners.
2. It is my understanding that I am required by South Carolina law to practice under the direction and supervision of a physical therapist and that I cannot practice on my own without violating the law.
3. I work in Greenville, South Carolina, at The Care Center, Inc. I always work under the direction and supervision of a licensed physical therapist. The physical therapists that direct and supervise my work are employed by the same company that employs me.

FURTHER, AFFIANT SAYETH NOT.

Sabrina Queen Bridges PTA
Sabrina Queen Bridges, PTA

Sworn to and subscribed before me on this
the 1 day of May, 2013.

Marilyn W. Howard
NOTARY PUBLIC, STATE OF SOUTH CAROLINA
My Commission Expires: 2/4/19

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Kristin Joseph, PT, Thomas N. Joseph, MD,)
and William G. McCarthy, MD,)
Plaintiffs,)

Civil Action No. 12-CP-40-2632

v.)

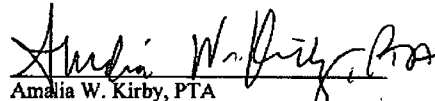
AFFIDAVIT OF AMALIA W. KIRBY

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

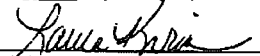
COMES NOW Applicant for Intervention Amalia W. Kirby, PTA, who swears and affirms as follows:

1. I am a physical therapist assistant licensed by the South Carolina Board of Physical Therapy Examiners.
2. It is my understanding that I am required by South Carolina law to practice under the direction and supervision of a physical therapist and that I cannot practice on my own without violating the law.
3. I am currently working as a prn ("pro re nata" or "as needed") physical therapist assistant through multiple companies in South Carolina. I always work under the direction and supervision of a licensed physical therapist. The physical therapists who direct and supervise my work are employed by the same company that employs me.

FURTHER, AFFIANT SAYETH NOT.


Amalia W. Kirby, PTA

Sworn to and subscribed before me on this
the 29th day of April, 2013.


NOTARY PUBLIC, STATE OF SOUTH CAROLINA
My Commission Expires: 6-8-15

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
 Kristin Joseph, PT, Thomas N. Joseph, MD, and William G. McCarthy, MD,	)))	Civil Action No. 12-CP-40-2632
Plaintiffs,	)	
	)	AFFIDAVIT OF JOSEPH M.
v.	)	MCKOWEN
	)	
South Carolina Department of Labor, Licensing and Regulation, South Carolina Board of Physical Therapy,	)))	
Defendant.	)	

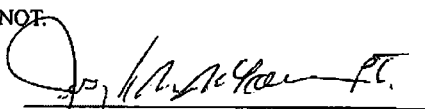
COMES NOW Applicant for Intervention Joseph M. McKowen, PT, who swears and affirms as follows:

1. I am a physical therapist licensed by the South Carolina Board of Physical Therapy Examiners to practice physical therapy.
2. I am the sole owner of Physical Therapy, Inc., a physical therapy practice based in Gaffney, South Carolina.
3. I employ both physical therapists and physical therapist assistants as part of my practice.
4. The physical therapist employees in my practice primarily examine and evaluate patients in order to develop a suitable plan of care.
5. After a physical therapist in my practice has evaluated the patient and developed a suitable plan of care, he or she ordinarily directs the patient to a physical therapist assistant, who takes the patient through the requisite interventions (e.g., therapeutic exercises).

6. My practice relies heavily on the work of physical therapy assistants. If I were unable to use physical therapist assistants in my business the economic consequences would be severe.

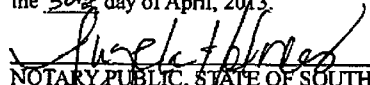
7. On occasion, physical therapists in my practice send or direct a patient to another physical therapist in the practice who is located in an office more convenient for the patient or whose schedule better accommodates the patient's schedule.

FURTHER, AFFIANT SAYETH NOT.



Joseph M. McKowen, PT
Physical Therapy, Inc.

Sworn to and subscribed before me on this
the 30th day of April, 2013.



NOTARY PUBLIC, STATE OF SOUTH CAROLINA
My Commission Expires: 3-30-2019

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
	)	
Kristin Joseph, PT, Thomas N. Joseph, MD,	)	Civil Action No. 12-CP-40-2632
and William G. McCarthy, MD,	)	
	)	
Plaintiffs,	)	PROPOSED ANSWER OF DEFENDANT-
	)	INTERVENORS
v.	)	
	)	
South Carolina Department of Labor,	)	
Licensing and Regulation, South	)	
Carolina Board of Physical Therapy,	)	
	)	
Defendant.	)	

TO: PLAINTIFFS KIRSTIN JOSEPH, PT, THOMAS N. JOSEPH, MD AND WILLIAN G. MCCARTHY, MD

PLEASE TAKE NOTICE that the South Carolina Chapter, American Physical Therapy Association ("SCAPTA"), and Joseph M. McKowen, PT, Sabrina Queen Bridges, PTA, and Amalia W. Kirby, PTA ("Individual Defendant-Intervenors") (collectively, the "Defendant-Intervenors"), pursuant to Rule 24(c) of the South Carolina Rules of Civil Procedure, submit the attached Proposed Answer of Defendant Intervenors.

Respectfully submitted,

By: 
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*Counsel for South Carolina Chapter,
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Counsel for Individual Defendant-Intervenors

West Columbia, South Carolina
May 13, 2013

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Kristin Joseph, PT, Thomas N. Joseph, MD,)
and William G. McCarthy, MD,)

Plaintiffs,)

v.)

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

Defendant.)

Civil Action No. 12-CP-40-2632

**ANSWER OF DEFENDANT-
INTERVENORS**

The South Carolina Chapter, American Physical Therapy Association ("SCAPTA"), and Joseph M. McKowen, PT, Sabrina Queen Bridges, PTA, and Amalia W. Kirby, PTA ("Individual Defendant-Intervenors") (collectively, the "Defendant-Intervenors"), pursuant to Rule 24(c) of the South Carolina Rules of Civil Procedure, answer the Complaint of the Plaintiffs as follows:

1. The Defendant-Intervenors lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of the Complaint.

2-3. The Defendant-Intervenors lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 2 and 3 of the Complaint.

4. The Defendant-Intervenors lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 4 of the Complaint.

5-7. Denied.

8-11. The Plaintiffs' allegations in Paragraphs 8, 9, 10, and 11 merely paraphrase language from statutes of the State of South Carolina and the Defendant-Intervenors crave

reference to those statutes for their exact language and deny any allegations inconsistent with those statutes.

12. The Defendant-Intervenors admit that physical therapists may or may not have the agreements referenced in Paragraph 12.

13. The Plaintiffs' allegations in Paragraph 13 merely assert interpretations of the PT Act, and the Defendant-Intervenors crave reference to those statutes for their exact language and deny any allegations inconsistent with those statutes.

14-15. The Plaintiffs' allegations in Paragraphs 14 and 15 merely paraphrase language from statutes of the State of South Carolina and the Defendant-Intervenors crave reference to those statutes for their exact language and deny any allegations inconsistent with those statutes.

16. Admitted.

17. Admitted.

18. The allegations in Paragraph 18 reference an opinion by the South Carolina Attorney General and the Defendant-Intervenors crave reference to that opinion for the exact language of that opinion and deny any allegations inconsistent with the exact language of the Attorney General's opinion.

19. Upon information and belief, the South Carolina Board of Physical Therapy issued a position statement. The Defendant-Intervenors crave reference to the actual language of the position statement and deny any allegations inconsistent with the actual language of the position statement. The Defendant-Intervenors deny the remaining allegations in Paragraph 19.

20. The Defendant-Intervenors admit the Attorney General's opinion addressed questions presented to the Attorney General, but deny all other allegations in Paragraph 20.

21. The Defendant-Intervenors admit that the South Carolina Supreme Court in the case of *Sloan v. South Carolina Board of Physical Therapy Examiners* held that “[S]ection 40-45-110 (A)(1) prohibits a physical therapist from receiving referrals from or dividing fees with a physician employer.”

22. Admitted that Paragraph 22 quotes the *Sloan* decision.

23. The Plaintiffs’ allegations in Paragraph 23 merely assert interpretations of the PT Act, and the Defendant-Intervenors crave reference to those statutes for their exact language and deny any allegations inconsistent with those statutes.

24-25. The Defendant-Intervenors state that a physical therapist may or may not enter into the contracts referenced in Paragraphs 24 and 25.

26. The Defendant-Intervenors admit that Bob Carpenter, PT, ATC-L, CSCS, wrote a letter on behalf of SCAPTA dated May 3, 2011, which is attached to the Complaint as Exhibit 1. The Defendant-Intervenors crave reference to the exact language of the letter, and deny any other allegations inconsistent with the language of the letter.

27. The Defendant-Intervenors admit that Ms. Swygert responded to the letter from Mr. Carpenter referenced in Paragraph 26 of the Plaintiffs’ Complaint and that a copy of Ms. Swygert’s letter was attached as Exhibit 2 to the Plaintiffs’ Complaint. The Defendant-Intervenors crave reference to the exact language of Ms. Swygert’s letter and deny any allegations inconsistent with the specific language of that letter.

28. The Defendant-Intervenors lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 28 of the Complaint.

29. The Defendant-Intervenors lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 29 of the Complaint.

30. The Defendant-Intervenors lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 30 of the Complaint.

31. The Defendant-Intervenors lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 31 of the Complaint.

32. Denied.

FOR A DEFENSE
TO THE FIRST CAUSE OF ACTION

33. The Defendant-Intervenors repeat their answers to Paragraphs 1 through 32 and incorporate those answers herein by reference.

34. The Plaintiffs' allegations in Paragraph 34 merely assert interpretations of the PT Act, and the Defendant-Intervenors crave reference to those statutes for their exact language and deny any allegations inconsistent with those statutes.

35. Denied.

36. Denied.

37. Denied.

38. Denied.

39. Denied.

40. Denied.

41. Denied.

42. Denied.

43. Denied.

Except as specifically admitted herein, each and every allegation in the Plaintiffs' first cause of action and in the Plaintiffs' entire Complaint is denied.

FOR A DEFENSE
TO THE SECOND CAUSE OF ACTION

44. The Defendant-Intervenors repeat their answers to Paragraphs 1 through 43 and incorporate those answers herein by reference.

45. Denied.

46. The Plaintiffs' allegations in Paragraph 46 merely assert interpretations of the *Sloan* decision, and the Defendant-Intervenors crave reference to that decision for its exact language and deny any allegations inconsistent with that decision.

47. Denied. Paragraph 47 of Plaintiffs' Complaint does not allege facts, but rather makes semantic arguments untethered to alleged facts or law, and further fails to adequately define the "concept" of "coverage" or "referral."

48. Denied.

Except as specifically admitted herein, each and every allegation in the Plaintiffs' second cause of action and in the Plaintiffs' entire Complaint is denied.

FOR A DEFENSE
TO THE THIRD CAUSE OF ACTION

49. The Defendant-Intervenors repeat their answers to Paragraphs 1 through 48 and incorporate those answers herein by reference.

50. Denied.

51. Denied.

52. Denied.

Except as specifically admitted herein, each and every allegation in the Plaintiffs' third cause of action and in the Plaintiffs' entire Complaint is denied.

FOR A DEFENSE
TO THE FOURTH CAUSE OF ACTION

53. Denied.

54. The Plaintiffs' allegations in Paragraph 54 merely paraphrase language from statutes of the State of South Carolina and the Defendant-Intervenors crave reference to those statutes for their exact language and deny any allegations inconsistent with those statutes.

55. The Defendant-Intervenors lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 55 of the Complaint.

56. Denied.

Except as specifically admitted herein, each and every allegation in the Plaintiffs' fourth cause of action and in the Plaintiffs' entire Complaint is denied.

FOR A DEFENSE
TO THE FIFTH CAUSE OF ACTION

57. The Defendant-Intervenors repeat their answers to Paragraphs 1 through 56 and incorporate those answers herein by reference.

58. Denied.

59. The Defendant-Intervenors lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 59 of the Complaint.

60. Denied.

61. The Defendant-Intervenors lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 61 of the Complaint.

62. Denied.

63. Denied.

64. Denied.

Except as specifically admitted herein, each and every allegation in the Plaintiffs' fifth cause of action and in the Plaintiffs' entire Complaint is denied.

FOR A DEFENSE
TO THE SIXTH CAUSE OF ACTION

65. The Defendant-Intervenors repeat their answers to Paragraphs 1 through 64 and incorporate those answers herein by reference.

66. Denied.

67. The Defendant-Intervenors lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 67 of the Complaint.

68. Denied.

69. Denied.

70. Denied.

Except as specifically admitted herein, each and every allegation in the Plaintiff's sixth cause of action and in the Plaintiff's entire Complaint is denied.

FOR A DEFENSE
TO THE SEVENTH CAUSE OF ACTION

71. The Defendant-Intervenors repeat their answers to Paragraphs 1 through 70 and incorporate those answers herein by reference.

72. Denied.

73. Denied.

74. Denied.

75. Denied.

Except as specifically admitted herein, each and every allegation in the Plaintiffs' seventh cause of action and in the Plaintiffs' entire Complaint is denied.

FOR A DEFENSE
TO THE EIGHTH CAUSE OF ACTION

76. The Defendant-Intervenors repeat their answers to Paragraphs 1 through 75 and incorporate those answers herein by reference.

77. Denied.

78. Denied.

79. Denied.

Except as specifically admitted herein, each and every allegation in the Plaintiffs' eighth cause of action and in the Plaintiffs' entire Complaint is denied.

FOR A DEFENSE
TO THE NINTH CAUSE OF ACTION

80. The Defendant-Intervenors repeat their answers to Paragraphs 1 through 79 and incorporate those answers herein by reference.

81. Denied.

82. The allegations in Paragraph 82 set forth a pure legal conclusion and the Defendant-Intervenors deny all allegations in Paragraph 82 inconsistent with the laws of the United States or the State of South Carolina.

83. Denied.

84. Denied.

85. Denied.

Except as specifically admitted herein, each and every allegation in the Plaintiffs' ninth cause of action and in the Plaintiffs' entire Complaint is denied.

FIRST DEFENSE TO ALL CAUSES OF ACTION

86. The Defendant-Intervenors repeat their answers to Paragraphs 1 through 85 and incorporate those answers herein by reference.

87. Plaintiff's Complaint fails to set forth any justiciable controversy for determination by this Court and the Defendant-Intervenors plead lack of justiciable controversy as a complete and total defense to the Plaintiff's Complaint and pray that it be dismissed by this Court.

SECOND DEFENSE TO ALL CAUSES OF ACTION

88. The Defendant-Intervenors repeat their answers to Paragraphs 1 through 87 and incorporate those answers herein by reference.

89. The Plaintiff's lack standing to maintain their lawsuit against Defendants and therefore the Defendant-Intervenors plead lack of standing as a complete and total defense to Plaintiff's Complaint and pray that it be dismissed by this Court.

THIRD DEFENSE TO ALL CAUSES OF ACTION

90. The Defendant-Intervenors repeat their answers to Paragraphs 1 through 89 and incorporate those answers herein by reference.

91. The Plaintiffs failed to exhaust the administrative remedies available to them prior to commencing this lawsuit and the Defendant-Intervenors plead failure to exhaust applicable administrative remedies as a complete and total defense to Plaintiff's Complaint

FOURTH DEFENSE TO ALL CAUSES OF ACTION

92. The Defendant-Intervenors repeat their answers to Paragraphs 1 through 91 and incorporate those answers herein by reference.

93. The Plaintiff's Complaint fails to state a cause of action upon which relief can be granted and therefore the Court should dismiss the same.

RELIEF SOUGHT

94. The Defendant-Intervenors deny that the Plaintiffs are entitled to any of the relief requested in the Complaint.

WHEREFORE, having fully answered, the Defendant-Intervenors respectfully request that their motion to intervene be granted, and that the Court grant such further relief as it deems just and proper.

Respectfully submitted,

By: _____

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ewhitney@devlinparkinson.com

Counsel for Individual Defendant-Intervenors

West Columbia, South Carolina
May 13, 2013

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 Kristin Joseph P.T., Thomas N. Joseph,)
 M.D., and William G. McCarthy, M.D.,)
)
 Plaintiffs,)
)
 vs.)
)
 South Carolina Department of Labor,)
 Licensing and Regulation, South Carolina)
 Board of Physical Therapy,)
)
 Defendant,)
)
 and)
)
 South Carolina Chapter, American)
 Physical Therapy Association, Joseph M.)
 McKowen, PT, Sabrina Queen Bridges,)
 PTA, and Amalia W. Kirby (PTA),)
)
 Defendants-Intervenors.)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTH JUDICIAL CIRCUIT

C/A No. 2012-CP-40-2632

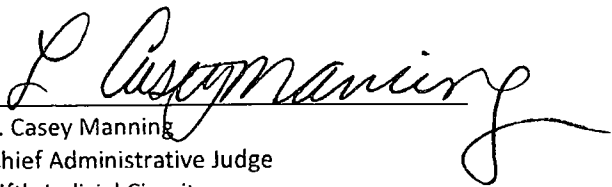
CONSENT ORDER

RICHLAND COUNTY
 FILED
 2013 JUL -1 PM 3:46
 JEANETTE M. JORDEN
 C.C.P. & S.S.

Pursuant to Rule 15, SCRCP, Plaintiffs seek to amend their Declaratory Judgment Action/ Complaint and have sought consent from Defendant South Carolina Department of Labor, Licensing and Regulation, Board of Physical Therapy Examiners (Board) and Defendants-Intervenors South Carolina Chapter, American Physical Therapy Association (SCAPTA), Joseph M. McKowen, PT, Sabrina Queen Bridges, PTA, and Amalia W. Kirby, PTA (Individual Intervenors) (collectively Defendant-Intervenors). Defendant and Defendants-Intervenors consent to Plaintiffs' filing of their amended complaint with the understand that nothing in the Amended Complaint is intended to nor shall it have any effect on the Order Denying Defendant's Motion to Dismiss as to Causes of Action One through Six and the Order Granting

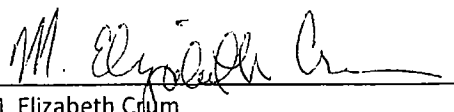
Summary Judgment as to Causes of Action Seven through Nine, filed by the Honorable G. Thomas Cooper Jr. with the Richland County Clerk of Court on September 17, 2012, and entered by the Clerk of Court's office on December 4, 2012, with the Order Denying the Motion to Reconsider being entered on January 9, 2013.

THEREFORE, IT IS ORDERED THAT Plaintiffs may amend their Declaratory Judgment Action/Complaint for Declaratory Judgment with the consent of the Defendant and Defendants-Intervenors and the amendments do not change the import of this Court's Order entered December 4, 2012.

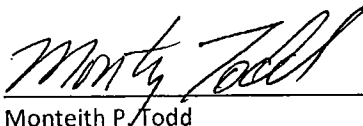

L. Casey Manning
Chief Administrative Judge
Fifth Judicial Circuit

June 20, 2013
Columbia, SC

WE SO MOVE:


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lcum@mcnair.net
Counsel for Plaintiffs

WE CONSENT:


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mtodd@sowell.com
Counsel for Defendant

WE CONSENT:

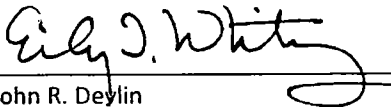


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Counsel for Defendants-Intervenors

WE CONSENT:

S. Jahue Moore
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Counsel for Defendant-Intervenor SCAPTA


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Counsel for Defendants-Intervenors

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

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

C/A No. 2012-CP-40-2632

vs.)

**AMENDED
DECLARATORY JUDGMENT
ACTION/COMPLAINT**

South Carolina Department of Labor,)
Licensing and Regulation, South Carolina)
Board of Physical Therapy,)
Defendant,)

and)

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

The Plaintiffs herein, complaining of the Defendant, would respectfully show unto the Court as follows:

PARTIES

1. Plaintiff Kristin Joseph, P.T., (PT Joseph) is a physical therapist (PT) licensed by the South Carolina Department of Labor, Licensing and Regulation (LLR), South Carolina Board of Physical Therapy (Board) to practice physical therapy. PT Joseph is subject to the requirements of S.C. Code Ann. § 40-45-5, et seq. (Rev. 2011) and the rules and regulations promulgated by the Board through LLR. PT Joseph is employed as a physical therapist by First Physical Therapy and practices in the Camden, Kershaw County, South Carolina office. PT Joseph seeks the right to be employed by a physician's practice and employ her physical therapy

skills as part of the physician practice.

2. Thomas N. Joseph, M.D. (Dr. Joseph) is a licensed orthopaedic surgeon in South Carolina. He is a Diplomate, American Board of Orthopaedic Surgeons, and is a member of Camden Bone & Joint, LLC (Camden Bone), a South Carolina limited liability company whose physicians provide professional medical services in Kershaw County, South Carolina, in the field of general orthopaedics and orthopaedic sports medicine and who employs physicians. Dr. Joseph has provider agreements with: 1) the Center for Medicare and Medicaid Services (CMS) to provide Medicare services to Medicare patients; 2) the South Carolina Department of Health and Human Services (SCDHHS) to provide Medicaid services to Medicaid patients; and 3) with numerous other third party payors to provide services to covered patients. Dr. Joseph seeks the same right to employ PTs as part of his practice and treatment for his patients as physical therapists and physical therapy groups currently enjoy and that physicians and physician groups enjoyed prior to the case of *Sloan v. South Carolina Board of Physical Therapy Examiners*, 370 S.C. 452, 636 S.E.2d 598 (2006), where the Supreme Court interpreted the Physical Therapy Act, S.C. Code Ann. §§ 40-45-10, *et seq.* (Rev. 2011) (PT Act) to prohibit physicians from referring patients to PTs or physical therapy assistants (collectively, PTs) they or their groups employed.

3. William G. McCarthy, Jr., M.D. (Dr. McCarthy) is a licensed orthopaedic surgeon in South Carolina. He is a Diplomate, American Board of Orthopaedic Surgeons, and is a member of Carolina Orthopaedic Surgery Associates, PA (Carolina), a South Carolina professional association, whose physicians provide professional medical services in York and Lancaster Counties, South Carolina, in the field of general orthopaedics, and who employs physicians and physician assistants. Dr. McCarthy has provider agreements with: 1) CMS to

provide Medicare services to Medicare patients; 2) SCDHHS to provide Medicaid services to Medicaid patients; and 3) with numerous other third party payors to provide services to covered patients. Dr. McCarthy and Carolina employed South Carolina licensed PTs until the *Sloan* case was decided and were forced to terminate the PTs' employment. Dr. McCarthy seeks the same right to employ PTs as part of his practice and treatment for his patients as PTs and physical therapy groups currently enjoy and that physicians and physician groups enjoyed prior to the *Sloan* case.

4. Defendant South Carolina Board of Physical Therapy (Board) is an agency of the State of South Carolina and is organized pursuant to the PT Act to license, regulate and discipline PTs and physical therapist assistants under the administration of LLR. The Board is located in Richland County, South Carolina.

JURISDICTION AND GOVERNING LAW

5. This is an action for a declaratory judgment, pursuant to the South Carolina Uniform Declaratory Judgments Act, S.C. Code Ann. §§ 15-53-10, *et seq.* (Rev. 2002), specifically including § 15-53-30, that this Court determine that the 2011 Position Statement adopted August 17, 2011, by the Board regarding the "Application of 40-45-110(A)(I) to Intra-Professional Interactions" violates the provisions of the PT Act and the Constitutions of South Carolina and the United States.

6. This Court has personal jurisdiction over the parties as each is a resident of, located in, or does business in South Carolina.

7. Venue is proper in Richland County.

FACTS

8. Section 44-45-110(A)(I) of the PT Act prohibits PTs from receiving wages for

professional services provided to a patient from a person who referred the patient and any PT who receives wages from a person who referred a patient or from a relative or business associate of the referring person is subject to disciplinary action by the Board.

9. Section 40-45-110(A)(l) of the PT Act provides, in pertinent part:

(A) In addition to other grounds provided for in Section 40-1-110, the board, after notice and hearing, may restrict or refuse to grant a license to an applicant and may 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;...

(Emphasis added).

10. The PT Act defines “person” as “an individual.” S.C. Code Ann. § 40-45-20(3) (Rev. 2011).

11. “Physical therapist” is defined as “a person who has met all the conditions of this chapter and is licensed in this State to practice physical therapy.” S.C. Code Ann. § 40-45-20(4) (Rev. 2011). “Physical therapy assistant” means “a person who is licensed by the board 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.” S.C. Code Ann. § 40-45-20(5) (Rev. 2011).

12. A physical therapist can enter into provider agreements: 1) with CMS for the provision of Medicare services to Medicare patients; 2) with SCDHHS for the provision of Medicaid services to Medicaid patients; 3) with numerous other third party payors to provide services to covered patients.

13. A PT, a PT assistant and a physician are each a person as defined in the PT Act.

14. The PT Act does not define the word “refer”, “referred” or “referral.”

15. “Referral” is defined in the “Physician Self Referral Act” S.C Code Ann. § 44-113-20(12) (Rev. 2002).

16. The PT Act, including § 44-7-110(A)(l), was amended in 1998. In 1998, the Board issued a Position Statement (1998 Position Statement), stating:

It is the Board’s position that physical therapists and physical therapist assistants involved in the practice settings that comply with state and federal laws regarding physician or provider referral to practices in which they have an ownership interest should not be subject to discipline. The Board does have the intention to further clarify this section of the statute in regulation at a later date.

Sloan, 370 S.C. 465, 636 S.E.2d 604–05 (2006).

17. On March 30, 2004, the Attorney General of South Carolina (SCAG) issued an opinion in response to the following questions:

1. Does S.C. Code Ann. § 40-45-110(A)(l) prohibit a physical therapist from working for pay for a licensed physician or group of physicians when the physician (or a member of the group) refers a patient to the physical therapist for physical therapy services?

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

2004 WL 736934 (S.C.A.G.), p. 1.

18. The Attorney General’s opinion determined that:

[T]he General Assembly clearly sought to bar the acceptance of a referral by a physical therapist from persons for whom there exists a financial relationship such as employment. Accordingly ... prohibits a physical therapist from working for pay for a licensed physician or group of physicians when the physician (or a member of the group) refers a patient to the physical therapist for physical therapy services. S.C. Code Ann. § 40-45-110(A)(l) also prohibits a physical therapist from working for pay for a professional corporation owned by one or more licensed physicians when a physician owner or employee of the corporation refers a patient to the physical therapist for physical therapy services.

2004 WL 736934 (S.C.A.G.), p. 5.

19. After the Attorney General's opinion was issued, Defendant met and, after holding a public hearing and convening into executive session, adopted the Attorney General's opinion as its own position statement (2004 Position Statement). The Board did not follow the requirements of agency rule making. Sections 1-23-10, *et seq.*, of the South Carolina Administrative Procedures Act (APA) in adopting the Attorney General's opinion as its 2004 Position Statement.

20. In the 2004 opinion request, the Attorney General was only asked and only addressed the question as to whether the employment prohibition contained in S.C. Code Ann. § 40-45-110(A)(1) applied to physician or a physician group member employment of and patient referral to PTs. The question of whether the PTs employment and referral prohibition also applied to a PT or physical therapy group employment of and patient referral to PTs was not addressed in the opinion request or the resulting opinion.

21. A declaratory judgment challenging the Board's adoption of the policy and its holding followed. The Supreme Court decided the matter in *Sloan* and concluded that "[Section] 40-45-110(A)(1) prohibits a physical therapist from receiving referrals from or dividing fees with a physician employer." *Sloan v. South Carolina Board of Physical Therapy Examiners*, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006).

22. In *Sloan*, the Supreme Court further concluded that the purpose of the 1998 amendment to Section 40-45-110(A)(1) was "to protect consumers as well as government-sponsored health care programs such as Medicare and Medicaid from actual and potential conflicts of interest which are likely to lead to overuse of medical services by physicians who, for their own financial gain rather than their patients' medical needs, refer patients to entities in which the physicians hold a financial interest." *Sloan*, 370 S.C. 469, 636 S.E.2d 607.

23. A person licensed pursuant to the PT Act may provide physical therapy services to a patient for up to thirty (30) days without a prior referral from a licensed physician or dentist. S.C. Code Ann. § 40-45-110(A)(4) (Rev. 2011).

24. A physical therapist enters into a provider contract with the Center for Medicare and Medicaid Services (CMS) and bills CMS for physical therapy services provided to Medicare patients.

25. A PT enters into a provider contract with SCDHHS and bills them for physical therapy services provided to Medicaid patients. The PT Act allows PTs to provide physical therapy services to a patient for up to thirty (30) days without a physician referral.

26. On May 2, 2011, Jim Stoker, PT, SCS, (Stoker) then president of the South Carolina Chapter, American Physical Therapy Association (SCAPTA), e-mailed a letter addressed to Ms. Marilyn Swygert, PT, DPT, Chairman of the Board (Swygert) to Swygert and Veronica Reynolds, Administrator of the Board requesting that the Board “issue a position statement advising how it interprets the statute [S.C. Code Ann. § 40-45-110(A)(1)] by answering the two questions set forth below.” Those questions were:

(#1) Does S.C. Code Ann. § 40-45-110(A)(1) prohibit a physical therapist or 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?

See Letter from Stoker to Swygert, dated May 2, 2011, attached as Exhibit 1. Stoker withdrew SCAPTA’s request for the position statement the same day. The SCAPTA is the only professional organization representing physical therapists and physical therapist assistants in

South Carolina.

27. On May 3, 2011, Bob Carpenter, PT, ATC-L, CSCS, (Carpenter) wrote on behalf of the South Carolina Chapter, American Physical Therapy Association (SCAPTA) a letter addressed to Ms. Marilyn Swygert, PT, DPT, Chairman of the Board, requesting that the Board issue "a 2011 Position Statement advising how it interprets the statute [S.C. Code Ann. § 40-45-110(A)(1)] by answering the two questions set forth below." Those questions were:

(#1) Does S.C. Code Ann. § 40-45-110(A)(1) prohibit a physical therapist or 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 to a patient the physical therapist for physical therapy services?

See Letter from Carpenter to Swygert, dated May 3, 2011, attached as Exhibit 2.

28. The same day, Carpenter withdrew the letter he submitted on behalf of SCAPTA and submitted a substantially similar letter, purportedly on his own behalf, containing the identical questions posed in the SCAPTA letter and his earlier letter, each of which asked the Board to issue a position statement. See Letter from Carpenter to Swygert, dated May 3, 2011, attached as Exhibit 3.

29. On June 2, 2011, Ms. Swygert responded to the SCAPTA request for a 2011 Position Statement by the Board, concluding that

"[t]he purpose of Sec. 40-45-110(A)(1) is to 'protect consumers as well as government-sponsored health care programs such as Medicare and Medicaid from actual and potential conflicts of interest which are likely to lead to overuse of medical services by physicians who, for their own financial gain rather than their patient's medical needs, refer patients to entities in which the physicians hold financial interest, (sic)

See Letter from Swygert to Carpenter, dated June 2, 2011, attached as Exhibit 4. The Board's letter also concluded that the answer to the two questions was "no". *Id.*

30. The Board met on July 14, 2011, in its regularly scheduled meeting and discussed the June 2, 2011, letter written by Chair Swygert to Mr. Carpenter. According to the minutes of the July 14, 2011, meeting, the Board voted to adopt the legal position taken in the June 2, 2011, letter and have it placed on the Board's website.

31. After becoming aware of the June 2, 2011, Board letter, the South Carolina Orthopaedic Association (SCOA) had a Freedom of Information Act request sent to the LLR requesting information regarding the June 2, 2011, letter and its adoption process. In response to this request, LLR reviewed the Board's July 14, 2011, action and the PT Board placed the matter on the agenda for its next scheduled meeting on August 17, 2011.

32. At the August 17, 2011, Board meeting, the PT Board went into executive session for receipt of legal advice about the June 2, 2011, letter, referred to by the Board as the "Intra-Professional Interactions Statement." After coming out of executive session, the Board voted affirmatively to rescind the previously adopted position and the vote thereon. The Board then voted affirmatively to "revisit the position expressed in the June 2, 2011 letter regarding Intra Professional Interactions and accept the position stated within the letter." *See* Exhibit 5, August 17, 2011, minutes of the Board, p. 2.

33. The 2011 Position Statement adopted by the Board on August 17, 2011, reached the same conclusion, albeit worded somewhat differently, as the June 2, 2011 letter. *See* Exhibit 6, Board statement "Application of 40-45-110(A)(1) to Intra-Professional Interactions" (2011 Position Statement). The 2011 Position Statement did not address whether a physical therapist is a "person" as used in the PT Act but concluded that "[t]he 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." *Id.*, p. 1

34. Plaintiffs are all directly adversely harmed by the Defendant Board's adoption of the 2011 Position Statement. Each Plaintiff is a licensed physical therapist or licensed physician concerned with the well-being of their patients and plaintiffs' economic, constitutional, and contractual rights. Defendant's 2011 Position Statement misconstrues the law to allow employed PTs to receive referrals from or divide fees with a PT when PTs are prohibited from doing the same with a physician employer. The 2011 Position Statement also allows a physical therapist to refer to employed PTs and bill for the patient that has been referred when a physician employer is prohibited from doing the same. Plaintiffs therefore present a justiciable controversy and relief under the Declaratory Judgment Act is proper.

FIRST CAUSE OF ACTION
(Declaratory Relief)(Contrary to Plain Meaning, Exceed
Statutory Authority and *Ultra Vires*)

35. The allegations of each paragraph above are realleged as if fully incorporated in this cause of action.

36. S.C. Code Ann. § 40-45-110(A)(1) prohibits PTs from being employed or receive wages from "a person who referred a patient, or with a relative or business associate of the referring person." A physical therapist employing a PT is a "person" referring a patient just as is a physician employing a PT and referring a patient.

37. A physical therapy group with whom a PT works is a business associate of the referring PT just as is a physician group with whom a physician works.

38. PTs are subject to the same prohibition under Section 40-45-110(A)(1) whether they are employed by a PT or a physical therapy group or by a physician or physician group. The employment/referral prohibition contained in Section 40-45-110(A)(1) and construed in *Sloan* applies to PTs working for pay for a PT, group of therapists or a corporation owned by one or more licensed physical therapists when a therapy owner or employee of the corporation refers a patient to the PTs for physical therapy services.

39. PTs are subject to the same referral prohibition under Section 40-45-110(A)(1) when they are referred patients by a physical therapist or physical therapy group from whom they receive payment as when they are referred patients by a physician or physician group from whom they receive payment.

40. Nowhere in Section 40-45-110(A)(1) is the disciplinary prohibition limited to a referral from a physician-rather the limitation is the referral from a person.

41. The 2011 Position Statement is contrary to the plain meaning of S.C. Code Ann. § 40-45-110(A)(1) and is in violation of law and exceeds the agency's statutory authority.

42. The 2011 Position Statement violates the legislative purpose of protecting "consumers as well as government-sponsored health care programs such as Medicare and Medicaid from actual and potential conflicts of interest which are likely to lead to overuse of medical services by physicians who, for their own financial gain rather than their patients' medical needs, refer patients to entities in which the physicians hold a financial interest." Exhibit 6, p. 1, ¶3.

43. Physical therapists or physical therapy groups have the same "actual and potential conflicts of interest which are likely to lead to overuse of medical services by [physical therapists] who, for their own financial gain rather than their patients' medical needs, refer

patients to entities in which the [physical therapists] hold a financial interest.” Exhibit 6, p. 1, ¶3.

44. The 2011 Position Statement should be struck as contrary to the plain meaning of Section 40-45-110(A)(l) and PTs should be prohibited from being employed by or receiving wages or remuneration from physical therapists or from physical therapy groups from whom they receive patient referrals.

45. This Court should declare that the PT Board’s 2011 Position Statement is contrary to the legislative purpose of Section 40-45-110(A)(l) and exceeds the Board’s statutory authority and its adoption constitutes an *ultra vires* act, that a physical therapist or physical therapy group is subject to the same referral prohibition as is a physician or physician group when PTs are employed and patients referred for physical therapy services, and 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.

SECOND CAUSE OF ACTION
(Declaratory Relief)(Misconstrues “Refer”)

46. The allegations of each paragraph above are realleged as if fully incorporated in this cause of action.

47. The 2011 Position Statement misconstrues the word “refer” as used in Section 40-45-110(A)(l) when it determined that “[t]he 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 ...” Exhibit 6, p. 1, ¶6.

48. *Sloan* found that the term “refer” as used in the statute should be interpreted according to its plain meaning, which in this instance is “to send or direct for treatment, aid,

information, [or] decision, [e.g.,] a patient to a specialist.” *Sloan*. 370 S.C. 470, 636 S.E.2d 607–08 (citation omitted). In *Sloan*, the Supreme Court prohibited PTs employed by a physician or physician group from being referred a patient for “treatment, aid, information [or] decision.” *Id.* The sending or directing of a patient of one physical therapist to another employed PT or a PT in the group for “treatment, aid, information; [or] decision” is a prohibited referral and does not constitute coverage.

49. The concept of one practitioner in a practice “covering” for another practitioner is different than the concept of a “referral.” The concept of medical provider “coverage” is that when a provider is temporarily unavailable to provide services to his/her patients, the provider arranges for another provider to provide the requisite medical service to his/her patients in his/her absence. The concept of “coverage” contemplates the referring provider continuing to provide the routine patient service after the temporary absence, not that the person to whom the patient was sent will continue to treat the patient.

50. This Court should declare that the 2011 Position Statement’s attempt to distinguish a “referral” from “coverage” is contrary to the plain meaning of Section 40-45-110(A)(1) and exceeds the Board’s statutory authority, that a physical therapist or physical therapy group is subject to the same prohibition as is a physician or physician group when PTs are employed and patients referred for physical therapy services, and 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.

FOR A THIRD CAUSE OF ACTION
(Declaratory Judgment)(“Coverage” Applies Equally)

51. The allegations of each paragraph above are realleged as if fully incorporated in this cause of action.

52. Based upon the clear and unambiguous language of Section 40-45-110(A)(1), there is no difference between a PT's receiving a patient for treatment from a physician or physician group employing the PT than a PT receiving a patient for treatment from a physical therapist or a physical therapy group employing the PT. The PT Act prohibits a PT from receiving wages from a person or business associate of the person who refers a patient.

53. In the event the 2011 Position Statement has correctly determined that PTs treating a patient sent from a physical therapist or physical therapy group employing the PT is coverage and not a referral, then PTs treating a patient sent from a physician or physician group employing the PT is also coverage.

54. This Court should declare that, if the 2011 Position Statement correctly construed "refer" to be "coverage" for a PT employed by a physical therapist or physical therapy group, a referral to a PT from a physician or physician group employing the PT should also be construed as coverage. The Court should further declare that a PT seeing a patient at the request of physician in the same group does not constitute a "referral," but is rather a PT providing coverage for a physician or other member of the group. The Court should further declare that the Board may not discipline a PT for entering into employment arrangements with physicians or physician groups under such circumstances.

FOR A FOURTH CAUSE OF ACTION
(Declaratory Relief)(APA Violation)

55. The 2011 Position Statement is or will be applied by the Board as a regulation. The 2011 Position Statement provides the Board no discretion in its enforcement and has a significant impact upon the rights of the Plaintiffs and all PTs regulated by the Board and physicians or physician groups who want the same right to employ PTs as the physical therapists and physical therapy groups enjoy under the 2011 Position Statement.

56. The APA requires that the PT Board follow specified procedures in its rulemaking processes, including notice and opportunity for the public to comment, submission to the South Carolina General Assembly for legislative review, and publication. *See, generally*, Articles I and II of the APA.

57. Defendant failed to provide notice and an opportunity for public comment, failed to submit its rulemaking to the South Carolina General Assembly for its approval, and generally failed to follow the rulemaking procedures required by the APA.

58. The Court should declare that Defendant's 2011 Position Statement and proposed enforcement fail to comply with the provisions of the APA and exceed the Board's statutory authority, and that the 2011 Position Statement is null and void for failure to follow the requirements of the APA.

FOR A FIFTH CAUSE OF ACTION
(Declaratory Relief)(Equal Protection)

59. The allegations of each paragraph above are realleged as if fully incorporated in this cause of action.

60. The 2011 Position Statement's interpretation of Section 44-45-110(a) to allow PTs to be employed by physical therapists or physical therapy groups and treat patients referred by physical therapists or members of the group and not allow PTs to be employed by physicians or physician groups and treat patients referred by physicians or members of the group violates Plaintiff PT Joseph's rights to equal protection under the South Carolina Constitution, art. I, sec. 3 and the United States Constitution, amend. XIV, sec. 1.

61. PT Joseph will be providing the same range of physical therapy services for the physical therapist or physical therapy group patients as she would be providing for the physician or physician group patients similarly referred.

62. Allowing PT Joseph to be employed by a physical therapist or physical therapy group and provide physical services to patients of a physical therapist or physical therapy group and prohibiting PT Joseph from being employed by a physician or physician group and provide the same physical therapy services to their patients as she provides to the physical therapist or physical therapy group patients denies PT Joseph her equal protection rights to be employed by a physician or a physician group.

63. Plaintiffs Dr. Joseph and Dr. McCarthy will be referring patients to PTs to provide the same range of physical therapy services as physical therapists or physical therapy groups will be referring similar patients to PTs to provide.

64. The 2011 Position Statement's interpretation of Section 44-45-110(a) to allow PTs to be employed by physical therapists or physical therapy groups and treat patients referred by physical therapists or members of the group and not to allow PTs to be employed by physicians or physician groups and treat patients referred by physicians or members of the group violates Plaintiffs Dr. Joseph's and Dr. McCarthy's rights to equal protection under the South Carolina Constitution, art. I, sec. 3 and the United States Constitution, amend. XIV, sec. 1 to employ PTs.

65. This Court should declare that the 2011 Position Statement denies PTs equal protection by allowing PTs to be employed by a physical therapist or a physical therapy group and provide physical therapy services to patients referred by the employer when *Sloan* does not allow PTs to be employed by a physician or physician group and provide physical therapy services to the employer's referred patient.

66. This Court should further declare that the 2011 Position Statement denies physicians and physician groups equal protection by allowing physical therapists and physical

therapy groups to employ PTs and refer patients for physical therapy services to the employed PTs when *Sloan* does not allow physicians or physician groups to employ PTs and refer patients to the PTs for physical therapy services.

FOR A SIXTH CAUSE OF ACTION
(Declaratory Relief)(Substantive Due Process)

67. The allegations of each paragraph above are realleged as if fully incorporated in this cause of action.

68. The 2011 Position Statement's interpretation of Section 44-45-110(a) to allow PTs to be employed by physical therapists or physical therapy groups and treat patients referred by physical therapists or members of the group and not allow PTs to be employed by physicians or physician groups and treat patients referred by physicians or members of the group violates Plaintiff PT Joseph's rights to substantive due process under the South Carolina Constitution, art. 1, sec. 3 and the United States Constitution, amend. XIV, sec. 1.

69. PT Joseph will be providing the same range of physical therapy services for the physical therapist or physical therapy group patient as she would be providing for similarly situated patients of the physician or physician group.

70. Allowing PT Joseph to be employed by a physical therapist or physical therapy group and provide physical therapy services to patients of a physical therapist or physical therapy group and to prohibit PT Joseph from being employed by a physician or physician group and provide the same physical therapy services to their patients as she provides to the physical therapy or physical therapy group patients denies PT Joseph her substantive due process rights under the South Carolina Constitution, art. I, sec. 3 and the United States Constitution, amend. XIV, sec. 1 to be employed by a physician or a physician group.

71. The 2011 Position Statement's interpretation of Section 44-45-110(a) to allow

PTs to be employed by physical therapists or physical therapy groups and treat patients referred by physical therapists or members of the group and not to allow PTs to be employed by physicians or physician groups and treat patients referred by physicians or members of the group violates Plaintiffs Dr. Joseph's and Dr. McCarthy's rights to substantive due process under the South Carolina Constitution, art. I, sec. 3 and the United States Constitution, amend, XIV, sec. 1 to employ PTs.

72. This Court should declare that the 2011 Position Statement denies PTs substantive due process by allowing PTs to be employed by a physical therapist or a physical therapy group and provide physical therapy services to patients referred by the employer when *Sloan* does not allow PTs to be employed by a physician or physician group and provide physical therapy services to the employer's referred patient.

FOR A SEVENTH CAUSE OF ACTION
(Declaratory Relief)(§ 40-45-110(A)(I) Prohibit Referral-for-Pay)

73. The allegations of each paragraph above are realleged as if fully incorporated in this cause of action.

74. Alternatively, Plaintiffs seek to argue against precedent and contend that *Sloan* incorrectly interpreted Section 40-45-110(A)(I) to prohibit a physician or a physician group from employing a PT and referring a patient to the PT for physical therapy services.

75. The plain and unambiguous language of the PT Act demonstrates that the legislative intent is to regulate unethical practices of PTs and not to prohibit specific employment arrangements.

76. Reading the language of the PT Act *in pari materi* with the Provider Self Referral Act, S.C. Code Ann. §§ 44-113-10, *et seq.* (Rev. 2002) allows providers within the same group to refer internally.

77. This Court should declare that S.C. Code Ann. § 40-45-110(A)(l) does not prohibit a PT from being employed by a physician or a physician group and receiving and treating patients referred by either the physician or a physician group, and the Board may not discipline a PT for the same. The Court should invalidate and hold null and void the 2004 Position Statement, as adopted by *Sloan*.

FOR AN EIGHTH CAUSE OF ACTION
(Declaratory Relief)(Equal Protection)

78. The allegations of each paragraph above are realleged as if fully incorporated in this cause of action.

79. Alternatively, Plaintiffs seek to argue against precedent and contend that S.C. Code Ann. § 40-45-110(A)(l) as interpreted by *Sloan*, violates their equal protection rights under the South Carolina Constitution, art. 1, sec. 3 and the United States Constitution, amend. XIV, sec. 1. Classifying PTs differently than all other South Carolina licensed health care providers for prohibited self referrals: (1) does not bear a reasonable relationship to the legislative purpose sought to be effected; (2) does not treat PTs alike under similar circumstances; and (3) there is no reasonable basis for the classification.

80. This Court should declare that S.C. Code Ann. § 40-45-110(A)(l) as interpreted by *Sloan* violates the equal protections rights of PT Joseph from being employed by a physician or a physician group and receiving and treating patients referred by either the physician or a physician group and the Board may not discipline a PT for the same. The Court should invalidate and hold null and void the 2004 Position Statement.

81. This Court should declare that S.C. Code Ann. § 40-45-110(A)(l) as interpreted by *Sloan* violates the equal protection rights of Drs. Joseph and McCarthy from being able to employ PTs and refer patients for treatment. The Court should invalidate and hold null and void

the 2004 Position Statement.

FOR A NINTH CAUSE OF ACTION
(Declaratory Relief)(Substantive Due Process)

82. The allegations of each paragraph above are realleged as if fully incorporated in this cause of action.

83. Alternatively, Plaintiffs seek to argue against precedent and contend that Section 40-45-110(A)(1) as interpreted by *Sloan*, violates PT Joseph's substantive due process rights under the South Carolina Constitution, art. 1, sec. 3 and the United States Constitution, amend. XIV, sec. 1.

84. The right to practice as a licensed PT is a cognizable property interest under both South Carolina Constitution, art. I, sec. 3 and the United States Constitution, amend. XIV, sec. 1.

85. PT Joseph has a substantive due process right to be employed by a physician or physician group.

86. There is no rational reason to treat PTs differently than other licensed medical professionals in South Carolina for purposes of employment by and patient referral from physicians or physician groups. Treating PTs differently than other licensed medical professionals in South Carolina for purposes of employment by and patient referral from physicians or physician groups is arbitrary and capricious.

87. This Court should declare that S.C. Code Ann. § 40-45-110(A)(1) as interpreted by *Sloan* violates the substantive due process right of PT Joseph from being employed by a physician or a physician group and receiving and treating patients referred by either the physician or a physician group and the Board may not discipline a PT for the same. The Court should invalidate and hold null and void the 2004 Position Statement.

RELIEF SOUGHT

Plaintiffs pray that:

1. In accordance with Rule 57, SCRCP, the Court order a speedy hearing and advance this matter on the calendar;
2. The Court issue a declaratory order stating that a physical therapist is a person under S.C. Code Ann. § 40-45-110(A)(1) and it is a violation of S.C. Code Ann. § 40-45-110(A)(1) for a PT to be employed by a physical therapist or a physical therapy group and be assigned patients for treatment and stating such PT is subject to disciplinary action by the Board;
3. The Court issue a declaratory order stating that an employed PT who is assigned patients for treatment by a physical therapist or physical therapy group employing the PT is not providing “coverage” but receiving referrals in contravention of S.C. Code Ann. § 40-45-110(A)(1) and stating such PT is subject to disciplinary action by the Board;
4. The Court issue a declaratory order that the 2011 Position Statement exceeds the Board’s statutory authority, violates the requirements of S.C. Code Ann, § 40-45-110(A)(1) and its adoption constitutes an *ultra vires* act and;
5. Alternatively, if the Court determines that PTs receiving patients from their employer physical therapist or physical therapy group is providing coverage, issue a declaratory order stating that an employed PT who is assigned patients for treatment by a physician or physician group employing the PT is providing coverage and the PT is not subject to and the Board may not discipline such PT for providing coverage;
6. The Court issue a declaratory order stating that the 2011 Position Statement fails to comply with the requirements of the South Carolina Administrative Procedure Act;
7. The Court issue a declaratory order stating the 2011 Position Statement violates

Plaintiffs' equal protection rights and that if physical therapists or physical therapy groups can employ and refer patients to PTs, equal protection requires that physicians and physician groups also can employ and refer patients to PTs without the PTs being subject to discipline by the Board;

8. The Court issue a declaratory order stating the 2011 Position Statement violates Plaintiff PT Joseph's substantive due process right to be employed by physicians or physician groups and that if physical therapists or physical therapy groups can employ and refer patients to PTs, substantive due process requires that Plaintiff PT Joseph can be employed by physicians and physician groups who refer patients to PTs without the PTs being subject to discipline by the Board;

9. The Court enter a permanent injunction prohibiting the Board from enforcing the 2011 Position Statement and restraining the Board and its officers, agents, servants, employees, and all other persons acting for or in participation with them from taking any action, under S.C. Code Ann. § 40-45-110, to allow or otherwise permit a licensed person who works for pay for a physical therapist or physical therapy from receiving a patient for the provision of physical therapy services;

10. Alternatively, the Court issue a declaratory order that *Sloan* incorrectly interpreted S.C. Code Ann. § 40-45-110(A)(1) and under the plain language of S.C. Code Ann. § 40-45-110(A)(1) a physician or physician group may lawfully employ a PT and assign patients to the PT for treatment;

11. Alternatively, the Court issue a declaratory order that the 2004 Position Statement and the *Sloan* interpretation of S.C. Code Ann. § 40-45-110(A)(1) is a violation of Plaintiffs' equal protection rights under the South Carolina Constitution, art. I, sec. 3 and the United States

Constitution, amend. XIV, sec. 1 and order that PTs may be employed by physicians or physician groups and receive patient referrals without the PTs' being subject to discipline by the Board;

12. Alternatively, that the Court issue a declaratory order that the 2004 Position Statement and the *Sloan* interpretation of S.C, Code Ann. § 40-45-110(A)(1) is a violation of Plaintiff PT Joseph's substantive due process rights under the South Carolina Constitution, art. I, sec. 3 and the United States Constitution, amend. XIV, sec. 1 and order that PTs may be employed by physicians or physician groups and receive patient referrals without the PTs being subject to discipline by the Board;

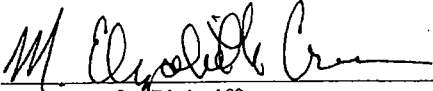
13. Alternatively, the Court enter a permanent injunction to restrain the Board and its officers, agents, servants, employees, and all other persons acting for or in participation with them from taking any action, under S.C. Code Ann. § 40-45-110, to restrict or refusing to grant a license to an applicant, refusing to renew the license of a licensed person, or suspending, revoking, or otherwise restricting the license of a licensed person who works for pay for a physician or physician group when either assigns a patient to an employed PT for physical therapy services;

14. The Court award Plaintiffs reasonable costs and fees in this action; and

15. The Court provide for such other and further relief as the Court deems just and proper.

(Signature Page to Follow)

M. Elizabeth Crum, S.C. Bar No. 1486
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Columbia, South Carolina 29211
(803) 799-9800

By: 
Attorneys for Plaintiffs

July 11, 2013

Columbia, South Carolina



American Physical Therapy Association
South Carolina Chapter

3581 Centre Circle
Suite 104
Fort Mill, SC 29715
(803) 802-5450
(815) 371-1499 fax

May 2, 2011

Marilyn Swygert, PT, Chairperson
South Carolina Board of Physical Therapy Examiners
P.O. Box 11329
Columbia, S.C. 29211-1329

Executive Committee

President

John Swygert, PT
Vice President

Eric Rodak, PT
Treasurer

Jill Boorman, PT
Secretary

Lisa Saladin, PT
Chief Delegate

Lisa Saladin, PhD
Past President

Jane Boorman
Executive Director

Board of Directors

Aaron Murphy, PT
Nina Chaffin, PT

Mark Murphy, PT
Dave Clark, PTA

John Benedetto, PT
Greg Sills, PTA

Re: Application of S.C. Code Ann. § 40-45-110(A)(1) to
Inter-Professional Interactions

As you know, in Sloan v. South Carolina Board of Physical Therapy Examiners, 376 S.E.2d 598 (S.C. 2006), the South Carolina Supreme Court held that South Carolina Code Ann. § 40-45-110(A)(1) prohibits a physical therapist from working as an employee of a physician when the physician refers patients to the physical therapist for services. I am writing on behalf of the South Carolina Chapter, American Physical Therapy Association (SCAPTA or Chapter) to ask the South Carolina Board of Physical Therapy Examiners (SCBPTE or Board) to issue a position statement advising how it interprets the statute by answering two questions set forth below.

As explained in the Court's opinion, the litigation was triggered by an opinion the Attorney General issued in 2004, which the Sloan opinion upheld. The Court ruled that the statutory prohibition applies when a physical therapist (PT) is employed by a physician who refers patients to the PT for the provision of physical therapy services – in short, an inter-professional referral. The Chapter understands that the Attorney General's office has received a request for an opinion as to whether the statutory clause covers intra-professional as well as inter-professional interactions. It appears that the Attorney General has received a request for an opinion on two questions, which are substantially as follows:

(#1) Does S.C. Code Ann. § 40-45-110(A)(1) prohibit a physical therapist or 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?

EXHIBIT

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American Physical Therapy Association
South Carolina Chapter

(#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?

The Chapter hereby requests that the Board issue a position statement addressing these two questions. The Chapter believes that the correct answer to the two questions is that the prohibition does not extend to a situation in which one physical therapist directs a patient for treatment to another physical therapist who is employee of the sending therapist or by a professional corporation owned by the sending therapist. The Chapter intends to submit to the Board in the near future a legal analysis addressing the questions.

In addition, the Chapter hereby asks the Board to advise the Attorney General that it is considering these questions and to request the Attorney General to postpone issuing his opinion until the Board has had the opportunity to answer the questions. The Chapter believes that the Board is the appropriate agency to address the questions. As the Sloan opinion stated, "The construction of a statute by an agency charged with its administration is entitled to the most respectful consideration and should not be overruled absent compelling reasons." 370 S.C. at 469, 636 S.E.2d at 607. The Attorney General follows this admonition to give appropriate deference to an agency's interpretation of the law it administers. See Op. S.C. Atty. Gen., April 20, 2007, "This Office, just as the courts of this state, 'gives deference to the opinion of a state agency charged with the duty and responsibility of enforcing a state statute.'" See Op. S.C. Atty. Gen., July 1, 2004, "If the administrative interpretation is reasonable, courts will defer to that construction, even if it is not the only reasonable one or the one the court would have adopted in the first instance." The office of the Attorney General does not have primary responsibility for administering the physical therapy practice act. The Chapter believes it would be unfortunate if the Attorney General were to issue an opinion before the Board had the opportunity to state its position concerning the law it is charged to enforce.

Thank you for your attention to the Chapter's requests.

Sincerely,

A handwritten signature in black ink, appearing to read "J. P. Stoker".

James P. Stoker, PT, SCS
President

05-03-2011

Marilyn Swyger, PT, Chairperson
South Carolina Board of Physical Therapy Examiners
P.O. Box 11329
Columbia, S.C. 29211-1329

Re: Application of S.C. Code Ann. § 40-45-110(A)(1) to
Intra-Professional Interactions

Dear Marilyn:

As you know, in Sloan v. South Carolina Board of Physical Therapy Examiners, 370 S.C. 452, 636 S.E.2d 598 (S.C. 2006), the South Carolina Supreme Court held that South Carolina Code Ann. § 40-45-110(A)(1) prohibits a physical therapist from working as an employee of a physician when the physician refers patients to the physical therapist for services. I am writing on behalf of the South Carolina Chapter, American Physical Therapy Association (SCAPTA or Chapter) to ask the South Carolina Board of Physical Therapy Examiners (SCBPTE or Board) to issue a position statement advising how it interprets the statute by answering two questions set forth below.

As explained in the Court's opinion, the litigation was triggered by an opinion the Attorney General issued in 2004, which the Sloan opinion upheld. The Court ruled that the statutory prohibition applies when a physical therapist (PT) is employed by a physician who refers patients to the PT for the provision of physical therapy services – in short, an inter-professional referral. The Chapter understands that the Attorney General's office has received a request for an opinion as to whether the statutory clause covers intra-professional as well as inter-professional interactions. It appears that the Attorney General has received a request for an opinion on two questions, which are substantially as follows:

(#1) Does S.C. Code Ann. § 40-45-110(A)(1) prohibit a physical therapist or 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?

The Chapter hereby requests that the Board issue a position statement addressing these two questions. The Chapter believes that the correct answer to the two questions is that

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the prohibition does not extend to a situation in which one physical therapist sends or directs a patient for treatment to another physical therapist who is employed by the sending therapist or by a professional corporation owned by the sending therapist. The Chapter intends to submit to the Board in the near future a legal analysis addressing the questions.

In addition, the Chapter hereby asks the Board to advise the Attorney General that it is considering these questions and to request the Attorney General to postpone issuing his opinion until the Board has had the opportunity to answer the questions. The Chapter believes that the Board is the appropriate agency to address the questions. As the Sloan opinion stated, "The construction of a statute by an agency charged with its administration is entitled to the most respectful consideration and should not be overruled absent compelling reasons." 370 S.C. at 469, 636 S.E.2d at 607. The Attorney General follows this admonition to give appropriate deference to an agency's interpretation of the law it administers. See Op. S.C. Atty. Gen., April 20, 2007, "This Office, just as the courts of this state, 'gives deference to the opinion of a state agency charged with the duty and responsibility of enforcing a state statute.'" See Op. S.C. Atty. Gen., July 1, 2004, "If the administrative interpretation is reasonable, courts will defer to that construction, even if it is not the only reasonable one or the one the court would have adopted in the first instance." The office of the Attorney General does not have primary responsibility for administering the physical therapy practice act. The Chapter believes it would be unfortunate if the Attorney General were to issue an opinion before the Board had the opportunity to state its position concerning the law it is charged to enforce.

Thank you for your attention to the Chapter's requests.

Respectfully,

Bob Carpenter, PT, ATC-L, CSCS

05-03-2011

Marilyn Swygert, PT, Chairperson
South Carolina Board of Physical Therapy Examiners
P.O. Box 11329
Columbia, S.C. 29211-1329

Re: Application of S.C. Code Ann. § 40-45-110(A)(1) to
Intra-Professional Interactions

Dear Marilyn:

As you know, in Sloan v. South Carolina Board of Physical Therapy Examiners, 370 S.C. 452, 636 S.E.2d 598 (S.C. 2006), the South Carolina Supreme Court held that South Carolina Code Ann. § 40-45-110(A)(1) prohibits a physical therapist from working as an employee of a physician when the physician refers patients to the physical therapist for services. I am writing on behalf for clarification & to ask the South Carolina Board of Physical Therapy Examiners (SCBPTE or Board) to issue a position statement advising how it interprets the statute by answering two questions set forth below.

As explained in the Court's opinion, the litigation was triggered by an opinion the Attorney General issued in 2004, which the Sloan opinion upheld. The Court ruled that the statutory prohibition applies when a physical therapist (PT) is employed by a physician who refers patients to the PT for the provision of physical therapy services – in short, an inter-professional referral. I understand that the Attorney General's office has received a request for an opinion as to whether the statutory clause covers intra-professional as well as inter-professional interactions. It appears that the Attorney General has received a request for an opinion on two questions, which are substantially as follows:

(#1) Does S.C. Code Ann. § 40-45-110(A)(1) prohibit a physical therapist or 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?

I would like for the Board issue a position statement addressing these two questions. I believe that the correct answer to the two questions is that the prohibition does not extend to a situation in which one physical therapist sends or directs a patient for treatment to

EXHIBIT

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another physical therapist who is employed by the sending therapist or by a professional corporation owned by the sending therapist. I intend to submit to the Board in the near future a legal analysis addressing the questions.

In addition, I would like to ask the Board to advise the Attorney General that it is considering these questions and to request the Attorney General to postpone issuing his opinion until the Board has had the opportunity to answer the questions. I believe that the Board is the appropriate agency to address the questions. As the Sloan opinion stated, "The construction of a statute by an agency charged with its administration is entitled to the most respectful consideration and should not be overruled absent compelling reasons." 370 S.C. at 469, 636 S.E.2d at 607. The Attorney General follows this admonition to give appropriate deference to an agency's interpretation of the law it administers. See Op. S.C. Atty. Gen., April 20, 2007, "This Office, just as the courts of this state, 'gives deference to the opinion of a state agency charged with the duty and responsibility of enforcing a state statute.'" See Op. S.C. Atty. Gen., July 1, 2004, "If the administrative interpretation is reasonable, courts will defer to that construction, even if it is not the only reasonable one or the one the court would have adopted in the first instance." The office of the Attorney General does not have primary responsibility for administering the physical therapy practice act. I think it would be very unfortunate if the Attorney General were to issue an opinion before the Board had the opportunity to state its position concerning the law it is charged to enforce.

Thank you for your attention to my requests.

Respectfully,

Bob Carpenter, PT, ATC-L, CSCS



South Carolina Board of Physical Therapy Examiners

Koger Office Park, Klingenstein Building
110 Centerview Drive
Post Office Box 11319
Columbia, SC 29211-1319

(803) 896-4655
FAX: (803) 896-4719

Robert Avery Carpenter, P.T.
210 Scooter Bridge Road
Daleburg, SC 29006-8133

June 2, 2011

Re: Application of S.C. Code Ann. Sec. 40-45-110(A)(1) to
Intra-Professional Interactions

Dear Mr. Carpenter:

The answer to the two questions posed in your letter of May 3, 2011 is NO for the following reasons:

In 1998, the General Assembly enacted Act 360 which constituted a major revision to the laws governing the licensing and regulation of physical therapists. Under this Act, the Board may take disciplinary action against a therapist who "in the absence of a referral from a licensed medical doctor or dentist provides physical therapy services beyond 30 days after the initial evaluation and/or treatment without referring the patient to a licensed medical doctor or dentist." See Sec.40-45-110(A)(4).

The Board may also take disciplinary action against a therapist who "requests, receives, participates or engages directly or indirectly in the dividing, transferring, assigning, rebating, or refunding fees received for professional services or profits by means of a credit or other valuable consideration including, but not limited to, wages, and unearned commission, discount, or gratuity with a person who referred a patient or with a relative or business associate of the referring person." See Sec.40-45-110(A)(1). The statutes were discussed first in an opinion from the Attorney General for the State of South Carolina in March of 2004 and then by the Supreme Court of South Carolina in the case of Sloan v. South Carolina Board of Physical Therapy Examiners, 370 S.C. 452, 636 S.E.2d 598 (2006). The Sloan case provides the answer to your inquiry.

The purpose of Sec.40-45-110(A)(1) is to "protect consumers as well as government-sponsored health care programs such as Medicare and Medicaid from actual and potential conflicts of interest which are likely to lead to overuse of medical services by physicians who, for their own financial gain rather than their patient's medical needs, refer patients to entities in which the physicians hold financial interest.

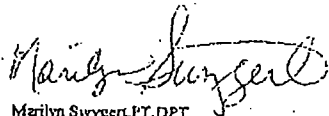
The question presented is whether or not a physical therapist or physical therapist assistant working in the same practice as another physical therapist can provide services to a patient during the 30 day window in which physical therapists can provide services to patients without a referral from a medical doctor or whether or not other physical therapists or physical therapist assistants in the group can provide physical therapy services upon referral by a medical doctor. The answer to these questions turns on the definition of the term "referral".

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In *Sloan*, the South Carolina Supreme Court held that Sec 40-45-110(A)(1) prohibits a physical therapist from receiving referrals or dividing fees if that physical therapist is part of the referring physician's practice. The South Carolina Supreme Court held that the term "refer" as used in the statute should be interpreted according to its plain meaning, which in this instance is "to send or direct for treatment, aid, information [or] decision [e.g.] a patient to a specialist." Webster's 3rd New International Dictionary 1907 (1981); *Sloan*, 370 S.C. at 470, 636 S.E.2d at 607-608.

In a group practice, a physical therapist or physical therapist assistant providing services to a patient of that practice should not fall within this definition of "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 for another member of the group. Moreover, because each of the physical therapists or physical therapist assistants are providing the same medical treatment, a physical therapist who is unable to see a patient is not directing a patient for treatment or aid that that particular physical therapist was unable to provide and thus, would not be sending a patient to a specialist, as is the typical definition of a referral. To hold otherwise would produce the absurd result of requiring a patient develop a new relationship with each physical therapist or physical therapist assistant who provides treatment to the patient within the 30 day window in which physical therapist can treat without referral from a physician, or in the situation of a physician referral, would require a separate referral for each and every physical therapist or physical therapist assistant who treats the patient. Having other physical therapists or physical therapist assistants in the same group covering for each other should not constitute a referral and should not violate Sec. 40-45-110(A)(1).



Marilyn Swygert, PT, DPT
SC Board of Physical Therapy Chair

SOUTH CAROLINA DEPARTMENT OF LABOR, LICENSING & REGULATION
South Carolina Board of Physical Therapy Examiners
Wednesday, August 17, 2011, 9:00 a.m.
Synergy Business Park, Kingstree Building
110 Centerview Drive, Room 204
Columbia, SC 29211

Board Members Present

Marilyn Swygert, P.T., Member, Chairperson
Jane E. Julian, P.T., Vice Chairperson
E. Dargan Ervin, Jr., P.T. Member
Cindy Ellis Witherspoon, P.T., Member
Roy Christopher Jenkins, P.T.A., Member
W. Dixon Reaves III, P.T.A., Member

Excused Absence

Darlene Pope, P.T., Member

Others Present

Dean Grigg, Advice Counsel
Paula Magargle, Office of General Counsel
Veronica Reynolds, Administrator
Mack Williams, Board Assistant

Public notice of this meeting was properly posted at the SC Board of Physical Therapy Examiners Office, the lobby Kingstree Building, and provided to all requesting persons, organizations, and news media in compliance with Section 30-4-80 of the South Carolina Freedom of Information Act. A quorum was present at all times.

CALL TO ORDER

Ms. Swygert, Chairperson, called the meeting to order at 9:14 a.m. The meeting was held in Room 204, Kingstree Bldg., 110 Centerview Drive, Columbia, South Carolina.

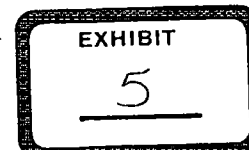
ADOPTION OF AGENDA

The August 17, 2011 agenda was presented for review and approval. Mr. Ervin made a motion to adopt the agenda. The motion was seconded and approved.

APPROVAL OF MINUTES

The Minutes of the July 14, 2011 meeting were presented for review and approval.

Motion: Mr. Jenkins made a motion to accept the July 14, 2011 minutes. The motion was seconded and approved.



Continued Business:

Intra-Professional Interactions Statement

Motion: Mr. Ervin made a motion the Board go into Executive Session to receive legal advice under Section 30-4-70 of the South Carolina Freedom of Information Act. The motion was seconded and approved.

Motion: Mr. Ervin made a motion to come out of Executive Session. The motion was seconded and approved.

Motion: Ms. Witherspoon made a motion to rescind the previous adoption of the position statement regarding *Intra-Professional Interactions* and the previous vote regarding its publication. The motion was seconded and approved.

Motion: Mr. Ervin made a motion to revisit the position expressed in the June 2, 2011 letter regarding *Intra Professional Interactions* and accept the position stated within the letter. The motion was seconded and approved.

Public Comments: The floor was open for public comments and there were no comments made.

NEW BUSINESS

Disciplinary Hearings

1. **Lisa Hill:** Ms. Hill made a personal appearance before the Board and was represented by legal counsel.

Motion: Ms. Witherspoon made a motion the Board go into Executive Session to receive legal advice under Section 30-4-70 of the South Carolina Freedom of Information Act. The motion was seconded and approved.

Motion: Mr. Junkins made a motion to come out of Executive Session. The motion was seconded and approved.

Motion: In open session, Mr. Ervin made a motion to dismiss the case and issue a letter of caution relative to communication and documentation in provision of services. The motion was seconded and approved.

2. **Jenna Thom:** Ms. Thom made a personal appearance before the Board and was not represented by legal counsel.

Motion: Ms. Witherspoon made a motion the Board go into Executive Session to receive legal advice under Section 30-4-70 of the South Carolina Freedom of Information Act. The motion was seconded and approved.

Motion: Mr. Ervin made a motion to come out of Executive Session. The motion was seconded and approved.

Motion: In open session, Ms. Julian made a motion to issue a public letter of reprimand with an expungement in five years if the respondent has no other actions taken against the license. The motion was seconded and approved.

3. **Kirsten Thompson:** Ms. Thompson made a personal appearance before the Board and was represented by legal counsel.

Motion: Ms. Witherspoon made a motion the Board go into Executive Session to receive legal advice under Section 30-4-70 of the South Carolina Freedom of Information Act. The motion was seconded and approved.

Motion: Mr. Ervin made a motion to come out of Executive Session. The motion was seconded and approved.

Motion: In open session, Ms. Julian made a motion to issue a public letter of reprimand with an expungement in five years if the respondent has no other actions taken against the license. The motion was seconded and approved.

4. **Wendi Reeves:** Ms. Reeves made a personal appearance before the Board and was represented by legal counsel

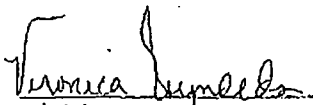
Motion: Mr. Ervin made a motion the Board go into Executive Session to receive legal advice under Section 30-4-70 of the South Carolina Freedom of Information Act. The motion was seconded and approved.

Motion: Mr. Jenkins made a motion to come out of Executive Session. The motion was seconded and approved.

Motion: In open session, Mr. Ervin made a motion to issue a public letter of reprimand and within one year complete a Board approved ethics course. The course must be an in-person organized program of instruction with faculty with the minimum of two days that will include reflection and completion of an essay. Ms. Reeves must continue employer supervision as outlined in the documents presented before the Board and submit quarterly reports from the supervisor. The motion was seconded and approved.

ADJOURNMENT

There being no further business, Ms. Witherspoon made a motion to adjourn the meeting at 6:19 p.m. The motion was seconded and approved.


Administrator

11/01/2011
Date

Next meeting is scheduled October 13, 2011, Kingstree Building, Room 108, 10:00 a.m.



Nikki R. Haley
Governor

Catherine B. Templeton
Director

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



110 Centerview Drive
Post Office Box 11329
Columbia, SC 29211-1329
Phone: (803) 896-4655
FAX: (803) 896-4719
www.llronline.com

Application of 40-45-110(A)(1) to Intra-Professional Interactions

In 1998, the General Assembly enacted Act 360 which constituted a major revision to the laws governing the licensing and regulation of physical therapists. Under this Act, the Board may take disciplinary action against a therapist who "in the absence of a referral from a licensed medical doctor or dentist provides physical therapy services beyond 30 days after the initial evaluation and/or treatment without referring the patient to a licensed medical doctor or dentist." See §40-45-110(A)(4).

The Board may also take disciplinary action against a therapist who "requests, receives, participates or engages directly or indirectly in the dividing, transferring, assigning rebating or refunding fees received for professional services or profits by means of a credit or other valuable consideration including, but not limited to, wages, and unearned commission, discount, or gratuity with a person who referred a patient or with a relative or business associate of the referring person." See §40-45-110(A)(1). The statutes were discussed first in an opinion from the Attorney General for the State of South Carolina in March of 2004 and then by the Supreme Court of South Carolina in the case of Sloan v. South Carolina Board of Physical Therapy Examiners, 370 S.C. 452, 636 S.E. 2d 598 (2006).

The purpose of §40-45-110(A)(1) is to "protect consumers as well as government-sponsored health care programs such as Medicare and Medicaid from actual and potential conflicts of interest which are likely to lead to overuse of medical services by physicians who, for their own financial gain rather than their patient's medical needs, refer patients to entities in which the physicians hold financial interest."

The question presented is whether or not a physical therapist or physical therapist assistant working in the same practice as another physical therapist can provide services to a patient during the 30 day window in which physical therapists can provide services to patients without a referral from a medical doctor or whether or not other physical therapists or physical therapist assistants in the group can provide physical therapy services upon referral by a medical doctor. The answer to these questions turns on the definition of the term "referral".

In Sloan, the South Carolina Supreme Court held that §40-45-110(A)(1) prohibits a physical therapist from receiving referrals or dividing fees if that physical therapist is part of the referring physician's practice. The South Carolina Supreme Court held that the term "refer" as used in the statute should be interpreted according to its plain meaning, which in this instance is "to send or direct for treatment, aid, information [or] decision [e.g.] a patient to a specialist." Webster's 3rd New International Dictionary 1907 (1981); Sloan 370 S.C. at 470, 636 S.E. 2d at 607-608.

In a group practice, a physical therapist or 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. Moreover, because each of the physical therapists or physical therapist assistants are providing the same medical treatment, a physical therapist who is unable to see a patient is not directing a patient for treatment or aid that that particular physical therapist was unable to provide and thus, would not be sending a patient to a specialist, as is the typical definition of a referral. To hold otherwise would produce

EXHIBIT

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the absurd result of requiring a patient to develop a new relationship with each physical therapist or physical therapist assistant who provides treatment to the patient within the 30 day window in which a physical therapist can treat without a referral from a physician, or in the situation of a physician referral, would require a separate referral for each and every physical therapist or physical therapist assistant who treats the patient. Having other physical therapists or physical therapist assistants in the same group covering for each other should not constitute a referral and should not violate §40-45-110(A)(1).

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
Kristin Joseph P.T., Thomas N. Joseph,)
M.D., and William G. McCarthy, M.D.,)
Plaintiffs,)
vs.)
South Carolina Department of Labor,)
Licensing and Regulation, South Carolina)
Board of Physical Therapy,)
Defendant,)
and)
South Carolina Chapter, American)
Physical Therapy Association, Joseph M.)
McKowen, PT, Sabrina Queen Bridges,)
PTA, and Amalia W. Kirby (PTA),)
Defendants-Intervenors.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

C/A No. 2012-CP-40-2632

**PLAINTIFFS'
MOTION FOR
SUMMARY JUDGMENT**

RICHLAND COUNTY
FILED
2013 NOV -1 PM 3:39
JEANETTE W. HERNODE
C.C.P. & G.S.

Plaintiffs Kristin Joseph, P.T. (PT Joseph), Thomas N. Joseph, M.D. (MD Joseph) and William G. McCarthy, M.D. (McCarthy) (collectively Plaintiffs), in accordance with Rule 56, SCRCP, files this Motion for Summary Judgment. The Plaintiffs' grounds for this motion are:

1. Defendant South Carolina Department of Labor, Licensing and Regulation (LLR), South Carolina Board of Physical Therapy's (PT Board) (collectively Defendant) August 17, 2011 statement regarding the "Application of 40-45-110(A)(I) to Intra-Professional Interactions" (2011 Position Statement) is contrary to the plain meaning of Physical Therapy Act, S.C. Code Ann. §§ 40-25-5 through 40-25-300 (PT Act), including S.C. Code Ann. § 40-25-110(A)(1), exceeds the PT Board's statutory authority, and constitutes an *ultra vires* act;
2. The 2011 Position Statement misconstrues the word "refer" as it is used in the PT Act, including S.C. Code Ann. § 40-25-110(A)(1).

3. Assuming *arguendo*, the PT Board's 2011 Position Statement properly construed the word "refer" in S.C. Code Ann. § 40-25-110(A)(1), then the plain meaning of the PT Act dictates that the "coverage" exception be applied equally to physical therapists (PT) and PT groups and physicians and physician groups;
4. The 2011 Position Statement was adopted in violation of the South Carolina Administrative Procedures Act (APA);
5. The 2011 Position Statement adopted by the PT Board violates the South Carolina and United States Equal Protection provisions; and
6. The 2011 Position Statement adopted by the PT Board violates PT Joseph's Substantive Due Process rights.

The Court should grant summary judgment to Plaintiffs and award the relief requested in the Amended Declaratory Judgment Action/Complaint.

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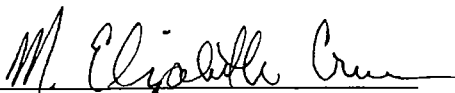
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By: 
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November 1, 2013
Columbia, South Carolina

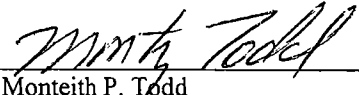
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
Kristin Joseph P.T., Thomas N. Joseph,	)	
M.D., and William G. McCarthy, M.D.,	)	C/A No. 2012-CP-40-2632
	)	
Plaintiffs,	)	
	)	
vs.	)	<u>NOTICE OF MOTION AND MOTION</u>
	)	<u>FOR SUMMARY JUDGMENT BY</u>
South Carolina Department of Labor,	)	<u>DEFENDANT, SOUTH CAROLINA</u>
Licensing and Regulation, South Carolina	)	<u>DEPARTMENT OF LABOR, LICENSING</u>
Board of Physical Therapy,	)	<u>AND REGULATION AND SOUTH</u>
	)	<u>CAROLINA BOARD OF PHYSICAL</u>
Defendant,	)	<u>THERAPY</u>
	)	
and	)	
	)	
South Carolina Chapter, American	)	
Physical Therapy Association, Joseph M.	)	
McKowen, PT, Sabrina Queen Bridges,	)	
PTA, and Amalia W. Kirby (PTA),	)	
	)	
Defendants-Intervenors.	)	

The defendant, South Carolina Department of Labor, Licensing and Regulation, South Carolina Board of Physical Therapy, hereby moves pursuant to Rule 56 of the South Carolina Rules of Civil Procedure for an order granting this defendant summary judgment on all of the plaintiffs' remaining claims against the defendant. The plaintiffs initially filed their Complaint in 2012 alleging nine causes of action against this defendant. The Court, pursuant to a motion to dismiss, dismissed the plaintiff's Seventh through Ninth Causes of Action.

On or about July 11, 2013, the plaintiff filed and served an Amended Complaint. The Amended Complaint corrected several technical matters, but did not change any of the plaintiff's substantive allegations. The defendant hereby moves and is entitled to summary judgment on Causes of Action One through Six in the plaintiffs' Amended Complaint because the only

reasonable inference that can be drawn from the pleadings, discovery responses, and depositions, and the applicable statutory and case law is that the defendant is entitled to a dismissal as a matter of law. Therefore, this defendant will move before the Presiding Judge of the Richland County Court of Common Pleas on the tenth (10th) day after service hereof or as soon thereafter as counsel can be heard for an order granting summary judgment to this defendant. This motion will be supported by a memorandum of law to be filed with the Court at or before the hearing on this motion, the pleadings and discovery in the case, and the case and statutory law of the State of South Carolina.

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By: 

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Columbia, South Carolina

Nov 7, 2013

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

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

Plaintiffs,)

vs.)

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

Defendant,)

and)

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

Defendant-Intervenors.)

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

C/A No. 2012-CP-40-2632

**DEFENDANT-INTERVENORS'
NOTICE OF MOTION AND
MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, the South Carolina Chapter, American Physical Therapy Association ("SCAPTA"), Joseph M. McKowen, PT, Sabrina Queen Bridges, PTA, and Amalia W. Kirby, PTA ("Individual Defendant-Intervenors") (collectively, the "Defendant-Intervenors"), hereby move for an order granting summary judgment to the Defendants on all of Plaintiffs' remaining claims.

On November 8, 2013, Defendant South Carolina Department of Labor, Licensing and Regulation, South Carolina Board of Physical Therapy (the "Board") (collectively with Defendant-Intervenors, the "Defendants") moved for summary judgment on Causes of Action One through Six in the Plaintiffs' Amended Complaint. For the reasons explained by the Board, as well as for additional reasons that will be supported by separate memorandum of law and

affidavit filed at or before any hearing, Defendant-Intervenors likewise move for summary judgment because the pleadings, depositions, and discovery responses, along with applicable statutory and caselaw of the State of South Carolina, show that Defendants are entitled to judgment as a matter of law. Accordingly, Defendant-Intervenors respectfully request that this

Court grant their motion for summary judgment and dismiss all of Plaintiffs' remaining claims.

Respectfully submitted,

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Counsel for Individual Defendant-Intervenors

West Columbia, South Carolina
November 14, 2013

RECEIVED

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
 COUNTY OF RICHLAND) FOR THE FIFTH JUDICIAL CIRCUIT

Kristin Joseph P.T., Thomas N. Joseph,) C/A No. 2012-CP-40-2632
 M.D., and William G. McCarthy, M.D.,)

Plaintiffs,)

vs.)

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

Defendant,)

and)

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

Defendants-Intervenors.)

MEMORANDUM IN SUPPORT OF PLAINTIFFS'
 MOTION FOR SUMMARY JUDGMENT

RICHLAND COUNTY
 FILED
 2013 DEC 13 PM 3:58
 JEANETTE W. McSPRUE
 C.C.P. & G.S.

Summary of Argument

On August 17, 2011, the Department of Labor, Licensing and Regulation (LLR), South Carolina Board of Physical Therapy (Board) (collectively Defendant) adopted a position statement entitled "Application of 40-45-110(A)(1) to Intra-Professional Interactions" (2011 Position Statement). Ex. 1. Plaintiffs seek a declaratory judgment that the 2011 Position

Statement is contrary to the clear and unambiguous language of § 40-45-110(A)(1) and the South Carolina Physical Therapy Act, S.C. Code Ann. §§ 40-45-10, et seq. (2013) (PT Act). Pursuant to the PT Act, both a physician and a physical therapist (PT) fall under the definition of "person" ("a person is an individual" § 40-45-20(3)). Therefore, both a physician and a PT are subject to the same referral prohibitions contained in Section 40-45-110(1)(A) of the PT Act. Further, if the directing of a patient for physical therapy services by a PT to an employed PT constitutes "coverage" and not a referral, then the directing of a patient for physical therapy services by a physician to an employed PT also constitutes "coverage" and not a referral. To interpret and apply the word "referral" in § 40-45-110(1)(A) differently for a physician and a PT for purposes of referral or coverage, violates Plaintiffs' due process and equal protection rights, is in violation of the plain and unambiguous language of the PT Act, and exceeds the Board's statutory authority and constitutes an *ultra vires* act.

In *Sloan v. South Carolina Board of Physical Therapy Examiners*, 370 S.C. 452, 469, S.E.2d 598 (2006), the Supreme Court held that the legislative purpose behind the enactment of § 40-45-110(1)(A) was to "protect consumers as well as government-sponsored health care programs such as Medicare and Medicaid from actual and potential conflicts of interest which are likely to lead to overuse of medical services by physicians who, for their own financial gain rather than their patients' medical needs, ..." *Id.*, 370 S.C. 469, 636 S.E.2d 607. The Centers for Medicare and Medicaid Services (CMS) has recently determined that PTs constitute a greater risk for making prohibited referrals for profit than do physicians. The legislature equally intended that consumers be protected from actual and potential conflicts of interest that are

likely to lead to overuse of medical services by PTs who, for their own financial gain rather than their patients' medical needs refer patients to employed PTs.

Finally, the 2011 Position Statement was adopted in violation of the South Carolina Administrative Procedures Act.

Factual Background

The South Carolina Supreme Court decided the *Sloan* case in 2006. *Sloan* arose from an opinion of the South Carolina Attorney General's Office, S.C. Atty. Gen. Op. dated March 30, 2004 (2004 WL 736934) (AG Opinion) and adopted by the PT Board as its position on April 8, 2004. Ex. 2. The AG Opinion addressed two specific questions concerning the use of the word "person" in S.C. Code Ann. § 40-45-110(A)(1) as it relates to physicians. It opined first that physicians were persons within the meaning of the PT Act and second that PTs could not be employed by physicians or physician groups and receive wages to treat patients referred by the physician or group for physical therapy services.

In a split decision, the Supreme Court interpreted the PT Act to prohibit a physician from referring patients to a physical therapist or physical therapy assistant (collectively PTs) the physician or his group employed. The issues before the *Sloan* Court were:

- I. Does South Carolina Code Ann. § 40-45-110(A)(1) (2001) prohibit a physical therapist from working as an employee of a physician when the physician refers patients to the physical therapist for services?
- II. Does the Board's decision to begin enforcing Section 40-45-110(A)(1) after formally endorsing an opinion issued by the Attorney General regarding the proper interpretation of the statute constitute a new regulation that is void for failure to comply with the rule-making provisions of the state Administrative Procedures Act?
- III. Does the Board's decision to enforce Section 40-45-110(A)(1) improperly infringe upon physicians' statutory right to practice medicine?

IV. Does Section 40-45-110(A)(1) violate the equal protection rights of physical therapists who wish to be employed by physicians who refer patients to them?

V. Does Section 40-45-110(A)(1) violate the substantive or procedural due process rights of physical therapists who wish to be employed by physicians who refer patients to them?

Sloan, 370 S.C. 468, 636 S.E.2d 606. *Sloan* did not address the issue of whether a PT is a "person" within the meaning of the § 40-45-110(A)(1) employment/referral prohibition and whether a PT is prohibited from being employed by and receiving referrals from another PT.

On May 3, 2011¹, Robert Carpenter wrote Marilyn Swygert, Chairperson of the Board, requesting "the Board of Physical Therapy Examiners (SCBPTE or Board) to issue a position statement advising how it interprets the statute [S. C. Code Ann. § 40-45-110(A)(1)]" *vis a vis* two questions:

(#1) Does S.C. Code Ann. § 40-45-110(A)(1) prohibit a physical therapist or 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 therapists 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?

Ex. 3.

On June 2, 2011, Marilyn Swygert, Chairman of the Board, responded to Mr. Carpenter's request to the Board and opined that the answers to Carpenter's "questions turns on the definition of the term 'referral'". Ex. 4. Swygert opined: "The physical therapist or physical

¹ See discussion of request for a Position Statement below at pages 13–16.

therapist assistant seeing a patient at the request of another physical therapist in the same group does not constitute a 'referral', but is rather physical therapist or physical therapist assistant providing coverage either within the 30-day window or pursuant to the same referral from a physician for another member of the group." *Id.*

On July 14, 2011, the Board placed on the agenda an item entitled "Intra-Professional Interactions". Ex. 5. On August 17, 2011, the Board approved a motion "to revisit the position expressed in the June 2, 2011 letter regarding Intra Professional Interactions and accept the position stated within the letter" and approved the 2011 Position Statement. Ex. 6. The 2011 Position Statement contains substantially similar language to the Swygert Letter quoted above. See Exs. 1 and 4.

Procedural History

On April 12, 2012, Plaintiffs filed their Declaratory Judgment Action/Complaint (Complaint) with the Clerk of Court for Richland County and served the Complaint on the Defendant along with interrogatories and requests to produce. On May 25, 2012, the Defendant filed its Answer and a Motion to Dismiss and requested an indefinite extension of time to answer discovery. Plaintiffs did not agree and Defendant filed a Motion for Protective Order. Defendant's Motion to Dismiss was argued on August 7, 2012 before the Honorable Judge G. Thomas Cooper Jr., who requested that proposed orders be sent to him by August 24, 2012. Judge Cooper sent his executed order denying the Motion to Dismiss to the Clerk's office on September 17, 2012. However, due to what appears to be a clerical error, the Judgment was not entered and filed, nor was notice given to the parties, until December 4, 2012.

Defendant moved for reconsideration pursuant to Rule 59(e), SCRPC, which Motion was denied on January 9, 2013. Defendant finally responded to Plaintiffs' April 12, 2012 discovery requests on February 13, 2013. Additional discovery commenced.

On May 2, 2013, SCAPTA and three individuals, Joseph M. McKowen, PT, Sabrina Queen Bridges, PTA, and Amalia W. Kirby, PTA, filed a Motion to Intervene. Plaintiffs and Defendant consented and on June 11, 2013, the order granting intervention was entered. Plaintiffs filed a Consent Order, entered on July 1, 2013, with the Court to amend its Declaratory Judgment/Complaint. The parties entered into a consent scheduling order that requires all dispositive motions to be filed by November 15, 2013, with memoranda in support of the motions filed by December 14, 2013 and replies, if any, by January 10, 2014.

STANDARD OF REVIEW

Rule 56(C), SCRPC, applies in determining whether summary judgment is proper in this case. Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Quality Towing Inc. v. City of Myrtle Beach*, 340 S.C. 29, 530 S.E.2d 369 (2000); Rule 56(c), SCRPC. "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006). "A trial court may properly grant a motion for summary judgment when 'the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.’ Rule 56(c), SCRPC; *Pittman v. Grand Strand Entm’t, Inc.*, 363 S.C. 531, 611 S.E.2d 922 (2005)”. *Young v. South Carolina Department of Disabilities and Special Needs*, 374 S.C. 360, 649 S.E. 2d 488 (2007).

“In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.” *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 329–30, 673 S.E.2d 801, 802 (2009) (internal citations omitted). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusions or inferences to be drawn from those facts. *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000); *Fleming v. Rose*, 338 S.C. 524, 236 S.E.2d 732 (2000).

When the summary judgment motion is supported by affidavits or deposition testimony, the “adverse party may not rest upon the mere allegations or denials of his pleading, but his response ... must set forth specific facts showing that there is a genuine issue for trial.” Rule 56(e), SCRPC. A party opposing summary judgment must come forward with affidavits or other supporting documents demonstrating the existence of a genuine issue for trial. *Doe v. Batson*, 345 S.C. 316, 321, 548 S.E.2d 854, 856 (2001). One may not create a genuine issue of material fact and thus avoid summary judgment by asserting that the trier of fact may disbelieve uncontradicted evidence. *Hoard ex rel. Hoard v. Roper Hosp. Inc.*, 387 S.C. 539, 694 S.E.2d 1 (2010). However, when plain, palpable, and indisputable facts exist on which reasonable minds

cannot differ, summary judgment should be granted. *Trico Surveying Inc. v. Godley Auction Co.*, 314 S.C. 542, 431 S.E.2d 565 (1993).

UNCONTESTED FACTS

The facts set forth herein are uncontested. Plaintiff Kristin Joseph, P.T., (PT Joseph) is licensed by Board to practice physical therapy in South Carolina. Exs. 7 and 8. PT Joseph is subject to the requirements of S.C. Code Ann. § 40-45-5, et seq. (Rev. 2011) and the rules and regulations promulgated by the Board through LLR.

Plaintiff Thomas N. Joseph, M.D. (Dr. Joseph) is a licensed orthopaedic surgeon in South Carolina. He is a Diplomate, American Board of Orthopaedic Surgeons, and is a member of Camden Bone & Joint, LLC (Camden Bone), a South Carolina limited liability company whose physicians provide professional medical services in Kershaw County, South Carolina, in the field of general orthopaedics and orthopaedic sports medicine. Ex. 10 and Ex. 11, Tr. p. 9. Dr. Joseph has provider agreements with: 1) the Center for Medicare and Medicaid Services (CMS) to provide Title XVIII of the Social Security Act (Medicare) services to Medicare patients; 2) the South Carolina Department of Health and Human Services (SCDHHS) to provide Medicaid services to Medicaid patients; and 3) with numerous other third party payors to provide services to covered patients. Dr. Joseph's South Carolina medical license allows him to provide physical therapy services within and as part of his scope of medical practice. Ex. 11, pp. 10-13. The South Carolina Physicians' Practice Act 40-47-20(36)(c) provides that the practice of medicine includes the "offering or undertaking to prevent or to diagnose, correct or treat in any manner, or by any means, methods, or devices, disease, illness, pain, wound, fracture, infirmity, defect, or abnormal physical or mental condition of a person, including the management or

pregnancy and parturition.” The diagnosis of medical conditions requiring physician therapy and the provision of physical therapy are within the scope of practice of a physician licensed to practice in South Carolina. Dr. Joseph’s practice does not now, nor has it, employed PTs and referred patients to the employed PTs for PT services. Ex. 11, pp. 9.

Plaintiff William G. McCarthy, Jr., M.D. (Dr. McCarthy) is a licensed orthopaedic surgeon in South Carolina. He is a Diplomate, American Board of Orthopaedic Surgeons, and is a member of Carolina Orthopaedic Surgery Associates, PA (Carolina), a South Carolina professional association, whose physicians provide professional medical services in York and Lancaster Counties, South Carolina, in the field of general orthopaedics, and who employs physicians and physician assistants. Ex. 12 and Ex. 13, Tr. pp. 6-7. Dr. McCarthy has provider agreements with: 1) CMS to provide Medicare services to Medicare patients; 2) SCDHHS to provide Medicaid services to Medicaid patients; and 3) with numerous other third party payors to provide services to covered patients. Ex. 13, Tr. pp. 11–12, 14–16; Ex. 14, ¶ 2. Dr. McCarthy and Carolina employed South Carolina licensed PTs until the *Sloan* case was decided and the practice was forced to terminate the PTs’ employment. Ex. 13, pp. 8–10. Dr. McCarthy provides physical therapy to his patients and educates them how to do physical therapy exercises. Ex. 14, ¶ 3; Ex. 13, pp. 12–13; 21–22.

Defendant Board is an agency of the State of South Carolina and is organized pursuant to the PT Act to license, regulate, and discipline PTs and physical therapist assistants under the administration of LLR. S.C. Code Ann. § 40-45-5 (2011). The Board is located in Richland County, South Carolina. The Board consists of nine members, six of whom are licensed physical therapists, two of whom are physical therapist assistants, and one from the general public. The

physical therapist and the physical therapist assistant members must have at least three years' experience and be actively practicing in this State while serving on the Board. S.C. Code Ann. § 40-45-10 (2011). The current Board members are: E. Dargan Ervin, Jr.², PT (former chair); Jane E. Julian,³ PT (Vice Chair); Roy Christopher Junkins⁴, PTA; Darlene P. Pope⁵, PT; Texas T. Smith⁶, public member; Marilyn M. Swygert⁷, PTA, (Chair); Matthew J. 'Judd' Warren⁸, PTA; Cynthia E. Witherspoon⁹, PT; and one vacant position.¹⁰ Ex. 15, List of PT Board Members. Each of the Board members, excepting only the public member, is in the active practice of physical therapy.

Five Board members were deposited—Ervin, Junkins, Pope, Swygert, and Witherspoon. Each of them practices or has practiced in a group that provides “coverage” through referring patients to employed PTs or PTAs within their respective group practices. See Ex. 16, Tr. pp. 18–19; Ex. 17, Tr. p. 27; Ex. 18, Tr. pp. 21–23¹¹; Ex. 19, Tr. pp. 28–29; and Ex. 20, Tr. pp. 43–45. Each of the five deposited Board members are owners of, or are, or have been employed by PT groups that participate in Title XVIII of the Social Security Act (Medicare) and they provide physical therapy services to Medicare patients. See Ex. 16, Tr. pp. 29-30; Ex. 17, Tr. p. 5; Ex. 18, Tr. pp. 21-23, 25; Ex. 19, Tr. p. 10; and Ex. 20, Tr. p. 17. Four of them practice or have practiced in groups that participate in the provision of physical therapy services to patients covered by

² Appointed 11/01/2000 and term expired 11/19/2003. LLR Website <http://sc.gov/pages/external.aspx?http://www.llr.state.sc.us/>

³ Appointed 03/20/2006 term expired 11/19/2006. *Id.*

⁴ Appointed 05/18/2000 term expired 11/19/2003, *Id.*

⁵ Appointed 04/21/2004 term expired 11/19/2007, *Id.*

⁶ Appointed 11/19/2010 term expires 11/19/2014, *Id.*

⁷ Appointed 05/04/2004 term expired 11/19/2007, *Id.*

⁸ Appointed 09/05/2012 term expired 11/18/2014, *Id.*

⁹ Appointed 03/08/1996 term expired 11/19/2003, *Id.*

¹⁰ LLR Web site checked as of December 4, 2013.

¹¹ Mr. Ervin was employed by Atlantic Physical Therapy, a PT owned group, until January, 2013. Atlantic Physical Therapy was purchased by the Georgetown Hospital System and is now operated as Next Step Rehab. Ervin also works in an inpatient rehabilitation facility and in a nursing home. Ex. 18, Tr. pp. 5–6.

TriCare. See Ex. 16, Tr. p. 28; Ex. 17, Tr. p. 5; Ex. 18, Tr. pp. 21–23; and Ex. 19, Tr. p. 10.

Junkins, Ervin, and Pope practice with PT groups that participate in Title XIX of the Social Security Act (Medicaid). Ex. 20, Tr. p. 17, Ex. 18, Tr. p. 5, and Ex. 16, Tr. p. 11. The five Board members, Mr. Stoker, and Mr. McKowen each practice with groups that participate in numerous other third party payors such as Blue Cross and Blue Shield, Aetna, Companion, United Health Care, etc.

Pope, Swygert, Witherspoon, Stoker, and McKowen are each owners of the physical therapy groups in which they practice. See Ex. 16, Tr. p. 11; Ex. 17, Tr. p. 15; Ex. 19, Tr. p. 7; Ex. 21, Tr. pp. 26-27; and Ex. 22, Tr. p. 4.

Defendant Intervenor SCAPTA is the South Carolina Chapter of the American Physical Therapy Association (APTA). APTA is the national professional organization that represents PTs and PTAs, and SCAPTA is APTA's affiliated South Carolina chapter. Ex. 23, ¶ 2. APTA and SCAPTA represent and promote the profession of physical therapy. *Id.*, ¶ 2. SCAPTA is the only professional organization in South Carolina that represents both PTs and PTA. *Id.* Board members Ervin, Swygert, Junkins, and Pope are all members of SCAPTA. See Ex. 17, Tr. pp. 8-9; Ex. 18, Tr. pp. 28-29; Ex. 16, Tr. p. 7, and Ex. 20, Tr. pp. 21–22, 32. At least, Ervin, Swygert, and Junkins each have served in leadership positions of SCAPTA. See Ex. 17, Tr. pp. 8–9; Ex. 18, Tr. p. 38, and Ex. 20, Tr. pp. 21–22, 32.

Joseph Mark McKowen, PT is an individual intervenor and is the owner of Physical Therapy, Inc. Mr. McKowen's PT group participates in both the Medicare and Medicaid Programs. Ex. 22, Tr. p. 10. Mr. McKowen directs patients to other licensed professionals in his practice under the concept of coverage. *Id.* Tr. pp. 23–27.

Sabrina Queen Bridges is an individual intervenor and a PTA who practices at The Care Center, Inc., in Greenville, South Carolina and the PTs that direct and supervise her work also are employed by The Care Center, Inc. Ex. 24. Amalia W. Kirby, is an individual intervenor and a PTA who is working as needed with multiple companies in South Carolina and always works under the direction and supervision of a PT. Ex. 25. Ms. Bridges is a current Board/Executive Committee officer of SCAPTA. Ms. Kirby is on the current SCAPTA programs committee. Ex. 38.

Mr. Carpenter, who requested the opinion resulting in the 2011 Position Statement, is a physical therapist licensed in South Carolina and is the owner of HealthQuest Physical Therapy. Ex. 26, Tr. pp. 8–9. HealthQuest participates in Medicare and TriCare, and provides physical therapy to patients covered by those government sponsored payor programs. Ex. 26, Tr. pp. 12, 15, 17–18, and 20. HealthQuest does not participate in the Medicaid program because it was not cost effective for them to do so. *Id.*, Tr. p, 20.

In February 2011, the SCAPTA and APTA became aware that a request had been made to the Attorney General for an opinion (Opinion Request) as to whether a PT constituted a “person” for purposes of the employment/referral prohibition in § 40-45-110(A)(1). Ex. 21, Tr. pp. 58-59. Mr. Jim Stoker is a licensed physical therapist in South Carolina and was the President of the SCAPTA in 2011. Ex. 21, Tr. p. 51. Mr. Stoker is an owner of Clemson Rehabilitation and Sports Medicine (CRSM), an outpatient rehabilitation provider that provides both physical therapy and occupational therapy services. CRSM has provider agreements with Medicare, Medicaid and TriCare. Ex. 21, Tr. p. 35.

On February 9, 2011, Mr. Stoker had a conversation with John (Jack) Bennett, Esquire,

national counsel for APTA, about the Opinion Request and the various options available to SCAPTA to deal with the request to the Attorney General. Ex. 21, Tr. p. 61. Mr. Stoker contemporaneously summarized his conversation with Mr. Bennett, which summary accurately reflects the conversation. Ex. 27. The Stoker Summary provides, in pertinent part:

The word referral is mentioned a few times in the practice act and the forwarding of a patient from one PT to another within the same practice may be interpreted as a referral. The work "person" is defined in the initial section of the practice act and essentially means flesh and blood and therefore would not be construed as a corporation. Therefore, there may be a through process that could interpret "person" as another PT.

The discussion centered around the possibility that referral could be considered only inter-professional and not intra-professional, thereby applying to MD to PT and not PT to PT.

Ex. 27 (emphasis added). Mr. Stoker and Mr. Bennett discussed four (4) options for gaining an opinion/interpretation concerning whether "person" applied to a PT: 1) ask the Attorney General; 2) the Board could issue a Position Statement; 3) initiate a complaint that the Board would investigate and decide; and 4) the Board could issue a regulation. *Id.*

On the morning of May 2, 2011, Mr. Stoker, on behalf of the SCAPTA, submitted a letter regarding "Application of S.C. Code Ann. § 40-45-110(A)(1) to Intra-Professional Interactions" to Marilyn Swygert, Chairman of the Board, requesting that the Board issue a position statement regarding whether § 40-45-110(A)(1) prohibits a PT or PT group from employing another PT and referring a patient to the PT for physical therapy services. Ex. 27, pp. 14-15, 17-19. Later that morning, Mr. Stoker withdrew the SCAPTA's request for a position statement. Ex. 27, pp. 16, 19. On the night of May 2, 2011, Mr. Stoker sent an e-mail with an attached letter for Mr. Carpenter to use in sending a request to the Board for an opinion regarding whether § 40-45-110(A)(1) prohibits a PT or PT group from employing another PT

and referring a patient to the PT for physical therapy services. Ex. 28.

On May 3, 2011, Robert Carpenter, PT, ATC, CSCS, submitted a series of letters¹² to Ms. Swygert requesting a position statement regarding "Application of S.C. Code Ann. § 40-45-110(A)(1) to Intra-Professional Interactions." Ex. 17, Tr. pp. 38-44. Mr. Carpenter submitted his first letter at 4: 58 AM to "Marilyn" (Swygert PT Board Chair) and "Veronica" (Reynolds-Board Administrator) "on behalf of SCAPTA" with an attachment "SCBPTE Request-1.doc". Ex. 29. At 5:02 AM and 5:06 AM, Carpenter notified Bennett and Stoker respectively that he had sent the letter to Marilyn and Vernoica (sic). Ex. 30. At 8:06 AM, Stoker sent an e-mail to Carpenter with a second request letter to the Board labeled "SCBPTE Request-2.doc", Carpenter sought clarification as to the "Stoker-ism" and at 9:13 AM Stoker emailed back to Carpenter telling him to "[u]se the one I sent you just after 8 this morning. its' good to go." Ex. 27, pp. 3-5. At 1:15 PM, Swygert e-mailed to Stoker forwarding Carpenter's 4:58 AM requesting an opinion on behalf of the SCAPTA and asking if Stoker knew Carpenter had e-mailed the request (on behalf of the SCAPTA) and then withdrawn it, to which Stoker answered "yes". Ex. 27, pp. 10-11.

On June 2, 2011, Ms. Swygert sent a letter titled "Application of S.C. Code Ann. Sec. 40-45-110(A)(1) to Intra-Professional Interactions" (Swygert Letter) answering Mr. Carpenter's Opinion Request. Ex. 4; Ex. 17, Tr. pp. 39-40; and Ex. 31. The Swygert Letter did not focus on whether a PT was a person within the meaning of the PT Act, as the Court had in *Sloan*. Rather the Swygert Letter focused on the meaning of "referral" within the Act. *Id.* E. Dargan Ervin, Jr.

¹² As only a cursory review demonstrates, Mr. Carpenter's letters submitted on May 3, 2011 are almost identical to the letter submitted and then withdrawn by Mr. Stoker on May 2, 2011. In fact, the initial letter Carpenter submitted to Swygert is identical except as to the date and name of the submitter.

was the only Board member to whom Swygert sent the Swygert Letter prior to sending it to Carpenter. Ex. 17, Tr. p. 45; Ex. 18, Ervin Depo Tr., pp. 10–11; Ex. 32, p. 2. The Swygert Letter provided, *inter alia*, that

The purpose of Sec. 40-45-110(A)(1) is to “protect consumers as well as government-sponsored health care programs such as Medicare and Medicaid from actual and potential conflicts of interest which are likely to lead to overuse of medical services by physicians who, for their own financial gain rather than their patient’s medical needs, refer patients to entities in which the physicians hold financial interest. (sic)

Ex. 4.

Mr. Ervin called outside counsel, Monteith P. Todd, Esquire to assist with Swygert’s response to the Carpenter Letter. Ex. 17, Tr. pp. 32–33; Ex. 18, Tr. p. 30. Mr. Todd was paid from the South Carolina Board of Physical Therapy Legal Defense Fund¹³ for his assistance with the June Position Statement. *Id.*; See also, Ex. 34, letter dated May 24, 2013 from Monteith P. Todd to M. Elizabeth Crum.

On July 14, 2011, the PT Board met in public session and the Swygert Letter was presented to the Board under the heading “Intra-Professional Relations”. Ex. 5. The Board voted to adopt the Swygert Letter and to turn it into “frequently asked questions” to be posted on the Board’s LLR website. Ex. 17, Tr. p. 50. The topic “Intra-Professional Relations” was again on the Board’s agenda for its August 17, 2011 meeting. Ex. 6. At the August 17, 2011 Board meeting, the Board adopted the 2011 Position Statement that is the subject of this action. *Id.*

¹³ In 2004, the Department of Labor, Licensing and Regulation (LLR) refused to approve Board or LLR funds to be used to hire outside counsel. Ex. 35. This fund is a 501(c)(6) fund set up by the Board in order to raise money for to hire outside counsel. *Id.* We ask the this Court to take judicial notice of 26 USC § 501(C)(6) and the fact that a 502(C)(6) must be established for the purpose of “[B]usiness leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues”.

DISCUSSION

1. THE PT BOARD'S 2011 POSITION STATEMENT IS CONTRARY TO THE PLAIN MEANING OF S.C. CODE ANN. § 40-25-110(A)(1), EXCEEDS THE PT BOARD'S STATUTORY AUTHORITY, AND CONSTITUTES AN *ULTRA VIRES* ACT.

The Act regulates the practice and conduct of PTs and PTAs. S.C. Code Ann. § 40-45-5 (2011). In construing a statute, it is black letter law that the cardinal rule of statutory construction is to determine the legislative intent behind the statute:

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Burns v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). If a statute's language is plain, unambiguous, and conveys a clear meaning, then "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992)."

Catawba Indian Tribe of South Carolina v. State of South Carolina, 372 S.C. 519, 525-26, 642 S.E.2d 751, 754 (2007); see also *Sloan*, 370 S.C. 468, 636 S.E.2d 606. In *Sloan* the Court stated:

A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. The real purpose and intent of the lawmakers will prevail over the literal import of particular words. *Browning v. Hartvigsen*, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992); *Caughman v. Columbia Y.M.C.A.*, 212 S.C. 337, 341, 47 S.E.2d 788, 789 (1948). Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. *Bryant v. City of Charleston*, 295 S.C. 408, 368 S.E.2d 899 (1988); *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991).

Id. 370 S.C. 468-69, 636 S.E. 2nd 606-07. In *Sloan*, the Supreme Court looked and the plain and ordinary meaning of the words in the PT Act and established the legislative purpose behind the passage of § 40-45-110(A)(1), which is

to protect consumers as well as government-sponsored health care programs such as Medicare and Medicaid from actual and potential conflicts of interest

which are likely to lead to overuse of medical services by physicians who, for their own financial gain rather than their patients' medical needs, refer patients to entities in which the physicians hold a financial interest.

Id., 370 S.C. 469, 636 S.E.2d 607. While the *Sloan* case determined that physicians were persons for conflict of financial interest potential overuse/abuse, the legislative purpose of protecting the public consumers and government-sponsored health care programs applies equally to any licensed health care provider that has the potential of referring patients for medical services to entities in which the health care provider has a financial interest.

An *ultra vires* act by a governmental body is one for which the governmental body has neither the duty nor the authority to undertake. See *Patterson v. Goldsmith*, 288 S.C. 551, 554, 343 S.E.2d 661, 663 (Ct. App. 1986) ("Because the County had neither a duty nor authority to notify a delinquent taxpayer of the approaching end of the redemption period, the Tax Collector's notification to Goldsmith and the Jacksons that they had 30 days from May 31, 1983, within which to redeem the property was clearly an *ultra vires* act.") South Carolina courts have held governmental actions to be ultra vires and void when they are contrary to a statute or when they exceed the authority granted to the body, either by statute or otherwise. In *Sloan v. Department of Transportation*, 379 S.C. 160, 174, 666 S.E.2d 236, 243 (2008), for example, the S.C. Supreme Court found the DOT's emergency procurement for construction services was invalid because no emergency existed. Therefore, the statute authorizing emergency procurements was inapplicable, and the use of an emergency procurement method was contrary to the statutes governing state procurements. Also, in *City of Charleston v. Oliver*, 16 S.C. 47, 57-58 (1881), the S.C. Supreme Court considered the propriety of an ordinance that required certain workers to be licensed. The Court looked first to the act upon which the

ordinance was predicated and found that act to be unconstitutional. Without a legal authorization to require such licensing, the ordinance was found to be ultra vires and void. In *Barringer v. City Council of Florence*, 41 S.C. 501, 19 S.E. 745, 747 (1894), the S.C. Supreme Court held that the Florence city council charter did not afford the council the power to grant licenses for the sale of liquor. Noting that “a municipal corporation has no powers except such as are conferred by its charter,” the Court held that any attempt to grant a liquor license would be “ultra vires and void.” *Id.*

A. PT is a person within the meaning of Section 40-45-110(A)(1).

Section 40-45-110(A)(1) provides, in pertinent part:

(A) In addition to other grounds provided for in Section 40-1-110, the board, after notice and hearing, may restrict or refuse to grant a license to an applicant and may 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; (Emphasis added)

Section 40-45-110(A) established the Board’s authority to regulate PTs conduct through refusal to issue restrictions on “licensed persons” regulated by the Act. The only “licensed persons” regulated by the Act are PTs and PTA. See also S.C. Code Ann. § 40-45-310 (Supp. 2011). The word “person” is specifically defined in the Act and “means an individual.” See § 40-45-20(3) (Supp. 2011)

A “physical therapist” is defined as “a person who has met all the conditions of this chapter and is licensed in this State to practice physical therapy.” S.C. Code Ann. § 40-45-20(4)

(2011) (emphasis added). "Physical therapy assistant" "means a person who is licensed by the board 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." S.C. Code Ann. § 40-45-20(5) (2011) (emphasis added). Section 40-45-110(D) states: "a person who accepts the privilege of practicing physical therapy" (emphasis added). Also, S.C. Code Ann. § 40-45-320 provides, in pertinent part: "Nothing in this chapter may be construed as authorizing a licensed physical therapist or any other person" (emphasis added). The statutory use of the phrase "or other person" certainly indicates the legislative intent that "person", as used in the PT Act, refers to PTs as well as other individuals. Clearly, a physical therapist and a physical therapy assistant are each individuals and each is "person" within the clear and unambiguous meaning of the language of S.C. Code Ann. § 40-45-110(A).

The statutory language is clear and unambiguous that the phrase "person who referred a patient, or with a relative or business associate of the referring person" means an "individual" who referred a patient. An individual, be it a physician, a dentist, a PT or any other licensed health care provider, refers patients. Following the clear and unambiguous definition of the word "person", a physical therapist is an individual and therefore constitute a "person who referred a patient" to Licensed Persons within the meaning of § 40-45-110(A)(1). See also Ex. 27, p. 81.

Further, there is nothing in the PT Act that that supports a conclusion that the Legislature intended the word "person" or the phrase "person so referr[ing] a patient" to be limited only to physicians. The plain and ordinary language of the PT Act is quite to the contrary. The PT Act uses the word physician or doctor in multiple sections. First, § 40-45-

110(A)(1) uses the general term “person” in prohibiting referral for profit. However, in § 40-45-110(A)(2) and (4), the legislature expressly uses the specific words “licensed medical doctor or dentist”. Again in § 40-45-110(D), the statute uses the specific word “physician”. Section 40-45-310 identifies specific licensed health care professionals and does not use the general word “person.” Section 40-45-310 provides:

Nothing in this chapter shall be construed to restrict, inhibit, or limit the practice of chiropractic as now practiced in this State and as taught by accredited schools or colleges of chiropractic. Nothing in this chapter shall be construed to restrict, inhibit, or limit the practice of licensed nurse practitioners, licensed physicians assistants, certified athletic trainers, licensed massage therapists, exercise physiologists, or personal trainers. Moreover, nothing in this chapter shall be construed to restrict, inhibit, or limit in any way the practice of dentistry pursuant to Chapter 15 of Title 40 or the practice of medicine pursuant to Chapter 47 of Title 40.

Finally, § 40-45-320 uses the specific words “doctor of medicine” and “from a person licensed to practice dentistry.”

Certainly, when the Legislature meant to restrict the “person” performing the function to a physician (or doctor of medicine), it said so. If the Legislature had meant only to restrict the PT referral for profits to PTs employed by physicians, it could have and would have used the word physician or doctor of medicine. Instead, it used the word “person”, thus prohibiting the referral for profit from any individual.

Additionally, the legislative history from the 1998 amendment to the PT Act is instructive. Board member Ervin was president of the Board in 1997 when the amendments to the PT Act were first introduced. On behalf of the Board, Ervin sent a bullet point explanation of the proposed amendments to all of the members of the General Assembly. Ex. 27, pp. 112-115 and 119. See also Ex. 35, ¶¶ 11-12. One of the “significant” changes in the proposed

legislation was the “Establishment of Board authority to deal with physical therapists practicing in referral for profit environments.” Ex. 27, p. 112. The bullet describing the changes to § 40-45-110 adds grounds for the Board to take “disciplinary action against physical therapists or physical therapy assistant who participate in a referral for profit practice.” *Id.*, p. 113. Nowhere in the bullet points is there mention of a physician or a doctor of medicine¹⁴ with regard to referral for profit. See Ex. 27, pp. 112-115.

In *Sloan*, the Supreme Court majority opined that “Section 40-45-110(A)(1) prohibits a physical therapist from receiving referrals from or dividing fees with a physician employer.” Clearly the word “person”, as used in § 40-45-110(A)(1), is equally applicable to PTs and PTs are statutorily prohibited from working as an employee of a physical therapist or PT group who refers patients to the physical therapist for services.

B. Directing a patient within a PT Group constitutes a “referral”.

The 2011 Position Statement addresses referrals by and between PTs and PT group practices in an outpatient setting (“whether or not a physical therapist or physical therapy assistant working in the same practice as another physical therapist can provide services to a patient during the 30 day window in which physical therapists can provide services without a referral from a medical doctor or whether or not other physical therapists or physical therapist assistants in the group can provide physical therapy services upon referral by a medical doctor.”) Ex. 1. The 2011 Position Statement creates the legal fiction of “inter-professional” versus “intra-professional” direction of a patient within the same group. Ex. 1. The Board 2011 Position Statement holds that the inter-professional direction of a patient within a group from

¹⁴ The bullet for § 40-45-20 does reference that fact that the bill would delete the requirement for treatment of a patient by prescription of a physician or dentist.

one type of licensed provider to another type provider (e.g. physician to PT) is a referral and that the intra-professional direction of a patient within a group between the same type licensed provider (e.g. physician to physician or PT to PT) is coverage.¹⁵ There is absolutely no language in § 40-45-110 or the rest of the PT Act that supports the Board's position regarding the definition of referral turning on whether the patient is directed inter-professionally (request from a physician to a PT) or intra-professionally (request from a PT to another PT) within the same group.

The purpose of the PT Act is to regulate the practice and conduct of PTs not that of other licensed health care providers.¹⁶ S.C. Code Ann. § 40-45-5. The Board licenses PTs and PTAs and the Board's purpose "is to protect the public through regulation of professionals who identify, assess, and provide treatment for individuals with physical disabilities through the administration and enforcement of this chapter and any regulations promulgated under the chapter." S.C. Code Ann. § 40-45-10. Section 40-45-10 sets forth conduct for which the Board can refuse to grant a license to an applicant, restrict or revoke the license of a licensed or refuse to renew the license of a licensed. Clearly, the only "licensed person" regulated by the PT Act is a PT or a PTA. To contend that because a PT directs a patient to another PT within the practice owned by the directing PT is not a referral defeats the purpose of the act in protecting

¹⁵ The 2011 Position Statement provides, in pertinent part:

"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 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. Moreover, because each of the physical therapists or physical therapist assistants are providing the same medical treatment, a physical therapist who is unable to see a patient is not directing a patient for treatment or aid that that particular physical therapist was unable to provide and thus, would not be sending a patient to a specialist, as is the typical definition of a referral." Ex. 1

¹⁶ As discussed above, the PT Act makes clear that it does not affect the scope of practice of other licensed South Carolina health care providers.

the public. Section 40-45-110(A)1) equally prohibits a PT from receiving referrals from or dividing fees with another PT.

In *Sloan*, the Court defined refer as:

The term “refer” as used in the statute should be interpreted according to its plain meaning, which in this instance is “to send or direct for treatment, aid, information, [or] decision, [e.g.,] a patient to a specialist.” *Webster’s Third New International Dictionary* 1907 (1981).

Sloan, 370 S.C. 470, 636 S.E.2d 607-08. The 2011 Position Statement states that a PT referring a patient within the group “would not be sending a patient to a specialist, as is the typical definition of a referral.” Ex. 1. “E.g.” used in the *Webster’s* definition means “for example”. Black’s Law Dictionary Eighth Ed., p. 555 (2004). The phrase “a patient to a specialist” is simply an illustrative example of a referral. The operative definition is “to send or direct for treatment, aid, information, [or] decision”. When a PT in a group directs a patient to another PT within the group, the PT is sending the patient to the PT for “treatment, aid, information, [or] decision.”

The *Sloan* court also addressed the definition of “referral” in the South Carolina Physician Self Referral Act and stated: “Second, and more importantly, the provision of the Provider Self-Referral Act cited by Appellants actually defines the term “referral”¹⁷ according to its plain and ordinary meaning and, in fact, does not draw a distinction between “outside” and “in-house” referrals as Appellants contend.” Just as the Provider Self-Referral Act does not draw a distinction between “outside” and “in-house” referrals, the PT Act does not draw a distinction between inter-professional (outside) and intra-professional (in-house) referrals.

¹⁷ The definition of “referral” in the Self Referral Act provides: “the forwarding of a patient by a health care provider to another health care provider or to an entity outside the health care professional’s office or group practice which provides or supplies designated health services or any other health care item or service; ...” § 44-113-20(12)(a). While the PT Act does not actually define “referral”, the definition in the Self Referral Act is instructive.

As *Sloan* found, one of the purposes of § 40-45-110(A)(1) is to protect consumers and government-sponsored health care programs (Medicare, Medicaid, TriCare, etc) “from actual and potential conflicts of interest which are likely to lead to overuse of medical services by physicians who, for their own financial gain rather than their patients' medical needs, refer patients to entities in which the physicians hold a financial interest.” The 2011 Position Statement, while not citing to *Sloan*, quotes this exact language. See Ex. 1. Certainly, the legislature equally intended to protect the health care consuming public and government-sponsored health care programs from physical therapists “who for their own financial gain rather than their patients' medical needs, refer patients to entities in which the physicians hold a financial interest.” *Sloan*, 370 S.C. 469, 636 S.E. 2nd 607.

Each of the physical therapists, including Board members, deposed in this case are Medicare providers and some of them are Medicaid providers, *i.e.* they see and treat patients covered by Medicare and/or Medicaid and accept reimbursement from the government-sponsored program for the treatment. See discussion *supra*, pp. 10–11. Each provides outpatient therapy services, *i.e.* not in a health care facility¹⁸.

On February 2, 2011, CMS and the Office of Inspector General (OIG) proposed regulations to implement Sec. 1866(j)(2)(3) of the ACA, which requires CMS “to determine the level of screening applicable to providers and suppliers according to the risk of fraud, waste, and abuse the Secretary determines is posed by the particular provider and supplier categories” Fed. Reg., Vol. 76, No. 22, Feb. 2, 2011, p. 5867. Physicians and physician groups are in the limited risk category for fraud, waste, and abuse. *Id.*, 5868. However, CMS placed physical

¹⁸ Ervin provides both outpatient and inpatient therapy.

therapists and physical therapy groups into the moderate risk category for fraud, waste, and abuse, which categorization was supported in part by the OIG report entitled “Questionable Billing for Medicare Outpatient Therapy Services” (December 2010) (<http://oig.hhs.gov/oei/reports/oei-04-09-0054-.pdf>). *Id.*, p. 5874, 5886, and 5894. For screen purposes, CMS has listed physical therapists and PT groups as moderate risk for fraud, waste, and abuse. *Id.*, p. 5895.

On December 3, 2012, the South Carolina Department of Health and Human Services (SCDHHS) issued a Medicaid Bulletin addressing the provider enrollment process based upon regulations published by CMS. Ex. 36. The new CMS and SCDHHS policies were based upon requirements of the Affordable Care Act (ACA) to implement stronger Medicaid Provider Enrollment and Screening. *Id.* SCDHHS amended the South Carolina Provider Enrollment Manual to require the conduct of “pre-enrollment and post-enrollment site visits of providers designated as ‘moderate’ or ‘high’ categorical risks to the Medicaid program.” *Id.*, p. 2. Physical therapists are categorized as moderate risk providers. *Id.*

The Board’s 2011 Position Statement asserting that internal referrals within PT group practices are not referrals vitiates the purpose of § 40-45-110(A)(1). The plain and clear language of Section 40-45-110(A)(1) prohibits a PT from working as an employee of a PT or a PT group when the employing PT refers patients to the PT for services.

C. The Position Statement Misapprehends or Misapplies “Coverage”.

The concept of “coverage” by licensed health care professionals is well established. “‘Coverage’ in the medical profession means having another physician take calls and see patients for a physician who is for some reason unavailable.” *Busby v. St. Paul Fire & Marine*

Insurance Company, 290 So.2d 701, 705 (1974). The South Carolina Supreme Court has also addressed “coverage”. “Where a physician for one reason or another is temporarily unable to attend the patient personally, the physician, without being viewed as having either abandoned or neglected his patient, may make provision for a competent physician to attend the patient. See *Browning v. Hoffman*, 90 W.Va. 568, 111 S.E. 492 (1922).” *Johnson v. Ward*, 288 S.C. 603, 610-11, 344 S.E.2d 166 (1986).

When asked what “coverage” in the 2011 Position Statement meant, each of the Board members defined coverage as a PT taking care of another PT’s patient when the PT was not available. This is the same definition that the courts have used for coverage for physicians. Intervenor SCAPTA named an expert witness who testified that the concept of “coverage” is the same for physicians and PT. Ex. 37, Tr. pp. 82-83. The Position Statement provides that “[h]aving other physical therapists or physical therapist assistants in the same group covering for each other should not constitute a referral and should not violate § 40-45-110(A)(1).”

Assuming *arguendo* that the 2011 Position Statement correctly determined that direction of patients within a PT group practice constitutes coverage and not a referral when the PT receiving the patient initially is unavailable for whatever reason,¹⁹ the language in S.C. Code Ann. § 40-45-110(A)(1) must apply equally to physicians and physician groups that employ PTs and PTs should be able to be paid to see and treat patients referred by their employing physicians or physician groups. As discussed above, the Medical Practice Act clearly indicates that the diagnosis of physical illness requiring physical therapy services and the provision of the

¹⁹ Reasons given by the PT deponents during discover range from convenience of the patient to be seen at another location to scheduling conflicts. See *e.g.*: Ex. 22, Tr. pp. 8-9; 21; Ex. 23, Tr. pp. 39-42; Ex. 19, Tr. pp. 14-15; and Ex. 17, Tr. pp. 26-27;

physical therapy services are within the scope of a licensed medical doctor's practice. Both Dr. Joseph and Dr. McCarthy testified that they provide physical therapy services on a limited basis to their patients. Ex. 11, Tr. p. 11; Ex. 13, Tr. pp. 12-13; and Ex. 14, ¶, 3. SCAPTA's expert, Mr. Stearns testified that the provision of physical therapy services is within the scope of practice of physicians licensed in South Carolina (Ex. 37, Tr. pp. 67-68) and that physicians can bill for their provision of physical therapy services under Medicare (*id.* Tr. p. 88). Finally, Chairman Swygert testified that the provision of physical therapy services is within the scope of practice of a South Carolina licensed physician. Ex. 17, Tr. p. 8..

Under the 2011 Position Statement, a physician or physician group can employ a PT and refer the patient for PT services under the concept of coverage, provided the direction is limited to PT services. As the South Carolina Supreme Court stated: "Where a physician for one reason or another is temporarily unable to attend the patient personally, the physician, without being viewed as having either abandoned or neglected his patient, may make provision for a competent physician to attend the patient." In this case, where a physician is temporarily unable to attend the patient and provide physical therapy services personally, the physician may make provisions to have a competent PT employed by the physician or group provide the physical therapy services to the patient. Coverage is coverage for the provision of physical therapy services.

D. The 2011 Position Statement was adopted in violation of the Administrative Procedures Act.

The 2011 Position Statement is intended to protect PTs and PT Groups from exposure to disciplinary action under § 40-45-110(A)(1), is intended to have the force of law and constitutes a binding norm.

“Regulation” means each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency. Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law. The term “regulation” includes general licensing criteria and conditions and the amendment or repeal of a prior regulation, but does not include descriptions of agency procedures applicable only to agency personnel; opinions of the Attorney General; ... advisory opinions of agencies; and other agency actions relating only to specified individuals.

S.C. Code Ann. § 1-23-10(4) (2005). Generally, the APA requires an agency to give public notice of a drafting period where public comments can be accepted; conduct a public hearing on the proposed regulation; possibly prepare reports about the regulation's impact on the economy, environment, and public health; and submit the regulation to the Legislature for review, modification, and approval or rejection. See S.C. Code Ann. §§ 1-23-110 to -160 (2005).

While the Board is expressly authorized to promulgate regulations to establish disciplinary procedures (S.C. Code Ann. § 40-45-60 (2011)), it is undisputed that the Board did not follow the APA regulatory scheme in issuing its 2011 Position Statement. The 2011 Position Statement was adopted at the August 17, 2011 Board meeting. The agenda simply identified the statement as “discussion of Intra-Professional Interactions.” Even Board Chair Swygert candidly admitted that when she first saw the phrase Inter-professional relations vs. Intra-professional relations, she did not understand it and had to “seek help” to understand it. Ex. 17, Tr. pp. 39-40; 47-48. When asked how the public could understand what the “notice” on the agenda meant, she testified she did not know. *Id.*, p. 47.

The test of whether an agency constitutes a binding norm is

the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case, or on the other hand, whether the policy so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion. As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency action in question has not established a binding norm.

Ryder Truck Lines, Inc. v. United States, 716 F.2d 1369, 1377 (11th Cir.1983) (internal citations omitted). If the agency action is a binding norm, it must be promulgated as a regulation under the APA. See *Home Health Serv., Inc.*, 312 S.C. at 329, 440 S.E.2d at 378. Further, “[w]hen there is a close question whether a pronouncement is a policy statement or a regulation, the [agency] should promulgate the ruling as a regulation in compliance with the APA.” *Id.*

Here, the Board intended PTs and PT groups to be able to rely on the 2011 Position Statement. The 2011 Position Statement arose from the Carpenter May 3, 2011 regarding “Application of S.C. Code Ann. § 40-45-119(A)(1) to Intra-Professional Interactions” and his request for the Board to “issue a position statement advising how it interprets the statute [§ 40-45-110(A)(1)]” Ex. 29, p. 1. The 2011 Position Statement” interpreted § 40-45-110(A)(1) to allow “physical therapists or physical therapist assistants in the same group covering for each other” and determined that such “should not constitute a referral and should not violate § 40-45-110(A)(1).” Ex. 1, p. 1.

Section 40-45-110(A)(1) is permissive (repeatedly using the word “may”) regarding disciplinary actions against PTs. The 2011 Position Statement leaves no discretion regarding whether a PT employed by another PT or PT group who is directed patients for physical therapy and is paid wages for the same is in violation of the referral for profit prohibition in § 40-45-110(A)(1). Based on the 2011 Position Statement the Board is not free to exercise its discretion

to follow or not to follow that general policy in an individual case. The Board's adoption of the 2011 Position Statement violates the requirements of the APA and should be struck.

E. The 2011 Position Statement Violates the Equal Protection Clause.

The 2011 Position Statement's interpretation of § 44-45-110(A)(1) to allow PTs to be employed by other PTs or PT Groups and treat patients referred by those PTs or members of the group and not to allow PTs to be employed by physicians or physician groups and treat patients referred by these physicians or members of the group violates Plaintiff PT Joseph's rights to equal protection under the South Carolina Constitution, art. I, sec. 3 and the United States Constitution, amend. XIV, sec. 1. PT Joseph will be providing the same range of physical therapy services for the PT and PT group patients that she would be providing for the physician or physician group patients referred for the same ailments or treatment. Allowing PT Joseph to be employed by a PT or PT group and provide physical services to patients but prohibiting her from being employed by a physician or physician group and provide the same physical therapy services denies PT Joseph her equal protection rights to be employed by a physician or a physician group.

Plaintiffs Dr. Joseph and Dr. McCarthy will be referring patients to PTs to provide the same range of physical therapy services that PTs or PT groups will be referring similar situated patients to PTs to provide. The 2011 Position Statement's interpretation of Section 44-45-110(a) to allow PTs to be employed by PTs or PT groups and treat patients referred by the employing PTs because the referral is intra-professional and to not allow Plaintiffs Dr. Joseph and Dr. McCarthy to employ PT and have the PTs treat their referred patients because the referral is inter-professional violates their rights to equal protection under the South Carolina

Constitution, art. I, sec. 3 and the United States Constitution, amend. XIV, sec. 1 to employ PTs.

Further, using the concept of coverage based on an intra-professional interaction to exempt PTs from the prohibition of referral for profit and not apply the concept of coverage to inter-professional interactions denies Plaintiffs their rights to equal protection under the law.

South Carolina Constitution, Article I, § 3, states that “nor shall any person be denied the equal protection of the laws.” Simply put, “no person, or class of persons, shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.” *City of Beaufort v. Holcombe*, 369 S.C. 643, 648, 632 S.E.2d 894, 897 (2006). If a statutory provision does not involve a suspect classification (race, religion, alienage, etc.) or a fundamental right, the question under an equal protection analysis is whether the legislation is rationally related to a legitimate state purpose. *Hendrix v Taylor*, 353 S.C. 542, 549, 579, S.E.2d, 320, 323 (2002) (citing *Curtis v. State*, 345 S.C. 557, 574, 549 S.E.2d 591, 600 (2001)). This disparate treatment for PTs employed by a PT or PT group vis a vis PTs being employed on the basis of intra-professional versus inter-professional interactions does not pass muster under the Equal Protection Clause.

The requirements of equal protection are satisfied under a rational basis test if (1) the classification bears a reasonable relation to the legislative purpose sought to be effected; (2) the members of the class are treated alike under similar circumstances and conditions; and (3) the classification rests on some reasonable basis. *Carll v. South Carolina Jobs-Econ. Dev. Auth.*, 284 S.C. 438, 445, 327 S.E.2d 331, 336 (1984)(emphasis added). The 2011 Position Statement must meet each of the three prongs of the rational basis test.

Allowing PTs to be employed by PTs or PT groups and treat patients and exempt the

PTs, based on intra-professional interaction classification, from the referral for profit prohibition of § 40-45-110(A)(1) bears no reasonable relationship to the legislative purpose of protecting consumers and "government-sponsored health care programs such as Medicare and Medicaid from actual and potential conflicts of interest which are likely to lead to overuse of medical services by physicians who, for their own financial gain rather than their patients' medical needs, ... " *Sloan*, 370 S.C. 469, 636 S.E. 2nd 607 The 2011 Position Statement interpretation of "refer" flies in the face of the stated legislative purpose. It is equally important to accomplish the legislative purpose of § 40-45-110(A)(1) that PT owners of PT groups or PTs that employ other PTs are prevented from referring for profit so that health care decisions and referrals to PTs are made in the best interest of the patient -- not for the PT's personal financial gain.

Equally, assuming *arguendo*, the 2011 Position Statement interpretation of § 40-45-110(A)(1) is correct, denying the right of Plaintiffs to utilize the concept of coverage, whether the patient is directed either intra-professionally or inter-professionally bears no reasonable relationship to the legislative purpose of § 40-45-110(A)(1) and denies Plaintiffs of their rights to equal protection under the law.

Further, the risk of abuse from outpatient PT group owners is greater than any abuse from physician owned physical therapy services (POPTS). PT owned physical therapy services or groups generally make 100% of their/its income from provision of PT services (Ex. 37, Tr. pp. 23-24), whereas physicians/physician groups do not. This increased risk of abuse is particularly worrisome in light of the fact that CMS has classified PTs and PT groups in the moderate risk category for fraud, waste and abuse for screening for the Medicare and Medicaid programs

(Fed. Reg., Vol. 76, No. 22, Feb. 2, 2011, p. 5867) and physicians and physician groups are classified in the limited risk category (Fed. Reg., Vol. 76, No. 22, Feb. 2, 2011, p. 5868). The 2011 Position Statement fails the first prong of the equal protection rational relationship test in that its classification of “referral” and “referral for profit” applying only to inter-professional interactions (physician employing PT) and “coverage” applying only to intra-professional interactions (PTs employed by other PTs or PT groups) bears no reasonable relationship to the legislative purpose of § 40-45-110(A)(1). In both the inter-professional interactions and intra-professional interactions, there is a licensed health care practitioner employing a PT and referring patients to the PT to provide physical therapy services for wages/reimbursement.

Further, we request that this Court declare that the 2011 Position Statement denies Plaintiffs equal protection by allowing PTs and PT groups to employ PTs and refer patients for physical therapy services to the employed PTs when *Sloan* does not allow physicians or physician groups to employ PTs and refer patients to the PTs for physical therapy services. Chief Justice Toal’s reasoned dissent in *Ed Robinson Laundry and Dry Cleaning, Inc., v. South Carolina Department of Revenue*, provides the framework for the analysis that physicians and physical therapist are members of the same class, health care providers, for purposes of equal protection analysis as follows:

There is no rational basis for treating dry cleaning services differently from other services.... In my view, the sales tax violated the rational basis test and this violated equal protections. Because I believe that dry cleaning services are part of the same class as other service providers, I would hold that the statute treats “similarly situated” entities differently. Further, I would hold that there is no rational basis for singling out dry cleaners—to the exclusion of other services—for sales tax purposes.... Segregating dry cleaning services from all other services does not rationally relate to a legitimate government purpose.

356 S.C. 120, 588 S.E.2d 97 (2003). Similarly, here there is no legitimate government purpose

for segregating PT owned physical therapy services on an intra-professional interaction basis from all other health care services on an inter-professional interaction basis.

F. Substantive Due Process—2011 Position Statement

The 2011 Position Statement's interpretation of Section 44-45-110(a) to allow PTs to be employed by PTs or PT groups and treat patients referred by PTs or PT group members and not to allow PTs to be employed by physicians or physician groups and treat patients referred by physicians or members of the group simply on the basis of intra-professional versus inter-professional is arbitrary and capricious and violates Plaintiff PT Joseph is right to substantive due process under the South Carolina Constitution, art. I, sec. 3 and the United States Constitution, amend, XIV, sec. 1. It is undisputed that PT Joseph will be providing the same range of physical therapy services for a PT or PT group patient as she would be providing for similarly situated patients of a physician or physician group.

"[To] prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law. *Worsley Co. v. Town of Mount Pleasant*, 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000)." *Grimsley v. South Carolina Law Enforcement Div.*, 396 S.C. 276, 283, 721 S.E.2d 423, 417 (2012). It is well established in South Carolina that the practice of medicine or other professions by a properly licensed person is a cognizable property interest. See *Dantzler v. Callison*, 230 S.C. 75, 92, 94 S.E.2d 177, 186 (1956). Ms. Joseph is a properly licensed PT in South Carolina.

As stated by United States Court of Appeals, Fourth Circuit:

The Fourteenth Amendment's directive that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law" prohibits "certain government actions regardless of the fairness of the procedures used to implement them." Thus, the Due Process Clause of the Fourteenth Amendment

“guarantees more than fair process” and “includes a substantive component that provides heightened protection against government interference with certain fundamental rights.”

Martin v. Saint Mary's Dept. Social Services, 346 F.3d 502, C.A.4 (Md. 2003). (internal citations omitted). The South Carolina Court of Appeals has held that a “decision is arbitrary if it is without a rational basis, is based alone on one’s will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards.” *Hatcher v. South Carolina District Council of Assemblies of God, Inc.*, 267 S.C. 107, 226 S.E.2d 253 (1976); *Turbeville v. Morris*, 203 S.C. 287, 26 S.E.2d 821 (1943).” *Deese v. South Carolina State Bd. of Dentistry*, 286 S.C. 182, 185, 332 S.E.2d 539, 541 (1985).

There is no rational basis to allow PT Joseph to be employed by a PT or PT group and be paid to treat referred patients and not to allow PT Joseph to be employed by a physician or physician group and be paid to treat referred patients, nor is there a rational basis to all PTs employed by PT or PT groups to treat patients under the concept of coverage and not have that concept of coverage to apply equally to physician or physician groups. Risk of fraud, waste and abuse, as determined by CMS for provider enrollment purposes is greater for PT and PT groups than it is for physician and physician groups. The 2011 Position Statement interpretation of § 40-45-110(A)(1) is unconstitutional and denies Plaintiff PT Joseph her substantive due process rights to be employed and treat patients referred for physical therapy services by the employer of her choice, whether the referral is intra-professional or inter-professional. Equally, assuming *arguendo*, the 2011 Position Statement interpretation of § 40-45-110(A)(1) is correct, denying the right of Plaintiff PT Joseph to be employed and treat patients on a coverage basis for

physical therapy services whether the coverage is intra-professional or inter-professional denies Plaintiff PT Joseph of her substantive due process right to practice physical therapy for the employer of her choice. This Court should declare that the 2011 Position Statement denies PT Joseph her substantive due process to be employed by the person of her choosing.

CONCLUSION

For the above stated reasons, the Court should grant Plaintiffs' Motion for Summary Judgment and grant the relief sought in Plaintiffs' Amended Declaratory Judgment/Complaint.

<Signature Page to Follow>

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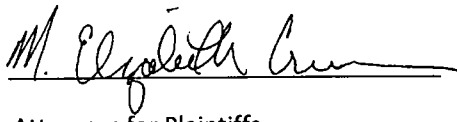
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By: 
Attorneys for Plaintiffs

Columbia, South Carolina

December 13, 2013

STATE OF SOUTH CAROLINA

COUNTY OF YORK

AFFIDAVIT OF WILLIAM G. MCCARTHY, JR., M.D.

Before me, the undersigned Notary Public in and for said County and State, personally appeared William G. McCarthy, Jr., M.D., known to me and being first duly sworn, deposes and says:

1. My name is William G. McCarthy, Jr., M.D., and I am a licensed orthopaedic surgeon in South Carolina and practice in York County. I am a Diplomate, American Board of Orthopaedic Surgeons, and a member of Carolina Orthopaedic Surgery Associates, PA, a South Carolina professional association, whose physicians provide professional medical services in York and Lancaster Counties, South Carolina, in the field of general orthopaedics, and who employ physicians and physician assistants. Previously, we employed physical therapists.

2. I have provider agreements with: 1) CMS to provide Medicare services to Medicare patients; 2) SCDHHS to provide Medicaid services to Medicaid patients; and 3) with numerous other third party payors to provide services to covered patients.

3. As part of my scope of practice, I have provided and do provide physical therapy services to my patients, and I educate them on how to do physical therapy exercises.

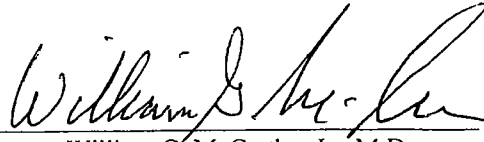
4. I have had difficulty getting physical therapists or physical therapy groups to see and provide services patients whose only source of health care coverage is Medicaid.

FURTHER AFFIANT SAITH NOT.

[signature on following page]

COLUMBIA 1134710v1





William G. McCarthy, Jr., M.D.

SWORN to before me this 5 day
of December, 2013

Mary G. Ellison

(L.S.)

Notary Public for South Carolina

My Commission Expires: 01/25/2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
Kristin Joseph P.T., Thomas N. Joseph,	)	C/A No. 2012-CP-40-2632
M.D., and William G. McCarthy, M.D.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	<u>DEFENDANT-INTERVENORS'</u>
	)	<u>MEMORANDUM IN SUPPORT</u>
South Carolina Department of Labor,	)	<u>OF MOTION FOR</u>
Licensing and Regulation, South Carolina	)	<u>SUMMARY JUDGMENT</u>
Board of Physical Therapy,	)	
	)	
Defendant,	)	
	)	
And	)	
	)	
South Carolina Chapter, American	)	
Physical Therapy Association, Joseph M.	)	
McKowen, PT, Sabrina Queen Bridges,	)	
PTA, and Amalia W. Kirby, PTA,	)	
	)	
Defendant-Intervenors.	)	

This matter comes before the Court on Defendant-Intervenors' South Carolina Chapter, American Physical Therapy Association ("SCAPTA"), Joseph M. McKowen, PT, Sabrina Queen Bridges, PTA, and Amalia W. Kirby, PTA ("Individual Defendant-Intervenors") (collectively, the "Defendant-Intervenors") Motion for Summary Judgment, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure.

The Plaintiffs' goal in filing this suit is explicit: they want physicians to be able to employ physical therapists ("PTs") and refer patients to them for treatment.¹ But this is not permitted under the Physical Therapy Practice Act, S.C. Code Ann. §§ 40-45-5 *et*

¹ Am. Compl. ¶ 1 ("PT Joseph seeks the right to be employed by a physician's practice..."); *id.* ¶ 2 ("Dr. Joseph seeks the same right to employ PTs [as before *Sloan* case]"); *id.* ¶ 3 ("Dr. McCarthy seeks the same right to employ PTs [as before *Sloan*]").

seq. (the “PT Act”). The issue was decided in *Sloan v. S.C. Bd. of Physical Therapy Exam’rs*, 636 S.E.2d 598 (S.C. 2006), where the Supreme Court held that § 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. 636 S.E.2d at 609. In doing so, the Supreme Court observed that § 40-45-110(A)(1) was designed to prevent “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 614; *see also id.* at 607.

Two physician groups, the South Carolina Association of Medical Professionals (“SCAMP”) and the South Carolina Orthopaedic Association (“SCOA”), were parties in the cases consolidated in *Sloan*. Plaintiffs have admitted that SCOA is financing their legal fees in this suit. *See* T. Joseph Dep. 26:7-24, Ex. A hereto; McCarthy Dep. 25:14-22, Ex. B hereto.

Since March 30, 2004, when an opinion of the Attorney General interpreting S.C. Code § 40-45-110(A)(1) to prohibit a referring physician from employing PTs was first issued, several bills were introduced, backed by physicians, that would have overturned the PT Act’s prohibition. These bills include: (i) H 3604, introduced on February 22, 2005; (ii) S 628, introduced on March 16, 2005; (iii) S 1031, introduced on January 12, 2010; and (iv) H 4329, introduced on January 13, 2010. All failed to pass.

Having failed to overturn the PT Act’s prohibition on physician-owned physical therapy practices at the Supreme Court and in the Legislature, the Plaintiffs—funded by SCOA—now bring this suit in a collateral attack on the PT Act and *Sloan*. Plaintiffs ask the Court to interpret the referral restrictions in the PT Act so as to prohibit PTs from

practicing together and from employing physical therapist assistants ("PTAs"). The Plaintiffs presumably are seeking an interpretation so absurd and devastating to the practice of physical therapy in South Carolina that PTs would be forced to join with physicians in asking the Legislature to eliminate the referral restriction in the PT Act. Specifically, Plaintiffs contend that:

- "... PTs should be prohibited from being employed by or receiving wages or remuneration from physical therapists or from physical therapy groups from whom they receive patient referrals." Am. Compl. ¶ 44; and
- Defendant South Carolina Department of Labor, Licensing and Regulation, South Carolina Board of Physical Therapy's (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." *Id.* ¶¶ 45, 50.

There is no legal or policy justification for interpreting the PT Act to produce such an unintended and absurd result, the elimination of the group practice of physical therapy in South Carolina. Moreover, as addressed in detail in the brief filed by the PT Board, this requested relief would not benefit the Plaintiffs in any way. It would not permit the physician plaintiffs, Drs. Joseph and McCarthy, to employ PTs. Nor would it permit the PT plaintiff, Mrs. Joseph, to work for a referring physician or physician group. Indeed, Mrs. Joseph would actually be harmed by the requested relief, as she would have to leave her current employment in a group PT practice. *See* K. Joseph Dep. 15:10-16:22, Ex. C hereto.

Plaintiffs' argument for their proposed interpretation is that "there is no difference between a PT's receiving a patient for treatment from a physician or physician group employing the PT than a PT receiving a patient for treatment from a physical therapist or physical therapy group employing the PT." Am. Compl. ¶ 52. This is patently wrong.

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, Ex. D hereto. A physician referral for physical therapy services directs a patient to a specialist and authorizes a new course of treatment by the PT beyond the treatment of the referring physician. *Id.* ¶ 34(a). The physician referral thus creates new care by authorizing the PT’s treatment under the law, and enabling the PT to obtain payment for that care from government and commercial insurers.

As explained in *Sloan*, the referral restrictions in the PT Act are designed to eliminate the temptation for a gatekeeper physician to order more physical therapy treatment than a patient might need where the physician has a financial interest in that treatment. 636 S.E.2d at 614. Because physicians hold the keys to care, there is concern about “overuse of physical therapy services” when physicians can make money by making referrals to PTs.

There is no such concern about “overuse of physical therapy services” in the transitions in the care of patients among PTs and PTAs working together in 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). 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 their treatment, in order to provide quality care at the most cost-effective and convenient level. *See Stearns Aff.* ¶¶ 36(a), 38(a). Again, no new physical therapy services are authorized when a PT directs a patient to a PTA for treatment. Neither the transition of treatment of patients from one PT to another in a group practice, nor the PT-to-PTA handoff of patients that typically occurs in the course of most physical therapy care, is a “referral” for purposes of the PT Act.

Thus, a fundamental contention of Plaintiffs’ case—that the group practice of physical therapy violates the referral prohibition in the PT Act—is mistaken. Plaintiffs ask the Court to adopt this mistaken interpretation to produce an unintended and absurd result, the elimination of the group practice of physical therapy in the State. For the reasons further addressed below, Plaintiffs’ request should be rejected, and summary judgment granted for the Defendants.

BACKGROUND²

“Referral” Provision in the PT Act

The PT Act, in pertinent part, states:

(A) In addition to the other grounds provided for in Section 40-1-110, the [PT 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

² Defendant-Intervenors incorporate by reference the factual and procedural background detailed in the PT Board’s Memorandum in Support of its Motion for Summary Judgment.

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) (emphasis added). As noted above, the Supreme Court has held that this section prohibits a PT from working as an employee of a physician when the physician refers patients to the PT for services. *Sloan*, 636 S.E.2d at 609.

2011 Position Statement

Although Plaintiffs' express goal is to overturn *Sloan* (see Am. Compl., Seventh through Ninth Causes of Action), the remaining counts in the Amended Complaint ostensibly relate to a non-binding policy statement made by the PT Board. On May 3, 2011, Robert Carpenter, a practicing PT, wrote the PT 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 or pay for a professional corporation owned by one or more licensed physical therapists physical therapists when a physical therapist owner or employee of the corporation refers a patient to the physical therapist for physical therapy services?

In response, the Chair of the PT Board issued a letter that the Board subsequently approved as a position statement (the "2011 Position Statement"). The 2011 Position Statement says:

In a group practice, a physical therapist or a physical therapist assistant providing services to a patient of that practice should not fall within the 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.

Ex. 5 to Am. Compl. (emphasis added). The 2011 Position Statement thus rejected the notion that when a PT sees a patient at the request of another PT employed by the same practice, there is a “referral” within the meaning of § 40-45-110(A)(1).

Plaintiffs’ Remaining Claims

Funded by SCOA, Plaintiffs filed this suit on April 12, 2012, bringing nine counts. Three of those counts, the Seventh through Ninth Causes of Action, expressly sought to overturn *Sloan*, and have been dismissed in response to the PT Board’s initial motion to dismiss. Dec. 4, 2012 Order Granting Partial Summary Judgment as to Causes of Action Seven Through Nine, at 12. Plaintiffs’ remaining claims in their Amended Complaint, which purport to challenge the 2011 Position Statement, are premised on the notion that “there is no difference between a PT’s receiving a patient for treatment from a physician or physician group employing the PT than a PT receiving a patient for treatment from a physical therapist or physical therapy group employing the PT.” Am. Compl. ¶ 52.

In their First Cause of Action, Plaintiffs allege that when a PT sends or directs a patient to another PT who is employed by the same physical therapy practice, this PT-to-PT handoff constitutes a prohibited “referral” under § 40-45-110(A)(1) of the PT Act. *Id.* ¶ 44 (“ . . . PTs should be prohibited from being employed by or receiving wages or remuneration from physical therapists or from physical therapy groups from whom they

receive patient referrals.”).³ According to Plaintiffs, the 2011 Position Statement is therefore contrary to the plain meaning of “referral” under § 40-45-110(A)(1), as well as the legislative purpose of the statute. *See id.* ¶¶ 41-45 (alleging that PTs have the “same actual and potential conflicts of interest which are likely to lead to overuse of medical services”). Similarly, in their Second Cause of Action, Plaintiffs contend that the 2011 Position Statement misconstrues the word “refer,” as used in § 40-45-110(A)(1), in determining that the “[PT] or [PTA] seeing a patient at the request of another [PT] in the same group does not constitute a ‘referral.’” *Id.* ¶ 47.

In the Third Cause of Action, the Plaintiffs do a turnabout and invite the Court, if it disagrees with their argument in the first two Causes of Action, to declare that when a patient is “sent” by a physician or physician group employing that PT, the PT is engaged in “coverage,” *id.* ¶ 53, and the physician’s act in sending the PT the patient does not constitute a “referral” within § 40-45-110(A)(1). *Id.* ¶ 54 (“[A] PT seeing a patient at the request of physician in the same group does not constitute a ‘referral,’ but is rather a PT providing coverage for a physician or other member of the group.”).

Plaintiffs’ remaining claims thus ask the Court to declare, among other things, that: (1) the 2011 Position Statement misinterprets the PT Act and what constitutes a “referral” thereunder (First and Second Causes of Action); and (2) that, if the first two Causes of Action are mistaken, the analysis of “coverage” in the 2011 Position Statement

³ This allegation naturally extends to PT-to-PTA handoffs as well, since both PTs and PTAs are “licensed persons” subject to § 40-45-110(A)(1). S.C. Code Ann. § 40-45-20(5).

means that a physician may send patients to PTs employed by the practice that employs the physician (Third Cause of Action).⁴

ARGUMENT

Defendants are entitled to summary judgment⁵ because each of Plaintiffs' remaining claims fails as a matter of law and undisputed fact.

In enacting § 40-45-110(A)(1), it was surely not the Legislature's intent to outlaw the group practice of physical therapy, as Plaintiffs now contend. As explained below, Plaintiffs seek an interpretation of the PT Act that produces an absurd result—one that would increase healthcare costs and harm PTs, PTAs, and patients. This is the opposite of what the Legislature intended.

Plaintiffs want this Court to adopt such an overbroad interpretation of the referral restrictions, one producing unintended and devastating effects on the practice of physical therapy, so that PTs and PTAs will be forced to join them in the physician-led efforts to repeal § 40-45-110(A)(1). Without any attempt to conceal the irony of their argument, Plaintiffs thus ask the Court to adopt an unintended and absurd interpretation of § 40-45-110(A)(1), so as to further their goal of eliminating § 40-45-110(A)(1) and the intended and proper interpretation of that provision adopted in *Sloan*.

⁴ Plaintiffs assert three other claims (Fourth through Sixth Causes of Action), which the PT Board has addressed in its Memorandum. Defendant-Intervenors hereby incorporate by reference the arguments of the PT Board with respect to the Fourth through Sixth Causes of Action, as well as the arguments in the PT Board's Memorandum concerning Plaintiffs' lack of standing. In this Memorandum, the Defendant-Intervenors argue that, even if Plaintiffs had standing and justiciable controversy (they do not), the Defendants still are entitled to summary judgment.

⁵ Defendant-Intervenors hereby incorporate by reference the summary judgment standard set forth in the PT Board's Memorandum.

Assuming their initial approach fails (as it should), Plaintiffs have an equally meritless fallback request: they ask in the alternative that the Court declare that the PT Board's concept of "coverage" set forth in the 2011 Position Statement somehow permits conduct—physicians employing PTs—forbidden by *Sloan*. But the 2011 Position Statement has nothing to do with physicians employing PTs. More importantly, neither this Court nor the PT Board can—or seeks to—overturn *Sloan*. For these reasons, Defendant-Intervenors' Motion should be granted, and all of Plaintiffs' remaining claims dismissed.

I. Plaintiffs' Interpretation of "Referral" Contravenes Legislative Intent and Creates Absurd Results

In their First and Second Causes of Action, Plaintiffs claim that the PT-to-PT handoffs (and implicitly PT-to-PTA handoffs) 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. These claims are meritless, and advocate an interpretation of the PT Act that would decimate the practice of physical therapy in South Carolina.

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.*, 745 S.E.2d 110, 121 (S.C. 2013); *see also McClanahan v. Richland Cnty Council*, 567 S.E.2d 240, 242 (S.C. 2002) ("All rules of statutory construction are subservient to the one that legislative intent must prevail if it can reasonably be discovered in the language used, and that language must be construed in light of the intended purpose of the statute."). As a result, a statute "must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of

lawmakers.” *Sloan v. S.C. Bd. of Physical Therapy Exm’rs*, 636 S.E.2d 598, 606 (S.C. 2006). Where faced with an undefined statutory term, a court should thus consider the word and its meaning “in conjunction with the whole purpose of the statute and the policy of the law.” *Whitner v. State*, 492 S.E.2d 777, 779 (S.C. 1997).

Further, as the South Carolina Supreme Court has made clear, “statutory language must be construed in light of the intended purpose of the statute.” *Barton*, 745 S.E.2d at 120-21. Courts thus should “not construe a statute in a way which leads to an absurd result or renders it meaningless.” *Id.* at 121; *see also Auto Owners Ins. v. Rollison*, 663 S.E.2d 484, 488 (S.C. 2008); *Lancaster Cnty. Bar Assoc. v. S.C. Comm’n on Indigent Def.*, 670 S.E.2d 371, 373 (S.C. 2008) (“In construing a statute, this Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature.”).

Here, while the PT Act does not define the term “referred” or “referral,”⁶ the intent of § 40-45-110(A)(1) was to prevent the overutilization of physical therapy services attributable to referrals made by the legal gatekeepers—i.e., licensed medical

⁶ Because the statute itself does not define the term “refer” or “referral,” this Court must look to the legislative intent. *See Barton*, 745 S.E.2d at 120. Indeed, while the *Sloan* opinion cites two extrinsic sources—Webster’s Third New International Dictionary (1981) and the Provider Self-Referral Act, § 44-113-20(12)—as expressing the plain meaning of “refer,” *Sloan*, 636 S.E.2d at 607-608, these two sources actually show that the meaning of “refer” is susceptible to more than one interpretation. *See id.* (dictionary defines “refer” as “to send or direct for treatment, aid, information, or decision, e.g., a patient to a specialist” whereas Provider Self-Referral Act defines “referral” as the “forwarding of a patient by a health care provider to another health care provider”). For instance, the two sources would give conflicting answers to the issue of whether a member of a group practice’s administrative staff who sends a patient to a PT by scheduling an appointment has “referred” the patient within § 40-45-110(A)(1). The dictionary definition supports an affirmative answer, because it imposes no limitation on the identity of the person who sends the patient, whereas the Provider Self-Referral Act supports a negative answer because its definition of “referral” says the sender must be a “health care provider.”

doctors—based on the gatekeepers’ economic self-interest. Indeed, in *Sloan*, the South Carolina Supreme Court stated that the apparent intent of § 40-45-110(A)(1) was the “avoidance of *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.” 636 S.E.2d at 614 (emphasis added); *see also id.* at 607, 612. Plaintiffs’ interpretation of “referred” would not advance this legislative purpose—preventing overutilization of physical therapy services by gatekeepers who make self-interested referrals—in any way.

In addition, Plaintiffs’ proposed interpretation would wreak havoc on the practice of physical therapy in South Carolina, harming PTs, PTAs, and patients alike. Specifically, if PT-to-PT or PT-to-PTA handoffs were deemed to be “referrals,” the practical effect would be that PTs could not practice with other PTs or PTAs. This would force many PTs to become solo practitioners, drive PTAs out of the profession altogether, increase healthcare costs, and create barriers to care for patients across the State. For these reasons, which are explained in further detail below, this Court should grant the Defendant-Intervenors’ Motion.

**A. The Transition in Treatment of a Patient from One PT to Another
in Group Practice Is Not A Referral Under the PT Act**

1. PT-to-PT Handoff Does Not Create Additional Care

Plaintiffs have not shown—and cannot show—that the transition of a patient from one PT to another PT within a group practice constitutes a “referral” under the PT Act. Within a physical therapy practice, where a patient is evaluated by one PT and subsequently treated by another, the transition of the patient’s therapist does not

constitute a “referral” because this handoff does not create any additional care, and thus does not present any potential for overutilization of physical therapy services.

Indeed, in most instances, the PT-to-PT handoff occurs simply as a “function of scheduling and/or patient request/convenience.” Stearns Aff. ¶ 34(a); *see also id.* ¶ 34(b)-(c). While there may be a handoff, the PT is “not [] forwarding patients to establish a new plan of care, a new episode of care, or create additional care.” Stearns Dep. 53:22-54:2, Ex. E hereto; *see also* McKowen Dep. 10:3-6, Ex. F hereto (“I wouldn’t say it’s a referral Because the referral already comes from the physician. I’m not generating a new referral.”). Thus, unlike a referral from a physician to a PT, the transition of care from one PT to another PT in a group practice does not—and cannot—create a new course of treatment or authorize additional treatment. *See* Stearns Aff. ¶ 12(a).⁷

It is physicians—not PTs—who write the referrals and are the gatekeepers with respect to the breadth and frequency of physical therapy services. *See* T. Joseph Dep. 28:25-29:4 (indicating that, when he refers a case to a PT, he gives a diagnosis, recommendations about what he wants, and sets forth the number of visits).⁸ PTs are

⁷ If, during the course of providing authorized treatment, either the original PT or a new treating PT sees a need to change the plan of care, and that change exceeds or alters the care currently authorized by the referring physician, the referring physician would be contacted to approve the new plan of care. Stearns Aff. ¶ 34(b)-(c); *see also* Stearns Dep. 40:22-24 (physician responsible for providing approval of therapy plan of care); S.C. Code Ann. § 40-45-110(A)(5).

⁸ Although a patient may come to a PT without a physician referral for an initial 30-day period, a licensed medical doctor or dentist must provide a referral for continued physical therapy services. *See* S.C. Code Ann. § 40-45-110(A)(4); *see also* S.C. Code of Regulations R. 101-11; Stearns Aff. ¶ 22 (“In practice, under the PT Act, Medicare regulations and the typical payment practices of private insurers, the referring physician acts as a gatekeeper for physical therapy services, authorizing reimbursable care through the referral process.”).

constrained by what physicians order, as they may be disciplined for modifying “specific patient care instructions or protocols” established by a physician without the physician’s approval. *See* S.C. Code Ann. § 40-45-110(A)(5). Accordingly, a PT sending or directing a patient to another PT for treatment within a group practice does not implicate the potential abuse that the Legislature attempted to curtail in enacting § 40-45-110(A)(1), namely overuse of physical therapy services. *See Sloan*, 636 S.E.2d at 614. Transitions in patient care from one PT to another in a group practice—the PT-to-PT handoff—thus do not constitute “referrals” for purposes of § 40-45-110(A)(1).

2. Construing the PT-to-PT Handoff as a “Referral” Would Create Absurd Results

Plaintiffs’ interpretation of the PT Act would result in the atomization of physical therapy practice in South Carolina because it would make it difficult—if not impossible—for PTs to practice together without exposing themselves to potential discipline. As evidenced by the discovery adduced in this matter, many PTs in South Carolina currently work in a group practice setting. *See, e.g.,* McKowen Dep. 5:1-4 (employs three part-time PTs); Stoker Dep. 10:9-18, Ex. G hereto (part of a PT group practice); Swygert Dep. 15:20-16:4, Ex. H hereto (one of founders and owners of a PT group practice). If Plaintiffs’ interpretation of the PT Act were adopted, each of these PTs would be forced to operate as sole practitioners in order to continue their private practice. Stearns Aff. ¶ 35(a). Requiring every PT wanting to work in a private practice 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. *Id.*; *see also* Stearns Dep. 85:7-17 (“[T]here’s great value to the quality of care by having a group practice. Professional collegiality conferring on symptoms, on literature . . . just exponentially adds to the value of the service provided to the patient. And if the position were that PTs could only operate in sole private practices, that collegiality and that camaraderie is gone and your ability to act with your peers like that is very limited. So ultimately you start affecting the quality of service that you’re able to provide.”); Stoker Dep. 41:6-12 (“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 together.”); Ervin Dep. 23:3-5, Ex. I hereto (“And I think it’s sometimes good to have another set of eyes as a physical therapist, I may have missed something.”).

Moreover, the availability of more than one PT in a practice eases the challenge of scheduling and enhances patient convenience. Stearns Aff. ¶ 35(a); *see also* Stoker Aff. ¶ 7, Ex. J hereto (“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, Ex. K hereto (“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 (scheduling “depends on which therapist is available, who has an open slot”); Stoker Dep. 41:17-23 (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 (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”).

Plaintiffs admitted as much in their depositions, where they acknowledged that PTs should be allowed to direct patients to other PTs where necessary for purposes of patient convenience. *See* T. Joseph Dep. 58:12-24 (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 (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).

Even assuming *arguendo* that solo practice was economically viable for all PTs (it surely is not), many PTs would not want to assume the administrative burden of becoming a small business owner. Stearns Aff. ¶ 35(b); *see also* Stearns Dep. 84:18-24 (“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.”). As a result, many PTs would be forced to change careers, resulting in a scarcity of PTs in South Carolina. *Id.* This, in turn, would create a barrier to care for patients, resulting in restricted access to healthcare across the State. Such absurd results are inconsistent with the purpose of the PT Act, and should be rejected. *See Barton*, 745 S.E.2d at 120-21.

**B. The Direction and Supervision of Treatment by PTAs Is Not A
“Referral” Under the PT Act**

**1. Transition in Treatment from a PT to a PTA Does Not
Create Additional Care**

If the Plaintiffs’ interpretation of “referral” were correct, it would apply equally to the transitions in patient care from PTs to PTAs as it would to PT-to-PT handoffs because both PTs and PTAs are “licensed persons” subject to § 40-45-110(A)(1). S.C. Code Ann. § 40-45-20(5). Thus, if, as Plaintiffs contend, PTs cannot direct patients for treatment to other PTs in a group practice, PTs similarly cannot direct patients to PTAs that they employ or who are employed by the same group practice.

PTAs are required by statute to work under the direction and supervision of a PT. S.C. Code Ann. § 40-45-20(5) (PTAs must be “supervised and directed by a physical therapist whose license is in good standing”).⁹ Accordingly, PTAs simply carry out treatments designed by the PT in response to the physician’s referral. *Stearns Aff.* ¶ 36(a). No new course of treatment is—or can be—created by the PTA. *See id.* ¶¶ 12(c), 36(b) (PTA “neither develops a plan of care nor creates any additional care”).

As a result, a PT’s directing a patient to a PTA cannot create any potential overuse of physical therapy services—the abuse which § 40-45-110(A)(1) was designed to address. *See Sloan*, 636 S.E.2d at 614. A PT thus does not make a “referral” when

⁹ *See also* *Stoker Aff.* ¶ 9; *Kirby Aff.* ¶¶ 2-3, Ex. L hereto (“It is my understanding that I am required by South Carolina law to practice under the direction and supervision of a physical therapist and that I cannot practice on my own without violating the law.”); *Bridges Aff.* ¶¶ 2-3, Ex. M hereto (same); *K. Joseph Dep.* 24:5-10 (“Q. And so then you would supervise that PTA when he or she is providing the assistance. A. That’s correct. Q. So it would be – PTA would be acting under your direction. A. That’s the way I understand the laws to be.”); *McCarthy Dep.* 21:3-4 (“The assistant’s supposed to work under the direction of the physical therapist.”); *Junkins Dep.* 13:19-22, Ex. N hereto (practices as a PTA “under the direction and supervision of a PT”); *Pope Dep.* 42:12-16, Ex. O hereto (PTA is supervised by a PT).

directing and supervising a PTA in the provision of physical therapy services as the law requires. *See* Ervin Dep. 25:17-20 (“Q. Do you believe that physical therapists refer to physical therapy assistants? A. No. We supervise physical therapist assistants.”).

For the foregoing reasons, there is no basis for Plaintiffs’ proposed interpretation of “referral” under the PT Act. At bottom, Plaintiffs’ interpretation would do nothing whatsoever to advance or serve the legislative goal of § 40-45-110(A)(1).

2. Construing the PT-to-PTA Handoff as a “Referral” Would Create Absurd Results

Plaintiffs’ interpretation of the PT Act would essentially eliminate the jobs of PTAs in South Carolina. PTAs are required by statute to be “supervised and directed” by a PT whose license is in good standing. *See* S.C. Code Ann. § 40-45-20(5). Thus, if the PT-to-PTA handoff is considered a “referral” for purposes of the PT Act, then PTAs would not be able to work for PTs or in a group practice where they receive directions from a PT. *See* Stearns Aff. ¶ 37(a).

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 (PTA cannot independently bill; the PT is actually billing); Stearns Aff. ¶¶ 18(c), 21. 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 direct and supervise them, and (2) PTs can submit reimbursement requests for their services to government and private payors. Stearns Aff. ¶ 37(c).

If PTAs cannot work for PTs or in a group physical therapy practice, this would threaten the economic viability of existing physical therapy practices, increase healthcare costs and create barriers to care for patients. PTAs provide cost-efficient services and, as

a result, PTs across the state depend heavily on PTAs. *See id.* ¶ 38(a) (noting that PTA wages are, on average, 32% less costly than a PT wages). For instance, Mr. McKowen, a practicing PT, has indicated that that if he were unable to use PTAs in his business, the economic consequences would be severe and he would be unable to keep his business open. McKowen Aff. ¶ 6 (“My practice relies heavily on the work of physical therapy assistants.”); McKowen Dep. 7:5-8, 15:20-22 (“If I wasn’t [] able to use physical therapy assistants, I wouldn’t be able to stay open. Financially I couldn’t make it if I had to replace those staff members with licensed PTs I feel like I wouldn’t be able to make a living. My family’s in jeopardy. My ability to make a living would be in jeopardy.”).

In addition, if PTs such as Mr. McKowen were not allowed to employ lower-cost PTAs, then the cost of physical therapy would increase, restricting patient access to vital physical therapy services. *See Stearns Aff.* ¶ 38(d) (“If physical therapy practices were not allowed to employ [PTAs], outpatient therapy practices may be disinclined to accept patients (particularly Medicare and Medicaid patients) whose insurance may pay lower reimbursement rates.”). Patients would be further harmed because, without the assistance of PTAs, PTs would be unable to deliver consistent, efficient care to patients or meet patient scheduling needs. *See Stearns Dep.* 86:22-87:7 (“From a quality of care perspective, frequently in group practices physical therapists get caught up and pulled away for new evaluations; and they may not be able to consistently treat a patient on a day-to-day basis. And that’s where the physical therapy assistant comes in. They are the ones who interact usually on an every-visit, consistent basis. They get to know the patient, and they’re delivering consistent care; whereas, the physical therapist might be drawn away periodically.”); Ervin Dep. 21:8-10 (“I’m here today, so I have two PT

assistants who are covering my patients back in North Myrtle Beach.”); Junkins Dep. 44:25-45:6 (“We have two teams, actually. Two PTs and two PTAs. And so the second visit when [the patient] come[s] back, if the therapist is busy with other patients, then I’ll be assigned that patient So that’s how I get them.”).

These absurd results—the potential elimination of the PTA profession, substantial increases in the cost of physical therapy services, and the erection of barriers to patient care—could not possibly have been intended by the Legislature when enacting § 40-45-110(A)(1). Indeed, taking Plaintiffs’ interpretation to its logical extension, the administrative personnel in physical therapy practices would also be making “referrals” within the meaning of the PT Act when they schedule patients to see a specific PT. This would create yet another absurd result. Such an overbroad interpretation of “referral” would mean that PTs could not employ administrative personnel to answer their phones or make appointments. *See Stearns Aff.* ¶ 26. For these additional reasons, Plaintiffs’ First and Second Causes of Action are baseless, and Defendant-Intervenors’ Motion should be granted.

II. The 2011 Position Statement Does Not—And Cannot—Overrule *Sloan*

In their Third Cause of Action the Plaintiffs set aside their quarrel with the 2011 Position Statement and instead ask this Court to conclude that the Statement is correct—and that it has succeeded in overruling the *Sloan* opinion. The Plaintiffs reach this astonishing conclusion by arguing that it makes no difference whether the person who sends a patient to a PT is a physician gatekeeper or another PT. Am. Compl. ¶ 52 (“there is no difference”). The Plaintiffs reason that if every time a PT sends a patient to another PT that act is “coverage”—and therefore not a violation of § 40-45-110(A)(1)—the same

must be true with regard to each and every time a physician sends a patient to a PT employed by the practice for which the physician works.¹⁰ Although the 2011 Position Statement has nothing to do with the referrals from physicians to PTs addressed in *Sloan*, the Plaintiffs nonetheless assert:

The Court should further declare that a PT seeing a patient at the request of a physician in the same group does not constitute a “referral,” but is rather a PT providing coverage for a physician or other member of the group.

Am. Compl. ¶ 54. But all the parties well know neither this Court nor the PT Board has the authority to declare lawful conduct that *Sloan* declared unlawful. Indeed, in granting summary judgment as to the Seventh through Ninth Causes of Action, this Court has already recognized that it will not—and cannot—create a backdoor around *Sloan*. See Dec. 4, 2012 Order Granting Partial Summary Judgment as to Causes of Action Seven Through Nine, at 12. For this reason, Plaintiffs’ Third Cause of Action, which similarly seeks to overturn *Sloan*, is meritless, and Defendant-Intervenors’ Motion should be granted.

CONCLUSION

For the foregoing reasons, as well as the reasons articulated by the PT Board in its separate Memorandum, the Defendants are entitled to summary judgment, and Plaintiffs’ remaining causes of action should be dismissed.

¹⁰ Plaintiffs make this argument ignoring the obvious fact that PTs do not—and cannot—practice medicine. See S.C. Code Ann. § 40-45-310; see also *id.* § 40-45-110(A)(2).

Respectfully submitted,

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West Columbia, South Carolina
December 13, 2013

12/13

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
Kristin Joseph P.T., Thomas N. Joseph,	)	C/A No. 2012-CP-40-2632
M.D., and William G. McCarthy, M.D.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	<u>SOUTH CAROLINA BOARD OF</u>
	)	<u>PHYSICAL THERAPY'S MEMORANDUM</u>
South Carolina Department of Labor,	)	<u>IN SUPPORT OF ITS MOTION FOR</u>
Licensing and Regulation, South Carolina	)	<u>SUMMARY JUDGMENT</u>
Board of Physical Therapy,	)	
	)	
Defendant,	)	
	)	
and	)	
	)	
South Carolina Chapter, American	)	
Physical Therapy Association, Joseph M.	)	
McKowen, PT, Sabrina Queen Bridges,	)	
PTA, and Amalia W. Kirby (PTA),	)	
	)	
Defendants-Intervenors.	)	

This matter is before the Court on cross motions for summary judgment by Plaintiffs and Defendants. The Defendant, South Carolina Department of Labor, Licensing and Regulation, South Carolina Board of Physical Therapy (the "Board"), is entitled to summary judgment pursuant to Rule 56, SCRCP, for the reasons set forth herein.

FACTUAL AND PROCEDURAL BACKGROUND

1998 Amendments to the PT Act

This case challenges the South Carolina statutory prohibition on physical therapists working for physician-owned practices. The background begins in 1998 with the passage of amendments to South Carolina Code §§ 40-45-5 *et seq.* (the "PT Act") that regulates physical

therapists (“PTs”) and physical therapist assistants (“PTAs”). The 1998 amendments included § 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). In December 1998, shortly after the effective date of the new statute, the Board issued a statement saying it would not discipline PTs and PTAs working for physician-owned practices, so long as the practices complied with state and federal laws relating to physicians referring patients to PT practices in which they have an ownership interest. Such laws included the federal self-referral laws, known as the “Stark laws,” and South Carolina’s “Provider Self-Referral Act,” codified at South Carolina Code §§ 44-113-10 to -80.

2004 Attorney General’s Opinion

From 1998 to 2004, the Board did not apply § 40-45-110(A)(1) to prevent physical therapists from working for, or receiving referrals from, a physician employer. In 2004, at the suggestion of the South Carolina Chapter of the American Physical Therapy Association (“SCAPTA”), two state senators requested an opinion from the Attorney General regarding the scope and interpretation of § 40-45-110(A)(1). 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. On March 30, 2004, the Attorney General issued an opinion concluding that the statute prohibited such employment relationships.

The *Sloan* Litigation

After the Attorney General's opinion, the Board in April 2004 voted to adopt the Attorney General's opinion and, after a period of 90 days, to accept complaints concerning PTs employed in physician-owned practices and to apply the Attorney General's opinion when determining whether to bring disciplinary action before the Board. Under this position statement by the Board (the "2004 Position Statement"), PTs were afforded a 90-day grace period to modify or terminate arrangements with referring physicians that were in violation of the statute. At the same time as the Board's 2004 Position Statement, a physician, Allen Sloan, sued the Board. Dr. Sloan sought a declaratory judgment that he may employ a PT and refer patients to that PT. Seven additional plaintiffs eventually joined Dr. Sloan: the South Carolina Medical Association; a PT employed by a physician-owned practice; a PTA employed by a physician-owned practice; and four physician-owned entities that employed PTs. The Attorney General and SCAPTA moved to intervene, and the circuit court granted their motions. Two other organizations, the South Carolina Association of Medical Professionals ("SCAMP") and the South Carolina Orthopaedic Association ("SCOA") filed a separate suit against the Board also seeking a declaratory judgment, which was then consolidated for proceedings with the *Sloan* case.

The plaintiffs in the consolidated cases challenged the Attorney General's opinion and the 2004 Position Statement on various statutory and constitutional grounds. On February 24, 2005, the circuit court (Kinard, J.) granted summary judgment in favor of the Board and dismissed the plaintiffs' causes of action.

The Supreme Court's Decision in *Sloan*

On appeal, the South Carolina Supreme Court affirmed the circuit court's decision, ruling in favor of the Board on all issues. Among other rulings, the Supreme 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. 636 S.E.2d at 609.
- (b) The Board's 2004 Position Statement was "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 it did "not constitute a new regulation that [was] 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.

Post-*Sloan* Legislative Efforts

Following the Supreme Court's decision in *Sloan*, SCOA lobbied the South Carolina General Assembly to amend or repeal S.C. Code Ann. § 40-45-110(A)(1) to permit physicians to refer patients to physical therapists whom the physicians employ. (*See* McCarthy Dep. 22-25; T. Joseph Dep. 21-23). Two bills (S1031 and H4329) were introduced in the General Assembly in 2010 to allow physicians to employ and refer patients to employed PTs. (*See* Exh. A and B). The General Assembly held hearings on these bills. Two of the named Plaintiffs in this lawsuit, Dr. McCarthy and Ms. Joseph, testified in a legislative hearing on a proposed bill to amend the statute. (*See* McCarthy Dep. 23-25; K. Joseph Dep. 52-54). Despite the lobbying efforts of the physicians and physician groups to amend the statute following the *Sloan* decision, the General Assembly decided not to amend or repeal the statute. S1031 died on the floor of the Senate and

H4329 died in the House 3-M Committee. (http://www.scstatehouse.gov/sess118_2009-2010/bills/1031/.htm and http://www.scstatehouse.gov/sess118_2009-2010/bills/4329.htm)

The 2011 Position Statement

On May 3, 2011, Robert Carpenter, a practicing PT, wrote 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 or pay for a professional corporation owned by one or more licensed physical therapists physical therapists when a physical therapist owner or employee of the corporation refers a patient to the physical therapist for physical therapy services?

Ex. 2 to Am. Compl. The Chair of the Board responded by letter dated June 2, 2011, stating her view that the answer to the questions was “no.” Ex. 4 to Am. Compl. At a Board meeting on August 17, 2011, the Board voted to adopt the position stated in the Chair’s letter, and a position statement (the “2011 Position Statement”) was then issued by the Board. Exs. 5 & 6 to Am. Compl. The 2011 Position Statement says:

In a group practice, a physical therapist or a physical therapist assistant providing services to a patient of that practice should not fall within the 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 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 sees a patient at the request of another PT employed by the same practice, there is a “referral” within the meaning of § 40-45-110(A)(1).

Plaintiffs' Allegations; Summary Judgment as to Seventh through Ninth Causes of Action

After having its arguments rejected by the Court and the legislature, South Carolina Orthopaedic Association recruited these Plaintiffs and instituted this lawsuit in which Plaintiffs seek to overturn *Sloan* by challenging the Board's 2011 Position Statement. (See McCarthy Dep. 13-14, 23-26; T. Joseph Dep. 18-20, 26-27). Specifically, on April 12, 2012, Plaintiffs filed a Declaratory Judgment Action/Complaint seeking a declaration that would allow physical therapists to be employed in practices owned by physicians, as they claim they were previously allowed to do before the *Sloan* decision. The Board moved to dismiss the case because, among other things, the Seventh through Ninth Causes of Action overtly sought to "argue against precedent," namely *Sloan*. This 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 Summary Judgment as to Causes of Action Seven Through Nine, at 12. This Court thus dismissed the Seventh through Ninth Causes of Action. *Id.* (finding that the Court "cannot grant the relief sought by Plaintiffs" and converting Defendant's motion to dismiss into one for partial summary judgment and granting the same).

Notwithstanding the Court's decision, Plaintiffs filed an Amended Complaint on May 24, 2013 that re-alleges verbatim the Seventh, Eighth, and Ninth Causes of Action that this Court already dismissed. Plaintiffs acknowledge, however, under the terms of the Consent Order regarding the Amended Complaint, that this amendment has no effect on the prior order granting summary judgment on the Seventh through Ninth Causes of Action.

Plaintiffs' Remaining Causes of Action

Plaintiffs' remaining claims in their Amended Complaint purport to challenge to the 2011 Position Statement, in that they ask the Court to "determine that the 2011 Position Statement . . .

violates the provisions of the PT Act and the Constitutions of South Carolina and the United States.” Am. Compl. ¶ 5. The Plaintiffs’ real grievance, however, is with *Sloan* and the statutory prohibition on PTs accepting referrals from physicians who employ them.

In the Amended Complaint, Kristin Joseph alleges she is a PT, practicing at First Physical Therapy in Camden, South Carolina. *Id.* ¶ 1. PT Joseph alleges that she has filed this lawsuit because she seeks the right to be employed by a physician or in a physician’s practice, like that of her husband, Plaintiff Thomas N. Joseph. *Id.*; see also T. Joseph Dep. 10:13-23 (indicating that they are married). Plaintiff Dr. Thomas Joseph alleges that he is a licensed orthopaedic surgeon in South Carolina. Am. Compl. ¶ 2. He alleges that he seeks to employ physical therapists in his practice, as he claims physicians were previously allowed to do before the *Sloan* decision. *Id.* Plaintiff Dr. William McCarthy also alleges that he is a licensed orthopaedic surgeon in South Carolina. *Id.* ¶ 3. He alleges that he, too, seeks to employ physical therapists in his practice, as he claims physicians were allowed to do before *Sloan*. *Id.*

Plaintiffs thus ask the Court to overrule *Sloan* by declaring that the Supreme Court misinterpreted the PT Act and that, as so misinterpreted, the PT Act violates, among other things, the Administrative Procedures Act (“APA”) as well as Plaintiffs’ equal protection and substantive due process rights. Plaintiffs’ Fourth Cause of Action, for instance, contends that the “2011 Position Statement is or will be applied by the Board as a regulation,” and that the PT Board thus should have followed certain procedures in its rulemaking process pursuant to the APA. *Id.* ¶¶ 55-56. In addition, Plaintiffs’ Fifth and Sixth Causes of Action contend that the 2011 Position Statement violated their constitutional rights to equal protection and due process by “allowing [PTs] to be employed by a physical therapist or a physical therapy group and provide physical therapy services to patients referred by the employer when *Sloan* does not allow

PTs to be employed by a physician or physician group and provide physical therapy services to the employer's referred patient." *Id.* ¶¶ 65, 72.

On November 1, 2013, the Plaintiffs moved for summary judgment on all remaining causes of action. On November 7, 2013, the Defendant South Carolina Board of Physical Therapy moved for summary judgment on all remaining causes of action. The Defendant-Intervenors subsequently moved for summary judgment as well.

ARGUMENT

Where "plain, palpable, and indisputable facts exist on which reasonable minds cannot differ," summary judgment is proper. *Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing, and Regulation*, 523 S.E.2d 795, 799 (S.C. Ct. App. 1999) (quoting *Rothrock v. Copeland*, 409 S.E.2d 366, 368 (S.C. 1991)). Summary judgment should therefore be granted when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" show that there is "no genuine issue" as to any material fact and that the moving party is "entitled to judgment as a matter of law." *Connor Holdings, LLC v. Cousins*, 644 S.E.2d 58, 60 (S.C. 2007) (affirming dismissal of action for lack of standing). Here, the Defendants are entitled to summary judgment because: (1) Plaintiffs lack standing; and (2) in any event, Plaintiffs' remaining claims fail as a matter of law.

A. Plaintiffs Lack Standing To Challenge The 2011 Position Statement.

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 Protection of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 550 S.E.2d 287, 291 (S.C. 2001); see also *ATC South, Inc. v. Charleston Cnty.*, 669 S.E.2d 337, 339 (S.C. 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.*

Here, Plaintiffs have not—and cannot—meet any of these elements with respect to their remaining claims challenging the 2011 Position Statement. Indeed, as evidenced by their pleadings and their depositions, neither the PT Plaintiff nor the physician Plaintiffs face any current or threatened injury attributable to the 2011 Position Statement. Plaintiffs’ 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 Plaintiffs’ challenges to it will neither enable PT Joseph to work for a physician’s practice, nor enable Drs. Joseph and McCarthy to hire PTs. Plaintiffs thus have no standing, and the Board is entitled to summary judgment.

1. Plaintiffs 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 Freeman v. Preston*, 398 S.C. 186, 193 (S.C. 2012) (no constitutional standing when party only suffered in “some indefinite way in common with people generally”).

Without an injury, there is no standing. *See, e.g., Furman Univ. v. Livingston*, 136 S.E.2d 254 (S.C. 1964) (person with no financial interest in taxes erroneously collected had no standing to sue for refund); *Davis v. Hamm*, 387 S.E.2d 676 (S.C. Ct. App. 1989) (former stockholder of a corporation had no standing to sue a current officer or director for breach of fiduciary duty). For example, in *Carolina Alliance*, a former temporary employee who was paid more than minimum wage brought a suit alleging that her employment agency's minimum wage notification did not comply with statutory requirements. 523 S.E.2d at 797-99. The court held that the employee did not have standing to bring an action for a declaratory judgment because she had earned more than minimum wage and so suffered no prejudice. *Id.* at 800. The court stated that the plaintiff:

complains she was not informed by [her employment agency] . . . that she would make more money than she was guaranteed. [The plaintiff] has failed to demonstrate any injury to her based on the Department's interpretation of the statute, despite her conclusory allegations. Simply put, [the plaintiff] was not prejudiced, and has not sustained the requisite injury for maintaining this law suit.

Id.

The same is true here. Plaintiffs have not suffered any injury necessary to confer standing because Plaintiffs face no imminent prejudice of a personal nature as a result of the 2011 Position Statement.

Ms. Joseph, for instance, will not be punished or disciplined as a result of the Board's interpretation of the PT Act in the 2011 Position Statement because it does not prohibit her from doing anything. In fact, as previously explained, and as confirmed in discovery, Ms. Joseph actually benefits from the interpretation of the PT Act in the 2011 Position Statement. (*See* K. Joseph Dep. 15:13-16 (admitting that she practices physical therapy with another PT in a group practice); *id.* 18:7-8, 26:13-15, 42:2-10 (admitting that she sees the patients of another PT in her practice group when that PT is on vacation and likewise wants that PT to see her patients in the

event that she is on vacation or has an issue with one of her children)). For this reason, PT Joseph has “suffered no prejudice.” *See Carolina Alliance*, 523 S.E.2d at 797-800.

Further, Drs. Joseph and McCarthy—who are neither PTs nor PTAs—may have an academic interest in 2011 Position Statement, but the policy does not apply to them and they thus have not, and cannot, suffer any harm. *See, e.g.*, T. Joseph Dep. 53:23-54:4 (“Q. Has there been any – in the way in which you refer patients to physical therapy, has there been any significant change since 2004? A. We’re still writing on that prescription pad. Is there any other way? Not that I know of. It’s still you write down the diagnosis and prescription on a prescription pad.”); *id.* 57:7-10 (“Q. Can you think of any change in the referral process, other than there’s different groups and different locations since 2004? A. I cannot think of any.”). Any purported prejudice the physician Plaintiffs 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*, 550 S.E.2d at 291; *Freemantle*, 398 S.C. at 193.

The fact that Plaintiffs have not suffered any immediate, personal injury is highlighted by their deposition testimony, where they each admit that they have never filed a complaint with the Board concerning a PT. *See* K. Joseph Dep. 42:11-14; T. Joseph Dep. 58:8-11; McCarthy Dep. 28:23-29:1. In fact, none of the named Plaintiffs have any problem with PTs in a group practice covering for other PTs. As 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, Plaintiffs’ issue with the 2011 Position Statement is purely abstract. Simply put, the Plaintiffs are not harmed by the 2011 Position Statement or any interpretation of the PT Act that allows PTs and PTAs to practice together. Lacking injury, Plaintiffs have no standing.

2. Plaintiffs cannot establish any causal connection

Plaintiffs likewise have not—and cannot—establish any causal connection between the 2011 Position Statement and their supposed injury. It is the PT Act itself, as interpreted by the Supreme Court in *Sloan*, that prohibits PT Joseph from working for physicians and prohibits Drs. Joseph and McCarthy from employing PTs, not the 2011 Position Statement. And throughout their respective depositions, Plaintiffs made it abundantly clear that their real issue is with *Sloan*, not the 2011 Position Statement. *See, e.g.*, McCarthy Dep. 21:9-15 (“Q. What relief are you looking to get out of this lawsuit? What would you like for the Court to do? A. To grant us the ability to employ physical therapists again, like we did in the past. Q. Anything else that you’re looking for out of this lawsuit? A. No, sir.”); T. Joseph Dep. 37:7-11 (“Q. What you’re seeking is to have the court overturn the interpretation of the statute that was rendered by the Supreme Court in *Sloan*; is that fair? A. That’s what we want, I would say.”); K. Joseph Dep. 41:5-8 (“I would like to have the choice to work for a group of physicians and provide physical therapy services to that group[.]”).

Indeed, to the extent Plaintiffs have read the 2011 Position Statement at all, they fundamentally misread it, repeatedly confusing it with *Sloan*. *See, e.g.*, K. Joseph Dep. 26:5-8 (“I understand [the 2011 Position Statement] to read that I am not allowed to provide coverage in an environment that I feel most comfortable working in.”); McCarthy Dep. 27:9-12 (admitting that he has not even read the 2011 Position Statement). For these reasons, Plaintiffs’ remaining claims should be dismissed because there is no causal connection between their claimed injury and the 2011 Position Statement and therefore no standing. *See Bailey v. S.C. Dep’t of Health*, 693 S.E.2d 426, 429-30 (S.C. Ct. App. 2010) (affirming ruling that party lacked legal standing where there was no causal connection); *Beaufort Realty Co. v. Beaufort Cnty.*, 551 S.E.2d 588,

590 (S.C. Ct. App. 2001) (affirming decision that group lacked standing where its purported injuries were not “traceable” to the challenged action of the defendant and therefore “not causally connected”).

3. Plaintiffs 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 Plaintiffs relief from the legal restriction of which they complain—namely that physicians may not employ PTs and PTAs. Even if the Court issued the requested declaratory judgment regarding the 2011 Position Statement, the PT Act still would prohibit PT Joseph from working for physicians or physician groups, and the PT Act still would prohibit the physician Plaintiffs from employing PTs. The only foreseeable consequence of the Court’s ruling in favor of the Plaintiffs would be that PT Joseph’s employer would have reason to terminate her employment, which hardly would constitute “relief.” Because the requested judicial declaration concerning the 2011 Position Statement would not provide the Plaintiffs with any actual relief, Plaintiffs have presented a purely abstract dispute—one that Plaintiffs lack standing to bring. *See Pee Dee Elec.*, 301 S.E.2d at 762; *Bailey*, 693 S.E.2d at 429-30 (no standing where alleged injury would not be redressed by a favorable decision). For these reasons, the Court lacks jurisdiction to proceed, and the Board should be granted summary judgment.¹

¹ Moreover, Plaintiffs have not—and cannot—present a justiciable controversy because the 2011 Position Statement does not prevent any of the Plaintiffs from doing anything. Under the Board’s interpretation of § 40-45-110(A)(1) in the 2011 Position Statement, when a PT sends a patient to another PT or to a PTA within the practice group, there is *no prohibited referral*. In other words, PTs are allowed to associate with other PTs and PTAs in a group practice. The 2011 Position Statement is thus *favorable* to PTs such as PT Joseph. *See* K. Joseph Dep. 15:13-16 (admitting that she practices physical therapy with another PT in a group practice); *id.* 18:7-8, 26:13-15, 42:2-10 (admitting that she sees the patients of another PT in her practice group when

B. Plaintiffs' Remaining Claims Fail as a Matter of Law.

1. The 2011 Position Statement cannot be used to reargue *Sloan*

Even if they had standing to bring them, Plaintiffs' claims fail as a matter of law and undisputed fact. Having had their arguments rejected by the South Carolina Supreme Court in *Sloan* and by the House and Senate in their post-*Sloan* lobbying efforts, the Plaintiffs now seek to use the Board's 2011 Position Statement as a vehicle to reargue *Sloan* or repeal § 40-45-110(A)(1). Plaintiffs concede their real purpose in this lawsuit is to obtain a ruling overturning the *Sloan* decision. Dr. McCarthy, Dr. Joseph, and Ms. Joseph all testified the relief they seek in this lawsuit is an order allowing them to employ and to refer patients to PTs whom they employ. (See McCarthy Dep. 21; T. Joseph Dep. 25, 37; K. Joseph Dep. 40).

The Plaintiffs conceded at the hearing on the Defendant's motion to dismiss that the Plaintiffs' request for an order allowing physicians to employ and refer patients to PTs they employ is foreclosed by the *Sloan* decision. Furthermore, the Court, in ruling on the Defendant's motion to dismiss, granted summary judgment to the Defendant on the Plaintiffs' Seventh through Ninth Causes of Action. These causes of action sought an order declaring that

that PT is on vacation and likewise wants that PT to see her patients in the event that she is on vacation or has an issue with one of her children). The 2011 Position Statement neither imposes any prohibition on PT Joseph nor otherwise limits her rights. The other two Plaintiffs, Drs. Joseph and McCarthy, are orthopaedic surgeons, not PTs or PTAs. See, e.g., T. Joseph Dep. 29:13-14 ("I'm not a physical therapist or physical therapist assistant[.]"). The 2011 Position Statement does not apply to them or limit their rights in any way. While they 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.*, 742 S.E.2d at 374. In sum, the judicial declaration that Plaintiffs purport to seek—namely that PTs may not associate with other PTs and PTAs in a group practice—would not allow PT Joseph to work for a physician (like her husband) or a physician group, nor would it allow Drs. Joseph and McCarthy to hire PTs. Plaintiffs' remaining claims thus seek nothing more than to "fish in judicial ponds for advice." *City of Columbia v. Sanders*, 97 S.E.2d 210, 213 (S.C. 1957). For these additional reasons, the Board should be granted summary judgment.

physicians could refer patients to PTs they employ. This relief, however, is prohibited by the Supreme Court's interpretation of S.C. Code Ann. § 40-45-110(A)(1) in *Sloan*.

2. The 2011 Position Statement does not violate S.C. Code Ann. § 40-45-110(A)(1)

Having had their arguments rejected by the South Carolina Supreme Court in *Sloan* and by the House and Senate in their post *Sloan* lobbying efforts, the plaintiffs now seek to use the Board's 2011 Position Statement as a vehicle to reargue *Sloan*. The plaintiffs claim that a PT or PTA seeing a patient at the request of another physical therapist in the same group constitutes a prohibited referral.

The issue presented to the Court is one of statutory construction and turns on the definition of the term "referral" in the statute. In interpreting a statute, the statute as a whole must receive practical, reasonable, and fair interpretation consistent with the purpose, design, and policy of lawmakers. The real purpose and intent of the lawmakers will prevail over the literal import of particular words. *Browning v. Hartvigsen*, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992); *Caughman v. Columbia YMCA*, 212 S.C. 337, 341, 47 S.E.2d 788, 789 (1948).

In *Sloan*, the South Carolina Supreme Court held that the purpose of § 40-45-110(A)(1) is to "protect consumers as well as government-sponsored healthcare programs, such as Medicare and Medicaid, from actual and potential conflicts of interest which are likely to lead to overuse of medical services by physicians who, for their own financial gain rather than their patient's medical needs, refer patients to entities in which the physicians hold a financial interest." *Sloan*, at 370 S.C. at 469, 636 S.E.2d at 607. The South Carolina Supreme Court also held that the term "refer" as used in the statute should be interpreted according to its plain meaning, which in this instance is "to send or direct for treatment, aid, information [or] decision [e.g.] a patient to a specialist." *Webster's Third New International Dictionary* 1907 (1981),

Sloan, 370 S.C. at 470, 636 S.E.2d at 607-608. Thus, under the dictionary definition and the definition adopted by the Supreme Court in *Sloan*, a referral is the sending of a patient to a specialist. A physical therapist or physical therapist assistant providing services to a patient of another physical therapist in the same practice does not fall within the definition of a referral because physical therapists and physical therapy assistants are all within the same profession and same scope of practice and are providing the same type of treatment. Moreover, the purpose of § 40-45-110(A)(1) as determined in *Sloan*, is to prevent situations in which gatekeeper physicians order more physical therapy than their patients need because the physicians have a financial interest in that treatment. (See Defendant-Intervenors Memo at pp. 10-20) There is no such concern about the overuse of services when the treatment of a patient transitions from one PT to another, or from a PT to a PTA, within a group practice. *Id.*

Furthermore, in construing the statute, a court should reject an interpretation which leads to an absurd result that could not have been intended by the Legislature. *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 663 S.E.2d 484 (2008); *Lancaster Cnty Bar Ass'n v. S.C. Comm'n on Indigent Defense*, 380 S.C. 219, 670 S.E.2d 371 (2008). To adopt the plaintiffs' interpretation in this case will produce absurd results not intended by the Legislature. The most obvious impact of the plaintiffs' interpretation is that it would prevent physical therapists in South Carolina from practicing in association with other PTs, forcing them instead to practice as solo practitioners and would legislate PTAs out of existence in South Carolina. This interpretation would produce deleterious effects for both PTs and their patients in that it would reduce patient access to PTs, eliminate patient access to PTAs, and prevent PTs from sharing overhead or working in a group. (See Stearns Dep. 84-87) The Defendant-Intervenors' Brief sets forth the harmful effects of the

Plaintiffs' proposed interpretation by the Plaintiffs and the Board hereby adopts the arguments and analysis set forth by the Defendant-Intervenors.

In fact, the plaintiffs, Ms. Joseph, Dr. Joseph, and Dr. McCarthy, testified that they do not seek to prevent another physical therapist covering for another physical therapist's patient if the physical therapist is not able to see a patient on that day because of illness or some other conflict. (See McCarthy Dep. 28:15-22; K. Joseph Dep. 42:2-8; T. Joseph Dep. 37:7-11). Yet the relief sought by the plaintiffs would produce just such a result. Additionally, PTs would not be able to collaborate with others in a group setting regarding patients, would not be able to share overhead, and could not accommodate patients on days when they are out of town or develop other conflicts.

Furthermore, the interpretation of the statute advanced by the plaintiffs would legislate PTAs out of existence in South Carolina. A physical therapy assistant (PTA) is a person licensed by the Board 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. See S.C. Code Ann. § 40-45-20(5). Since a PTA can only see a patient at the direction and under the supervision of a PT, plaintiffs' interpretation of the statute would prevent PTAs from treating patients because a PTA can only care for any patient under the direction and supervision of a PT. This direction and supervision by a PT, however, would violate the broad definition of "referral" the plaintiff's urge the Court to adopt.

Thus the plaintiffs' requested relief regarding the Position Statement would produce results not intended by the Legislature, results that do not benefit the named plaintiffs, and results harmful to PTs, PTAs, and to the public.

3. The Position Statement does not violate the APA

In their Fourth Cause of Action, Plaintiffs claim that the 2011 Position Statement will be applied by the Board as a regulation, and violates the Administrative Procedures Act (“APA”). This argument plainly lacks merit. The plaintiffs in *Sloan* made this same argument with regard to the Board’s 2004 Position Statement, and these arguments were rejected by the Supreme Court. As in *Sloan*, the Board’s 2011 statement regarding its interpretation of § 40-45-110(A)(1) is not a regulation or the equivalent of a regulation. In *Sloan*, the Court stated:

The Board’s . . . [2004 position statement] was nothing more than a policy or guidance statement which does not have the force or effect of law in any individual case. The Board’s statement regarding its interpretation of Section 40-45-110(A)(1) is not a regulation or the equivalent of a regulation. The Board stated in 2004, in essence, “This interpretation is what we believe the law means and we direct our staff to enforce it accordingly, beginning ninety days after our vote today.”

370 S.C. at 474, 636 S.E.2d at 610.

Just like the 2004 Position Statement, the Board’s 2011 Position Statement did not prescribe practice requirements for PTs in more detail than set forth in the statute. Instead, the Position Statement sets forth the Board’s understanding of the statute’s meaning. Therefore, the Plaintiffs’ argument regarding failure to comply with rule-making in this case should be rejected for the same reasons it was rejected by the Court in the *Sloan* decision.

4. Plaintiffs’ equal protection and due process claims are foreclosed by *Sloan*

In their Fifth and Sixth Causes of Action, Plaintiffs claim that the 2011 Position Statement violated their constitutional rights to equal protection and due process by “allowing [PTs] to be employed by a physical therapist or a physical therapy group and provide physical therapy services to patients referred by the employer when *Sloan* does not allow PTs to be

employed by a physician or physician group and provide physical therapy services to the employer's referred patient." Am. Compl. ¶¶ 65, 72. These claims are baseless.

First, Plaintiffs' equal protection claim is foreclosed by the Supreme Court's decision in *Sloan*. There, the Supreme Court already rejected the argument that § 40-45-110(A)(1) violated the equal protection rights of PTs who wish to be employed by physicians who refer patients to them. *Sloan*, 636 S.E.2d at 613-14. And to the extent Plaintiffs attack the 2011 Position Statement rather than § 40-45-110(A)(1) directly,² Plaintiffs' equal protection claim would still fail. As the Court observed in *Sloan*, the prohibition on physician-owned physical therapy practices bears a reasonable relation to the legislative purpose of avoiding overuse of physical therapy services. 636 S.E.2d at 614. Further, all PTs are barred from such employment relationships, and are thus treated alike. As such, there has been no violation of Plaintiffs' equal protection rights, and Plaintiffs' Fifth Cause of Action should be dismissed. *See id.* (noting that equal protection clause is satisfied where the classification at issue: (1) bears a reasonable relation to the legislative purpose sought to be achieved; (2) member of the class are treated alike under similar circumstances; and (3) the classification rests on some rational basis).³

Second, Plaintiffs' due process claim is similarly barred by *Sloan*, where the Supreme Court already rejected the argument that § 40-45-110(A)(1) violates the substantive due process rights of PTs who wish to be employed by physicians who refer patients to them. *Sloan*, 636

² Because the 2011 Position Statement is merely a policy or guidance statement, and is not a regulation, it is dubious whether the strictures of equal protection are applicable in the first instance. *See Continental Coal, Inc. v. Cunningham*, 553 F. Supp. 2d 1273, 1279 n.2 (D. Kan. 2008) ("As to the equal protection claim that the Board treated Continental differently . . . , such a claim fails because the Journal Entry is not enforceable against Continental[.]"). In any event, Plaintiffs cannot show that there has been any violation of their equal protection rights, for the reasons explained herein.

³ Even if doctors are a separate class, *see* Am. Compl. ¶ 66, Plaintiffs' claims fail for the same reasons—namely that the prohibition on physician-owned physical therapy practices bears a reasonable relation to the legislative purpose, and all doctors are barred from employing PTs.

S.E.2d at 614-15. While Plaintiffs’ Sixth Cause of Action purports to take issue with the 2011 Position Statement rather than § 40-45-110(A)(1) itself,⁴ this does not change the fact that their argument is meritless. At the core, any prohibition of employment relationships between physicians and physical therapists would “bear[] a reasonable relationship to a legitimate interest of government”—namely the interest in “enhancing the public welfare in the practice of medicine and related professions.” *Sloan*, 636 S.E.2d at 615. Accordingly, Plaintiffs’ due process rights have not been violated in any way. *See id.* at 614 (substantive due process looks at whether there is a “reasonable relationship to any legitimate interest of government”).

For these reasons, Plaintiffs’ Complaint fails as a matter of law, and the Board’s Motion should be granted.

CONCLUSION

For the reasons set forth herein and in the Brief of the Defendant-Intervenors, the Plaintiffs lack standing to bring this suit. Further, even if Plaintiffs had standing (they do not), all of their remaining claims—which seek to overturn *Sloan*—fail as a matter of law. Accordingly, Defendant’s Motion for Summary Judgment should be granted.

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⁴ Again, because the 2011 Position Statement is not a regulation, substantive due process rights are not at stake. *See Narragansett Improvement Co. v. Wheeler*, 21 A.3d 430, 440-41 (R.I. 2011) (“Because the [] commission’s actions were purely advisory and not enforceable to any extent, we decline to recognize plaintiffs’ substantive due process claim.”). In any event, Plaintiffs cannot show that there has been any violation of their due process rights, for the reasons explained herein.

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Labor, Licensing and Regulation, South Carolina
Board of Physical Therapy

Columbia, South Carolina

December 13, 2013

Exhibit A

South Carolina General Assembly
118th Session, 2009-2010

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~~Indicates Matter Stricken~~
Indicates New Matter

S. 1031

STATUS INFORMATION

General Bill

Sponsors: Senators Hayes, Reese, O'Dell, Jackson, Rose, Coleman, Nicholson, Ford, Elliott, Bright, Campbell, Massey and Matthews

Document Path: I:\council\bill\ncd\11226ac09.docx

Companion/Similar bill(s): 4329

Introduced in the Senate on January 12, 2010
Currently residing in the Senate

Summary: Physical therapists

HISTORY OF LEGISLATIVE ACTIONS

Date	Body	Action Description with journal page number
1/12/2010	Senate	Introduced and read first time <u>SJ-61</u>
1/12/2010	Senate	Referred to Committee on Medical Affairs <u>SJ-61</u>
3/9/2010	Senate	Committee report: Majority favorable, minority unfavorable Medical Affairs <u>SJ-14</u>

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VERSIONS OF THIS BILL

1/12/2010
3/9/2010

(Text matches printed bills. Document has been reformatted to meet World Wide Web specifications.)

~~Indicates Matter Stricken~~

Indicates New Matter

COMMITTEE REPORT

March 9, 2010

S. 1031

Introduced by Senators Hayes, Reese, O'Dell, Jackson, Rose, Coleman, Nicholson, Ford, Elliott, Bright, Campbell, Massey and Matthews

S. Printed 3/9/10--S.

Read the first time January 12, 2010.

THE COMMITTEE ON MEDICAL AFFAIRS

To whom was referred a Bill (S. 1031) to amend Section 40-45-110, Code of Laws of South Carolina, 1976, relating, among other things, to licensure of physical therapists and grounds for sanctions, etc., respectfully

REPORT:

That they have duly and carefully considered the same and recommend that the same do pass:

Majority favorable. Minority unfavorable.

ROBERT W. HAYES, JR. KEVIN L. BRYANT

For Majority. RALPH ANDERSON

For Minority.

A BILL

TO AMEND SECTION 40-45-110, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING, AMONG OTHER THINGS, TO LICENSURE OF PHYSICAL THERAPISTS AND GROUNDS FOR SANCTIONS AGAINST LICENSEES, SO AS TO REVISE THE PROHIBITION AGAINST A LICENSEE WHO IS INVOLVED IN THE DIVIDING, TRANSFERRING, ASSIGNING, REBATING, OR REFUNDING OF FEES RECEIVED FOR PROFESSIONAL SERVICES BY CERTAIN MEANS BY DELETING THE REFERENCE TO "WAGES", AS A MEANS OF ENGAGING IN THE PROHIBITED CONDUCT, AND TO FURTHER SPECIFY ARRANGEMENTS THAT MAY EXIST BETWEEN A PHYSICAL THERAPIST AND A PHYSICIAN WHICH MAY NOT BE CONSIDERED CONDUCT SUBJECT TO SANCTIONS BY THE BOARD OF PHYSICAL THERAPY EXAMINERS.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Section 40-45-110(A) of the 1976 Code, is amended to read:

http://www.scstatehouse.gov/sess118_2009-2010/bills/1031.htm

12/11/2013

"(A) In addition to other grounds provided for in Section 40-1-110, the board, after notice and hearing, may restrict or refuse to grant a license to an applicant and may 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; Notwithstanding any other provision of this section or any regulation promulgated by the board, a person licensed under this chapter, who has a bona fide employment or independent contract with a physician, a physician group, or an entity with which a physician has a legal compensation arrangement, including fair market value wages, compensation, benefits, or rents for services or property provided, must not be deemed to be engaged in conduct that is subject to licensure denial, suspension, revocation, restriction, or any other disciplinary action or penalty under this chapter by virtue of such employment or contract, or by virtue of the provision of physical therapy services pursuant to a referral from the employing or contracting physician as provided for in Section 44-113-30(A)(1).
- (2) has treated or undertaken to treat human ailments otherwise than by physical therapy or has practiced physical therapy and failed to refer to a licensed medical doctor or dentist any patient whose medical condition should have been determined at the time of evaluation or treatment to be beyond the scope of practice of a physical therapist;
- (3) knowingly aided, assisted, procured, or advised a person to practice physical therapy contrary to this chapter or to regulations promulgated by the board pursuant to this chapter or knowingly performed an act which aids, assists, procures, or advises an unlicensed person to practice physical therapy;
- (4) 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;
- (5) changes, or in any way modifies, any specific patient care instructions or protocols established by an appropriate health care provider without prior consultation with and approval by the appropriate health care provider."

SECTION 2. This act takes effect upon approval by the Governor.

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This web page was last updated on Monday, October 10, 2011 at 12:17 P.M.

Exhibit B

South Carolina General Assembly
118th Session, 2009-2010

Download [This Bill](#) in Microsoft Word format

~~Indicates Matter Stricken~~
Indicates New Matter

H. 4329

STATUS INFORMATION

General Bill

Sponsors: Reps. Bingham, Gunn, Simrill, Mitchell, Gilliard, Stewart, Barfield, Brady, A.D. Young, Anderson, Millwood, J.R. Smith, Bales, Cole, Dellaney, Hamilton, Harrison, Hart, Harvin, Hearn, Horne, Hosey, Kelly, Littlejohn, Parker, Weeks, Williams, T.R. Young, Viers, Sellers and Alexander
Document Path: I:\council\bill\ncd\11344ac09.docx
Companion/Similar bill(s): 1031

Introduced in the House on January 13, 2010

Currently residing in the House Committee on **Medical, Military, Public and Municipal Affairs**

Summary: Physical therapists

HISTORY OF LEGISLATIVE ACTIONS

Date	Body	Action Description with journal page number
1/13/2010	House	Introduced and read first time <u>HJ-44</u>
1/13/2010	House	Referred to Committee on Medical, Military, Public and Municipal Affairs <u>HJ-44</u>
1/14/2010	House	Member(s) request name removed as sponsor: V.S.Moss
1/19/2010	House	Member(s) request name removed as sponsor: Allison, Wylie
1/20/2010	House	Member(s) request name removed as sponsor: Erickson
1/21/2010	House	Member(s) request name removed as sponsor: Willis, Rutto, Haley, Vick, Clemmons, Hardwick, Herbkersman
1/28/2010	House	Member(s) request name removed as sponsor: Sellers, Knight
2/3/2010	House	Member(s) request name added as sponsor: Sellers
2/4/2010	House	Member(s) request name added as sponsor: Alexander

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VERSIONS OF THIS BILL

1/13/2010

(Text matches printed bills. Document has been reformatted to meet World Wide Web specifications.)

A BILL

TO AMEND SECTION 40-45-110, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING, AMONG OTHER THINGS, TO LICENSURE OF PHYSICAL THERAPISTS AND GROUNDS FOR SANCTIONS AGAINST LICENSEES, SO AS TO REVISE THE PROHIBITION AGAINST A LICENSEE WHO IS INVOLVED IN THE DIVIDING, TRANSFERRING, ASSIGNING, REBATING, OR REFUNDING OF FEES RECEIVED FOR PROFESSIONAL SERVICES BY CERTAIN MEANS BY DELETING THE REFERENCE TO "WAGES", AS A MEANS OF ENGAGING IN THE PROHIBITED CONDUCT, AND TO FURTHER SPECIFY ARRANGEMENTS THAT MAY EXIST BETWEEN A PHYSICAL THERAPIST AND A PHYSICIAN WHICH MAY NOT BE CONSIDERED CONDUCT SUBJECT TO SANCTIONS BY THE BOARD OF PHYSICAL THERAPY EXAMINERS.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Section 40-45-110(A) of the 1976 Code, is amended to read:

"(A) In addition to other grounds provided for in Section 40-1-110, the board, after notice and hearing, may restrict or refuse to grant a license to an applicant and may 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; Notwithstanding any other provision of this section or any regulation promulgated by the board, a person licensed under this chapter, who has a bona fide employment or independent contract with a physician, a physician group, or an entity with which a physician has a legal compensation arrangement, including fair market value wages, compensation, benefits, or rents for services or property provided, must not be deemed to be engaged in conduct that is subject to licensure denial, suspension, revocation, restriction, or any other disciplinary action or penalty under this chapter by virtue of such employment or contract, or by virtue of the provision of physical therapy services pursuant to a referral from the employing or contracting physician as provided for in Section 44-113-30(A)(1).
- (2) has treated or undertaken to treat human ailments otherwise than by physical therapy or has practiced physical therapy and failed to refer to a licensed medical doctor or dentist any patient whose medical condition should have been determined at the time of evaluation or treatment to be beyond the scope of practice of a physical therapist;
- (3) knowingly aided, assisted, procured, or advised a person to practice physical therapy contrary to this chapter or to regulations promulgated by the board pursuant to this chapter or knowingly performed an act which aids, assists, procures, or advises an unlicensed person to practice physical therapy;
- (4) 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;
- (5) changes, or in any way modifies, any specific patient care instructions or protocols established by an appropriate health care provider without prior consultation with and approval by the appropriate health care provider."

SECTION 2. This act takes effect upon approval by the Governor.

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This web page was last updated on Monday, October 10, 2011 at 12:24 P.M.

practices. The 2011 Position Statement thus does not apply to the two Plaintiffs who are physicians and whose admitted goal is to overturn *Sloan*. As to PT Plaintiff Kristin Joseph, the PT Board's interpretation of the PT Act in the 2011 Position Statement is arguably applicable, but it does her no harm. At her deposition, PT 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 (K. Joseph Dep. 18:4-9, 26:10-15), precisely the kind of "coverage" that the Amended Complaint asserts is unlawful. The 2011 Position Statement's interpretation of the PT Act merely permits PT Joseph to continue accepting compensation from her group practice without violating § 40-45-110(A)(1)—hardly an injury. If the Court were to grant the "relief" the Amended Complaint seeks in the First and Second Causes of Action, PT Joseph would not be able to accept her paycheck without exposing herself to discipline by the PT Board.

Simply put, the Court cannot order the relief the Plaintiffs want—overturning *Sloan*. And given their lack of standing to challenge the 2011 Position Statement, as addressed in the PT Board's briefs, there is no reason for the Court to consider adopting the interpretation of the PT Act urged by Plaintiffs in their First and Second Causes of Action—an interpretation that would outlaw the group practice of physical therapy and essentially eliminate the PTA profession. But even if the Court were to ignore Plaintiffs' lack of standing and consider such claims on the merits, Plaintiffs' remaining claims fail as a matter of law and undisputed fact.

I. Plaintiffs' Interpretation of "Referral" Contravenes Legislative Intent and Would Purposefully Create Absurd Results

With respect to their First and Second Causes of Action, Plaintiffs argue that:

(1) the plain meaning of the term "refer" encompasses PT-to-PT and PT-to-PTA handoffs

occurring within group physical therapy practices because the PTs are sending patients to another PT or PTA for “treatment, aid, information, or decision”; and (2) the Legislature “[c]ertainly” intended for § 40-45-110(A)(1) to prohibit such handoffs in the same way it prohibits gatekeeping physicians from employing PTs to whom they refer patients. Pls.’ Mem. at 23-25. As a result, Plaintiffs claim, “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, 50; *see also id.* Prayer for Relief ¶ 2. These arguments are mistaken, fly in the face of legislative intent, and purposefully seek to produce absurd results.

A. Plaintiffs’ “Plain Meaning” Argument Is Misplaced

The plain meaning rule does not help the Court apply “refer” in this case because, as applied here, the term is “susceptible to more than one interpretation” and is thus “ambiguous.” *See Barton v. S.C. Dep’t of Probation Parole & Pardon Servs.*, 745 S.E.2d 110, 120-21 (S.C. 2013) (plain meaning rule did not apply where statute was “ambiguous, and thus susceptible to more than one interpretation”). The Plaintiffs base their “plain meaning” argument on two extrinsic sources cited in *Sloan*, Webster’s Third New International Dictionary 1907 (1981) and the Provider Self-Referral Act (“PSRA”), S.C. Code Ann. § 44-113-20(12). Pls.’ Mem. at 23 (citing *Sloan*, 636 S.E.2d at 607-608). But these two sources give conflicting answers to questions involving the application of the prohibition in § 40-45-110(A)(1). For example, under the literal reading of the Webster’s definition posited by Plaintiffs, 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.¹ On the other hand, the PSRA definition limits “referrals” to the “forwarding” of patients by “health care providers,” and thus would not appear to reach appointment scheduling by administrative staff. As this example illustrates, the “plain meaning” of “refer” does not provide a single definite answer to the question of interpretation raised by the Amended Complaint—namely what type of “sending or directing” of a patient to a PT constitutes a “referral” under the statute. In order to effectuate the legislative intent of § 40-45-110(A)(1), the Court must thus take into account the context in which the term is used, whether the proposed interpretation would advance the legislative intent, and whether the interpretation would offend common sense by producing absurd results. *See Barton*, 745 S.E.2d at 120-23.

B. Plaintiffs’ Interpretation of “Refer” Ignores Its Context in § 40-45-110(A)

In the context of § 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 (or dentist) 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-

¹ In articulating the supposed “plain meaning” of the term “refer,” Plaintiffs point to the Webster’s dictionary definition of “refer” cited in *Sloan*, which is “to send or direct for treatment, aid, information, [or] decision, [e.g.] a patient to a specialist.” Pls.’ Mem. at 23 (citing *Sloan*, 636 S.E.2d 607-08). Plaintiffs contend that the “operative” part of the definition is “to send or direct for treatment, aid, information or decision,” dismissing the “to a specialist” language as being a mere “illustrative example,” presumably of no import. Pls.’ Mem. at 23. Their discomfort doubtless flows from the realization that only a relatively small number of PTs are board-certified specialists, a limitation that would tend to lessen the impact of winning a favorable ruling. In other words, the Plaintiffs urge this Court to hew to the dictionary definition, except when doing so would lessen the mischief they would like to accomplish. Nothing in South Carolina law allows parties to pick and choose only the elements of a dictionary definition that they happen to find useful in supporting their arguments.

day window. Indeed, if the Legislature's intent were to outlaw the group practice of physical therapy, as Plaintiffs 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[.]"). This was obviously not the Legislature's intent.

C. Expanding the Scope of the Referral Prohibition in § 40-45-110(A)(1) Would Contravene Legislative Intent

Plaintiffs admit—as they must—that the legislative purpose behind the “referral” prohibition in § 40-45-110(A)(1) was to prevent “overuse of medical services by *physicians* who, for their own financial gain rather than their patients’ medical needs, refer patients to [physical therapy] entities in which the *physicians* hold a financial interest.” Pls.’ Mem. at 2, 24 (quoting *Sloan*, 636 S.E.2d at 607) (emphasis added). Plaintiffs then argue, without any support, that the Legislature “[c]ertainly” intended for this provision to equally prohibit PT-to-PT and PT-to-PTA handoffs. *Id.* at 24 (emphasis added).

The argument that the statute’s purpose is to prevent PT-to-PT and PT-to-PTA handoffs finds absolutely no support in *Sloan*, which described 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*, 636 S.E.2d at 607, 612, 614. The South Carolina Supreme 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.

The Plaintiffs 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. Plaintiffs' attempt to expand the scope of the statute should be rejected. *See Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing, and Regulation*, 523 S.E.2d 795, 802 (S.C. Ct. App. 1999) ("The court may not resort to subtle or forced construction to . . . expand a statute's operation."). Moreover, Plaintiffs present no evidence to suggest that the PT-to-PT and PT-to-PTA handoffs that occur in group practice increase the risk of overutilization. Plaintiffs are thus asking the Court to discover legislative intent to outlaw the group practice of physical therapy in order to tackle a problem—overutilization resulting from PT-to-PT and PT-to-PTA handoffs within group practice—that does not exist. In contrast, there is peer-reviewed research showing that there are real problems associated with allowing gatekeeper physicians to employ physical therapists, including overutilization and increased costs.

As a threshold matter, Plaintiffs are inviting this Court to improperly legislate (based solely on Plaintiffs' unsupported assertion of what the Legislature "certainly" intended), which South Carolina courts have repeatedly indicated they will not do. *See, e.g., Keyserling v. Beasley*, 470 S.E.2d 100, 101 (S.C. 1996) ("We do not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly.").

Evidently assuming that this Court is disposed to legislate, Plaintiffs contend that the Court should extend the application of § 40-45-110(A)(1) to PT-to-PT and PT-to-PTA handoffs because PTs and PT groups are somehow more likely to be guilty of "fraud, waste, and abuse" than physicians and physician groups, citing (i) a publication of

the Centers for Medicare and Medicaid Services (“CMS”), (ii) a report by the Office of Inspector General (“OIG”) of the U.S. Department of Health and Human Services, and (iii) a Medicaid Bulletin issued by the State Department of Health and Human Services. Pls.’ Mem. at 24-25. This argument is far off the mark.

The sources that Plaintiffs cite, 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, Ex. P hereto. 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. Nor was there any way of telling whether the reported abuse was the result of outright fraud, which referral prohibitions do nothing to combat, as opposed to overutilization. *Id.* at ¶ 20. Indeed, the OIG report and other CMS publications cited by Plaintiffs did not focus at all on physician-to-PT referrals or PT-to-PT and PT-to-PTA handoffs. *Id.* at ¶¶ 14, 20. Thus, Plaintiffs’ assertion that “[t]he Centers for Medicare and Medicaid Services (CMS) has recently determined that PTs constitute a higher risk for making prohibited referrals for profit than do physicians[,]” Pls.’s Mem. at 2, is simply wrong. *Id.* at ¶ 27.

In contrast, research into the patterns of utilization between physician-owned physical therapy practices 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), Ex. Q hereto; 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) (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), Ex. R hereto. The research of Drs. Mitchell & Scott also indicates that patients typically receive higher quality care—more time with licensed providers—at physical therapy facilities not owned by referring physicians. *Id.* at 2058.² Similarly, the OIG has issued reports noting concerns with physicians billing as “physical therapy” services provided by unqualified and non-licensed providers. Stearns Aff. at ¶¶ 23-24.

In sum, there is ample evidence to support the wisdom of the Legislature’s intent, as described in *Sloan*, to prohibit referring physicians from employing PTs. On the other hand, Defendant-Intervenors are not aware of any research—and Plaintiffs have pointed to none—that would support an expansion of the scope of § 40-45-110(A)(1) beyond physician referrals to prohibit PTs associating together in group practice.

² Their research further indicates—contrary to Plaintiffs’ suggestion—that non-physician-owned therapy practices derive a greater percentage of their revenue from Medicare patients, with physician-owned therapy practices treating relatively more patients with “good insurance coverage.” *Id.*

While some states have taken action to specifically address problems of overuse of physical therapy services, none has adopted the solution that Plaintiffs propose, which instead of addressing problems of overuse of physical therapy services, would only hurt PTs, effectively eliminate PTAs, hinder patient access, and increase health care cost. In effect, Plaintiffs ask this Court to make an outlandish legislative decision that would force PTs to practice solo and drive PTAs out of business, based on no relevant evidence whatsoever that doing so would curb potential overutilization. To Defendant-Intervenors' knowledge, not a single legislator in any one of the 50 states has ever suggested that PTs should be forbidden from practicing in group settings or from utilizing PTAs. Yet these results are what the Plaintiffs contend the South Carolina Legislature "certainly" intended. If the Plaintiffs have any evidence to support such a policy decision, they should present that evidence—and their concerns—directly to the Legislature, not this Court.

D. Plaintiffs' Interpretation of § 40-45-110(A)(1) Creates Absurd Results

As discussed above, in support of their proposed interpretation of § 40-45-110(A)(1), Plaintiffs have failed to present a single and definite meaning of "refer" consistent with the context of the rest of § 40-45-110. They have likewise failed to explain how their strained interpretation advances the legislative intent behind the statute, as identified in *Sloan*. But most importantly, Plaintiffs' requested interpretation has to be rejected because it produces absurd results. In a unanimous opinion the Supreme Court cautioned:

Nonetheless, however plain the ordinary meaning of the words used in a statute may be, we will reject that meaning when to accept it would lead to

a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention.

J.T. Baggerly v. CSX Transp., Inc., 635 S.E.2d 97, 103 (S.C. 2006) (citing *Kiriakides v. United Artists Commcn's, Inc.*, 440 S.E.2d 364 (S.C. 1994)).

The Plaintiffs insist that “refer” means “to send or direct for treatment, aid, information, [or] decision,” Pls.’ Mem. at 23, and that “person” includes all individuals, *id.* at 19. Thus, under Plaintiffs’ interpretation, “person who referred” in § 40-45-110(A)(1) means not just a physician gatekeeper, but any human being who sends or directs a patient for treatment. If that proposition were correct, then § 40-45-110(A)(1) would prevent two or more PTs from practicing together unless they scrupulously refrained from ever caring for the same patient—an absurd result. If the Plaintiffs were correct, then all PTAs in South Carolina would be sidelined because the PT Act would require PTAs to work only under the supervision and direction of a PT, but at the same time would prohibit PTAs from doing so—an absurd Catch-22 result. In addition, if the Plaintiffs were correct, then PTs would be prevented from paying administrative staff (“persons”) to schedule (“send or direct”) patients for appointments—a ludicrous result.

Indeed, having the Court reach a result devastating to the practice of physical therapy, a result that does nothing for the physician Plaintiffs and actually harms PT Joseph, is the Plaintiffs’ goal in their First and Second Causes of Action. Funded by the South Carolina Orthopaedic Association, the Plaintiffs would have the Court make an absurd interpretation of § 40-45-110(A)(1)—one that harms PTs, PTAs, patients, and taxpayers—so that the PTs will be forced to join with the orthopaedists in their heretofore unsuccessful attempts to pass legislation eliminating § 40-45-110(A)(1). Plaintiffs thus ask the Court for an absurd interpretation of the law in order to gain leverage to seek its

elimination in the Legislature. This is hardly a proper basis for seeking a declaratory judgment, particularly given the Plaintiffs' lack of standing.

II. Plaintiffs' Other Remaining Causes of Action Should Be Dismissed

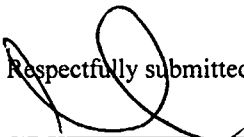
For all the reasons set forth in the Defendants' opening briefs, and those herein and in the PT Board's response filed herewith, Plaintiffs' Causes of Action Three through Six likewise fail and should be dismissed as a matter of law and undisputed fact.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Defendant-Intervenors' opening briefs and those articulated by the PT Board in its separate briefs, the Defendants are entitled to summary judgment, and Plaintiffs' remaining causes of action should be dismissed.

Respectfully submitted,

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West Columbia, South Carolina
January 10, 2013

RECEIVED

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McNair Law Firm, PA

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS	
	)		
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT	
	)		
Kristin Joseph P.T., Thomas N. Joseph,	)	C/A No. 2012-CP-40-2632	
M.D., and William G. McCarthy, M.D.,	)		
	)		
Plaintiffs,	)		
	)		
vs.	)	<u>SOUTH CAROLINA BOARD OF</u>	2014 JUN 10 AM 11:57
	)	<u>PHYSICAL THERAPY'S RESPONSE</u>	FILED
South Carolina Department of Labor,	)	<u>IN SUPPORT OF ITS MOTION FOR</u>	
Licensing and Regulation, South Carolina	)	<u>SUMMARY JUDGMENT</u>	
Board of Physical Therapy,	)		
	)		
Defendant,	)		
	)		
And	)		
	)		
South Carolina Chapter, American	)		
Physical Therapy Association, Joseph M.	)		
McKowen, PT, Sabrina Queen Bridges,	)		
PTA, and Amalia W. Kirby, PTA,	)		
	)		
<u>Defendant-Intervenors.</u>	)		

Plaintiffs' opening brief confirms the Board is entitled to summary judgment. While Plaintiffs continue to quarrel with the 2011 Position Statement, that statement by the Board has no force of law. Further, discovery has confirmed that the statement does not affect Plaintiffs or their claimed rights in any way. To the contrary, the interpretation of the PT Act that actually has caused the Plaintiffs their alleged harm is the binding interpretation of the South Carolina Supreme Court in *Sloan*. This Court has already recognized, in dismissing the Plaintiffs' Seventh through Ninth Causes of Action, that it has no authority to overrule *Sloan*.

As is now clear from the record—and Plaintiffs' opening brief—Plaintiffs lack standing, and the only reasonable inference that can be drawn from the pleadings,

discovery responses, depositions, and the applicable statutory and case law is that the Board is entitled to dismissal of Plaintiffs' remaining claims as a matter of law.

A. Plaintiffs Lack Standing To Challenge The 2011 Position Statement.

To begin, Plaintiffs' opening brief overlooks the threshold issue of standing. *Cf. Bodman v. State*, 742 S.E.2d 363, 366 (S.C. 2013) (indicating that standing is a "threshold" issue because it is a "fundamental requirement in instituting an action").¹ As previously explained, and as evidenced by the pleadings and depositions in this case, Plaintiffs cannot meet any of the three required elements of standing.

First, Plaintiffs cannot establish any injury in fact because neither the PT Plaintiff nor the physician Plaintiffs face any harm attributable to the 2011 Position Statement. The Board's interpretation of the PT Act in the 2011 Position Statement—which allows PTs to continue practicing together in a group practice—does not prohibit Ms. Joseph from doing anything. *See* K. Joseph Dep. 15:13-16, 18:7-8, 26:13-15, 42:2-10. In fact, Ms. Joseph has no problem seeing patients for the PT with whom she works or with that PT seeing her patients. *See* K. Joseph Dep. 27:8 – 28:12 Further, as Plaintiffs recognize, Drs. Joseph and McCarthy are both "licensed orthopaedic surgeon[s]." Pls.' Mem. at 8-9. As a result, the 2011 Position Statement does not apply to them and they cannot suffer

¹ Notwithstanding the Court's ruling at the motion to dismiss stage, the "burden of establishing standing rests with the [plaintiff] and must be supported at *each stage of the litigation*." *U.S. v. Various Vehicles, Funds, and Real Props. Described in Attachment A*, C/A No. 2:11-1528-DCN-SVH, 2011 WL 6012424, at *3 (D.S.C. Oct. 25, 2011) (emphasis added).

any harm. *See* Pls.' Mem. at 22 (admitting that the PT Act "regulate[s] the practice and conduct of PTs not that of other licensed health care providers").²

Second, Plaintiffs cannot establish any causal connection between the 2011 Position Statement and their supposed injury because their real grievance is with *Sloan* and the PT Act itself. While Plaintiffs attempt to mask their true intent by claiming that *Sloan* did not address the issue of whether a PT "is prohibited from being employed by and receiving referrals from another PT" under the PT Act, Pls.' Mem. at 4, Plaintiffs' end goal is to allow PTs to be "employed by physicians or physician groups and treat patients referred by physicians or members of the group." Pls.' Mem. at 34; *see also id.* at 30; McCarthy Dep. 21:9-15; T. Joseph Dep. 37:7-11; K. Joseph Dep. 41:5-8. It is the PT Act, as interpreted in *Sloan*, that prohibits physicians from employing PTs—not the 2011 Position Statement.

Third, because the 2011 Position Statement is not the source of the prohibition on physicians employing PTs, Plaintiffs cannot obtain any relief from any judicial declaration regarding the 2011 Position Statement. Even if the Court issued the requested declaratory judgment concerning the 2011 Position Statement, the PT Act would still prohibit PT Joseph from working for physicians or physician groups, and the PT Act would still prohibit PTs from working for the Plaintiff physicians. Plaintiffs' remaining claims thus seek to impermissibly "fish in judicial ponds for advice." *City of Columbia v. Sanders*, 97 S.E.2d 210, 213 (S.C. 1957).

² For these reasons, Plaintiffs have likewise not presented a justiciable controversy because the 2011 Position Statement does not prevent any of the Plaintiffs from doing anything. *See* Board's Mem. in Support of Mot. for Summ. J. at n.1.

For all of these reasons, the Board should be granted summary judgment because Plaintiffs have presented an abstract dispute they lack standing to bring.

B. Plaintiffs' Remaining Claims Fail As A Matter of Law.

1. Plaintiffs' argument that a PT is a "person" is a red herring

Plaintiffs devote much of their opening brief to the argument that a PT is a "person" under the PT Act, *see, e.g.*, Pls.' Mem. at 18-21. This proposition is not in dispute. Under the PT Act, a person is defined as an "individual," S.C. Code Ann. § 40-45-20(3). The 2011 Position Statement makes no suggestion that a PT is not a "person" for purposes of the PT Act, nor has the Board ever taken such a nonsensical position. Plaintiffs would have the Court believe that, if PTs are persons, their claims have merit. This is mistaken and obvious misdirection. *See Taylor v. State*, 745 S.E.2d 97, 103 (S.C. 2013) (rejecting claim that was a "red herring").³ Assuming *arguendo* that Plaintiffs have standing, the issue of statutory interpretation that their First and Second Causes of Action raise is whether the term "referral" in the PT Act should be interpreted so as to outlaw group practice of physical therapy and effectively eliminate the profession of PTA in this State. As discussed in the Defendants' opening briefs and below, there is no basis for interpreting the PT Act to produce such absurd and unintended results.

2. The 2011 Position Statement does not violate S.C. Code Ann. § 40-45-110(A)(1)

Plaintiffs agree that "[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Barton v. S.C. Dep't of Probation Parole &*

³ Plaintiffs similarly mischaracterize the *Sloan* decision by claiming that it determined that physicians were "persons." *See* Pls.' Mem. at 17. The issue in *Sloan* was not whether physicians were "persons" under the PT Act, but whether the PT Act prohibits a PT from working as an employee of a physician when the physician refers patients to the PT for physical therapy services. *See Sloan*, 636 S.E.2d at 609.

Pardon Servs., 745 S.E.2d 110, 120 (S.C. 2013) (quoting *Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue*, 694 S.E.2d 525, 529 (S.C. 2010) and *Charleston Cnty. Sch. Dist. v. State Budget & Control Bd.*, 437 S.E.2d 6, 8 (S.C. 1993)); *see also* Pls.' Mem. at 16.

Plaintiffs likewise concede that the legislative purpose behind the "referral" prohibition in § 40-45-110(A)(1) was to prevent "overuse of medical services by *physicians* who, for their own financial gain rather than their patients' medical needs, refer patients to [physical therapy] entities in which the *physicians* hold a financial interest." Pls.' Mem. at 2, 24 (emphasis added), quoting *Sloan*, 636 S.E.2d at 607. Plaintiffs then argue in their First and Second Causes of Action, without any support, that the Legislature intended for this provision to apply not just to the referrals from gatekeeping physicians, but also to PT-to-PT and PT-to-PTA handoffs within a group physical therapy practice. Pls.' Mem. at 24.

As addressed in the Defendant-Intervenors' briefs, PT-to-PT and PT-to-PTA handoffs occurring in group practice do not create or authorize new care, and outlawing the group practice of physical therapy does nothing to limit the potential for overutilization of physical therapy services by gatekeeper physicians motivated by their own financial interest. Plaintiffs' proposed interpretation thus does nothing to advance the intent of the Legislature, as identified in *Sloan*. 636 S.E.2d at 607, 612, 614. Indeed, if the Legislature had wanted to outlaw the group practice of physical therapy, it could have done so explicitly in the PT Act.

Plaintiffs' proposed interpretation would prevent PTs in South Carolina from practicing in association with other PTs, forcing them instead to practice as solo practitioners. This not only harms PTs, but also increases health care costs and restricts

patient access to physical therapy services. Plaintiffs' interpretation also would legislate PTAs out of existence in South Carolina, eliminating a profession authorized in detail by the PT Act. This result would not only devastate PTAs, it would also further increase health care costs and restrict patient access to physical therapy services. Given the Plaintiffs' lack of standing, there is no justification for the Court even to consider the Plaintiffs' proposed interpretation of § 40-45-110(A)(1) presented in their First and Second Causes of Action. Even if the Court were to consider the question on the merits, there is no legal or factual justification for the Court to adopt the Plaintiffs' strained interpretation, which does not advance legislative intent and produces absurd results that would harm PTs, PTAs, patients and taxpayers.

Summary judgment should thus be awarded to the Board on Plaintiffs' First and Second Causes of Action.

3. The 2011 Position Statement cannot be used to reargue *Sloan*

Plaintiffs' Third Cause of Action is their claim that PTs should be able to work for referring physicians, because their treatment of referred patients would merely be "coverage" for the referring physician. This is a blatant attempt to evade the PT Act's prohibition on physician-owned PT practices. Whether PTs can work for physicians was already 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 in this case. This Court has already recognized as much in granting summary judgment as to the Seventh through Ninth Causes of Action. *See* Dec. 4, 2012 Order Granting Partial Summary Judgment as to Causes of Action Seven Through Nine, at 12.

Moreover, Plaintiffs' position is wrong. Plaintiffs cite court cases defining "coverage" as one physician covering for another physician. Pls.' Mem. at 25-26. They note that PTs can and do "cover" for one another. *Id.* at 26. Then 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 27. It is this last step where Plaintiffs' train of logic derails. They offer no legal or factual support for the proposition that a PT can "cover" for a physician. They 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). They ignore the fact that two key medical functions, prescribing drugs and performing surgery, are within the scope of practice of a physician, but not that of a PT. *See* S.C. Code Ann. § 40-47-20(36). They ignore the law that requires PTs to treat patients (beyond an initial 30-day window) only with a "referral" from a physician (or dentist). *Id.* § 40-45-110(A)(4). And while they argue that both PTs and physicians are qualified to provide physical therapy services, they ignore their own testimony that the physical therapy services physicians offer are brief and educational in nature. *See* T. Joseph Dep. 11:22-12:5 ("So usually the physical therapy that we do is educational, for the most part. It's very – it's fairly brief It's not as extensive as the physical therapist who would do physical therapy for 30 minutes, 45 minutes, an hour"); McCarthy Dep. 22:5-16 (indicating that he merely educates patients in the exercises that they need to perform); *see also* Pls.' Mem. at 27 (admitting that Drs. Joseph and McCarthy testified that they provide physical therapy services only on a "limited basis"); Stearns Aff. ¶ 39. There is simply no basis for the notion that PTs

can “cover” for physicians, and likewise no basis for a claim that a PT’s treatment of patients referred by a physician employer does not violate the PT Act.

For these reasons, Plaintiffs’ Third Cause of Action, which seeks to overturn *Sloan*, is meritless, and summary judgment should be granted.

4. The 2011 Position Statement does not violate the APA

With respect to their Fourth Cause of Action, Plaintiffs argue in their opening brief that the 2011 Position Statement is “intended to have the force of law,” 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”). Pls.’ Mem. at 28-30. This argument is mistaken, as evidenced by *Sloan*, which Plaintiffs improperly omit from their analysis. In *Sloan*, the South Carolina Supreme Court held that an earlier 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.” 636 S.E.2d at 610. This holding applies equally here. For this reason, Plaintiffs’ Fourth Cause of Action should be dismissed.

5. Plaintiffs’ equal protection and due process claims are foreclosed by *Sloan*

With respect to their Fifth and Sixth Causes of Action, Plaintiffs’ opening brief again ignores *Sloan*, claiming that the 2011 Position Statement violated Plaintiffs’ constitutional rights to equal protection and substantive due process by allowing “PTs to be employed by other PTs or PT Groups and treat patients referred by those PTs or members of the group and not [] allow[ing] PTs to be employed by physicians or physicians groups and treat patients referred by these physicians or members of the

group.” Pls.’ Mem. at 30, 34. Again, these claims do not take issue with the 2011 Position Statement, which does not prohibit the Plaintiffs from doing anything. These constitutional claims take issue with the decision in *Sloan*, and were addressed and dispensed with in *Sloan*. 636 S.E.2d at 613-15.

Without discussing *Sloan*, and citing only a dissenting opinion in another South Carolina Supreme Court case, Pls.’ Mem. at 33-34, Plaintiffs attempt to argue that that there is no rational basis for treating different healthcare professionals (physicians and PTs) differently under the law. This same argument was specifically rejected in *Sloan*, 636 S.E.2d at 613 (“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.”). There is thus no merit to the claim 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.⁴

As the Supreme Court ruled in *Sloan*, the prohibition on physician-owned physical therapy practices bears a reasonable relation to the legislative purpose of avoiding overuse of physical therapy services, 636 S.E.2d at 614. Plaintiffs concede that this is the legislative purpose of § 40-45-110(A)(1), but argue that this reasoning should apply equally to coverage, co-treatment and other PT-to-PT and PT-to-PTA handoffs occurring in physical therapy group practices. *See* Pls.’ Mem. at 32-33. But, as

⁴ If Plaintiffs’ equal protection claim that the law must treat physicians and PTs the same had any merit, then PTs would be able to challenge, on equal protection grounds, the requirement that they need a “referral” from a physician to treat a patient beyond an initial 30-day window, S.C. Code Ann. § 40-45-110(A)(4), and the prohibition on PTs changing, on their own, the treatment plan authorized by the referring physician, S.C. Code Ann. § 40-45-110(A)(5).

explained in Defendant-Intervenors' opening brief and above, 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 handoffs occurring within a group practice thus does nothing to further the intended purpose of § 40-45-110(A)(1), curbing 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, as Plaintiffs request, would thus 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.

Ironically, Plaintiffs' equal protection claim seeks to impose hardships on PTs and PTAs that the law does not impose on physicians. While *Sloan* allows physicians to continue to associate with one another in group medical practices, a judgment in favor of the Plaintiffs in this case would prevent PTs from practicing in association with one another. Similarly, while *Sloan* allows physicians to employ and utilize physician assistants and other licensed supportive personnel, a judgment in favor of the Plaintiffs in this case would prevent PTs from employing and utilizing PTAs. Plaintiffs' requested interpretation of the PT Act would, in effect, prohibit PTAs from working, period.

In addition to their erroneous assertion that physicians and PTs must be treated as part of the same class, Plaintiffs make the confusing argument that PT Joseph has “equal protection rights to be employed by a physician or in a physician group” and that Drs. Joseph and McCarthy have “equal protection” rights to employ PTs. Pls.’ Mem. at 30. This boils down to an argument that Plaintiffs are being treated unfairly because they want to do something the law prohibits. It is analogous to a child and a factory owner seeking to invalidate a child labor law simply because the child wants to work in a factory and the factory owner wants to employ children. That’s not a valid equal protection claim, it’s just disagreement with the law.

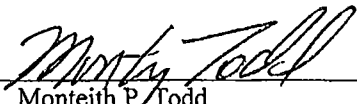
As to Plaintiffs’ substantive due process claim, that was likewise addressed in *Sloan*. 636 S.E.2d at 614-15. Again, the 2011 Position Statement does not prohibit Plaintiffs from doing anything, and thus cannot possibly deprive them of any property right, with or without due process. Plaintiffs instead take issue with the prohibition on PTs working for physicians addressed in *Sloan*. They argue that there is “no rational basis” to prohibit physical therapists from being “employed by a physician or physician group and be[ing] paid to treat referred patients,” Pls.’ Mem. at 35. But this argument was considered—and rejected—in *Sloan*. The South Carolina Supreme Court has already held that the prohibition on physicians employing PTs is based upon a “legitimate interest of government,” namely the interest in “enhancing the public welfare in the practice of medicine and related professions.” *Sloan*, 636 S.E.2d at 615. As such, Plaintiffs’ due process rights have not been violated in any way.

For all these reasons, Plaintiffs’ Fifth and Sixth Causes of Action fail as a matter of law and undisputed fact, and the Board’s Motion should be granted.

CONCLUSION

For the foregoing reasons, the Board is entitled to summary judgment, and Plaintiffs' remaining causes of action (Causes of Action One through Six) should be dismissed with prejudice.

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January 10, 2014

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
Kristin Joseph P.T., Thomas N. Joseph,)
M.D., and William G. McCarthy, M.D.,)
Plaintiffs,)
vs.)
South Carolina Department of Labor,)
Licensing and Regulation, South Carolina)
Board of Physical Therapy,)
Defendant,)
and)
South Carolina Chapter, American)
Physical Therapy Association, Joseph M.)
McKowen, PT, Sabrina Queen Bridges,)
PTA, and Amalia W. Kirby PTA,)
Defendants-Intervenors.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

C/A No. 2012-CP-40-2632

**PLAINTIFFS' REPLY TO DEFENDANT-
INTERVENORS'
MOTION FOR
SUMMARY JUDGMENT**

RICHLAND COUNTY
FILED
2014 JAN 10 PM 4:24
JEANETTE W. McBRIDE
C.C.P. & G.S.

Plaintiffs Kristin Joseph, P.T. (PT Joseph), Thomas N. Joseph, M.D. (MD Joseph) and William G. McCarthy, M.D. (McCarthy) (collectively Plaintiffs), in accordance with Rule 56, SCRCP, files this Reply to Defendant-Intervenors', South Carolina Chapter, American Physical Therapy Association (SCAPTA), Joseph M. McKowen, PT (McKowen), Sabrina Queen Bridges, PTA (Bridges) and Amalia W. Kirby, PTA (Kirby) (collectively APTA) Motion for Summary Judgment.

While APTA's history of Sloan v. S.C. Bd. Of Physical Therapy Exam'rs., and the legislative efforts on behalf of the South Carolina Orthopaedic Association (SCOA) and SCAPTA and various

Board members¹ is interesting from the historical prospective, it does not address any of the issues pending before this Court. The only issue before the Sloan Court was whether physicians (no other category of "person") were prohibited from employing physical therapists (PT) and referring patients to the employed PT for provision of physical therapy services. The first six causes of action in Plaintiffs' Complaint do not seek to overturn Sloan², as APTA argues. Rather, Plaintiffs seek a declaratory judgment as to whether the § 40-45-110(A)(1) referral for profit prohibition for "persons" referring patients applies equally to PTs and physicians; whether the 2011 Position Statement concluding that so called intra-professional patient transfers are "coverage" and not referrals is equally applicable to physicians and physician groups demands the interpretation that coverage is coverage as long as the person providing coverage is properly license to provide the services being covered; whether Plaintiffs have been denied due process and equal protection rights under the 2011 Position Statement; and whether the Board's 2011 Position Statement was adopted in compliance with the South Carolina Administrative Procedures Act.

APTA³ makes a point of the fact that SCOA is funding the law suit while not mentioning that it drafted the letter that formed the foundation of the 2011 Position Statement and private funds from Board members and others were used to funded the Board's defense of the Sloan

¹ See Ex, 27,, pp. 98-104, 107-111. Each exhibit referenced herein is to Plaintiffs' exhibits filed in support of their Motion for Summary Judgment unless expressly stated to the contrary.

² As Plaintiffs candidly admitted during argument of the South Carolina Board of Physical Therapy's Motion to Dismiss, Causes of Action 7-9 seek to overturn Sloan and were included in the Complaint simply for issue preservation purposes.

³ APTA also expends significant efforts characterizing Plaintiffs' causes of action. Plaintiff's causes of action speak for themselves and Plaintiffs crave reference to their Amended Petition for Declaratory Judgment/Complaint (Complaint). The Complaint contains alternate theories regarding the Board's 2011 Position Statement interpretation of § 40-45-110(A)(1). Causes of Action 1 and 2 deal with the Board's application/interpretation of the word refer; Cause 3 contends that if PTs can employ other PTs and PTA and transfer patients under the theory of coverage to employed PTs/PTA with a licensure violation, so can physicians.

case after the Department of Labor, Licensing and Regulation refused to approve and expend state funds for the defense of Sloan⁴.

APTA also contends that the relief Plaintiffs seek would not benefit them in any way. As addressed in more detail in the Plaintiffs' Reply Memorandum to the Board's Memorandum in Support of its Motion for Summary Judgment (Board Memo), if the 2011 Position Statement's coverage interpretation is applied equally to physician and physician practices in the employment of PTs, PT Joseph could work in the physician office setting in which she is more comfortable—from a quality of care standpoint—providing services and Drs. Joseph and McCarthy could employ PTs and transfer patients to PTs to provide coverage for physical therapy services, thus improving quality of care and patient convenience and access to physicians.

As APTA contends, Sloan found vis a vis the application of § 40-45-110(A)(1) that it was designed to prevent "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 physicians." (citation omitted), APTA Memo, p. 2. Section 40-45-110(A)(1) is equally designed to prevent "overuse of physical therapy services by [PTs] who, for their own financial gain rather than their patients' medical needs, refer patients to therapists employed by the [PTs] who will generate additional fees for the PTs" or who inappropriately document the PT record so as to allow over utilization of services or provision of medically unnecessary services for their own personal gain. The referral restriction for PTs is designed to eliminate the temptation for PTs to document the need for

⁴ One cannot help but question whether the Board's actions in Sloan constituted state action to which the Court should give deference since the actions were not paid by/with State funds.

more physical therapy treatment than a patient might need where the PT has a financial interest in that treatment.

1. APTA Misidentified the Position Statement at Issue in the Complaint.

APTA identifies the 2011 Position Statement as the June 2, 2011 letter written by Board Chair Swygert in response to the May 3, 2011 letter SCAPTA (written by APTA general counsel Bennett) wrote for Mr. Carpenter to send to the Board. APTA Memorandum in Support of Motion for Summary Judgment (APTA Memo), pp. 6-7. In fact, the Board specifically withdrew the Swygert June 2 letter at its July 2011 meeting and at its August 2011 meeting adopted the 2011 Position Statement entitled "Application of 40-45-110(A)(1) to Intra-Professional Interactions. See Plaintiff's Memorandum in Support of Motion for Summary Judgment (Plaintiffs' Memo), pp. 4-5 and referenced exhibits.

2. Plaintiffs' Interpretation of Referral and Coverage Do Not Create an Absurd Result.

As part of its argument, APTA contends that Plaintiffs seek to eliminate § 40-45-110(A)(1). APTA Memo, p. 9. That is not Plaintiffs goal. Plaintiffs simply seek, per the allegations in the Amended Complaint, to have § 40-45-110(A)(1) applied to "persons" (physicians or PTs) equally, be it the statutory referral prohibition under Sloan or the 2011 Position Statement "coverage" exemption to the referral prohibition. APTA further contends that Plaintiffs' interpretation of the Position Statement will create the absurd result that PTs cannot practice in a group practice setting. APTA Memo., pp. 12-14. This assertion is again incorrect.

A. *PT-to-PT Referral Has the Potential for Waste, Fraud and Abuse.* In support of its argument, APTA continues to assert that the intent of § 40-45-110(A)(1) is to prevent overutilization of physical therapy attributable to physicians—gatekeepers as styled by APTA and there is no potential for abuse in the PT-to-PT handoff. APTA Memo, p. 11. APTA’s argument ignores the fact that § 40-45-110(A)(1) uses the word “person”, not the word “physician.” The PT Act uses the words physician or medical doctor multiple times (including within § 40-45-110(A)(1). If the Legislature had intended to restrict the referral prohibition of referral for profit to physicians, it would have used the word physician or term medical doctor. See Plaintiffs’ Memo, pp. 19-20.

APTA argues that PT-to-PT “handoff”⁵ is not a referral because it does not create additional care. APTA Memo, pp. 12-13. The intent of the fee for profit referral prohibition in § 40-45-110(A)(1) is not whether the referral creates “additional care” but whether the referral invites the opportunity or provides temptation for abuse or overuse of physical therapy services. Relying on the testimony of Dr. Joseph, APTA argued that physicians are the “gatekeepers”, setting utilization of PT services and the duration and frequency of therapy in their referral order. APTA Memo, p. 13 (citing Joseph as testifying that “when he refers a case to a PT, he gives a diagnosis, recommendations about what he wants, and sets forth the number of visits.”) In fact, Plaintiff Dr. Joseph testified that in referring a patient for therapy services he always writes a diagnosis and usually writes both “evaluate and treat” and sets forth recommended treatment, usually with flexibility, but that what he writes in the referral order varies from case to case. Ex. 11, pp. 28-29. Dr. McCarty testified that his referral orders vary

⁵ This is one of the multiple terms APTA and the Board substitute for the work “refer”.

from case to case (Ex. 13, pp. 27-28) but that typically he writes an order for physical therapy which just says "physical therapy" (*Id.*, p. 14). Further, Board member Witherspoon testified that the referral orders vary greatly and depends on the person giving the order. The order may say "evaluate and treat" or may give the frequency per week and the number of weeks but the referral orders vary "across the board" with regard to physician direction concerning type, frequency and duration of physical therapy services provided to the referred patient. Ex. 19, pp. 84-85. Except in "direct access" provisions of physical therapy services, physicians do control initial access to therapy services. However, as discussed below, in many cases it may be the PTs through the POC, progress reports, evaluation and recertification of POCs that dictate the frequency and types of physical therapy utilization.

When a patient comes to a PT or PT group for treatment, the patient either comes to see a particular PT or is assigned a PT. The PT receiving the patient must first evaluate the patient and develop a plan of care (POC) to be followed in treating the patient. A PT to PTA patient delegation, discussed below, is covered by S.C. Code Ann. § 40-45-300. The PT's POC must include: 1) treatment to be rendered; 2) frequency and duration of treatment; and 3) measurable goals. The PT Act allows a PT to supervise concurrently up to three (3) full time equivalent (FTE) PTAs as long as the PT is on site⁶. S.C. Code Ann. Reg. 101-9 (2012; *see also*: *Medicare Benefit Policy Manual, Chapter 15, Part 220.1.2 and 1.3 Rev. December 13 and 30, 2013 (Medicare Policy Manual)*), a copy of which is attached hereto as Attachment A for the convenience of the Court.

⁶ Section 40-45-20(2) defines "on site" supervision as physically present.

For Medicare and Medicaid to cover and reimburse for provision of physical therapy services, there must be a referring physician who has approved the POC prior to treatment. There are certain insurance companies that also require that a physician refer a patient to a PT for the therapy services to be covered and reimbursed.

In South Carolina, patients have “direct access” to physical therapy services—that is for the first 30 days of physical therapy treatment, a PT or PTA under the supervision of a PT, can provide physical therapy services without a physician referral or a physician first approving the POC, unless the patient has private insurance that requires a physician referral as a condition of coverage or the patient is covered by a government sponsored program. S.C. Code Ann. § 40-45-110(A)(4) and S.C. Code Ann. Reg. 101-11. Section 40-45-300(B) requires that when a patient is being treated by a PTA under the supervision of a PT, the PT must reevaluate a delegated patient every eighth treatment or every 60 days, whichever comes first. Finally, only a PT can bill for the therapy services of a PTA provided under the onsite supervision of the PT.

A PT can concurrently supervise up to three FTE⁷ PTAs and provide contemporaneous therapy service at the same time. Thus, a PT can bill for treating four (4) patients simultaneously. The PT or the PT group is getting the revenue from the PTAs’ provision of therapy services under his/her supervision. Under the PT Act, the PT has to reevaluate the patient once every eight treatments or 60 days. In reevaluating the patient, the PT could be tempted simply to determine that the patient had not progressed sufficiently and extend the treatment, even if it is not medically necessary, thus putting the PT’s own financial gain over the medical needs of his/her patients. As APTA’s expert admitted, generally a 100% of a PT or

⁷ Reg. 101-9 also provides for the Board to grant a temporary waiver for a PT to supervise more than 3 PTAs.

PT Group's income comes from the provision of therapy services. The same is certainly not true with physicians or physician groups.

Under Medicare and Medicaid, only a PT can bill for therapy services of a PTA, since a PTA legally cannot enter into a Medicare Provider Agreement with government sponsored programs. See Ex. 20, pp. 14-15; *see also*: Attachment A, *Medicare Policy Manual*, Part 220. Board Chair Swygert, one of two PT owners of her outpatient PT practice, testified that she and her partner and the practice's employed PTs each have provider agreements with CMS, bill for their services and assign the Medicare reimbursement to the practice and are paid a salary in return. Ex. 17, p. 19. Board Member Dargan testified that when he was employed by an outpatient physical therapy practice he assigns his Medicare reimbursement to the practice and was not paid directly by Medicare. Ex. 18, p. 14. Mr. Stoker testified that he is an owner of his outpatient rehabilitation practice (provides both physical therapy and occupational therapy services—Ex. 21, pp. 9-10) and as an owner, shares in the profits (Ex. 21, p. 27). Certainly, the greater the reimbursement, the greater the likelihood that the practice will make a profit that PT owners will share.

As noted above, the PT must develop a POC to be approved by the referring physician⁸, except in certain direct access cases. Attachment A, § 220.1.1 and 1.2. After the physician or NPP approves the POC, the PT can make changes to the POC. The PT can only make significant changes, *e.g.* a new condition to be treated, with written approval from the physician or the NPP. *Id.*, § 220.1.2.C. However, an "insignificant alteration in the plan would be a change in the frequency or duration due to the patient's illness, or a modification of short-term goals to

⁸ Non-physician practitioners (NPP) such as nurse practitioners or physician assistants can also make referrals to PTs under the Medicare program.

adjust for improvements made toward the same long-term goals.” *Id.* Under the Medicare payment rules, Medicare will pay for up to 90 days of physical therapy service. *Id.*, § 220(A) Definitions, “Interval”.

The responsible PT, even one supervising a PTA’s provision of therapy services, must document the physical therapy record with a “progress report” (which provides justification for the medical necessity of the treatment), at least once every ten (10) treatment days. *Id.*, § 220.3.D. While a supervised PTA can make suggestions/recommendations to the PT (to whom the PTA reports and is dependant on for a job), it is the PT’s responsibility to make the objective and subjective determinations as to how the patient is progressing.

If the PT fails to document progress appropriately, *e.g.* understates the patient’s progress, then the PT can develop a new POC with, *e.g.* more frequent services or therapy for a more extended time, to take to the physician or NPP for approval. Even with reporting to a referring physician or NPP, abuse in overutilization of services or providing services that are not medically necessary can and does occur.

The Center for Medicare and Medicaid Services (CMS) clearly recognized the potential for fraud and abuse by PTs in physical therapy outpatient settings when it designated outpatient PT services as a moderate risk for waste, fraud and abuse while physicians and physician groups were placed in the limited risk category. See discussion in Plaintiffs’ Memo, pp. 24-25. Further, in December 2010, the US Department of Health and Human Services, Office of Inspector General issued a report entitled “Questionable Billing for Medicare Outpatient Therapy Services” (OIG Report). See Attachment B, attached hereto for the convenience of the Court. Among other things, the OIG Report provides: “Medicare limits (i.e.

caps) its annual per-beneficiary outpatient therapy expenditures. Providers may exceed a beneficiary's cap if the services are medically necessary and are supported by medical record documentation." OIG Report, p. i. Obviously, accurate and truthful documentation in the regulatorily mandated Progress Reports and Evaluations are critical to continued treatment, thus to continued reimbursement. PTs are "persons" just as are physicians. Although the PTs and physicians have different professional licenses, as people, they share the same propensity (temptation) to overuse physical therapy services, who, for their own financial gain rather than their patients' medical needs, refer patients to other PTs or PTA who will generate additional fees for them or their practice.

Further, the possible abuse and overutilization of physical therapy services exists under the 2011 Position Statement coverage exception to the § 40-45-110(A)(1). APTA states that "in most instances, the PT-to-PT handoff occurs simply as a 'function of scheduling and/or patient request/convenience.'" APTA Memo, p. 13. As discussed at pages 25-26 of Plaintiff's Memo and *infra* at p. 10, "coverage" occurs when a licensed health care provider is temporarily unavailable for his/her patient and arranges for a competent licensed health care provider to provide the needed health service. APTA admits that PTs and PT groups use "coverage" in most instances as "a function of scheduling and/or patient request/convenience." A PT referring patients to another PT for scheduling and/or patient requests/convenience does not fall within the medical profession's recognized definition of coverage (licensed professional's temporary absence) or that of the South Carolina courts and allows for significant temptation for abuse.

Another example of potential abuse is where a PT has a patient scheduled at one location and the patient, for convenience, wants to have therapy at a location where the PT is

not practicing. The PT is not temporarily unavailable, just not in the location where the patient wants to be treated. Again, this allows the PT to arrange for another PT to see the patient while the original PT sees another patient.

B. PTs Can Be Employed by Physicians and Treat Transmitted Patients Under the 2011 Position Statement Coverage Exception.

The 2011 Position Statement determined that an intra-professional handoff of a patient from one PT to another PT did not meet the definition of “referral” but instead was “coverage” and provides:

In a group practice, a physical therapist or physical therapist assistance 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.”

Ex. 1, p. 1.

Mr. Stearns’ affidavit opined that “[f]rom time to time, a physical therapist treating the patient may be temporarily unavailable to perform a treatment as scheduled or a patient may request a change in appointment times. In those instances, another physical therapist or physical therapist assistant may provide the scheduled treatment according to the treatment plan already established. This is frequently referred to as ‘coverage.’” Ex. 39, ¶ 30. The South Carolina courts defines coverage to mean when a physician or other licensed person is temporarily unable to attend to his/her patient personally, the physician can make arrangements for a competent physician to treat the patient. See: Johnson v. Ward, 288 S.C. 603, 610-11, 344 S.E.2d 166 (1986).

It is uncontested that it is within a South Carolina licensed medical doctor's scope of practice to provide physical therapy services to his/her patients. See Ex. 39, ¶ 39.a; Plaintiff's Memo, pp. 26-27. APTA contends that Sloan prohibits physicians or physician groups from employing PTs and directing patients to them under a coverage scenario. APTA Memo, p. 10. Sloan only decided whether physicians could employ PTs and pay them wages to provide physical therapy services to patients "referred" by the physicians. The issue of whether coverage for physical therapy services within the same group practice, whether the group be a physician group or a PT group, was not raised or addressed in Sloan. The 2011 Position Statement carves out an exception to the fee for referral prohibition in § 40-45-110(A)(1). This coverage exception should be applicable to any person employing a PT and transferring patients to be seen by way of coverage.

C. PT's Can Still Practice in a Group. APTA argues that Plaintiffs' interpretation creates an absurd result and would have the practical effect of prohibiting PTs from practicing with other PTs or PTAs. As discussed *below*, under the clear language of the PT Act, PTs are expressly authorized to delegate patient treatment to PTAs and PTAs are statutorily exempt from the § 40-45-110(A)(1) referral prohibition. PTs and PTAs can practice in a group together.

PTs can also have their own group practices just as do physicians, occupational therapists, dentists, etc. There is absolutely nothing to prohibit a PT from seeing his or her own patients, whether the patient is specifically referred to the PT by a physician, the patient chooses to be seen by the specific PT or the scheduling clerk for the practice (group or otherwise) randomly assigns the patient to the PT. Medicare and Medicaid reimbursement requirements mandate that the PT providing the initial evaluation be the billing person and the

person who provides the physical therapy services. Attachment A, § 220.1.2. Further, there is nothing that prohibits PTs within the same practice from consulting with each other about a particular patient or issue. PT group practices will still operate like physician group practices.

3. Delegation by a PT of a patient to a PTA is not a referral under § 40-45-110(A)(1).

APTA contends that “[i]f Plaintiffs’ interpretation of ‘referral’ were correct, it would apply equally to the transitions in patient care from PTs to PTAs as it would to PT-to-PT handoff’s because both PTs and PTAs are ‘licensed persons’ subject to § 40-45-110(A)(1).” APTA Memo, p. 17. APTA’s interpretation misconstrues the PT Act. PTAs employed by PTs or PT groups are statutorily exempt from the “referral” prohibition in § 40-45-110(1)(A).

Section 40-45-20(5) defines a PTA as: “a person who is licensed by the board 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.” Further, S.C. Code Ann. § 40-45-300 expressly authorizes a PT to delegate a patient to a PTA to work under the direction and supervision of the assigning PT. Section 40-45-300(A) provides:

A physical therapist is professionally and legally responsible for patient care given by a physical therapist assistant, physical therapy aide, physical therapist student, or physical therapist assistant student under the physical therapist’s supervision. A physical therapist may delegate to and supervise selected acts, tasks, or procedures which fall within the practice of physical therapy but do not exceed the education or training of a physical therapist assistant, physical therapy aide, physical therapist student, or physical therapist assistant student. (Emphasis added)

Section 40-45-300(B) further provides that a PTA must work under the supervision of a PT licensed in this state and can only perform the functions delegated by the PT to the PTA. For a PTA to continue providing PT services to a patient, the PT must reevaluate and reapprove the

plan of care "every eighth treatment day or every sixty calendar days, whichever comes first."

Id. Prior to a PT delegating a patient to a PTA for treatment, the PT must conduct the patient's initial evaluation and develop the patient's plan of care. S.C. Code Ann. § 40-45-280(A) and (C)(1) and (2).

It is axiomatic that words in a statute are to be given their plain and ordinary meaning when interpreting a statute. Catawba Indian Tribe of South Carolina v. State of South Carolina, 372 S.C. 519, 525-26, 642 S.E.2d 751, 754 (2007); see also Sloan, 370 S.C. 468, 636 S.E.2d 606. Delegate means "to give (control, responsibility, authority, etc.) to someone : to trust someone with (a job, duty, etc.)". *Merriam Webster On-line Dictionary* (January 10, 2014). "Assign" means "to give someone a particular job or duty : to require someone to do a particular task."⁹ Id.

Another rule of statutory construction is that the specific statutory provision prevails over the more general statutory provision. "Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect. (Emphasis added) Spectre, LLC v. South Carolina Dept. of Health and Environmental Control, 386 S.C. 357, 372, 688 S.E.2d 844, 852 (2010) Internal citations omitted. Section 40-45-300 is the specific provision in the PT Act that deals with the ability of a PT to supervise and delegate patients to a PTA for the provision of supervised PT services within the PT's practice.

⁹ Mr. Stearns affidavit uses the word "assign" instead of "delegate". A PTA is defined as one who assists at PT. The PT Act uses assign and delegate interchangeably.

Section 40-45-110(A)(1) is the general statutory provision that deals with the sanctions of a person licensed¹⁰ under the PT Act. Section 40-45-110(A)(1) provides, in pertinent part that the Board

may restrict or refuse to grant a license to an applicant and may 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;

“Wages” means “a payment usually of money for labor or services usually according to contract and on an hourly, daily, or piecework basis —often used in plural.” *Merriam Webster On-line Dictionary* (January 10, 2014). A PT or PT group employing a PTA paying the PTA wages is not subject to the prohibition of § 40-45-110(A)(1) because § 40-45-300 of the PT Act expressly authorizes PTs to employ¹¹, supervise and direct patients to PTA through the delegation of the PT’s patients.

“In construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect. TNS Mills, Inc. v. South Carolina Dept. of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998). A statute should not be construed by concentrating on an isolated phrase. Laurens County School Districts 55 and 56 v. Cox, 308 S.C. 171, 417 S.E.2d 560 (1992). South Carolina State Ports Authority, v. Jasper County, 368 SC 388, 398, 629 S.E.2d 624, 629 (2006). Clearly,

¹⁰ The person may be one applying for at PT, PTA, PT aide, provisional PT or provisional PTA license.

¹¹ Of course, the amount of wages received by the PTA being delegated the patients must be within the industry norm.

§§ 40-45-20(5) and 300 can be construed together with § 40-45-110(A)(1) to give effect to each of the sections. Section 40-45-110(A)(1) is still applicable to prohibit a PT referral/delegation of a patient to a PTA if the PTA receives a credit or other valuable consideration including such things as "an unearned commission, discount, or gratuity [from] a person who referred a patient, or with a relative or business associate of the referring person." See § 40-45-110(A)(1). Reading the provisions of the PT Act together as one must, it is clear that a PT delegating a patient to a PTA employed by the PT or the PT's group for the provision of directed and supervised PT services is expressly exempt from the referral prohibition of § 40-45-110(A) when the PTA receives only wages and not other prohibited remuneration.

Plaintiffs' interpretation of the PT Act does not "essentially eliminate the jobs of PTAs in South Carolina" and does not create an absurd result. APTA Memo, p. 18. Rather, it allows PTAs to continue to work in a PT owned private setting¹² while prohibiting potential abuse from overutilization. APTA further argues that the delegation of a patient by a PT to a PTA under the PT's supervision does not create the potential for overuse of PT services because a PTA cannot develop a plan or nor create additional care. APTA Memo, p. 17. In fact, the delegation of patients by PTs to PTAs can create the potential for abuse, including whether the therapy treatment itself is medically necessary.

CONCLUSION

For the reasons stated above, the APTA Motion for Summary Judgment should be denied.

¹² PTAs still have the option of being employed in hospitals, Certified Outpatient Rehabilitation Facilities, nursing homes or in home health agencies, for example. See Ex. 18, Ervin deposition, pp. 4-7.

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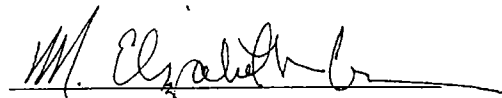
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By:


Attorneys for Plaintiffs

January 10, 2014
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 Kristin Joseph P.T., Thomas N. Joseph,)
 M.D., and William G. McCarthy, M.D.,)
)
 Plaintiffs,)
)
 vs.)
)
 South Carolina Department of Labor,)
 Licensing and Regulation, South Carolina)
 Board of Physical Therapy,)
)
 Defendant,)
)
 and)
)
 South Carolina Chapter, American)
 Physical Therapy Association, Joseph M.)
 McKowen, PT, Sabrina Queen Bridges,)
 PTA, and Amalia W. Kirby (PTA),)
)
 Defendants-Intervenors.)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTH JUDICIAL CIRCUIT

C/A No. 2012-CP-40-2632

**PLAINTIFFS' REPLY TO DEFENDANT'S
 MOTION FOR
 SUMMARY JUDGMENT**

RICHLAND COUNTY
 FILED
 2014 JAN 10 PM 4:24
 JEANETTE W. McBRIDE
 C.C.P. & G.S.

Plaintiffs Kristin Joseph, P.T. (PT Joseph), Thomas N. Joseph, M.D. (MD Joseph) and William G. McCarthy, M.D. (McCarthy) (collectively Plaintiffs), in accordance with Rule 56, SCRPC, files this Reply to Defendant's, South Carolina Department of Labor, Licensing and Regulation (LLR), South Carolina Board of Physical Therapy (Board) Memorandum in Support of Motion for Summary Judgment (Board Memo).

I. Plaintiffs have standing to bring this action.

Defendant's motion should be denied because the Plaintiffs have standing to bring this action. As addressed in more detail in the Plaintiffs' Reply Memorandum to the Defendant-Intervenors' Memorandum in Support of Summary Judgment (APTA Memo), if the 2011

Position Statement's coverage interpretation is applied equally to physician and physician practices in the employment of PTs, PT Joseph could work in the physician office setting in which she is more comfortable—from a quality of care standpoint—providing services and Drs. Joseph and McCarthy could employ PTs and transfer patients to PTs to provide coverage for physical therapy services, thus improving quality of care and patient convenience and access to physicians.

Nothing in discovery has changed the applicability of this Court's ruling in denying Defendant's earlier Motion to Dismiss as to causes of action 1 through 6¹, where the Court ruled:

30. "The basic purpose of the [Declaratory Judgments] Act is to provide for declaratory judgments without awaiting a breach of existing rights." Sunset Cay, 357 S.C. at 424, 593 S.E.2d at 467. A declaratory judgment is proper "when there is an existing controversy or at least the ripening seeds of a controversy." Id., 357 S.C. 414, 423, 593 S.E.2d 462, 466. The Supreme Court held "a party is not required under the Declaratory Judgments Act to spend time and money complying with what allegedly is an invalid or unconstitutional ordinance." Id. I find that there is an existing controversy and this matter is ripe for hearing.

...

33. In Baird v. Charleston County, the Supreme Court held: "[t]o have standing one must generally have a personal stake in the subject matter of the lawsuit, i.e., one must be a real party in interest. A real party in interest is one with a real, material, or substantial interest." Baird v. Charleston Cnty., 333 S.C. 519, 530, 511 S.E.2d 69, 75 (1999) (citations and footnote omitted). In Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S. Ct. 2130 (1992), the United States Supreme Court enunciated a test for standing, which consists of the following three elements:

First, the Petitioners must have suffered an 'injury in fact'— an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical'. Second, there must be a causal connection

¹ The Court granted partial summary judgment as to causes of action 7 through 9.

between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'

Id. at 559-61, 112 S. Ct. at 2136 (internal citations omitted); see also Smiley v. S.C. Dept. of Health and Envtl. Control, 374 S.C. 326, 649 S.E.2d 31(2007); Beaufort Realty Co. v. S.C. Coastal Conservation League, 346 S.C. 298, 551 S.E.2d 588 (Ct. App. 2001).

34. I find that Plaintiffs have standing to bring this case. Plaintiffs' injury is the infringement on their abilities to practice their chosen profession and the disparate treatment under the 2011 Position Statement in allowing PTs or PT groups to refer patients for PT services to employed PTs under the guise of "coverage" and not allowing physicians or physician groups to refer patients for PT services to employed PTs under the guise of "coverage."

35. I find that this injury is not "conjectural or hypothetical." It is concrete and particularized because the Plaintiffs currently are unable to employ and be employed as they choose, a direct result of Defendant's 2011 Position Statement interpretation of South Carolina Code Ann. § 40-45-110(A)(1).. The Court's decision will determine whether the PT Board's 2011 Position Statement violates the plain meaning of the statute, exceeds the PT Board's authority or is applying the statute unconstitutionally. The judgment here will have a practical effect on the controversy and will determine the parties' rights under the statute at issue, namely the Plaintiffs' rights to be employed by or to employ licensed professionals of their choosing and the Defendant's right to discipline any PT so employed.

36. Further, the South Carolina Supreme Court has recognized that "standing may be conferred upon a party 'when an issue is of such public importance as to require its resolution for future guidance.'" Sloan v. Wilkins, 362 S.C. 430, 436-37, 608 S.E.2d 579, 583 (2005) (quoting Baird v. Charleston Cnty., 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999)); Sloan v. Department of Transp., 379 S.C. 160, 666 S.E. 2d, 236, 241 (2008).

37. The 2011 Position Statement recognizes that the purpose of S.C. Code Ann § 45- 110(A)(1) was to protect the public and government-sponsored health care programs from actual and potential conflicts of interest which are likely to lead to overuse of medical services by physicians who, for their own financial gain rather than their patients' medical needs, refer patients to entities in which the physicians hold a financial interest." The public has an equal interest in being

protected from overuse of medical services by PTs who, for their own financial gain rather than their patients' medical needs, refer patients to entities in which the PTs hold a financial interest and I so find.

Order dated September 17, 2012 denying SCDLLR Motion to Dismiss as to Causes of Action One through Six and Granting Partial Summary Judgment to Causes of Action Seven Through Nine².

The deposition testimony highlights that this matter is of "such public importance as to require its resolution for future guidance." PT Joseph testified that for physical therapy to be provided in an orthopedist office:

benefits the patients. It maximizes the coordination of care, and patients, in my experience, should also have the right to have their therapy done by a therapist with the direct supervision of the surgeon who did their surgery, watching over that rehabilitation. In my experience, maximizing of the coordination of care is better... It's in the best interest of the patient, it's a more timely manner when the -- the doctor has direct supervision over their therapists and their patients. I feel like the patient should have the right to have their surgery directly supervised, overseen by the surgeon who performed the surgery. Patients are - every patient's different. Every rotator cuff repair is different. There is a standard type or protocol that -- you know, patients are people and there are things that come up that you have to consult with the doctor with. And I think it would improve the coordination of care ultimately for patients... we are seeking the same rights that a physical therapist has under [the August 17th, 2011 position statement issued by PT Board] that allows physical therapists to provide coverage for another physical therapist in the provision of physical therapy services, yet does not allow physicians to have a physical therapist provide coverage for a physician in order to provide those same physical therapy services.

Ex. 9, p. 35—36. MD Joseph testified that that the application of the 2011 Position Statement causes injury to both him and the public as follows:

Because we are not allowed to provide the same -- or allowed to have a physical therapist provide the same coverage for physical therapy services, as a physical

² The Order dated September 17, 2012 order denying SCDLLR Motion to Dismiss as to Causes of Action One through Six and Granting Partial Summary Judgment to Causes of Action Seven Through Nine was signed September 17, 2012, but was not entered until December 4, 2012. Plaintiffs received the order on December 10, 2012. The Board's Motion to Reconsider was denied on January 9, 2013.

therapist would be allowed to have a physical therapist cover for physical therapy services. It impacts our ability to oversee physical therapy services. ...It affects our ability to coordinate care with physical therapy. It affects our ability to provide direct oversight to the provision of physical therapy services. It affects our ability to improve patient outcomes. It affects our ability to improve patient satisfaction and patient convenience... It impacts our ability to improve patient outcomes. It affects our ability to provide direct oversight and provision of physical therapy services. It impacts our ability to provide convenient physical therapy services. It impacts our ability to improve outcomes by direct oversight of physical therapy services.

Ex. 11, pp. 42--43.

Moreover, Defendant-Intervenors (collectively APTA) argue that if Plaintiffs' interpretation of the 2011 Position Statement is upheld there allegedly will be dramatic and dire consequences to the public in terms of denied access to care, increased cost, etc. ... and will severely negatively impact the physical therapy profession. APTA Memo, pp. 14-16, 18-20.

Since this Court's earlier ruling finding that Plaintiffs have standing, our Supreme Court has again noted that "'standing is not inflexible.' Thus, 'standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance.' In recent years, we routinely have found standing through this exception". Bodman v. State, 403 S.C. 60, 742 S.E.2d 363 (2013), internal citations omitted. Without question, the issues "before this court are of such public importance as to require its resolution for future guidance."

II. Plaintiffs Remaining Claims do not Fail as a Matter of Law

To the extent that arguments contained in the Board's Memo are also contained in the APTA's Memo, Plaintiffs hereby incorporate by reference its Reply to APTA.

It is telling that the Board has created at least 3 new terms of art of avoiding using the term referral when describing physical therapist referring to other physical therapist such as (1)

coverage³, (2) intra-professional interactions⁴, and (3) patient transitions⁵. Similarly, the Defendant-Intervenors avoid using the term referral in favor of language such as (1) "when a PT sees a patient at the request of another PT"⁶, (2) "PT-to-PT handoffs (and PT-to-PTA handoffs)"⁷, (3) "transition of the patient's therapist"⁸, (4) "sending or directing a patient to another PT"⁹.

Furthermore, the Board's argument that "physical therapists and physical therapy assistants are all within the same profession and same scope of practice and are providing the same type of treatment" fails as a matter of law. See: Board, p. 16. In fact, testimony in this case reflects the fact that a physical therapist may specialize in a particular scope of practice. Ex. 18, p. 20 ll. 15-23; Ex. 21, p. 29 ll. 3-14; Ex. 26, p. 24 l. 10 - p. 26 l. 5; Ex. 16, p. 23 l. 23- p. 25 l. 7.

Furthermore, the American Physical Therapy Association established a specialist certification program in 1978 by which a physical therapist builds on a broad base of professional education and practice to develop a greater depth of knowledge and skills related to a particular area of practice. See <http://www.abpts.org/Certification/About/>. Plaintiffs request that this Court take judicial notice, pursuant to Rule 201, SCRE, of the information contained www.abpts.org. According to APTA, "[c]linical specialization in physical therapy responds to a specific area of patient need and requires knowledge, skill, and experience

³ Ex. 1, p.

⁴ *Id.*

⁵ Board Memo p. 16: "when the treatment of a patient transitions from one PT to another, or from a PT to a PTA, within a group practice"

⁶ APTA Memo p. 7.

⁷ *Id.* p. 10.

⁸ *Id.* p. 12.

⁹ *Id.* p. 14.

exceeding that of the physical therapist at entry to the profession and unique to the specialized area of practice.” Id. The following areas of specialization are listed by APTA:

1. Cardiovascular & Pulmonary (CCS)
2. Clinical Electrophysiologic (ECS)
3. Geriatrics (GCS)
4. Neurology (NCS)
5. Orthopaedics (OCS)
6. Pediatrics (PCS)
7. Sports (SCS)
8. Women’s Health (WCS)

While the Board’s 2011 Position Statement, Ex. 1, states that a PT referring a patient within the group “would not be sending a patient to a specialist, as is the typical definition of referral,” the Board categorically ignores that a PT sending (to include instances of coverage, intra-professional interactions, patient transitions, a PT seeing a patient at the request of another PT, PT-to-PT handoffs, PT-to-PTA handoffs, and/or sending or directing a patient to another PT) a patient to a PT with an above listed APTA area of specialization, would, in fact, be the typical definition or example of a referral prohibited by the Sloan decision. Further, as discussed in Plaintiffs’ Memo, in the Sloan definition of “referral”, the “to a specialist” language is nothing more than an example of a “referral” and is not a limitation on what constitutes a “referral.” See Plaintiffs’ Memo, p. 23.

Conclusion

Plaintiffs respectfully request that this Court deny the Board’s Motion for Summary Judgment on the grounds contained herein.

(Signature Page to Follow)

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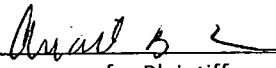
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By: 
Attorneys for Plaintiffs

January 10, 2014
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGE: _____ IN A CIVIL CASE

CASE NUMBER: **2012CP4002632**

Kristin Joseph

Thomas N Joseph

PLAINTIFF(S)

SC Dept Of Labor Licensing And Regulation

South Carolina Board of Physical Therapy

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this 22 April 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Mary Elizabeth (Liz) Crum

Monteith Powell Todd
Emily Whitney Medlyn

S. Jahue Moore
John Robert Devlin Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court _____

RECEIVED

APR 28 2014

McNair Law Firm, PA

SCRPC Form 4C (10/2011)

SCANNED

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
Kristin Joseph P.T., Thomas N. Joseph,)
M.D., and William G. McCarthy, M.D.,)
Plaintiffs,)
vs.)
South Carolina Department of Labor,)
Licensing and Regulation, South Carolina)
Board of Physical Therapy,)
Defendant,)
And)
South Carolina Chapter, American)
Physical Therapy Association, Joseph M.)
McKowen, PT, Sabrina Queen Bridges,)
PTA, and Amalia W. Kirby (PTA),)
Defendants-Intervenors.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Case No.: 2012-CP-40-2632

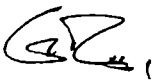
**ORDER GRANTING DEFENDANTS'
MOTIONS FOR SUMMARY JUDGMENT
AND DENYING PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT**

RICHLAND COUNTY
FILED
2014 APR 22 PM 2:40
JEANETTE W. HENDERSON
C.C.P. & G.S.

This matter came before the Court on cross-motions for summary judgment, filed by Plaintiffs and Defendants pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. The Court heard oral argument on the parties' cross-motions on January 16, 2014. For the reasons set forth herein, the Court hereby **DENIES** Plaintiffs' motion for summary judgment and **GRANTS** the motions for summary judgment filed by the Defendants.

FACTUAL AND PROCEDURAL HISTORY

This case stems from the 1998 passage of certain amendments to South Carolina Code §§ 40-45-5 *et seq.* (the "PT Act") that regulate physical therapists ("PTs") and physical therapist assistants ("PTAs"), the subsequent litigation over the interpretation of that statute, and the resulting South Carolina Supreme Court opinion in *Sloan v. S.C. Bd. of Physical Therapy*



Exam'rs, 636 S.E.2d 598 (S.C. 2006). The statutory provision that was at issue in *Sloan*, and is at issue in this matter, is S.C. Code Ann. § 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), as amended by § 1 of Act No. 360, 1998 S.C. Acts 2103-2119.

Much of the history relevant here is recounted in the *Sloan* opinion. In 2004, two state senators requested an opinion from the Attorney General regarding the scope and interpretation of § 40-45-110(A)(1). 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—or for a physician-owned professional corporation when a physician owner or employee of the corporation refers patients to the PT. The Attorney General issued an opinion concluding that the statute prohibited such employment relationships.

In a position statement, the South Carolina Department of Labor, Licensing and Regulation, South Carolina Board of Physical Therapy (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”). Following the Board’s 2004 Position Statement, a physician, Allen Sloan, filed a lawsuit against the Board. Dr. Sloan was eventually joined by the South Carolina Medical Association, Doctor’s Care, P.A., Barry E.

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Fitch, Jerry O'Reilly, Oaktree Medical Centre, P.C., FirstChoice Healthcare, P.C., and Southern Orthopedic Sports Medicine, LLC. The South Carolina Association of Medical Professionals, and the South Carolina Orthopedic Association filed a separate suit against the Board, which was consolidated with the earlier action. These plaintiffs sought declaratory judgment relief based upon their interpretation of § 40-45-110(A)(1)—namely that physicians could employ a PT and refer patients to that PT without running afoul of the statute—as well as upon equal protection and due process grounds. 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.

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 the rulings, the Supreme 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.

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In reaching this decision, the Supreme Court observed that § 40-45-110(A)(1) was designed to prevent “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 614; *see also id.* at 607, 612.

Following the Supreme Court’s decision in *Sloan*, two bills were introduced that attempted to amend or repeal the statutory prohibition on PTs working for physician-owned practices. These bills were: (i) S 1031, introduced on January 12, 2010; and (ii) H 4329, introduced on January 13, 2010. The General Assembly held hearings on these bills. Two of the named Plaintiffs in this lawsuit, Dr. McCarthy and Ms. Joseph, testified in a legislative hearing on a proposed bill. Despite the lobbying efforts of physicians and physician groups, including the South Carolina Orthopedic Association, in favor of the two proposed bills, both of them failed to pass.

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 or 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?

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.” At a Board meeting on August 17, 2011, 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. The 2011 Position Statement says:

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 sees a patient at the request of another PT employed by the same practice, there is a "referral" within the meaning of § 40-45-110(A)(1).

On April 12, 2012, the Plaintiffs Kristin Joseph, Thomas Joseph, and William McCarthy filed a Declaratory Judgment Action/Complaint against the Board, seeking a declaration that would allow PTs to be employed in practices owned by physicians.¹ Kristin Joseph is a practicing PT. PT Joseph alleges that she has filed this lawsuit because she seeks the right to be employed by a physician or in a physician's practice. Dr. Joseph alleges that he is a licensed orthopedic surgeon in South Carolina. He alleges that he seeks to employ physical therapists in his practice. Plaintiff Dr. William McCarthy also alleges that he is a licensed orthopedic surgeon in South Carolina. He alleges that he, too, seeks to employ physical therapists in his practice, as he claims physicians were allowed to do before *Sloan*.

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*. This Court agreed, finding that, "[a]s a matter of law, this Court is bound by the Supreme Court's decision in *Sloan*

¹ Plaintiffs testified that the South Carolina Orthopedic Association, one of the parties in *Sloan*, is paying their legal fees in this suit. See T. Joseph Dep. 26:7-24; McCarthy Dep. 25:14-22.

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and has no authority to overrule *Sloan*.” This Court thus dismissed the Seventh through Ninth Causes of Action.

On May 2, 2013, a motion to intervene as party defendants was filed by SCAPTA, Joseph M. McKowen, PT, Sabrina Queen Bridges, PTA, and Amalia W. Kirby, PTA (collectively, the “Defendant-Intervenors”). SCAPTA is a professional association that represents South Carolina’s PTs, PTAs, and student PTs and PTAs. It is affiliated with the national professional organization, the American Physical Therapy Association. Defendant-Intervenor McKowen is a PT and the sole owner of a practice that employs both PTs and PTAs. Defendant-Intervenors Bridges and Kirby are licensed PTAs. The other parties consented to the intervention, and the Court granted the motion.

On May 24, 2013, Plaintiffs filed an Amended Declaratory Judgment Action/Complaint. Plaintiffs’ remaining claims in their Amended Complaint purport to challenge the 2011 Position Statement, in that they ask this Court to “determine that the 2011 Position Statement . . . violates the provisions of the PT Act and the Constitutions of South Carolina and the United States.”

In their First Cause of Action, Plaintiffs allege that when a PT sends or directs a patient to another PT who is employed by the same physical therapy practice, this constitutes a prohibited “referral” under § 40-45-110(A)(1) of the PT Act.² Similarly, in their Second Cause of Action, Plaintiffs contend that the 2011 Position Statement misconstrued the word “refer” in § 40-45-110(A)(1) in determining that a “[PT] or [PTA] seeing a patient at the request of another [PT] in the same group does not constitute a ‘referral.’” Plaintiffs thus ask that the “Court issue a declaratory order stating that an employed PT who is assigned patients for treatment by a physical therapist or physical therapy group employing the PT is not providing ‘coverage’ but

² This allegation naturally extends to PTAs, as both PTs and PTAs are “licensed persons” equally subject to § 40-45-110(A)(1). S.C. Code Ann. § 40-45-20(5).

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receiving referrals in contravention of S.C. Code Ann. § 40-45-110(A)(1) and stating that such PT is subject to discipline by the Board.”

In the Third Cause of Action, Plaintiffs argue, in the alternative, that if this Court disagrees with their argument in the first two Causes of Action, then it should declare that when a patient is “sent” to a PT by a physician or physician group employing that PT, the PT is engaged in “coverage,” and the physician’s sending of the patient to the PT does not constitute a “referral” within § 40-45-110(A)(1). (“[A] PT seeing a patient at the request of physician in the same group does not constitute a ‘referral,’ but is rather a PT providing coverage for a physician or other member of the group.”).

Finally, Plaintiffs allege in their Fourth through Sixth Causes of Action that the 2011 Position Statement violates the Administrative Procedures Act (“APA”), as well as Plaintiffs’ equal protection and substantive due process rights.

On November 1, 2013, the Plaintiffs moved for summary judgment on all remaining causes of action. On November 7, 2013, the Defendant South Carolina Board of Physical Therapy moved for summary judgment on all remaining causes of action. The Defendant-Intervenors subsequently moved for summary judgment as well. All parties thus agree that this case of statutory interpretation is ripe for decision.

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. The Act defines “physical therapist” to mean “a person who has met all the conditions of this chapter and is licensed in this State to practice physical therapy.” *Id.* § 40-45-20(4). It 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

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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 of a licensed PT. The supervising PT is professionally and legally responsible for patient care given by a PTA. § 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. 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. Any alteration of a patient plan of care must be approved in advance and in writing by a licensed PT. Periodically, a PT must reevaluate every patient and reapprove the plan of care.

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:

(4) 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 expiration of the 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.

STANDARD OF REVIEW

Where “plain, palpable, and indisputable facts exist on which reasonable minds cannot differ,” summary judgment is proper. *Carolina Alliance for Fair Employment v. S.C. Dep’t of Labor, Licensing, and Regulation*, 523 S.E.2d 795, 799 (S.C. Ct. App. 1999) (quoting *Rothrock v. Copeland*, 409 S.E.2d 366, 368 (S.C. 1991)). Summary judgment should therefore be granted when the “pleadings, depositions, answers to interrogatories, and admissions on file, together



with the affidavits” show that there is “no genuine issue” as to any material fact and that the moving party is “entitled to judgment as a matter of law.” *Connor Holdings, LLC v. Cousins*, 644 S.E.2d 58, 60 (S.C. 2007).

DISCUSSION

Defendants are entitled to summary judgment because the pleadings, depositions, and record before the Court show that Plaintiffs’ remaining claims fail as a matter of law and undisputed fact.

I. Plaintiffs’ Claims

A. First and Second Causes of Action

In their First and Second Causes of Action, Plaintiffs claim that the transitions in treatment of 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. As a matter of law and undisputed fact, the Court finds that these claims are mistaken, and that Plaintiffs’ proposed interpretation of the PT Act would harm the practice of physical therapy in South Carolina without advancing the legislative purpose of the statute. Defendants are thus entitled to summary judgment.

1. Physicians Are the Gatekeepers for Physical Therapy Services.

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.*, 745 S.E.2d 110, 121 (S.C. 2013); *see also McClanahan v. Richland Cnty Council*, 567 S.E.2d 240, 242 (S.C. 2002) (“All rules of statutory construction are subservient to the one that legislative intent must prevail if it can reasonably be discovered in the language used, and that language must be construed in light of the intended purpose of the statute.”). As a result, a

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statute “must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers.” *Sloan v. S.C. Bd. of Physical Therapy Exm’rs*, 636 S.E.2d 598, 606 (S.C. 2006). Where faced with an undefined statutory term, a court should thus consider the word and its meaning “in conjunction with the whole purpose of the statute and the policy of the law.” *Whitner v. State*, 492 S.E.2d 777, 779 (S.C. 1997).

Further, as the South Carolina Supreme Court has made clear, “statutory language must be construed in light of the intended purpose of the statute.” *Barton*, 745 S.E.2d at 120-21. Courts thus should “not construe a statute in a way which leads to an absurd result or renders it meaningless.” *Id.* at 121; *see also Auto Owners Ins. v. Rollison*, 663 S.E.2d 484, 488 (S.C. 2008); *Lancaster Cnty. Bar Assoc. v. S.C. Comm’n on Indigent Def.*, 670 S.E.2d 371, 373 (S.C. 2008) (“In construing a statute, this Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature.”).

2. 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. 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.

3. Section 40-45-110(A)(1) Targets Referrals by Gatekeeper Physicians.

Because *Sloan* already has interpreted the statute, the starting point for this Court is the Supreme Court’s analysis of the Legislature’s purpose in enacting § 40-45-110(A)(1). As



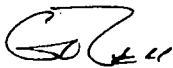
explained in *Sloan*, the referral restrictions in the PT Act are designed to eliminate the temptation for a gatekeeper physician to order more physical therapy treatment than a patient might need where the physician has a financial interest in that treatment. 636 S.E.2d at 607, 612, 614. Because physicians hold the keys to care, there is concern about “overuse of physical therapy services” when physicians can make money by making referrals to PTs. *Id.* at 614. Thus, while the PT Act does not define the terms “referred” or “referral,” the Supreme Court has already determined that the intent of § 40-45-110(A)(1) was the: “avoidance of 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.* (emphases added); *see also id.* at 607, 612. Plaintiffs have acknowledged—as they must—that this was the legislative purpose articulated by the South Carolina Supreme Court in *Sloan*.

4. Plaintiffs Interpret the Referral Restrictions in § 40-45-110(A) to Prohibit the Group Practice of Physical Therapy.

Plaintiffs nonetheless argue that the term “referred” in § 40-45-110(A)(1) applies not just to the gatekeeping referrals from physicians to PTs addressed in *Sloan*, and referenced in § 40-45-110(A)(4), but also to patient transitions in the group practice of physical therapy. Plaintiffs would have the Court interpret the PT Act to prevent a PT from being “assigned patients for treatment by a physical therapist or physical therapy group employing the PT. Such an interpretation would effectively eliminate the ability of PTs to work for other PTs or join together in group practice.

5. Plaintiffs’ Interpretation of “Refer” Ignores Its Context in § 40-45-110(A).

In the context of § 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. The Court declines to adopt Plaintiffs' interpretation, which would expand the operation of § 40-45-110(A)(1) effectively to ban the group practice of physical therapy. *See, e.g., Carolina Alliance*, 523 S.E.2d at 802 ("The court may not resort to subtle or forced construction to . . . expand a statute's operation.").

6. Prohibiting Patient Transitions Occurring in the Group Practice of Physical Therapy Would Not Advance Legislative Intent.

To support their position that the Legislature intended § 40-45-110(A)(1) to apply to patient transitions within a physical therapy practice group, Plaintiffs argue that there is the potential for waste, fraud, and abuse in the practice of physical therapy. Granted, PTs are not immune to the temptation to over-treat patients. Plaintiffs' argument fails, however, because that temptation exists for PTs who practice solo just as much as for PTs who practice in a group.

Plaintiffs discuss Medicare and Medicaid rules and guidance applicable to PTs. The crux of their argument is that, just as physicians could be tempted to over-refer if they were able to profit from doing so, PTs can be tempted to provide excessive treatment for their own good rather than that of their patients. But Plaintiffs have presented no evidence that this risk is increased by the shared treatment of patients by PTs in group practice.³ PTs working together in group practice and PTs working separately in solo practice have the same opportunities and incentive to over-treat patients. There is no reason—and certainly no evidence—to believe that a

³ In addition, the Court is not persuaded that the evidence advanced by Plaintiffs is sufficient to demonstrate that, in 1998, the Legislature intended to make § 40-45-110(A)(1) applicable to the patient transitions from one PT to another in the same group practice. That evidence, which dates from 2010, is better addressed to the Legislature than to this Court.

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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.

As the record in this case shows, the transition of patients from one PT to another PT within a group practice normally occurs as a simple function of scheduling and patient request or convenience. While Plaintiffs contend that re-scheduling a patient from one location to another for the convenience of the patient is an “example of potential abuse” at which the statutory prohibition is aimed, the Court does not believe that the Legislature never intended to prohibit a PT or his/her practice group from accommodating the needs of a patient by scheduling appointments at a convenient time or place, even if that necessitates the patient being treated by another PT.

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. Accordingly, a PT sending or directing a patient to another PT (or a PTA) for treatment within a group practice does not implicate the potential abuse that the Legislature sought to curtail in enacting the prohibition on self-interested “referrals” in § 40-45-110(A)(1), namely overuse of physical therapy services.

7. Plaintiffs’ Interpretation Would Produce Unintended Results.

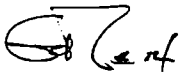
Plaintiffs’ requested interpretation would produce results not intended by the Legislature. Many PTs in South Carolina currently work in a group practice setting. If Plaintiffs’ interpretation of the PT Act were adopted, PTs could be forced to operate as solo practitioners in order to continue their practice. Defendants have presented evidence that requiring PTs to

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practice in isolation would create inefficiencies, increase the cost of care, lower the quality of care, and produce patient inconvenience throughout the State.

Defendants contend that Plaintiffs' interpretation of § 40-45-110(A)(1) could have the consequence of eliminating the jobs of PTAs in South Carolina. Both PTs and PTAs are "licensed persons" subject to § 40-45-110(A)(1). If Plaintiffs are correct, that any sending or directing of a patient to a licensed person for treatment is a covered "referral," then situations in which PTs send or direct patients to PTAs they employ or PTAs employed in the same practice would be prohibited "referrals." Thus, under Plaintiffs' proposed interpretation of "referral," PTAs could not work for the PTs or physical therapy practices from whom they receive patients. PTAs, however, are required by the PT Act to be "supervised and directed" by a PT whose license is in good standing. *See* S.C. Code Ann. § 40-45-20(5). Furthermore, PTAs cannot submit reimbursement requests to obtain payment for physical therapy services from government and private health insurers; they rely on their PT employers to do so for them. PTAs cannot work on their own but rather must work in a setting where (1) PTs can direct and supervise them, and (2) PTs can submit reimbursement requests for their services to government and private payors. Plaintiffs' proposed interpretation of "referral" would have the PT Act prohibit PTAs from working for PTs, while the same Act expressly requires PTAs to practice only under the direction and supervision of PTs.

Plaintiffs' response to the Defendants' argument concerning PTAs is that the PTAs are "exempt" from the prohibition in § 40-45-110(A)(1). Plaintiffs invoke the principle of statutory interpretation that, in the event of a conflict between two provisions, the more specific provision will be deemed an exception to the more general. Plaintiffs argue that § 40-45-300 is "the specific provision in the PT Act that deals with the ability of a PT to supervise and delegate



patients to a PTA” and that this section “expressly authorizes PTs to employ, supervise and direct patients to PTA[s].” They contend that the referral prohibition in § 40-45-110(A)(1) is the “general statutory provision that deals with the sanctions” applicable to licensed persons. But Plaintiffs’ proposed “exemption” for PTAs is only partial, since they argue that a PTA may accept “wages” from a supervising PT or the company that employs the supervising PT, but the PTA may not accept “a credit or other valuable consideration including such things as ‘an unearned, commission, discount, or gratuity.’”

The Court finds that Plaintiffs’ proposed interpretation of “referral” for purposes of § 40-45-110(A)(1) would yield unworkable results for PTAs. Plaintiffs’ arguments that PTAs are “exempt” from § 40-45-110(A)(1) are simply not supported by the language of the PT Act. The Court is not persuaded that § 40-45-300 is more specific than § 40-45-110(A)(1); a statutory provision that regulates clinical practice is not intrinsically more “specific” than one that lists potential grounds for discipline. Furthermore, Plaintiffs’ assertion that § 40-45-300 expressly authorizes PTs to “employ” PTAs is not supported by the language of the section, which makes no reference to employment of PTAs. For example, Plaintiffs maintain that § 40-45-110(A)(1) is still partially applicable to a PT’s delegation of a patient to a PTA because the PTA may not receive any “credit or valuable consideration” from the employer other than the “wages” he/she is permitted to accept, but that, “[o]f course, the amount of wages received by the PTA being delegated the patients must be within the industry norm.” None of this is found in the PT Act. This analysis can be avoided by an interpretation limiting the application of § 40-45-110(A)(1) to the “referrals” of gatekeeper physicians, consistent with the rest of § 40-45-110(A) and the intent of the Legislature as determined in *Sloan*.



8. Plaintiffs' Reliance on "Plain Meaning" Is Misplaced.

Plaintiffs contend that the plain meaning of the PT Act compels the conclusion that a PT who sends a patient to another PT or a PTA employed by that PT or in the same group practice has made a "referral" prohibited by § 40-45-110(A)(1). I disagree.

Plaintiffs contend, and Defendants do not contest, that every PT is an individual and therefore a "person" within the definition in § 40-45-20(3). But the definition of "person" is not at issue, and that definition does not clarify whether a PT who sends a patient to another PT or a PTA in the same group practice a person who "referred" the patient for purposes of § 40-45-110(A)(1). While the PT Act does not specifically define the term "refer," the *Sloan* opinion interpreted the term "according to its 'plain meaning, which in this instance is 'to send or direct for treatment, aid, information, [or] decision, [e.g.,] a patient to a specialist.'" Webster's Third New International Dictionary 1907 (1981)." 636 S.E.2d at 607-608. The opinion also cited the Provider Self-Referral Act ("PSRA"), S.C. Code Ann. § 44-113-20(12), which "defines the term 'referral' according to its plain and ordinary meaning," i.e., "the forwarding of a patient by a health care provider to another health care provider." *Id.* at 608. When a "statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed." *Barton*, 745 S.E.2d at 120-21. However, if a statute is "susceptible to more than one interpretation," a court must utilize the rules of statutory interpretation to discover the legislature's intent. *Id.* at 121.

Unlike *Sloan*, the plain meaning rule does not help the Court apply "refer" in this case because, as applied to individuals working in a physical therapy group practice, the term is "susceptible of more than one interpretation" and is thus "ambiguous." In particular, although Plaintiffs base their "plain meaning" argument on the two extrinsic sources cited in *Sloan*,

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Webster's Dictionary and the PSRA, these two sources give conflicting answers to questions involving the application of the prohibition in § 40-45-110(A)(1). For example, under the literal reading of the Webster's definition posited by Plaintiffs, an unlicensed member of a practice's administrative staff who schedules a patient to see a PT has made a "referral" by sending or directing the patient to a PT for treatment. The Webster's definition imposes no limitation on the individuals who make "referrals" by "sending or directing" a patient to a PT. Thus, under one "plain meaning" analysis, PTs could not employ unlicensed personnel to make their patient appointments. On the other hand, the PSRA definition limits "referrals" to the "forwarding" of patients by "health care providers," and thus would not appear to reach appointment scheduling by administrative staff.

As this example illustrates, the "plain meaning" of "refer" does not provide a single definite answer to the question of interpretation raised by the Amended Complaint—namely what type of "sending or directing" of a patient to a licensed person constitutes a "referral" under the statute. In order to effectuate the legislative intent of § 40-45-110(A)(1), the Court must thus take into account the context in which the term is used, whether the proposed interpretation would advance the legislative purpose, and whether the interpretation would offend common sense by producing absurd results. *See Barton*, 745 S.E.2d at 120-23. As discussed above, all those factors lead the Court to conclude that the "referrals" targeted by § 40-45-110(A)(1) are the referrals of gatekeeping physicians, consistent with the rest of § 40-45-110(A) and the intent of the Legislature as determined in *Sloan*.

For all of the foregoing reasons, Plaintiffs' First and Second Causes of Action fail as a matter of law.

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B. Third Cause of Action

In their Third Cause of Action, Plaintiffs make the alternative argument that, even 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. The issue of whether PTs can work for physicians, however, was already decided in *Sloan*. The Court is bound by that case and thus finds that Plaintiffs' claim fails as a matter of law.

Plaintiffs' claim is premised on the notion that it makes no difference whether the person who sends a patient to a PT is a physician gatekeeper or another PT. The Plaintiffs reason that if every time a PT sends a patient to another PT that act is "coverage"—and therefore not a violation of § 40-45-110(A)(1)—the same must be true with regard to each and every time a physician sends a patient to a PT employed by the practice for which the physician works.⁴ However, an analysis of the legislative intent makes clear that the statute does not apply to a PT's sending a patient to a PT (or PTA) employed by the same practice, without regard to whether the PT (or PTA) who receives the patient is providing coverage.

According to Plaintiffs, the Board's 2011 Position Statement "carve[d] out an exception to the fee for referral prohibition in § 40-45-110(A)(1)." Plaintiffs claim that this supposed exception should permit PTs, in the guise of "coverage," to work for physicians:

⁴ Plaintiffs offer no legal or factual support for the proposition that a PT can "cover" for a physician. The law expressly prohibits PTs from practicing medicine. See S.C. Code Ann. § 40-45-310; see also *id.* § 40-45-110(A)(2). And although both PTs and physicians are qualified to provide physical therapy services, the plaintiff Physicians have testified that the physical therapy services physicians offer are brief and educational in nature. See T. Joseph Dep. 11:22-12:5 ("So usually the physical therapy that we do is educational, for the most part. It's very – it's fairly brief It's not as extensive as the physical therapist who would do physical therapy for 30 minutes, 45 minutes, an hour"); McCarthy Dep. 22:5-16 (indicating that he merely educates patients in the exercises that they need to perform).

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The Court should [] declare that a PT seeing a patient at the request of a physician in the same group does not constitute a “referral,” but is rather a PT providing coverage for a physician or other member of the group.

Am. Compl. ¶ 54. Neither this Court nor the Board has the 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 granting summary judgment as to the Seventh through Ninth Causes of Action, this Court has already recognized that it will not—and cannot—create a backdoor around *Sloan*. See Dec. 4, 2012 Order Granting Partial Summary Judgment as to Causes of Action Seven Through Nine, at 12. For this reason, Plaintiffs’ Third Cause of Action fails, and Defendants are entitled to summary judgment.

C. Fourth Cause of Action

In their Fourth Cause of Action, the Plaintiffs claim that the 2011 Position Statement is intended to have the force of law, will be applied by the Board as a regulation, and violates the Administrative Procedures Act (“APA”). The Court disagrees.

The plaintiffs in *Sloan* made this same argument with regard to the Board’s 2004 Position Statement, and these arguments were rejected by the Supreme Court. In *Sloan*, the Court stated:

The Board’s . . . [2004 position statement] was nothing more than a policy or guidance statement which does not have the force or effect of law in any individual case. The Board’s statement regarding its interpretation of Section 40-45-110(A)(1) is not a regulation or the equivalent of a regulation. The Board stated in 2004, in essence, “This interpretation is what we believe the law means and we direct our staff to enforce it accordingly, beginning ninety days after our vote today.”

636 S.E.2d at 610.

As in *Sloan*, the Board’s 2011 statement regarding its interpretation of § 40-45-110(A)(1) is not a regulation or the equivalent of a regulation. Just like the 2004 Position Statement, the Board’s 2011 Position Statement did not prescribe practice requirements for PTs in more detail

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than set forth in the statute. Instead, the Position Statement was merely a policy or guidance statement that set forth the Board's understanding of the statute's meaning. For this reason, Defendants are entitled to summary judgment as to Plaintiffs' Fourth Cause of Action.

D. Fifth and Sixth Causes of Action

In their Fifth and Sixth Causes of Action, Plaintiffs claim that the 2011 Position Statement violated their constitutional rights to equal protection and due process by "allowing [PTs] to be employed by a physical therapist or a physical therapy group and provide physical therapy services to patients referred by the employer when *Sloan* does not allow PTs to be employed by a physician or physician group and provide physical therapy services to the employer's referred patient." The Court will enter judgment dismissing these claims.

1. Equal Protection

To begin, Plaintiffs' equal protection claim is foreclosed by the Supreme Court's decision in *Sloan*. There, the Supreme Court rejected the argument that there is no rational basis for treating different healthcare professionals—e.g., physicians and PTs—differently under the law. *See Sloan*, 636 S.E.2d at 613 ("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."). There is thus no merit to the claim 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 the Supreme Court ruled in *Sloan*, the prohibition on physician-owned physical therapy practices bears a reasonable relation to the legislative purpose of avoiding overuse of physical therapy services, 636 S.E.2d at 614. Plaintiffs concede that this is the legislative purpose of § 40-45-110(A)(1), but argue that this reasoning should apply equally to coverage,

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co-treatment and other PT-to-PT and PT-to-PTA patient transitions occurring in physical therapy group practices. The Court disagrees. As previously explained, a PT directing a patient to another PT or a PTA within the same group practice is not 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 handoffs occurring within a group practice thus 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 thus 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.

2. Due Process

The Plaintiffs’ substantive due process claim was likewise addressed in *Sloan*. 636 S.E.2d at 614-15. The 2011 Position Statement does not prohibit Plaintiffs from doing anything, and thus does not deprive them of any property right, with or without due process. Although Plaintiffs take issue with the prohibition on PTs’ working for physicians, arguing that there is no rational basis to prohibit physical therapists from being employed by a physician or physician group and being paid to treat referred patients, this argument was considered—and rejected—in

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Sloan. There, the South Carolina Supreme Court held that the prohibition on physicians employing PTs is based upon a "legitimate interest of government," namely the interest in "enhancing the public welfare in the practice of medicine and related professions." *Sloan*, 636 S.E.2d at 615. As such, Plaintiffs' due process rights have not been violated.

For these reasons, Plaintiffs' Fifth and Sixth Causes of Action fail as a matter of law, and the Defendants are entitled to summary judgment.

II. Standing

Having previously ruled by Order dated September 17, 2012 that Plaintiffs have standing to pursue this action, the Court need not repeat its position on this issue.

III. Supporting Expert Testimony

For the above stated reasons, I choose to adopt the opinion of the Defendants' expert⁵ as a correct statement of policy that complies with *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, the 2011 Position Statement of the Board of Physical Therapy, and Section 40-45-110(A)(1) of the South Carolina Code of Laws as follows:

- a. Within a group physical therapy practice where a patient may be evaluated by one therapist and subsequently treated by another, the transition of the patient's therapy from one therapist to another is not a referral. Unlike a referral from a physician to a therapist, the transition of care from one physical therapist to another physical therapist does not create a new course of treatment or authorize additional treatment.
- b. If the Physical therapy Practice Act is interpreted to prohibit physical therapists from practicing together in a group practice owned by one or more physical therapists, this would create terrible inefficiencies, inconvenience, and barriers to care for patients in need of physical therapy services.
- c. A physical therapist is not making a referral to a physical therapist assistant when directing that physical therapist assistant in the

⁵ See Affidavit of John P. Stearns, December 12, 2013.

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provision of physical therapy services. No new course of treatment is created nor is any additional treatment authorized by this legally required supervision

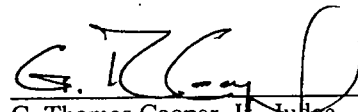
- d. If the Physical Therapy Practice Act is interpreted to prohibit physical therapist assistants from working with physical therapists, physical therapist assistants will, as a practical matter, not be able to work in South Carolina. This likely would result in substantial increases in the cost of physical therapy services and create inefficiencies and barriers to care for patients in need of physical therapy services.
- e. Physical therapists cannot "cover" for physicians.

CONCLUSION

The Court finds that all of Plaintiffs' remaining claims fail as a matter of law and undisputed fact. For these reasons, the Court **DENIES** Plaintiffs' Motion for Summary Judgment and **GRANTS** the Motions for Summary Judgment filed by the Defendants. All of Plaintiffs' remaining claims are hereby dismissed with prejudice.

IT IS SO ORDERED.

Columbia, South Carolina
April 21, 2014


G. Thomas Cooper, Jr., Judge
Fifth Judicial Circuit

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
Kristin Joseph P.T., Thomas N. Joseph, M.D.,	)	C/A No. 2012-CP-40-2632
and William G. McCarthy, M.D.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
South Carolina Department of Labor,	)	
Licensing and Regulation, South Carolina	)	
Board of Physical Therapy,	)	
	)	
Defendant,	)	
	)	
and	)	
	)	
South Carolina Chapter, American Physical	)	
Therapy Association, Joseph M. McKowen,	)	
PT, Sabrina Queen Bridges, PTA, and Amalia	)	
W. Kirby, PTA,	)	
	)	
Defendants-Intervenors.	)	

PLAINTIFFS'
MOTION TO RECONSIDER
ALTER OR AMEND

RICHLAND COUNTY
FILED
2014 MAY -8 PM 3:05
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

Pursuant to Rules 52 and 59, SCRCP, Plaintiffs move this Court to reconsider, alter, or amend its Order Granting Defendants' Motions for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment (Order). Plaintiffs seek an amended order that grants their motion for summary judgment and denies Defendants' motion for summary judgment or, in the alternative, that rules explicitly on each ground raised by Plaintiffs in their motion and corrects factual errors. It also does not rule on some issues raised to the Court, contains errors of law, and fails to recite accurately the arguments raised by Plaintiffs. Therefore Plaintiffs respectfully submit that this Court should reconsider, alter or amend its Order to grant Plaintiffs' Motion in whole or in part, or in the alternative, issue an amended order that either omits all unnecessary and/or erroneous findings and conclusions. This motion has two parts: (1) a summary of the

principal grounds for an order granting Plaintiffs' motion for summary judgment and denying Defendants' motion for summary judgment; and (2) a summary list of grounds, including alternative grounds, previously presented to this Court.

The Order is dated April 21, 2014, was filed April 22, 2014 and Plaintiffs received a copy of the Order, as signed and filed, on April 28, 2014.

INTRODUCTION

The present case involves a complaint for declaratory judgment alleging that the position statement adopted on August 17, 2011, by the Board entitled "Application of 40-45-110(A)(1) to Intra-Professional Interactions" (2011 Position Statement) is (1) contrary to the clear and unambiguous language of § 40-45-110(A)(1) and the South Carolina Physical Therapy Act, S.C. Code Ann. §§ 40-45-10, et seq. (2013) (PT Act), (2) violates the South Carolina and United States due process and equal protection clauses, and (3) was adopted in violation of the Administrative Procedures Act (APA).

I. **It is respectfully submitted that this Court should reconsider its Order and grant Plaintiffs' motion for summary judgment and deny Defendants' motion for summary judgment.**

1. First Cause of Action. Agencies of the State are creatures of statute and have only that authority given by statute or necessary implication thereof. The PT Act regulates the conduct of physical therapists (PT) and physical therapy assistants (PTA). Section 40-45-110(A)(1) provides for sanctions for PTs that violate the provisions of the PT Act and prohibits a PT from being employed and earning wages from a "person who referred a patient, or with a relative or business associate of the referring person." One of the legislative purposes of

section 40-45-110(A)(1) is to protect consumers as well as third party payors from actual or potential conflicts of interest from a person who employs another person and directs a patient to be treated for his own financial gain, rather than for the patient's medical needs. Plaintiffs are entitled to summary judgment under the first cause of action because a PT and a PTA are each a "person" under the PT Act. S.C. Code Ann. § 40-45-110(A)(1) prohibits a person, for financial gain, from referring a patient to a PT employed by the referring person. The Board's 2011 Position Statement determining that a PT sending a patient to another PT in an intra-professional setting does not constitute a referral is contrary to the plain meaning of S.C. Code Ann. § 40-45-110(A)(1), its legislative purpose and the PT Act as a whole. The 2011 Position Statement exceeds the Board's statutory authority and constitutes an *ultra vires* act.

2. Second Cause of Action. The 2011 Position Statement misconstrues the word "referred" as it is used in S.C. Code Ann. § 40-25-110(A)(1). As defined in Sloan v. S.C. Bd. Of Physical Therapy Exm'rs., 370, S.C. 452, 470, 636 S.E. 2d 598, 607, "refer" means "to send or direct for treatment, aid, information, [or] decision." When a PT is sending a patient to employed PT, the referring PT is sending the patient for treatment, thus the PT is referring the patient. The Board's 2011 Position Statement determination that a PT sending a patient to another employed PT or PTA for treatment is coverage and not a referral is contrary to the plain meaning of S.C. Code Ann. § 40-45-110(A)(1), its legislative purpose and the PT Act as a whole. "Coverage" in a medical setting is distinctly different from that of a "referral" in a medical setting. "Coverage" occurs when a licensed provider sees a patient during the absence of the patient's normal medical provider and contemplates that the referring provider continues to provide routine patient services after a temporary absence, not the continued provision of

service. The 2011 Position Statement exceeds the Board's statutory authority and constitutes an *ultra vires* act.

3. Third Cause of Action. Alternately, if the PT Board's 2011 Position Statement properly construed the word "refer" in S.C. Code Ann. § 40-25-110(A)(1), then the plain meaning of the PT Act dictates that the "coverage" exception be applied equally to physicians and physician groups just as it is to PTs and PT groups. The provision of physical therapy services is within the scope of practice of a physician in South Carolina. If, under the PT Act, a PT can send a patient to an employed PT for treatment under the coverage exception, neither the plain language nor the legislative intent of the Act prohibits a physician from sending a patient to an employed PT for physical therapy treatment under the coverage exception.

4. Fourth Cause of Action. The 2011 Position Statement was adopted in violation of the South Carolina Administrative Procedures Act (APA).

5. Fifth Cause of Action. The 2011 Position Statement adopted by the PT Board violates Plaintiffs rights under the South Carolina and United States Equal Protection provisions.

6. Sixth Cause of Action. The 2011 Position Statement adopted by the PT Board violates PT Joseph's Substantive Due Process rights.

II. It is respectfully requested that this Court specifically rule upon all grounds raised by the Plaintiffs or correct legal and factual findings if it does not amend its order so as to grant the Plaintiffs' Motion for Summary Judgment and deny Defendants' Motions for Summary Judgment.

1. Plaintiffs' Motion for Summary Judgment should be granted as to the First and Second

Causes of Action because:

a) The only issue before Sloan was whether a physician was a person within the meaning of the 40-45-110(A)(1) prohibition against referring a patient to an

employee or an employee of a family member or a business associate. It did not address the issue of whether a PT or PTA was a person for purposes of the referral prohibition. Sloan is not controlling.

- b) The Sloan case does not stand for the proposition that the "person" referring a patient to a PT can only be a physician and that the overuse of physical therapy services sought to be prevented by § 40-45-110(A)(1) only applies to physicians to the exclusion of other persons. Sloan did not address the application of the referral prohibition as to any person, including other licensed medical providers, other than physicians. Sloan is not controlling.
- c) The 2011 Position Statement creates a legal fiction that for purposes of what constitutes a referral, there is a difference between patients referred or directed for physical therapy treatment inter-professionally and intra-professionally. The plain meaning of the PT Act does not recognize the distinction between inter-professional and intra-professional referrals to employed PTs.
- d) Patients in South Carolina have direct access to PTs. A PT or a PTA under the direction of a PT can see a patient for thirty (30) days without a referral from a physician. Physicians are not the legal gate keepers for PTs or PTA for the initial thirty (30) days of treatment of a patient. Non-physician practitioners such as nurse practitioners or physician assistants can also make referrals to PTs.
- e) The PT Act legislative purpose of protecting the public consumers and government-sponsored and other health care programs applies equally to any licensed health care provider that has the potential of referring patients for medical services to entities in which the health care provider has a family member or business associate.
- f) Reading the PT Act as a whole, when the Legislature meant to use the word "physician" it did and by using the word "person" in § 40-45-110(A)(1), it intended to include PTs within the definition of "person".
- g) The 2011 Position Statement misapprehends the definition of coverage. "Coverage" in the medical profession means having another appropriately credentialed medical provider take call and see patients for a provider who is for some reason unavailable. See Busby v. St. Paul Fire & Marine Insurance Company, 290 So.2d 701, 705 (1974).
- h) The factual findings as to any legislative activity after the Sloan decision is irrelevant to the declaratory judgment action as to whether the 2011 Position Statement is contrary to the plain meaning of the PT Act, exceeds the Board's statutory authority or constitutes an *ultra vires* act.

- i) The Order erred by stating that the Board Chair's response to Mr. Carpenter's letter, written by the SCAPTA and APTA, was "her" view. The June 2, 2011 letter answering Mr. Carpenter's letter was written as Board Chair, on Board letterhead and not in an individual capacity.
- j) The Order mischaracterizes the Amended Declaratory Judgment Action filed by Plaintiffs by stating that it seeks a "declaration that would allow PTs to be employed in practices owned by physicians." Plaintiffs crave reference to the Amended Declaratory Judgment Action/Complaint for the correct declaration.

2. Plaintiffs' Motion for Summary Judgment should be granted as to the Third Cause of

Action because:

- a) Sloan only declared it unlawful for a physician to refer a patient to a PT employed by the physician or the physician's group. Sloan did not address whether a physician could send a patient to an employed PT under the concept of coverage.
- b) The provision of physical therapy services is within the scope of practice of a physician in South Carolina. A PT can provide coverage to a physician's patient needing only PT services under the coverage exception to the 2011 Position Statement.

3. Plaintiffs' Motion for Summary Judgment should be granted as to the Fourth Cause of

Action because:

- a) The Order erred by not including the complete actions taken and not taken by the Board regard adoption of the 2011 Policy Statement from the Carpenter May 3, 2011 request until the Board adopted the 2011 Position Statement on August 17, 2011. These facts demonstrate that the Board did not follow the requirements of the APA in adopting the 2011 Position Statement, including but not limited to public notice of the hearing for the 2011 Policy Statement or legislative approval thereof.
- b) The 2011 Policy Statement constitutes a binding norm and is subject to the requirements of the APA.

4. Plaintiffs' Motion for Summary Judgment should be granted as to the Fifth Cause of

Action because:

- a) Sloan did not address Plaintiffs' equal protection rights as to performing PT services through providing coverage for physical therapy services for a physician or physician group employing her.
 - b) The risk of overutilization and abuse in physical therapy owned groups that employ PTs and refer patients is greater than is the risk in physician owned groups that employ PTs and refer patients. *Cf. Fed. Reg.*, Vol. 76, No. 22 (Feb. 2, 2011)
5. Plaintiffs' Motion for Summary Judgment should be granted as to the Sixth Cause of Action because:

- a) Plaintiffs' Sixth Cause of Action only alleged a substantive due process violation as to Plaintiff PT Joseph, not as to all Plaintiffs, as the order contends.
- b) Sloan did not address PT Joseph's substantive due process rights as to performing PT services through providing coverage for physical therapy services for a physician or physician group employing her.

CONCLUSION

For all of the foregoing reasons, and for the reasons and grounds set forth in Plaintiffs' Motion for Summary Judgment, Memorandum in Support of Motion for Summary Judgment, Reply in Support of Motion for Summary Judgment, and Proposed Order (granting motion to dismiss), all of which are incorporated herein by reference, it is respectfully requested that this Court issue an amended order granting the Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment or, in the alternative, issue an amended order that rules on all of the above noted and incorporated grounds.

(Signature Page to Follow)

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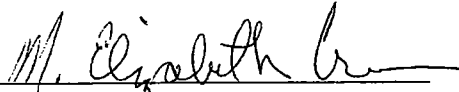
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By: 
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Columbia, South Carolina

May 8, 2014

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
Kristin Joseph P.T., Thomas N. Joseph,	)	C/A No. 2012-CP-40-2632
M.D., and William G. McCarthy, M.D.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	DEFENDANTS' MEMORANDUM IN
	)	OPPOSITION TO PLAINTIFFS'
South Carolina Department of Labor,	)	MOTION TO RECONSIDER, ALTER
Licensing and Regulation, South Carolina	)	OR AMEND
Board of Physical Therapy,	)	
	)	
Defendant,	)	
	)	
and	)	
	)	
South Carolina Chapter, American	)	
Physical Therapy Association, Joseph M.	)	
McKowen, PT, Sabrina Queen Bridges,	)	
PTA, and Amalia W. Kirby, PTA,	)	
	)	
Defendant-Intervenors.	)	
	)	

Defendant South Carolina Department of Labor, Licensing and Regulation, South Carolina Board of Physical Therapy and Defendant-Intervenors South Carolina Chapter, American Physical Therapy Association, Joseph M. McKowen, PT, Sabrina Queen Bridges, PTA, and Amalia W. Kirby, PTA (collectively "Defendants") submit this memorandum in opposition to Plaintiffs' motion to reconsider, alter or amend the Order entered by the Court on April 22, 2014. Plaintiffs' motion rehashes the arguments that Plaintiffs made—and the Court rejected—in Plaintiffs' motion for summary judgment. Accordingly, the motion should be denied.

As a threshold matter, Plaintiffs concede that their arguments were "previously presented to this Court." Pls.' Mot. to Reconsider at 2. Indeed, Plaintiffs raised the same

arguments in their summary judgment briefing, and at oral argument. *See generally* Pls.’ Mot. for Summ. J. (filed Nov. 1, 2013); Pls.’ Mem. in Supp. of Mot. for Summ. J. (filed Dec. 13, 2013); Pls.’ Reply to Def.’s Mot. for Summ. J. (filed Jan. 10, 2014); Pls.’ Reply to Def.-Intervenors’ Mot. for Summ. J. (filed Jan. 10, 2014); Jan. 16, 2014 Hearing Tr.

The Court considered these arguments, along with the factual, statutory, and regulatory background of this case, *see* Apr. 22, 2014 Order at 1-8, and held that:

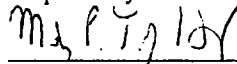
- The “referrals” targeted by § 40-45-110(A)(1) are the “referrals of gatekeeping physicians,” and Plaintiffs’ proposed interpretation of the PT Act to apply to patient transitions in the group practice of physical therapy would “harm the practice of physical therapy in South Carolina without advancing the legislative purpose of the statute,” Apr. 21, 2014 Order at 9-17 (First and Second Causes of Action);
- Plaintiffs’ requested “coverage” exception would impermissibly “declare conduct lawful that *Sloan* declared unlawful,” *id.* at 18-19 (Third Cause of Action);
- 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 (Fourth Cause of Action); and
- The 2011 Position Statement did not violate Plaintiffs’ equal protection or substantive due process rights, *id.* at 20-22 (Fifth and Sixth Causes of Action).

Thus, contrary to what Plaintiffs now assert, the Court ruled on *all* of the grounds raised by Plaintiffs in their motion for summary judgment, and found that Plaintiffs’ claims fail as a matter of law. Plaintiffs have presented no new material fact or principle

of law that would warrant reconsideration of that decision. For these reasons, Plaintiffs' motion to reconsider, alter or amend should be denied.

By:

Respectfully submitted,



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West Columbia, South Carolina

May 16, 2014

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2012CP4002632

Kristin Joseph

SC Dept Of Labor Licensing And Regulation

Thomas N Joseph

South Carolina Board of Physical Therapy

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP; ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 43(k), SCRCP (Settled); ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____

Judge Code _____

Date _____

For Clerk of Court Office Use Only

This judgment was entered on the ____ day of _____, 20 ____ and a copy mailed first class or placed in the appropriate attorney's box on this 19 May 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Mary Elizabeth (Liz) Crum

Monteith Powell Todd
Emily Whitney Medlyn

S. Jahue Moore
John Robert Devlin Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

MAY 32 2014

Clerk of Court

McNair Law Firm, PA

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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

Plaintiffs,

vs.

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

Defendants,

and

South Carolina Chapter, American Physical
Therapy Association, Joseph M. McKowen, P.T.,
Sabrina Bridges, P.T.A., and Amalia W. Kirby,
P.T.A.,

Defendants/Intervenors.

IN THE COURT OF COMMON PLEAS
IN THE FIFTH JUDICIAL CIRCUIT

Case No. 2012-CP-40-02632

**ORDER DENYING PLAINTIFFS'
MOTION TO RECONSIDER**

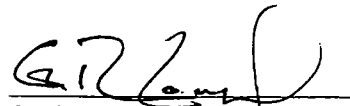
RICHLAND COUNTY
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JEANETTE W. McBRIDE
C.C.P. & G.S.

This matter comes before the Court by way of Plaintiffs' Motion to Reconsider pursuant to Rule 59(e), SCRCP. Specifically, Plaintiffs ask this Court to reconsider its Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment filed April 21, 2014.

After careful consideration of the record in this case and the submissions of the parties, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby **DENIES** Plaintiffs' Motion under Rule 59(e), SCRCP to Reconsider this Court's Order filed April 21, 2014. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

IT IS SO ORDERED.

Columbia, South Carolina
May 14, 2014


G. Thomas Cooper, Jr., Judge
Fifth Judicial Circuit

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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MAY 23 2014

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

SC Court of Appeals

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2012-CP-40-2632

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

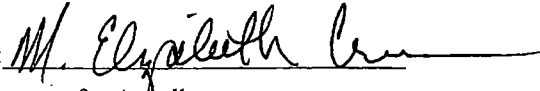
NOTICE OF APPEAL

Appellants Kristin Joseph P.T., Thomas N. Joseph, M.D., and William G. McCarthy, M.D. (Appellants) appeal the Order of the Honorable G. Thomas Cooper, Jr., dated April 21, 2014, granting Respondents' Motion for Summary Judgment and denying Appellants' Motion for Summary Judgment. Appellants received written notice of the entry of this Order on April 28, 2014. Appellants filed and served a Motion to Reconsider, Alter or Amend pursuant to Rule 59(e), SCRCP, on May 8, 2014. Judge Cooper signed an Order Denying Appellants' Motion to Reconsider, Alter or Amend on May 14, 2014. Appellants received written notice of entry of this Order on May 23, 2014.

Respectfully submitted,

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Medicare Benefit Policy Manual

Chapter 15 – Covered Medical and Other Health Services

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D. Collaboration

Collaboration is a process in which a CNS works with one or more physicians (MD/DO) to deliver health care services within the scope of the CNS' professional expertise with medical direction and appropriate supervision as required by the law of the State in which the services are furnished. In the absence of State law governing collaboration, collaboration is to be evidenced by the CNS documenting his or her scope of practice and indicating the relationships that the CNS has with physicians to deal with issues outside the CNS' scope of practice.

The collaborating physician does not need to be present with the CNS when the services are furnished or to make an independent evaluation of each patient who is seen by the CNS.

E. Direct Billing and Payment

A CNS may bill directly and receive direct payment for their services.

F. Assignment Requirement

Assignment is required for the service to be covered.

220 - Coverage of Outpatient Rehabilitation Therapy Services (Physical Therapy, Occupational Therapy, and Speech-Language Pathology Services) Under Medical Insurance

(Rev. 176, Issued: 12-13-13, Effective: 01-07-14, Implementation: 01-07-14)

A comprehensive knowledge of the policies that apply to therapy services cannot be obtained through manuals alone. The most definitive policies are Local Coverage Determinations found at the Medicare Coverage Database www.cms.hhs.gov/mcd. A list of Medicare contractors is found at the CMS Web site. Specific questions about all Medicare policies should be addressed to the contractors through the contact information supplied on their Web sites. General Medicare questions may be addressed to the Medicare regional offices <http://www.cms.hhs.gov/RegionalOffices/>.

A. Definitions

The following defines terms used in this section and §230:

ACTIVE PARTICIPATION of the clinician in treatment means that the clinician personally furnishes in its entirety at least 1 billable service on at least 1 day of treatment.

ASSESSMENT is separate from evaluation, and is included in services or procedures, (it is not separately payable). The term assessment as used in Medicare manuals related to therapy services is distinguished from language in Current Procedural Terminology

(CPT) codes that specify assessment, e.g., 97755, Assistive Technology Assessment, which may be payable). Assessments shall be provided only by clinicians, because assessment requires professional skill to gather data by observation and patient inquiry and may include limited objective testing and measurement to make clinical judgments regarding the patient's condition(s). Assessment determines, e.g., changes in the patient's status since the last visit/treatment day and whether the planned procedure or service should be modified. Based on these assessment data, the professional may make judgments about progress toward goals and/or determine that a more complete evaluation or re-evaluation (see definitions below) is indicated. Routine weekly assessments of expected progression in accordance with the plan are not payable as re-evaluations.

CERTIFICATION is the physician's/nonphysician practitioner's (NPP) approval of the plan of care. Certification requires a dated signature on the plan of care or some other document that indicates approval of the plan of care.

The CLINICIAN is a term used in this manual and in Pub 100-04, chapter 5, section 10 or section 20, to refer to only a physician, nonphysician practitioner or a therapist (but not to an assistant, aide or any other personnel) providing a service within their scope of practice and consistent with state and local law. Clinicians make clinical judgments and are responsible for all services they are permitted to supervise. Services that require the skills of a therapist, may be appropriately furnished by clinicians, that is, by or under the supervision of qualified physicians/NPPs when their scope of practice, state and local laws allow it and their personal professional training is judged by Medicare contractors as sufficient to provide to the beneficiary skills equivalent to a therapist for that service.

COMPLEXITIES are complicating factors that may influence treatment, e.g., they may influence the type, frequency, intensity and/or duration of treatment. Complexities may be represented by diagnoses (ICD-9 codes), by patient factors such as age, severity, acuity, multiple conditions, and motivation, or by the patient's social circumstances such as the support of a significant other or the availability of transportation to therapy.

A DATE may be in any form (written, stamped or electronic). The date may be added to the record in any manner and at any time, as long as the dates are accurate. If they are different, refer to both the date a service was performed and the date the entry to the record was made. For example, if a physician certifies a plan and fails to date it, staff may add "Received Date" in writing or with a stamp. The received date is valid for certification/re-certification purposes. Also, if the physician faxes the referral, certification, or re-certification and forgets to date it, the date that prints out on the fax is valid. If services provided on one date are documented on another date, both dates should be documented.

The EPISODE of Outpatient Therapy – For the purposes of therapy policy, an outpatient therapy episode is defined as the period of time, in calendar days, from the first day the patient is under the care of the clinician (e.g., for evaluation or treatment) for the current condition(s) being treated by one therapy discipline (PT, or OT, or SLP) until the last date of service for that discipline in that setting.

During the episode, the beneficiary may be treated for more than one condition; including conditions with an onset after the episode has begun. For example, a beneficiary receiving PT for a hip fracture who, after the initial treatment session, develops low back pain would also be treated under a PT plan of care for rehabilitation of low back pain. That plan may be modified from the initial plan, or it may be a separate plan specific to the low back pain, but treatment for both conditions concurrently would be considered the same episode of PT treatment. If that same patient developed a swallowing problem during intubation for the hip surgery, the first day of treatment by the SLP would be a new episode of SLP care.

EVALUATION is a separately payable comprehensive service provided by a clinician, as defined above, that requires professional skills to make clinical judgments about conditions for which services are indicated based on objective measurements and subjective evaluations of patient performance and functional abilities. Evaluation is warranted e.g., for a new diagnosis or when a condition is treated in a new setting. These evaluative judgments are essential to development of the plan of care, including goals and the selection of interventions.

FUNCTIONAL REPORTING, which is required on claims for all outpatient therapy services pursuant to 42CFR410.59, 410.60, and 410.62, uses nonpayable G-codes and related modifiers to convey information about the patient's functional status at specified points during therapy. (See Pub 100-04, chapter 5, section 10.6)

RE-EVALUATION provides additional objective information not included in other documentation. Re-evaluation is separately payable and is periodically indicated during an episode of care when the professional assessment of a clinician indicates a significant improvement, or decline, or change in the patient's condition or functional status that was not anticipated in the plan of care. Although some state regulations and state practice acts require re-evaluation at specific times, for Medicare payment, reevaluations must also meet Medicare coverage guidelines. The decision to provide a reevaluation shall be made by a clinician.

INTERVAL of certified treatment (certification interval) consists of 90 calendar days or less, based on an individual's needs. A physician/NPP may certify a plan of care for an interval length that is less than 90 days. There may be more than one certification interval in an episode of care. The certification interval is not the same as a Progress Report period.

MAINTENANCE PROGRAM (MP) means a program established by a therapist that consists of activities and/or mechanisms that will assist a beneficiary in maximizing or maintaining the progress he or she has made during therapy or to prevent or slow further deterioration due to a disease or illness.

NONPHYSICIAN PRACTITIONERS (NPP) means physician assistants, clinical nurse specialists, and nurse practitioners, who may, if state and local laws permit it, and when appropriate rules are followed, provide, certify or supervise therapy services.

PHYSICIAN with respect to outpatient rehabilitation therapy services means a doctor of medicine, osteopathy (including an osteopathic practitioner), podiatric medicine, or optometry (for low vision rehabilitation only). Chiropractors and doctors of dental surgery or dental medicine are not considered physicians for therapy services and may neither refer patients for rehabilitation therapy services nor establish therapy plans of care.

PATIENT, client, resident, and beneficiary are terms used interchangeably to indicate enrolled recipients of Medicare covered services.

PROVIDERS of services are defined in §1861(u) of the Act, 42CFR400.202 and 42CFR485 Subpart H as participating hospitals, critical access hospitals (CAH), skilled nursing facilities (SNF), comprehensive outpatient rehabilitation facilities (CORF), home health agencies (HHA), hospices, participating clinics, rehabilitation agencies or outpatient rehabilitation facilities (ORF). Providers are also defined as public health agencies with agreements only to furnish outpatient therapy services, or community mental health centers with agreements only to furnish partial hospitalization services. To qualify as providers of services, these providers must meet certain conditions enumerated in the law and enter into an agreement with the Secretary in which they agree not to charge any beneficiary for covered services for which the program will pay and to refund any erroneous collections made. Note that the word PROVIDER in sections 220 and 230 is not used to mean a person who provides a service, but is used as in the statute to mean a facility or agency such as rehabilitation agency or home health agency.

QUALIFIED PROFESSIONAL means a physical therapist, occupational therapist, speech-language pathologist, physician, nurse practitioner, clinical nurse specialist, or physician's assistant, who is licensed or certified by the state to *furnish* therapy services, and who also may appropriately *furnish* therapy services under Medicare policies. Qualified *professional* may also include a physical therapist *assistant* (PTA) or an occupational therapy *assistant* (OTA) when *furnishing services* under the supervision of a qualified therapist, *who is working within the state scope of practice in the state in which the services are furnished*. Assistants are limited in the services they may *furnish* (see section 230.1 and 230.2) and may not supervise *other therapy caregivers*.

QUALIFIED PERSONNEL means staff (auxiliary personnel) who have been educated and trained as therapists and qualify to furnish therapy services only under direct supervision incident to a physician or NPP. See §230.5 of this *chapter*. Qualified personnel may or may not be licensed as therapists but meet all of the requirements for therapists with the exception of licensure.

SIGNATURE means a legible identifier of any type acceptable according to policies in Pub. 100-08, Medicare Program Integrity Manual, chapter 3, §3.3.2.4. concerning signatures.

SUPERVISION LEVELS for outpatient rehabilitation therapy services are the same as those for diagnostic tests defined in 42CFR410.32. Depending on the setting, the levels include personal supervision (in the room), direct supervision (in the office suite), and general supervision (physician/NPP is available but not necessarily on the premises).

SUPPLIERS of therapy services include individual practitioners such as physicians, NPPs, physical therapists and occupational therapists who have Medicare provider numbers. Regulatory references on physical therapists in private practice (PTPPs) and occupational therapists in private practice (OTPPs) are at 42CFR410.60 (C)(1), 485.701-729, and 486.150-163.

THERAPIST refers only to qualified physical therapists, occupational therapists and speech-language pathologists, as defined in §230. Qualifications that define therapists are in §§230.1, 230.2, and 230.3. Skills of a therapist are defined by the scope of practice for therapists in the state).

THERAPY (or outpatient rehabilitation services) includes only outpatient physical therapy (*PT*), occupational therapy (*OT*) and speech-language pathology (*SLP*) services paid using the Medicare Physician Fee Schedule or the same services when provided in hospitals that are exempt from the hospital Outpatient Prospective Payment System and paid on a reasonable cost basis, including critical access hospitals.

Therapy services referred to in this *chapter* are those skilled services *furnished* according to the standards and conditions in CMS manuals, (e.g., in this chapter and in Pub. 100-04, Medicare Claims Processing Manual, chapter 5), within their scope of practice by qualified professionals or qualified personnel, as defined in this section, represented by procedures found in the American Medical Association's "Current Procedural Terminology (CPT)." A list of CPT (HCPCS) codes is provided in Pub. 100-04, chapter 5, §20, and in Local Coverage Determinations developed by contractors.

TREATMENT DAY means a single calendar day on which treatment, evaluation and/or reevaluation is provided. There could be multiple visits, treatment sessions/encounters on a treatment day.

VISITS OR TREATMENT SESSIONS begin at the time the patient enters the treatment area (of a building, office, or clinic) and continue until all services (e.g., activities, procedures, services) have been completed for that session and the patient leaves that area to participate in a non-therapy activity. It is likely that not all minutes in the visits/treatment sessions are billable (e.g., rest periods). There may be two treatment sessions in a day, for example, in the morning and afternoon. When there are two visits/treatment sessions in a day, plans of care indicate treatment amount of twice a day.

B. References

Paper Manuals. The following manuals, now outdated, were resources for the Internet Only Manuals:

- Part A Medicare Intermediary Manual, (Pub. 13)
- Part B Medicare Carrier Manual, (Pub. 14)
- Hospital Manual, (Pub. 10)
- Outpatient Physical Therapy/CORF Manual, (Pub. 9)

Regulation and Statute. The information in this section is based in part on the following current references:

- 42CFR refers to Title 42, Code of Federal Regulation (CFR).
- The Act refers to the Social Security Act.

Internet Only Manuals. Current Policies that concern providers and suppliers of therapy services are located in many places throughout CMS Manuals. Sites that may be of interest include:

- Pub.100-01 GENERAL INFORMATION, ELIGIBILITY, AND ENTITLEMENT
 - Chapter 1- General Overview
 - 10.1 - Hospital Insurance (Part A) for Inpatient Hospital, Hospice, Home Health and SNF Services - A Brief Description
 - 10.2 - Home Health Services
 - 10.3 - Supplementary Medical Insurance (Part B) - A Brief Description
 - 20.2 - Discrimination Prohibited
- Pub. 100-02, MEDICARE BENEFIT POLICY MANUAL
 - Ch 6 - Hospital Services Covered Under Part B
 - 10 - Medical and Other Health Services Furnished to Inpatients of Participating Hospitals
 - 20 - Outpatient Hospital Services
 - 20.2 - Outpatient Defined
 - 20.4.1 - Diagnostic Services Defined
 - 70 - Outpatient Hospital Psychiatric Services
 - Ch 8 - Coverage of Extended Care (SNF) Services Under Hospital Insurance
 - 30.4. - Direct Skilled Rehabilitation Services to Patients

40 - Physician Certification and Recertification for Extended Care Services
50.3 - Physical Therapy, Speech-Language Pathology, and Occupational
Therapy Furnished by the Skilled Nursing Facility or by Others Under
Arrangements with the Facility and Under Its Supervision
70.3 - Inpatient Physical Therapy, Occupational Therapy, and Speech
Pathology Services

○ Ch 12 - Comprehensive Outpatient Rehabilitation Facility (CORF)
Coverage

10 - Comprehensive Outpatient Rehabilitation Facility (CORF) Services
Provided by Medicare

20 - Required and Optional CORF Services

20.1 - Required Services

20.2 - Optional CORF Services

30 - Rules for Provision of Services

30.1 - Rules for Payment of CORF Services

40 - Specific CORF Services

40.1 - Physicians' Services

40.2 - Physical Therapy Services

40.3 - Occupational Therapy Services

40.4 - Speech Language Pathology Services

• Pub. 100-03 MEDICARE NATIONAL COVERAGE DETERMINATIONS
MANUAL

○ Part 1

20.10 - Cardiac Rehabilitation Programs

30.1 - Biofeedback Therapy

30.1.1 - Biofeedback Therapy for the Treatment of Urinary Incontinence

50.1 - Speech Generating Devices

50.2 - Electronic Speech Aids

50.4 - Tracheostomy Speaking Valve

○ Part 2

150.2 - Osteogenic Stimulator

160.7 - Electrical Nerve Stimulators

160.12 - Neuromuscular Electrical Stimulation (NMES)

160.13 - Supplies Used in the Delivery of Transcutaneous Electrical Nerve
Stimulation (TENS) and Neuromuscular Electrical Stimulation (NMES)

160.17 - L-Dopa

○ Part 3

170.1 - Institutional and Home Care Patient Education Programs
170.2 - Melodic Intonation Therapy
170.3 - Speech Pathology Services for the Treatment of Dysphagia
180 – Nutrition

o Part 4

230.8 - Non-implantable Pelvic Flood Electrical Stimulator
240.7 - Postural Drainage Procedures and Pulmonary Exercises
270.1 -Electrical Stimulation (ES) and Electromagnetic Therapy for the Treatment of Wounds
270.4 - Treatment of Decubitus Ulcers
280.3 - Mobility Assisted Equipment (MAE)
280.4 - Seat Lift
280.13 - Transcutaneous Electrical Nerve Stimulators (TENS)
290.1 - Home Health Visits to A Blind Diabetic

• Pub. 100-08 PROGRAM INTEGRITY MANUAL

o Chapter 3 - Verifying Potential Errors and Taking Corrective Actions

3.4.1.1 - Linking LCD and NCD ID Numbers to Edits

o Chapter 13 - Local Coverage Determinations

13.5.1 - Reasonable and Necessary Provisions in LCDs

Specific policies may differ by setting. Other policies concerning therapy services are found in other manuals. When a therapy service policy is specific to a setting, it takes precedence over these general outpatient policies. For special rules on:

- CORFs - See chapter 12 of this manual and also Pub. 100-04, chapter 5;
- SNF - See chapter 8 of this manual and also Pub. 100-04, chapter 6, for SNF claims/billing;
- HHA - See chapter 7 of this manual, and Pub. 100-04, chapter 10;
- GROUP THERAPY AND STUDENTS - See Pub. 100-02, chapter 15, §230;
- ARRANGEMENTS - Pub. 100-01, chapter 5, §10.3;
- COVERAGE is described in the Medicare Program Integrity Manual, Pub. 100-08, chapter 13, §13.5.1; and
- THERAPY CAPS - See Pub. 100-04, chapter 5, §10.2, for a complete description of this financial limitation.

C. General

Therapy services are a covered benefit in §§1861(g), 1861(p), and 1861(l) of the Act. Therapy services may also be provided incident to the services of a physician/NPP under §§1861(s)(2) and 1862(a)(20) of the Act.

Covered therapy services are furnished by providers, by others under arrangements with and under the supervision of providers, or furnished by suppliers (e.g., physicians, NPP, enrolled therapists), who meet the requirements in Medicare manuals for therapy services.

Where a prospective payment system (PPS) applies, therapy services are paid when services conform to the requirements of that PPS. Reimbursement for therapy provided to Part A inpatients of hospitals or residents of SNFs in covered stays is included in the respective PPS rates.

Payment for therapy provided by an HHA under a plan of treatment is included in the home health PPS rate. Therapy may be billed by an HHA on bill type 34x if there are no home health services billed under a home health plan of care at the same time (e.g., the patient is not homebound), and there is a valid therapy plan of treatment.

In addition to the requirements described in this chapter, the services must be furnished in accordance with health and safety requirements set forth in regulations at 42CFR484, and 42CFR485.

When therapy services may be furnished appropriately in a community pool by a clinician in a physical therapist or occupational therapist private practice, physician office, outpatient hospital, or outpatient SNF, the practice/office or provider shall rent or lease the pool, or a specific portion of the pool. The use of that part of the pool during specified times shall be restricted to the patients of that practice or provider. The written agreement to rent or lease the pool shall be available for review on request. When part of the pool is rented or leased, the agreement shall describe the part of the pool that is used exclusively by the patients of that practice/office or provider and the times that exclusive use applies. Other providers, including rehabilitation agencies (*previously referred to as OPTs and ORFs*) and CORFs, are subject to the requirements outlined in the respective State Operations Manual regarding rented or leased community pools.

220.1 - Conditions of Coverage and Payment for Outpatient Physical Therapy, Occupational Therapy, or Speech-Language Pathology Services

(Rev. 165, Issued: 12-21-12, Effective: 01-01-13, Implementation: 01-07-13)

Reference: 42CFR424.24

Refer to §230.4 for physical therapist/occupational therapist in private practice rules.

Coverage rules for specific services are in Pub. 100-03, Medicare National Coverage Determinations Manual.

Other payment rules are found in Pub. 100-04, Medicare Claims Processing Manual, chapter 5.

Since the outpatient therapy benefit under Part B provides coverage only of therapy services, payment can be made only for those services that constitute therapy. In cases where there is doubt about whether a service is therapy, the contractor's local coverage determination (LCD) shall prevail.

In order for a service to be covered, it must have a benefit category in the statute, it must not be excluded and it must be reasonable and necessary. Therapy services are a benefit under §1861 of the Act. Consult Pub. 100-08, chapter 13, §13.5.1 for full descriptions of a reasonable and necessary service.

Outpatient therapy services furnished to a beneficiary by a provider or supplier are payable only when furnished in accordance with certain conditions. The following conditions apply.

- Services are or were required because the individual needed therapy services (see 42CFR424.24(c), §220.1.3);
- A plan for furnishing such services has been established by a physician/NPP or by the therapist providing such services and is periodically reviewed by a physician/NPP* (see 42CFR424.24(c), §220.1.2);
- Services are or were furnished while the individual is or was under the care of a physician* (see 42CFR424.24(c), §220.1.1);
- In certifying an outpatient plan of care for therapy a physician/NPP is certifying that the above three conditions are met (42 CFR 424.24(c)). Certification is required for coverage and payment of a therapy claim.
- Claims submitted for outpatient (and CORF) PT, OT, and SLP services must contain the National Provider (NPI) of the certifying physician identified for a PT, OT, and SLP plan of care. This requirement is effective for claims with dates of service on or after October 1, 2012. (See Pub. 100-04, Medicare Claims Processing Manual, chapter 5, section 10.3.)
- Claims submitted for outpatient (and CORF) PT, OT, and SLP services must contain the required functional reporting. (See 42CFR410.59, 60, and 62), Pub. 100-04, Medicare Claims Processing Manual, chapter 5, section 10.6.)
- The patient functional limitations(s) reported on claims, as part of the functional reporting, must be consistent with the functional limitations identified as part of the therapy plan of care and expressed as part of the patient's long term goals*

(see 42CFR410.61, 42CFR410.105, Pub. 100-04, Medicare Claims Processing Manual, chapter 5, section 10.6.)

220.1.1 - Care of a Physician/Nonphysician Practitioner (NPP)

(Rev. 176, Issued: 12-13-13, Effective: 01-07-14, Implementation: 01-07-14)

Although there is no Medicare requirement for an order, when documented in the medical record, an order provides evidence that the patient both needs therapy services and is under the care of a physician. The certification requirements are met when the physician certifies the plan of care. If the signed order includes a plan of care (see essential requirements of plan in §220.1.2), no further certification of the plan is required. Payment is dependent on the certification of the plan of care rather than the order, but the use of an order is prudent to determine that a physician is involved in care and available to certify the plan.

(The CORF services benefit does not recognize an NPP for orders and certification.)

220.1.2 - Plans of Care for Outpatient Physical Therapy, Occupational Therapy, or Speech-Language Pathology Services

(Rev. 176, Issued: 12-13-13, Effective: 01-07-14, Implementation: 01-07-14)

Reference: 42CFR 410.61 and 410.105(c) (for CORFs)

A. Establishing the plan (See §220.1.3 for certifying the plan.)

The services must relate directly and specifically to a written treatment plan as described in this chapter. The plan, (also known as a plan of care or plan of treatment) must be established before treatment is begun. The plan is established when it is developed (e.g., written or dictated).

The signature and professional identity (e.g., MD, OTR/L) of the person who established the plan, and the date it was established must be recorded with the plan. Establishing the plan, which is described below, is not the same as certifying the plan, which is described in §§220.1.1 and 220.1.3

Outpatient therapy services shall be furnished under a plan established by:

- A physician/NPP (consultation with the treating physical therapist, occupational therapist, or speech-language pathologist is recommended. Only a physician may establish a plan of care in a CORF;
- The physical therapist who will provide the physical therapy services;
- The occupational therapist who will provide the occupational therapy services; or

- The speech-language pathologist who will provide the speech-language pathology services.

The plan may be entered into the patient's therapy record either by the person who established the plan or by the provider's or supplier's staff when they make a written record of that person's oral orders before treatment is begun.

Treatment under a Plan. The evaluation and treatment may occur and are both billable either on the same day or at subsequent visits. It is appropriate that treatment begins when a plan is established.

Therapy may be initiated by qualified professionals or qualified personnel based on a dictated plan. Treatment may begin before the plan is committed to writing only if the treatment is performed or supervised by the same clinician who establishes the plan. Payment for services provided before a plan is established may be denied.

Two Plans. It is acceptable to treat under two separate plans of care when different physician's/NPP's refer a patient for different conditions. It is also acceptable to combine the plans of care into one plan covering both conditions if one or the other referring physician/NPP is willing to certify the plan for both conditions. The treatment notes continue to require timed code treatment minutes and total treatment time and need not be separated by plan. Progress reports should be combined if it is possible to make clear that the goals for each plan are addressed. Separate progress reports referencing each plan of care may also be written, at the discretion of the treating clinician, or at the request of the certifying physician/NPP, but shall not be required by contractors.

B. Contents of Plan (See §220.1.3 for certifying the plan.)

The plan of care shall contain, at minimum, the following information as required by regulation (42CFR424.24, 410.61, and 410.105(c) (for CORFs)). (See §220.3 for further documentation requirements):

- Diagnoses;
- Long term treatment goals; and
- Type, amount, duration and frequency of therapy services.

The plan of care shall be consistent with the related evaluation, which may be attached and is considered incorporated into the plan. The plan should strive to provide treatment in the most efficient and effective manner, balancing the best achievable outcome with the appropriate resources.

Long term treatment goals should be developed for the entire episode of care in the current setting. When the episode is anticipated to be long enough to require more than one certification, the long term goals may be specific to the part of the episode that is

being certified. Goals should be measurable and pertain to identified functional impairments. *Therapists typically also establish short term goals, such as goals for a week or month of therapy, to help track progress toward the goal for the episode of care. If the expected episode of care is short, for example therapy is expected to be completed in 4 to 6 treatment days, the long term and short term goals may be the same. In other instances measurable goals may not be achievable, such as when treatment in a particular setting is unexpectedly cut short (such as when care is transferred to another therapy provider) or when the beneficiary suffers an exacerbation of his/her existing condition terminating the current episode; documentation should state the clinical reasons progress cannot be shown.* The functional impairments identified and expressed in the long term treatment goals must be consistent with those used in the claims-based functional reporting, using nonpayable G-codes and severity modifiers, for services furnished on or after January 1, 2013. (Reference: 42CFR410.61 and 42CFR410.105 (for CORFs).

The type of treatment may be PT, OT, or SLP, or, where appropriate, the type may be a description of a specific treatment or intervention. (For example, where there is a single evaluation service, but the type is not specified, the type is assumed to be consistent with the therapy discipline (PT, OT, SLP) ordered, or of the therapist who provided the evaluation.) Where a physician/NPP establishes a plan, the plan must specify the type (PT, OT, SLP) of therapy planned.

There shall be different plans of care for each type of therapy discipline. When more than one discipline is treating a patient, each must establish a diagnosis, goals, etc. independently. However, the form of the plan and the number of plans incorporated into one document are not limited as long as the required information is present and related to each discipline separately. For example, a physical therapist may not provide services under an occupational therapist plan of care. However, both may be treating the patient for the same condition at different times in the same day for goals consistent with their own scope of practice.

The amount of treatment refers to the number of times in a day the type of treatment will be provided. Where amount is not specified, one treatment session a day is assumed.

The frequency refers to the number of times in a week the type of treatment is provided. Where frequency is not specified, one treatment is assumed. If a scheduled holiday occurs on a treatment day that is part of the plan, it is appropriate to omit that treatment day unless the clinician who is responsible for writing progress reports determines that a brief, temporary pause in the delivery of therapy services would adversely affect the patient's condition.

The duration is the number of weeks, or the number of treatment sessions, for THIS PLAN of care. If the episode of care is anticipated to extend beyond the 90 calendar day limit for certification of a plan, it is desirable, although not required, that the clinician also estimate the duration of the entire episode of care in this setting.

The frequency or duration of the treatment may not be used alone to determine medical necessity, but they should be considered with other factors such as condition, progress, and treatment type to provide the most effective and efficient means to achieve the patients' goals. For example, it may be clinically appropriate, medically necessary, most efficient and effective to provide short term intensive treatment or longer term and less frequent treatment depending on the individuals' needs.

It may be appropriate for therapists to taper the frequency of visits as the patient progresses toward an independent or caregiver assisted self-management program with the intent of improving outcomes and limiting treatment time. For example, treatment may be provided 3 times a week for 2 weeks, then 2 times a week for the next 2 weeks, then once a week for the last 2 weeks. Depending on the individual's condition, such treatment may result in better outcomes, or may result in earlier discharge than routine treatment 3 times a week for 4 weeks. When tapered frequency is planned, the exact number of treatments per frequency level is not required to be projected in the plan, because the changes should be made based on assessment of daily progress. Instead, the beginning and end frequencies shall be planned. For example, amount, frequency and duration may be documented as "once daily, 3 times a week tapered to once a week over 6 weeks". Changes to the frequency may be made based on the clinicians clinical judgment and do not require recertification of the plan unless requested by the physician/NPP. The clinician should consider any comorbidities, tissue healing, the ability of the patient **and/or caregiver to do more independent self-management** as treatment progresses, and any other factors related to frequency and duration of treatment.

The above policy describes the minimum requirements for payment. It is anticipated that clinicians may choose to make their plans more specific, in accordance with good practice. For example, they may include these optional elements: short term goals, goals and duration for the current episode of care, specific treatment interventions, procedures, modalities or techniques and the amount of each. Also, notations in the medical record of beginning date for the plan are recommended but not required to assist Medicare contractors in determining the dates of services for which the plan was effective.

C. Changes to the Therapy Plan

Changes are made in writing in the patient's record and signed by one of the following professionals responsible for the patient's care:

- The physician/NPP;
- The physical therapist (in the case of physical therapy);
- The speech-language pathologist (in the case of speech-language pathology services);
- The occupational therapist (in the case of occupational therapy services); or

- The registered professional nurse or physician/NPP on the staff of the facility pursuant to the oral orders of the physician/NPP or therapist.

While the physician/NPP may change a plan of treatment established by the therapist providing such services, the therapist may not significantly alter a plan of treatment established or certified by a physician/NPP without their documented written or verbal approval (see §220.1.3(C)). A change in long-term goals, (for example if a new condition was to be treated) would be a significant change. Physician/NPP certification of the significantly modified plan of care shall be obtained within 30 days of the initial therapy treatment under the revised plan. An insignificant alteration in the plan would be a change in the frequency or duration due to the patient's illness, or a modification of short-term goals to adjust for improvements made toward the same long-term goals. If a patient has achieved a goal and/or has had no response to a treatment that is part of the plan, the therapist may delete a specific intervention from the plan of care prior to physician/ NPP approval. This shall be reported to the physician/NPP responsible for the patient's treatment prior to the next certification.

Procedures (e.g., neuromuscular reeducation) and modalities (e.g., ultrasound) are not goals, but are the means by which long and short term goals are obtained. Changes to procedures and modalities do not require physician signature when they represent adjustments to the plan that result from a normal progression in the patient's disease or condition or adjustments to the plan due to lack of expected response to the planned intervention, when the goals remain unchanged. Only when the patient's condition changes significantly, making revision of long term goals necessary, is a physician's/NPP's signature required on the change, (long term goal changes may be accompanied by changes to procedures and modalities).

220.1.3 - Certification and Recertification of Need for Treatment and Therapy Plans of Care

(Rev. 88, Issued: 05-07-08, Effective: 01-01-08, Implementation: 06-09-08)

Reference: 42CFR424.24(c)

See specific certification rules in Pub. 100-01, chapter 4, §20 for hospital services.

A. Method and Disposition of Certifications

Certification requires a dated signature on the plan of care or some other document that indicates approval of the plan of care. It is not appropriate for a physician/NPP to certify a plan of care if the patient was not under the care of some physician/NPP at the time of the treatment or if the patient did not need the treatment. Since delayed certification is allowed, the date the certification is signed is important only to determine if it is timely or delayed. The certification must relate to treatment during the interval on the claim. Unless there is reason to believe the plan was not signed appropriately, or it is not timely, no further evidence that the patient was under the care of a physician/NPP and that the patient needed the care is required.

The format of all certifications and recertifications and the method by which they are obtained is determined by the individual facility and/or practitioner. Acceptable documentation of certification may be, for example, a physician's progress note, a physician/NPP order, or a plan of care that is signed and dated by a physician/NPP, and indicates the physician/NPP is aware that therapy service is or was in progress and the physician/NPP makes no record of disagreement with the plan when there is evidence the plan was sent (e.g., to the office) or is available in the record (e.g., of the institution that employs the physician/NPP) for the physician/NPP to review. For example, if during the course of treatment under a certified plan of care a physician sends an order for continued treatment for 2 more weeks, contractors shall accept the order as certification of continued treatment for 2 weeks under the same plan of care. If the new certification is for less treatment than previously planned and certified, this new certification takes the place of any previous certification. At the end of the 2 weeks of treatment (which might extend more than 2 calendar weeks from the date the order/certification was signed) another certification would be required if further treatment was documented as medically necessary.

The certification should be retained in the clinical record and available if requested by the contractor.

B. Initial Certification of Plan

The physician's/NPP's certification of the plan (with or without an order) satisfies all of the certification requirements noted above in §220.1 for the duration of the plan of care, or 90 calendar days from the date of the initial treatment, whichever is less. The initial treatment includes the evaluation that resulted in the plan.

Timing of Initial Certification. The provider or supplier (e.g., facility, physician/NPP, or therapist) should obtain certification as soon as possible after the plan of care is established, unless the requirements of delayed certification are met. "As soon as possible" means that the physician/NPP shall certify the initial plan as soon as it is obtained, or within 30 days of the initial therapy treatment. Since payment may be denied if a physician does not certify the plan, the therapist should forward the plan to the physician as soon as it is established. Evidence of diligence in providing the plan to the physician may be considered by the Medicare contractor during review in the event of a delayed certification.

Timely certification of the initial plan is met when physician/NPP certification of the plan is documented, by signature or verbal order, and dated in the 30 days following the first day of treatment (including evaluation). If the order to certify is verbal, it must be followed within 14 days by a signature to be timely. A dated notation of the order to certify the plan should be made in the patient's medical record.

Recertification is not required if the duration of the initially certified plan of care is more than the duration (length) of the entire episode of treatment.

C. Review of Plan and Recertification

Reference: 42CFR424.24(c), 1861(r), 42CFR 410.61(e).

The timing of recertification changed on January 1, 2008. Certifications signed on or after January 1, 2008, follow the rules in this section. Certifications signed on or prior to December 31, 2007, follow the rule in effect at that time, which required recertification every 30 calendar days.

Payment and coverage conditions require that the plan must be reviewed, as often as necessary but at least whenever it is certified or recertified to complete the certification requirements. It is not required that the same physician/NPP who participated initially in recommending or planning the patient's care certify and/or recertify the plans.

Recertifications that document the need for continued or modified therapy should be signed whenever the need for a significant modification of the plan becomes evident, or at least every 90 days after initiation of treatment under that plan, unless they are delayed.

Physician/NPP Options for Certification. A physician/NPP may certify or recertify a plan for whatever duration of treatment the physician/NPP determines is appropriate, up to a maximum of 90 calendar days. Many episodes of therapy treatment last less than 30 calendar days. Therefore, it is expected that the physician/NPP should certify a plan that appropriately estimates the duration of care for the individual, even if it is less than 90 days. If the therapist writes a plan of care for a duration that is more or less than the duration approved by the physician/NPP, then the physician/NPP would document a change to the duration of the plan and certify it for the duration the physician/NPP finds appropriate (up to 90 days). Treatment beyond the duration certified by the physician/NPP requires that a plan be recertified for the extended duration of treatment. It is possible that patients will be discharged by the therapist before the end of the estimated treatment duration because some will improve faster than estimated and/or some were successfully progressed to an independent home program.

Physicians/NPPs may require that the patient make a physician/NPP visit for an examination if, in the professional's judgment, the visit is needed prior to certifying the plan, or during the planned treatment. Physicians/NPPs should indicate their requirement for visits, preferably on an order preceding the treatment, or on the plan of care that is certified. If the physician wishes to restrict the patient's treatment beyond a certain date when a visit is required, the physician should certify a plan only until the date of the visit. After that date, services will not be considered reasonable and necessary due to lack of a certified plan. Physicians/NPPs should not sign a certification if they require a visit and a visit was not made. However, Medicare does not require a visit unless the National Coverage Determination (NCD) for a particular treatment requires it (e.g., see Pub. 100-03, §270.1 - Electrical Stimulation (ES) and Electromagnetic Therapy for the Treatment of Wounds).

Restrictions on Certification. Certifications and recertifications by doctors of podiatric medicine must be consistent with the scope of the professional services provided by a doctor of podiatric medicine as authorized by applicable state law. Optometrists may order and certify only low vision services. Chiropractors may not certify or recertify plans of care for therapy services.

D. Delayed Certification

References: §1835(a) of the Act
42CFR424.11(d)(3)

Certifications are required for each interval of treatment based on the patient's needs, not to exceed 90 calendar days from the initial therapy treatment. Certifications are timely when the initial certification (or certification of a significantly modified plan of care) is dated within 30 calendar days of the initial treatment under that plan. Recertification is timely when dated during the duration of the initial plan of care or within 90 calendar days of the initial treatment under that plan, whichever is less. Delayed certification and recertification requirements shall be deemed satisfied where, at any later date, a physician/NPP makes a certification accompanied by a reason for the delay. Certifications are acceptable without justification for 30 days after they are due. Delayed certification should include one or more certifications or recertifications on a single signed and dated document.

Delayed certifications should include any evidence the provider or supplier considers necessary to justify the delay. For example, a certification may be delayed because the physician did not sign it, or the original was lost. In the case of a long delayed certification (over 6 months), the provider or supplier may choose to submit with the delayed certification some other documentation (e.g., an order, progress notes, telephone contact, requests for certification or signed statement of a physician/NPP) indicating need for care and that the patient was under the care of a physician at the time of the treatment. Such documentation may be requested by the contractor for delayed certifications if it is required for review.

It is not intended that needed therapy be stopped or denied when certification is delayed. The delayed certification of otherwise covered services should be accepted unless the contractor has reason to believe that there was no physician involved in the patient's care, or treatment did not meet the patient's need (and therefore, the certification was signed inappropriately).

EXAMPLE: Payment should be denied if there is a certification signed 2 years after treatment by a physician/NPP who has/had no knowledge of the patient when the medical record also shows e.g., no order, note, physician/NPP attended meeting, correspondence with a physician/NPP, documentation of discussion of the plan with a physician/NPP, documentation of sending the plan to any physician/NPP, or other indication that there was a physician/NPP involved in the case.

EXAMPLE: Payment should not be denied, even when certified 2 years after treatment, when there is evidence that a physician approved needed treatment, such as an order, documentation of therapist/physician/NPP discussion of the plan, chart notes, meeting notes, requests for certification, certifications for intervals before or after the service in question, or physician/NPP services during which the medical record or the patient's history would, in good practice, be reviewed and would indicate therapy treatment is in progress.

EXAMPLE: Subsequent certifications of plans for continued treatment for the same condition in the same patient may indicate physician certification of treatment that occurred between certification dates, even if the signature for one of the plans in the episode is delayed. If a certified plan of care ends March 30th and a new plan of care for continued treatment after March 30th is developed or signed by a therapist on April 15th and that plan is subsequently certified, that certification may be considered delayed and acceptable effective from the first treatment date after March 30th for the frequency and duration as described in the plan. Of course, documentation should continue to indicate that therapy during the delay is medically necessary, as it would for any treatment. The certification of the physician/NPP is interpreted as involvement and approval of the ongoing episode of treatment, including the treatment that preceded the date of the certification unless the physician/NPP indicates otherwise.

E. Denials Due to Certification

Denial for payment that is based on absence of certification is a technical denial, which means a statutory requirement has not been met. Certification is a statutory requirement in SSA 1835(a)(2)- ("periodic review" of the plan).

For example, if a patient is treated and the provider/supplier cannot produce (on contractor request) a plan of care (timely or delayed) for the billed treatment dates certified by a physician/NPP, then that service might be denied for lack of the required certification. If an appropriate certification is later produced, the denial shall be overturned.

In the case of a service furnished under a provider agreement as described in 42CFR489.21, the provider is precluded from charging the beneficiary for services denied as a result of missing certification.

However, if the service is provided by a supplier (in the office of the physician/NPP, or therapist) a technical denial due to absence of a certification results in beneficiary liability. For that reason, it is recommended that the patient be made aware of the need for certification and the consequences of its absence.

A technical denial decision may be reopened by the contractor or reversed on appeal as appropriate, if delayed certification is later produced.

220.1.4 - Requirement That Services Be Furnished on an Outpatient Basis

(Rev. 176, Issued: 12-13-13, Effective: 01-07-14, Implementation: 01-07-14)

Reference: 42CFR410.60

Therapy services are payable under the Physician Fee Schedule when furnished by 1.) a provider to its outpatients in the patient's home; 2.) a provider to patients who come to the facility's outpatient department; 3.) a provider to inpatients of other institutions, or 4.) a supplier to patients in the office or in the patient's home. (CORF rules differ on providing therapy at home.)

Coverage includes therapy services furnished by participating hospitals and SNFs to their inpatients who have exhausted Part A inpatient benefits or who are otherwise not eligible for Part A benefits. Providers of therapy services that have inpatient facilities, other than participating hospitals and SNFs, may not furnish covered therapy services to their own inpatients. However, since the inpatients of one institution may be considered the outpatients of another institution, all providers of therapy services may furnish such services to inpatients of another health facility.

A certified distinct part of an institution is considered to be a separate institution from a nonparticipating part of the institution. Consequently, the certified distinct part may render covered therapy services to the inpatients of the noncertified part of the institution or to outpatients. The certified part must bill the *MAC* or intermediary under Part B.

Therapy services are payable when furnished in the home at the same physician fee schedule *payment rates* as in other outpatient settings. Additional expenses incurred by providers of *outpatient therapy* due to travel to the beneficiary are not covered.

Under the Medicare law, there is no authority to require a provider to furnish a type of service. Therefore, a hospital or SNF may furnish therapy to its inpatients without having to set up facilities and procedures for furnishing those services to its outpatients. However, if the provider chooses to furnish a particular service, it may not charge any individual or other person for items or services for which the individual is entitled to have payment made under the program because it is bound by its agreement with Medicare. Thus, whenever a hospital or SNF furnishes outpatient therapy to a Medicare beneficiary (either directly or under arrangements with others) it must bill the program under Part B and may charge the patient only for the applicable deductible and coinsurance.

220.2 - Reasonable and Necessary Outpatient Rehabilitation Therapy Services

(Rev. 176, Issued: 12-13-13, Effective: 01-07-14, Implementation: 01-07-14)

References: Pub. 100-08, chapter 13, §13.5.1,
42CFR410.59,
42CFR410.60

A. General

To be covered, services must be skilled therapy services as described in this chapter and be rendered under the conditions specified. Services provided by professionals or personnel who do not meet the qualification standards, and services by qualified people that are not appropriate to the setting or conditions are unskilled services. *A service is not considered a skilled therapy service merely because it is furnished by a therapist or by a therapist/therapy assistant under the direct or general supervision, as applicable, of a therapist. If a service can be self-administered or safely and effectively furnished by an unskilled person, without the direct or general supervision, as applicable, of a therapist, the service cannot be regarded as a skilled therapy service even though a therapist actually furnishes the service. Similarly, the unavailability of a competent person to provide a non-skilled service, notwithstanding the importance of the service to the patient, does not make it a skilled service when a therapist furnishes the service.*

Skilled therapy services may be necessary to improve a patient's current condition, to maintain the patient's current condition, or to prevent or slow further deterioration of the patient's condition. For further information see 220.2, subsections C (Rehabilitative Services) and subsection D (Maintenance Programs).

Services that do not meet the requirements for covered therapy services in Medicare manuals are not payable using codes and descriptions as therapy services. For example, services related to activities for the general good and welfare of patients, e.g., general exercises to promote overall fitness and flexibility and activities to provide diversion or general motivation, do not constitute therapy services for Medicare purposes. Also, services not provided under a therapy plan of care, or provided by staff who are not qualified or appropriately supervised, are not payable therapy services.

Examples of coverage policies that apply to all outpatient therapy claims are in this chapter, in Pub. 100-04, chapter 5, and Pub. 100-08, chapter 13. Some policies in other manuals are repeated here for emphasis and clarification. Further details on documenting reasonable and necessary services are found in section 220.3 of this chapter.

B. Reasonable and Necessary

To be considered reasonable and necessary, *each of* the following conditions must be met. (This is a representative list of required conditions and does not fully describe reasonable and necessary services. See the remainder of this section and associated information in section 230.)

- The services shall be considered under accepted standards of medical practice to be a specific and effective treatment for the patient's condition. Acceptable practices for therapy services are found in:
 - Medicare manuals (such as this manual and Publications 100-03 and 100-04),

- Contractors Local Coverage Determinations (LCDs and NCDs are available on the Medicare Coverage Database: <http://www.cms.hhs.gov/mcd>, and
- Guidelines and literature of the professions of physical therapy, occupational therapy and speech-language pathology.
- The services shall be of such a level of complexity and sophistication or the condition of the patient shall be such that the services required can be safely and effectively performed only by a therapist, or in the case of physical therapy and occupational therapy by or under the supervision of a therapist. Services that do not require the performance or supervision of a therapist are not skilled and are not considered reasonable or necessary therapy services, even if they are performed or supervised by a qualified professional. *Medicare coverage does not turn on the presence or absence of a beneficiary's potential for improvement from the therapy, but rather on the beneficiary's need for skilled care. (For additional guidance, see subsection D below related to Maintenance Programs.)*
- If the contractor determines the services furnished were of a type that could have been safely and effectively performed only by or under the supervision of such a qualified professional, *the contractor shall presume that such services were properly supervised when required. However, this presumption is rebuttable and, if in the course of processing a claim, the contractor finds that services were not furnished under proper supervision, it shall deny the claim and bring this matter to the attention of the Division of Survey and Certification of the Regional Office.*
- While a beneficiary's particular medical condition is a valid factor in deciding if skilled therapy services are needed, a beneficiary's diagnosis or prognosis *cannot* be the sole factor in deciding that a service is or is not skilled. The key issue is whether the skills of a therapist are needed to treat the illness or injury, or whether the services can be carried out by nonskilled personnel. See *items C and D* for descriptions of *covered* skilled services: *and*
- The amount, frequency, and duration of the services must be reasonable under accepted standards of practice. The contractor shall consult local professionals or the state or national therapy associations in the development of any utilization guidelines.

NOTE: Claims for therapy services denied because they are not considered reasonable and necessary under §1862(a)(1)(A) of the Act and, *for services furnished on or after January 1, 2013, those denied as a result of application of the therapy caps under §1833(g)(1) or (g)(3) are subject to consideration under the waiver of liability provision in §1879 of the Act.*

C. Rehabilitative Therapy

Rehabilitative therapy includes *services designed to address recovery or improvement in function and, when possible, restoration to a previous level of health and well-being.* Therefore, evaluation, re-evaluation and assessment documented in the Progress Report should describe objective measurements which, when compared, show improvements in function, decrease in severity or rationalization for an optimistic outlook to justify continued treatment. *Improvement is evidenced by successive objective measurements whenever possible (see objective measurement and other instruments for evaluation in the §220.3.C of this chapter). If an individual's expected rehabilitation potential is insignificant in relation to the extent and duration of therapy services required to achieve such potential, rehabilitative therapy is not reasonable and necessary.*

Rehabilitative therapy services are skilled procedures that may include but are not limited to:

- Evaluations *and* reevaluations;
- Establishment of treatment goals specific to the patient's disability or dysfunction and designed to specifically address each problem identified in the evaluation;
- Design of a plan of care addressing the patient's disorder, including establishment of procedures to obtain goals, determining the frequency and intensity of treatment;
- Continued assessment and analysis during implementation of the services at regular intervals;
- Instruction leading to establishment of compensatory skills;
- Selection of devices to replace or augment a function (e.g., for use as an alternative communication system and short-term training on use of the device or system); and
- *Training of patient and family to augment rehabilitative treatment. Training of staff and family should be ongoing throughout treatment and instructions modified intermittently as the patient's status changes.*

Rehabilitative therapy *requires* the skills of a therapist to safely and effectively furnish a recognized therapy service whose goal is improvement of an impairment or functional limitation. (See *definition of therapist* in section 220.A of this chapter.) *Services that can be safely and effectively furnished by nonskilled personnel or by PTAs or OTAs without the supervision of therapists are not rehabilitative therapy services.*

Rehabilitative therapy may be needed, and improvement in a patient's condition may occur, even when a chronic, progressive, degenerative, or terminal condition exists. For

example, a terminally ill patient may begin to exhibit self-care, mobility, and/or safety dependence requiring skilled therapy services. The fact that full or partial recovery is not possible does not necessarily mean that skilled therapy is not needed to improve the patient's condition *or to maximize his/her functional abilities*. The deciding factors are always whether the services are considered reasonable, effective treatments for the patient's condition and require the skills of a therapist, or whether they can be safely and effectively carried out by nonskilled personnel.

Rehabilitative therapy is not required to effect improvement or restoration of function when a patient suffers a transient and easily reversible loss or reduction of function (e.g., temporary and generalized weakness, which may follow a brief period of bed rest following surgery) that could reasonably be expected to improve spontaneously as the patient gradually resumes normal activities. Therapy furnished in such situations is not considered reasonable and necessary for the treatment of the individual's illness or injury and the services are not covered.

If at any point in the treatment of an illness it is determined that the treatment is not rehabilitative, the services will no longer be considered reasonable and necessary under this section. (See Section 220.2 D for additional covered therapy benefits under maintenance programs). Services that are not reasonable or necessary are excluded from coverage under §1862(a)(1)(A) of the Act.

D. Maintenance Programs

Skilled therapy services that do not meet the criteria for rehabilitative therapy may be covered in certain circumstances as maintenance therapy under a maintenance program. The goals of a maintenance program would be, for example, to maintain functional status or to prevent or slow further deterioration in function.

Coverage for skilled therapy services related to a reasonable and necessary maintenance program is available in the following circumstances:

- *Establishment or design of maintenance programs. If the specialized skill, knowledge and judgment of a qualified therapist are required to establish or design a maintenance program to maintain the patient's current condition or to prevent or slow further deterioration, the establishment or design of a maintenance program by a qualified therapist is covered. If skilled therapy services by a qualified therapist are needed to instruct the patient or appropriate caregiver regarding the maintenance program, such instruction is covered. If skilled therapy services are needed for periodic reevaluations or reassessments of the maintenance program, such periodic reevaluations or reassessments are covered.*
- *Delivery of maintenance programs. Once a maintenance program is established, coverage of therapy services to carry out a maintenance program turns on the beneficiary's need for skilled care. A maintenance program can generally be*

performed by the beneficiary alone or with the assistance of a family member, caregiver or unskilled personnel. In such situations, coverage is not provided. However, skilled therapy services are covered when an individualized assessment of the patient's clinical condition demonstrates that the specialized judgment, knowledge, and skills of a qualified therapist are necessary for the performance of safe and effective services in a maintenance program. Such skilled care is necessary for the performance of a safe and effective maintenance program only when (a) the therapy procedures required to maintain the patient's current function or to prevent or slow further deterioration are of such complexity and sophistication that the skills of a qualified therapist are required to furnish the therapy procedure or (b) the particular patient's special medical complications require the skills of a qualified therapist to furnish a therapy service required to maintain the patient's current function or to prevent or slow further deterioration, even if the skills of a therapist are not ordinarily needed to perform such therapy procedures. Unlike coverage for rehabilitation therapy, coverage of therapy services to carry out a maintenance program does not depend on the presence or absence of the patient's potential for improvement from the therapy.

The deciding factors are always whether the services are considered reasonable, effective treatments for the patient's condition and require the skills of a therapist, or whether they can be safely and effectively carried out by nonskilled personnel or caregivers.

The examples that follow are intended to provide illustrations of how coverage determinations are made. These examples are not intended to include all possible situations in which coverage is provided or all reasons for denying coverage. Rather they are intended only to show how to analyze the coverage issue.

Example #1 reflects a typical outpatient scenario in which a patient has been receiving ongoing therapy under a physical therapy plan of care and the physical therapist begins the establishment of the maintenance program prior to the patient's anticipated discharge date.

EXAMPLE: A patient with Parkinson's disease is nearing the end of a rehabilitative physical therapy program and requires the services of a therapist during the last week(s) of treatment to determine what type of exercises will contribute the most to maintain function or to prevent or slow further deterioration of the patient's present functional level following cessation of treatment. In such situations, the establishment of a maintenance program appropriate to the capacity and tolerance of the patient by the qualified therapist, the instruction of the patient or family members in carrying out the program, and such reassessments and/or reevaluations as may be required may constitute covered therapy because of the need for the skills of a qualified therapist.

Example #2 is an outpatient scenario in which a patient who has not been receiving ongoing therapy under a therapy plan of care needs a maintenance plan.

EXAMPLE: A patient with multiple sclerosis needs a maintenance program to slow or prevent deterioration in communication ability caused by the medical condition. Therapy services from a qualified speech-language pathologist may be covered to establish a maintenance program even though the patient's current medical condition does not yet justify the need for individual skilled therapy sessions. Evaluation, establishment of the program, and training the family or support personnel may require the skills of a therapist and would be covered. **NOTE:** In this example, the skills of a therapist are not required to actually carry out the maintenance program services and, as a result, are not covered.

Example #3 describes a scenario where the skilled services of a therapist would be necessary to actually carry out the maintenance program services.

EXAMPLE: Where there is an unhealed, unstable fracture that requires regular exercise to maintain function until the fracture heals, the skills of a therapist may be needed to ensure that the fractured extremity is maintained in proper position and alignment during range of motion exercises. In this case, since the skills of a therapist may be required to safely carry out the maintenance program given this particular patient's special medical complications, therapy services would be covered.

Example #4 describes another scenario where the skilled services of a therapist are needed to actually carry out the maintenance program services.

EXAMPLE: A patient with a long history of Multiple Sclerosis has difficulties transferring in and out of the wheelchair and maintaining range of motion (ROM) of the lower extremities (LEs) due to increased spasticity muscle tone since the most recent exacerbation episode of her Multiple Sclerosis. The beneficiary is unable to walk but is independent with the use of her wheelchair. The beneficiary needs to be able to safely transfer in and out of her wheelchair by herself or with the assistance of a family member or other caregiver(s). After an individualized assessment by the physical therapist, and given the patient's overall medical and physical condition, the skills of the physical therapist are required to instruct the patient and/or caregivers in proper techniques of wheelchair transfers and LE stretches due to the special medical complications from the progression of Multiple Sclerosis. When the physical therapist determines that the patient can carry out the transfers and stretching activities safely and effectively, either alone or with the assistance of the caregivers, the skills of the physical therapist are no longer necessary to furnish the maintenance therapy; and, the patient is discharged from PT.

Example #5 describes a scenario where a patient on a maintenance program needs intermittent review and possibly a new or revised maintenance program.

EXAMPLE: A patient who has a progressive degenerative disease is performing the activities in a maintenance program established by a therapist with the assistance of family members. The program needs to be re-evaluated to

determine whether assistive equipment is needed and to establish a new or revised maintenance program to maintain function or to prevent or slow further deterioration. Intermittent re-evaluation of the maintenance program would generally be covered as this is a service that requires the skills of a therapist. Should the therapist conducting the re-evaluation determine that the program needs to be revised, these services would generally be covered.

Maintenance program services that do not meet the criteria of this section are not reasonable or necessary and are not covered under §1862(a)(1)(A) of the Act.

The maintenance program provisions outlined in this section do not apply to the PT, OT, or SLP services furnished in a comprehensive outpatient rehabilitation facility (CORF) because the statute specifies that CORF services are rehabilitative.

220.3 - Documentation Requirements for Therapy Services

(Rev. 176, Issued: 12-13-13, Effective: 01-07-14, Implementation: 01-07-14)

A. General

To be payable, the medical record and the information on the claim form must consistently and accurately report covered therapy services as documented in the medical record. Documentation must be legible, relevant and sufficient to justify the services billed. In general, services must be covered therapy services provided according to Medicare requirements. Medicare requires that the services billed be supported by documentation that justifies payment. Documentation must comply with all requirements applicable to Medicare claims.

The documentation guidelines in sections 220 and 230 of this chapter identify the minimal expectations of documentation by providers or suppliers or beneficiaries submitting claims for payment of therapy services to the Medicare program. State or local laws and policies, or the policies or professional guidelines of the relevant profession, the practice, or the facility may be more stringent. It is encouraged but not required that narratives that specifically justify the medical necessity of services be included in order to support approval when those services are reviewed. (See also section 220.2- Reasonable and Necessary Outpatient Rehabilitation Therapy Services)

Contractors shall consider the entire record when reviewing claims for medical necessity so that the absence of an individual item of documentation does not negate the medical necessity of a service when the documentation as a whole indicates the service is necessary. Services are medically necessary if the documentation indicates they meet the requirements for medical necessity including that they are skilled, rehabilitative services, provided by clinicians (or qualified professionals when appropriate) with the approval of a physician/NPP, safe, and effective (i.e., progress indicates that the care is effective in rehabilitation of function).

B. Documentation Required

List of required documentation. These types of documentation of therapy services are expected to be submitted in response to any requests for documentation, unless the contractor requests otherwise. The timelines are minimum requirements for Medicare payment. Document as often as the clinician's judgment dictates but no less than the frequency required in Medicare policy:

- Evaluation and Plan of Care (may be one or two documents). Include the initial evaluation and any re-evaluations relevant to the episode being reviewed;
- Certification (physician/NPP approval of the plan) and recertifications when records are requested after the certification/recertification is due. See definitions in section 220 and certification policy in section 220.1.3 of this chapter. Certification (and recertification of the plan when applicable) are required for payment and must be submitted when records are requested after the certification or recertification is due.
- Progress Reports (including Discharge Notes, if applicable) when records are requested after the reports are due. (See definitions in section 220 and descriptions in 220.3 D);
- Treatment notes for each treatment day (may also serve as progress reports when required information is included in the notes);
- A separate justification statement may be included either as a separate document or within the other documents if the provider/supplier wishes to assure the contractor understands their reasoning for services that are more extensive than is typical for the condition treated. A separate statement is not required if the record justifies treatment without further explanation.

Limits on Requirements. Contractors shall not require more specific documentation unless other Medicare policies require it. Contractors may request further information to be included in these documents concerning specific cases under review when that information is relevant, but not submitted with records.

Dictated Documentation. For Medicare purposes, dictated therapy documentation is considered completed on the day it was dictated. The qualified professional may edit and electronically sign the documentation at a later date.

Dates for Documentation. The date the documentation was made is important only to establish the date of the initial plan of care because therapy cannot begin until the plan is established unless treatment is performed or supervised by the same clinician who establishes the plan. However, contractors may require that treatment notes and progress reports be entered into the record within 1 week of the last date to which the progress report or treatment note refers. For example, if treatment began on the first of the month at a frequency of twice a week, a progress report would be required at the end of the

month. Contractors may require that the progress report that describes that month of treatment be dated not more than 1 week after the end of the month described in the report.

Document Information to Meet Requirements. In *preparing* records, clinicians must be familiar with the requirements for covered and payable outpatient therapy services. For example, the records should justify:

- The patient is under the care of a physician/NPP;

Physician/NPP care shall be documented by physician/NPP certification (approval) of the plan of care; and

Although not required, other evidence of physician/NPP involvement in the patient's care may include, for example: order/referral, conference, team meeting notes, and correspondence.

- Services require the skills of a therapist.

Services must not only be provided by the qualified professional or qualified personnel, but they must require, for example, the expertise, knowledge, clinical judgment, decision making and abilities of a therapist that assistants, qualified personnel, caretakers or the patient cannot provide independently. A clinician may not merely supervise, but must apply the skills of a therapist by actively participating in the treatment of the patient during each progress report period. In addition, a therapist's skills may be documented, for example, by the clinician's descriptions of their skilled treatment, the changes made to the treatment due to a clinician's assessment of the patient's needs on a particular treatment day or changes due to progress the clinician judged sufficient to modify the treatment toward the next more complex or difficult task.

- Services are of appropriate type, frequency, intensity and duration for the individual needs of the patient.

Documentation should establish the variables that influence the patient's condition, especially those factors that influence the clinician's decision to provide more services than are typical for the individual's condition.

Clinicians and contractors shall determine typical services using published professional literature and professional guidelines. The fact that services are typically billed is not necessarily evidence that the services are typically appropriate. Services that exceed those typically billed should be carefully documented to justify their necessity, but are payable if the individual patient benefits from medically necessary services. Also, some services or episodes

of treatment should be less than those typically billed, when the individual patient reaches goals sooner than is typical.

Documentation should establish through objective measurements that the patient is making progress toward goals. Note that regression and plateaus can happen during treatment. It is recommended that the reasons for lack of progress be noted and the justification for continued treatment be documented if treatment continues after regression or plateaus.

Needs of the Patient. When a service is reasonable and necessary, the patient also needs the services. Contractors determine the patient's needs through knowledge of the individual patient's condition, and any complexities that impact that condition, as described in documentation (usually in the evaluation, re-evaluation, and progress report). Factors that contribute to need vary, but in general they relate to such factors as the patient's diagnoses, complicating factors, age, severity, time since onset/acuity, self-efficacy/motivation, cognitive ability, prognosis, and/or medical, psychological and social stability. *Changes* in objective and sometimes to subjective measures of improvement also help establish the need for *rehabilitative* services. The use of scientific evidence, obtained from professional literature, and sequential measurements of the patient's condition during treatment is encouraged to support the potential for continued improvement that may justify the patients need for *rehabilitative therapy* or *the patient's need for maintenance therapy*.

- Functional information included on claims as required.

The clinician is required to document in the patient's medical record, using the G-codes and severity modifiers used in functional reporting, the patient's current, projected goal, and discharge status, as reported pursuant to functional reporting requirements for each date of service for which the reporting is required. See section 220.4 below for details on documenting G-code and modifiers.

C. Evaluation/Re-Evaluation and Plan of Care

The initial evaluation, or the plan of care including an evaluation, should document the necessity for a course of therapy through objective findings and subjective patient self-reporting. Utilize the guidelines of the American Physical Therapy Association, the American Occupational Therapy Association, or the American Speech-Language and Hearing Association as guidelines, and not as policy. Only a clinician may perform an initial examination, evaluation, re-evaluation and assessment or establish a diagnosis or a plan of care. A clinician may include, as part of the evaluation or re-evaluation, objective measurements or observations made by a PTA or OTA within their scope of practice, but the clinician must actively and personally participate in the evaluation or re-evaluation.

The clinician may not merely summarize the objective findings of others or make judgments drawn from the measurements and/or observations of others.

Documentation of the evaluation should list the conditions and complexities and, where it is not obvious, describe the impact of the conditions and complexities on the prognosis and/or the plan for treatment such that it is clear to the contractor who may review the record that the services planned are appropriate for the individual.

Evaluation shall include:

- A diagnosis (where allowed by state and local law) and description of the specific problem(s) to be evaluated and/or treated. The diagnosis should be specific and as relevant to the problem to be treated as possible. In many cases, both a medical diagnosis (obtained from a physician/NPP) and an impairment based treatment diagnosis related to treatment are relevant. The treatment diagnosis may or may not be identified by the therapist, depending on their scope of practice. Where a diagnosis is not allowed, use a condition description similar to the appropriate ICD-9 code. For example the medical diagnosis made by the physician is CVA; however, the treatment diagnosis or condition description for PT may be abnormality of gait, for OT, it may be hemiparesis, and for SLP, it may be dysphagia. For PT and OT, be sure to include body part evaluated. Include all conditions and complexities that may impact the treatment. A description might include, for example, the premorbid function, date of onset, and current function;

- **Results of one of the following four measurement instruments are recommended, but not required:**

National Outcomes Measurement System (NOMS) by the American Speech-Language Hearing Association

Patient Inquiry by Focus On Therapeutic Outcomes, Inc. (FOTO)

Activity Measure – Post Acute Care (AM-PAC)

OPTIMAL by Cedaron through the American Physical Therapy Association

- If results of one of the four instruments above is not recorded, the record shall contain instead the following information indicated by asterisks (*) and should contain (but is not required to contain) all of the following, as applicable. Since published research supports its impact on the need for treatment, information in the following indented bullets may also be included with the results of the above four instruments in the evaluation report at the clinician's discretion. This information may be incorporated into a test instrument or separately reported within the required documentation. If it changes, update this information in the re-evaluation, and/or treatment notes, and/or progress reports, and/or in a separate

record. When it is provided, contractors shall take this documented information into account to determine whether services are reasonable and necessary.

Documentation supporting illness severity or complexity including, e.g.,

- Identification of other health services concurrently being provided for this condition (e.g., physician, PT, OT, SLP, chiropractic, nurse, respiratory therapy, social services, psychology, nutritional/dietetic services, radiation therapy, chemotherapy, etc.), and/ or
- Identification of durable medical equipment needed for this condition, and/or
- Identification of the number of medications the beneficiary is taking (and type if known); and/or
- If complicating factors (complexities) affect treatment, describe why or how. For example: Cardiac dysrhythmia is not a condition for which a therapist would directly treat a patient, but in some patients such dysrhythmias may so directly and significantly affect the pace of progress in treatment for other conditions as to require an exception to caps for necessary services. Documentation should indicate how the progress was affected by the complexity. Or, the severity of the patient's condition as reported on a functional measurement tool may be so great as to suggest extended treatment is anticipated; and/or
- Generalized or multiple conditions. The beneficiary has, in addition to the primary condition being treated, another disease or condition being treated, or generalized musculoskeletal conditions, or conditions affecting multiple sites and these conditions will directly and significantly impact the rate of recovery; and/or.
- Mental or cognitive disorder. The beneficiary has a mental or cognitive disorder in addition to the condition being treated that will directly and significantly impact the rate of recovery; and/or.
- Identification of factors that impact severity including e.g., age, time since onset, cause of the condition, stability of symptoms, how typical/atypical are the symptoms of the diagnosed condition, availability of an intervention/treatment known to be effective, predictability of progress.

Documentation supporting medical care prior to the current episode, if any, (or document none) including, e.g.,

- Record of discharge from a Part A qualifying inpatient, SNF, or home health episode within 30 days of the onset of this outpatient therapy episode, or
- Identification of whether beneficiary was treated for this same condition previously by the same therapy discipline (regardless of where prior services were furnished; and
- Record of a previous episode of therapy treatment from the same or different therapy discipline in the past year.

Documentation required to indicate beneficiary health related to quality of life, specifically,

- The beneficiary's response to the following question of self-related health: "At the present time, would you say that your health is excellent, very good, fair, or poor?" If the beneficiary is unable to respond, indicate why; and

Documentation required to indicate beneficiary social support including, specifically,

- Where does the beneficiary live (or intend to live) at the conclusion of this outpatient therapy episode? (e.g., private home, private apartment, rented room, group home, board and care apartment, assisted living, SNF), and
- Who does beneficiary live with (or intend to live with) at the conclusion of this outpatient therapy episode? (e.g., lives alone, spouse/significant other, child/children, other relative, unrelated person(s), personal care attendant), and
- Does the beneficiary require this outpatient therapy plan of care in order to return to a premorbid (or reside in a new) living environment, and
- Does the beneficiary require this outpatient therapy plan of care in order to reduce Activities of Daily Living (ADL) or Instrumental Activities of Daily Living or (IADL) assistance to a premorbid level or to reside in a new level of living environment (document prior level of independence and current assistance needs); and

*Documentation required to indicate objective, measurable beneficiary physical function including, e.g.,

- Functional assessment individual item and summary scores (and comparisons to prior assessment scores) from commercially available therapy outcomes instruments other than those listed above; or
 - Functional assessment scores (and comparisons to prior assessment scores) from tests and measurements validated in the professional literature that are appropriate for the condition/function being measured; or
 - Other measurable progress towards identified goals for functioning in the home environment at the conclusion of this therapy episode of care.
- Clinician's clinical judgments or subjective impressions that describe the current functional status of the condition being evaluated, when they provide further information to supplement measurement tools; and
 - A determination that treatment is not needed, or, if treatment is needed a prognosis for return to premorbid condition or maximum expected condition with expected time frame and a plan of care.

NOTE: When the Evaluation Serves as the Plan of Care. When an evaluation is the only service provided by a provider/supplier in an episode of treatment, the evaluation serves as the plan of care if it contains a diagnosis, or in states where a therapist may not diagnose, a description of the condition from which a diagnosis may be determined by the referring physician/NPP. The goal, frequency, and duration of treatment are implied in the diagnosis and one-time service. The referral/order of a physician/NPP is the certification that the evaluation is needed and the patient is under the care of a physician. Therefore, when evaluation is the only service, a referral/order and evaluation are the only required documentation. If the patient presented for evaluation without a referral or order and does not require treatment, a physician referral/order or certification of the evaluation is required for payment of the evaluation. A referral/order dated after the evaluation shall be interpreted as certification of the plan to evaluate the patient.

The time spent in evaluation shall not also be billed as treatment time. Evaluation minutes are untimed and are part of the total treatment minutes, but minutes of evaluation shall not be included in the minutes for timed codes reported in the treatment notes.

Re-evaluations shall be included in the documentation sent to contractors when a re-evaluation has been performed. See the definition in section 220. Re-evaluations are usually focused on the current treatment and might not be as extensive as initial evaluations. Continuous assessment of the patient's progress is a component of ongoing therapy services and is not payable as a re-evaluation. A re-evaluation is not a routine, recurring service but is focused on evaluation of progress toward current goals, making a professional judgment about continued care, modifying goals and/or treatment or terminating services. A formal re-evaluation is covered only if the documentation

supports the need for further tests and measurements after the initial evaluation. Indications for a re-evaluation include new clinical findings, a significant change in the patient's condition, or failure to respond to the therapeutic interventions outlined in the plan of care.

A re-evaluation may be appropriate prior to planned discharge for the purposes of determining whether goals have been met, or for the use of the physician or the treatment setting at which treatment will be continued.

A re-evaluation is focused on evaluation of progress toward current goals and making a professional judgment about continued care, modifying goals and/or treatment or terminating services. Reevaluation requires the same professional skills as evaluation. The minutes for re-evaluation are documented in the same manner as the minutes for evaluation. Current Procedural Terminology does not define a re-evaluation code for speech-language pathology; use the evaluation code.

Plan of Care. See section 220.1.2 for requirements of the plan. The evaluation and plan may be reported in two separate documents or a single combined document.

D. Progress Report

The progress report provides justification for the medical necessity of treatment.

Contractors shall determine the necessity of services based on the delivery of services as directed in the plan and as documented in the treatment notes and progress report. For Medicare payment purposes, information required in progress reports shall be written by a clinician that is, either the physician/NPP who provides or supervises the services, or by the therapist who provides the services and supervises an assistant. It is not required that the referring or supervising physician/NPP sign the progress reports written by a PT, OT or SLP.

Timing. The minimum progress report period shall be at least once every 10 treatment days. The day beginning the first reporting period is the first day of the episode of treatment regardless of whether the service provided on that day is an evaluation, re-evaluation or treatment. Regardless of the date on which the report is actually written (and dated), the end of the progress report period is either a date chosen by the clinician or the 10th treatment day, whichever is shorter. The next treatment day begins the next reporting period. The progress report period requirements are complete when both the elements of the progress report and the clinician's active participation in treatment have been documented.

For example, for a patient evaluated on Monday, October 1 and being treated five times a week, on weekdays: On October 5, (before it is required), the clinician may choose to write a progress report for the last week's treatment (from October 1 to October 5). October 5 ends the reporting period and the next treatment on Monday, October 8 begins the next reporting period. If the clinician does not choose to write a report for the next

week, the next report is required to cover October 8 through October 19, which would be 10 treatment days.

It should be emphasized that the dates for recertification of plans of care do not affect the dates for required progress reports. (Consideration of the case in preparation for a report may lead the therapist to request early recertification. However, each report does not require recertification of the plan, and there may be several reports between recertifications). In many settings, weekly progress reports are voluntarily prepared to review progress, describe the skilled treatment, update goals, and inform physician/NPPs or other staff. The clinical judgment demonstrated in frequent reports may help justify that the skills of a therapist are being applied, and that services are medically necessary.

Absences. Holidays, sick days or other patient absences may fall within the progress report period. Days on which a patient does not encounter qualified professional or qualified personnel for treatment, evaluation or re-evaluation do not count as treatment days. However, absences do not affect the requirement for a progress report at least once during each progress report period. If the patient is absent unexpectedly at the end of the reporting period, when the clinician has not yet provided the required active participation during that reporting period, a progress report is still required, but without the clinician's active participation in treatment, the requirements of the progress report period are incomplete.

Delayed Reports. If the clinician has not written a progress report before the end of the progress reporting period, it shall be written within 7 calendar days after the end of the reporting period. If the clinician did not participate actively in treatment during the progress report period, documentation of the delayed active participation shall be entered in the treatment note as soon as possible. The treatment note shall explain the reason for the clinician's missed active participation. Also, the treatment note shall document the clinician's guidance to the assistant or qualified personnel to justify that the skills of a therapist were required during the reporting period. It is not necessary to include in this treatment note any information already recorded in prior treatment notes or progress reports.

The contractor shall make a clinical judgment whether continued treatment by assistants or qualified personnel is reasonable and necessary when the clinician has not actively participated in treatment for longer than one reporting period. Judgment shall be based on the individual case and documentation of the application of the clinician's skills to guide the assistant or qualified personnel during and after the reporting period.

Early Reports. Often, progress reports are written weekly, or even daily, at the discretion of the clinician. Clinicians are encouraged, but not required to write progress reports more frequently than the minimum required in order to allow anyone who reviews the records to easily determine that the services provided are appropriate, covered and payable.

Elements of progress reports may be written in the treatment notes if the provider/supplier or clinician prefers. If each element required in a progress report is included in the treatment notes at least once during the progress report period, then a separate progress report is not required. Also, elements of the progress report may be incorporated into a revised plan of care when one is indicated. Although the progress report written by a therapist does not require a physician/NPP signature when written as a stand-alone document, the revised plan of care accompanied by the progress report shall be re-certified by a physician/NPP. See section 220.1.2C, Changes to the Therapy Plan, for guidance on when a revised plan requires certification.

Progress Reports for Services Billed Incident to a Physician's Service. The policy for incident to services requires, for example, the physician's initial service, direct supervision of therapy services, and subsequent services of a frequency which reflect his/her active participation in and management of the course of treatment (see section 60.1B of this chapter. Also, see the billing requirements for services incident to a physician in Pub. 100-04, chapter 26, Items 17, 19, 24, and 31.) Therefore, supervision and reporting requirements for supervising physician/NPPs supervising staff are the same as those for PTs and OTs supervising PTAs and OTAs with certain exceptions noted below.

When a therapy service is provided by a therapist, supervised by a physician/NPP and billed incident to the services of the physician/NPP, the progress report shall be written and signed by the therapist who provides the services.

When the services incident to a physician are provided by qualified personnel who are not therapists, the ordering or supervising physician/NPP must personally provide at least one treatment session during each progress report period and sign the progress report.

Documenting Clinician Participation in Treatment in the Progress Report. Verification of the clinician's required participation in treatment during the progress report period shall be documented by the clinician's signature on the treatment note and/or on the progress report. When unexpected discontinuation of treatment occurs, contractors shall not require a clinician's participation in treatment for the incomplete reporting period.

The Discharge Note (or Discharge Summary) is required for each episode of outpatient treatment. In provider settings where the physician/NPP writes a discharge summary and the discharge documentation meets the requirements of the provider setting, a separate discharge note written by a therapist is not required. The discharge note shall be a progress report written by a clinician, and shall cover the reporting period from the last progress report to the date of discharge. In the case of a discharge unanticipated in the plan or previous progress report, the clinician may base any judgments required to write the report on the treatment notes and verbal reports of the assistant or qualified personnel.

In the case of a discharge anticipated within 3 treatment days of the progress report, the clinician may provide objective goals which, when met, will authorize the assistant or qualified personnel to discharge the patient. In that case, the clinician should verify that

the services provided prior to discharge continued to require the skills of a therapist, and services were provided or supervised by a clinician. The discharge note shall include all treatment provided since the last progress report and indicate that the therapist reviewed the notes and agrees to the discharge.

At the discretion of the clinician, the discharge note may include additional information; for example, it may summarize the entire episode of treatment, or justify services that may have extended beyond those usually expected for the patient's condition. Clinicians should consider the discharge note the last opportunity to justify the medical necessity of the entire treatment episode in case the record is reviewed. The record should be reviewed and organized so that the required documentation is ready for presentation to the contractor if requested.

Assistant's Participation in the Progress Report. PTAs or OTAs may write elements of the progress report dated between clinician reports. Reports written by assistants are not complete progress reports. The clinician must write a progress report during each progress report period regardless of whether the assistant writes other reports. However, reports written by assistants are part of the record and need not be copied into the clinician's report. Progress reports written by assistants supplement the reports of clinicians and shall include:

- Date of the beginning and end of the reporting period that this report refers to;
- Date that the report was written (not required to be within the reporting period);
- Signature, and professional identification, or for dictated documentation, the identification of the qualified professional who wrote the report and the date on which it was dictated;
- Objective reports of the patient's subjective statements, if they are relevant. For example, "Patient reports pain after 20 repetitions". Or, "The patient was not feeling well on 11/05/06 and refused to complete the treatment session."; and
- Objective measurements (preferred) or description of changes in status relative to each goal currently being addressed in treatment, if they occur. Note that assistants may not make clinical judgments about why progress was or was not made, but may report the progress objectively. For example: "increasing strength" is not an objective measurement, but "patient ambulates 15 feet with maximum assistance" is objective.

Descriptions shall make identifiable reference to the goals in the current plan of care. Since only long term goals are required in the plan of care, the progress report may be used to add, change or delete short term goals. Assistants may change goals only under the direction of a clinician. When short term goal changes are dictated to an assistant or to qualified personnel, report the change, clinician's name, and date. Clinicians verify

these changes by co-signatures on the report or in the clinician's progress report. (See section 220.1.2(C) to modify the plan for changes in long term goals).

The evaluation and plan of care are considered incorporated into the progress report, and information in them is not required to be repeated in the report. For example, if a time interval for the treatment is not specifically stated, it is assumed that the goals refer to the plan of care active for the current progress report period. If a body part is not specifically noted, it is assumed the treatment is consistent with the evaluation and plan of care.

Any consistent method of identifying the goals may be used. Preferably, the long term goals may be numbered (1, 2, 3,) and the short term goals that relate to the long term goals may be numbered and lettered 1.A, 1.B, etc. The identifier of a goal on the plan of care may not be changed during the episode of care to which the plan refers. A clinician, an assistant on the order of a therapist or qualified personnel on the order of a physician/NPP shall add new goals with new identifiers or letters. Omit reference to a goal after a clinician has reported it to be met, and that clinician's signature verifies the change.

Content of Clinician (Therapist, Physician/NPP) Progress Reports. In addition to the requirements above for notes written by assistants, the progress report of a clinician shall also include:

- Assessment of improvement, extent of progress (or lack thereof) toward each goal;
- Plans for continuing treatment, reference to additional evaluation results, and/or treatment plan revisions should be documented in the clinician's progress report; and
- Changes to long or short term goals, discharge or an updated plan of care that is sent to the physician/NPP for certification of the next interval of treatment.
- Functional documentation is required as part of the progress report at the end of each progress reporting period. It is also required at the time of discharge on the discharge note or summary, as applicable. The clinician documents, on the applicable dates of service, the specific nonpayable G-codes and severity modifiers used in the required reporting of the patient's functional limitation(s) on the claim for services, including how the modifier selection was made. See subsection C of 220.4 below for details relevant to documentation requirements.

A re-evaluation should not be required before every progress report routinely, but may be appropriate when assessment suggests changes not anticipated in the original plan of care.

Care must be taken to assure that documentation justifies the necessity of the services provided during the reporting period, particularly when reports are written at the

minimum frequency. Justification for treatment must include, for example, objective evidence or a clinically supportable statement of expectation that:

- *In the case of rehabilitative therapy, the patient's condition has the potential to improve or is improving in response to therapy. maximum improvement is yet to be attained; and there is an expectation that the anticipated improvement is attainable in a reasonable and generally predictable period of time.*
- *In the case of maintenance therapy, treatment by the therapist is necessary to maintain, prevent or slow further deterioration of the patient's functional status and the services cannot be safely carried out by the beneficiary him or herself, a family member, another caregiver or unskilled personnel.*

Objective evidence consists of standardized patient assessment instruments, outcome measurements tools or measurable assessments of functional outcome. Use of objective measures at the beginning of treatment, during and/or after treatment is recommended to quantify progress and support justifications for continued treatment. Such tools are not required, but their use will enhance the justification for needed therapy.

Example: The Plan states diagnosis is 787.2- Dysphagia secondary to other late effects of CVA. Patient is on a restricted diet and wants to drink thick liquids. Therapy is planned 3X week, 45 minute sessions for 6 weeks. Long term goal is to consume a mechanical soft diet with thin liquids without complications such as aspiration pneumonia. Short Term Goal 1: Patient will improve rate of laryngeal elevation/timing of closure by using the super-supraglottic swallow on saliva swallows without cues on 90% of trials. Goal 2: Patient will compensate for reduced laryngeal elevation by controlling bolus size to ½ teaspoon without cues 100%. The progress report for 1/3/06 to 1/29/06 states: 1. Improved to 80% of trials; 2. Achieved. Comments: Highly motivated; spouse assists with practicing, compliant with current restrictions. New Goal: "5. Patient will implement above strategies to swallow a sip of water without coughing for 5 consecutive trials. Mary Johns, CCC-SLP, 1/29/06." Note the provider is billing 92526 three times a week, consistent with the plan; progress is documented; skilled treatment is documented.

E. Treatment Note

The purpose of these notes is simply to create a record of all treatments and skilled interventions that are provided and to record the time of the services in order to justify the use of billing codes on the claim. Documentation is required for every treatment day, and every therapy service. The format shall not be dictated by contractors and may vary depending on the practice of the responsible clinician and/or the clinical setting.

The treatment note is not required to document the medical necessity or appropriateness of the ongoing therapy services. Descriptions of skilled interventions should be included in the plan or the progress reports and are allowed, but not required daily. Non-skilled interventions need not be recorded in the treatment notes as they are not billable.

However, notation of non-skilled treatment or report of activities performed by the patient or non-skilled staff may be reported voluntarily as additional information if they are relevant and not billed. Specifics such as number of repetitions of an exercise and other details included in the plan of care need not be repeated in the treatment notes unless they are changed from the plan.

Documentation of each treatment shall include the following required elements:

- Date of treatment; and
- Identification of each specific intervention/modality provided and billed, for both timed and untimed codes, in language that can be compared with the billing on the claim to verify correct coding. Record each service provided that is represented by a timed code, regardless of whether or not it is billed, because the unbilled timed services may impact the billing; and
- Total timed code treatment minutes and total treatment time in minutes. Total treatment time includes the minutes for timed code treatment and untimed code treatment. Total treatment time does not include time for services that are not billable (e.g., rest periods). For Medicare purposes, it is not required that unbilled services that are not part of the total treatment minutes be recorded, although they may be included voluntarily to provide an accurate description of the treatment, show consistency with the plan, or comply with state or local policies. The amount of time for each specific intervention/modality provided to the patient may also be recorded voluntarily, but contractors shall not require it, as it is indicated in the billing. The billing and the total timed code treatment minutes must be consistent. See Pub. 100-04, chapter 5, section 20.2 for description of billing timed codes; and
- Signature and professional identification of the qualified professional who furnished or supervised the services and a list of each person who contributed to that treatment (i.e., the signature of Kathleen Smith, PTA, with notation of phone consultation with Judy Jones, PT, supervisor, when permitted by state and local law). The signature and identification of the supervisor need not be on each treatment note, unless the supervisor actively participated in the treatment. Since a clinician must be identified on the plan of care and the progress report, the name and professional identification of the supervisor responsible for the treatment is assumed to be the clinician who wrote the plan or report. When the treatment is supervised without active participation by the supervisor, the supervisor is not required to cosign the treatment note written by a qualified professional. When the responsible supervisor is absent, the presence of a similarly qualified supervisor on the clinic roster for that day is sufficient documentation and it is not required that the substitute supervisor sign or be identified in the documentation.

If a treatment is added or changed under the direction of a clinician during the treatment days between the progress reports, the change must be recorded and justified on the

medical record, either in the treatment note or the progress report, as determined by the policies of the provider/supplier. New exercises added or changes made to the exercise program help justify that the services are skilled. For example: The original plan was for therapeutic activities, gait training and neuromuscular re-education. "On Feb. 1 clinician added electrical stim. to address shoulder pain."

Documentation of each treatment may also include the following optional elements to be mentioned only if the qualified professional recording the note determines they are appropriate and relevant. If these are not recorded daily, any relevant information should be included in the progress report.

- Patient self-report;
- Adverse reaction to intervention;
- Communication/consultation with other providers (e.g., supervising clinician, attending physician, nurse, another therapist, etc.);
- Significant, unusual or unexpected changes in clinical status;
- Equipment provided; and/or
- Any additional relevant information the qualified professional finds appropriate.

See Pub. 100-04, Medicare Claims Processing Manual, chapter 5, section 20.2 for instructions on how to count minutes. It is important that the total number of timed treatment minutes support the billing of units on the claim, and that the total treatment time reflects services billed as untimed codes.

220.4 – Functional Reporting

(Rev. 165, Issued: 12-21-12, Effective: 01-01-13, Implementation: 01-07-13)

A. Selecting the G-codes to Use in Functional Reporting.

There are 42 functional G-codes, 14 sets of three codes each, for that can be used in identifying the functional limitation being reported. Six of the G-code sets are generally for PT and OT functional limitations and eight sets of G-codes are for SLP functional limitations. (For a list of these codes and descriptors, see Pub. 100-04, Medicare Claims Processing Manual, chapter 5, section 10.6 F.)

Only one functional limitation shall be reported at a time. Consequently, the clinician must select the G-code set for the functional limitation that most closely relates to the primary functional limitation being treated or the one that is the primary reason for treatment. When the beneficiary has more than one functional limitation, the clinician may need to make a determination as to which functional limitation is primary. In these cases, the clinician may choose the functional limitation that is:

- Most clinically relevant to a successful outcome for the beneficiary;
- The one that would yield the quickest and/or greatest functional progress; or
- The one that is the greatest priority for the beneficiary.

In all cases, this primary functional limitation should reflect the predominant limitation that the furnished therapy services are intended to address.

For services typically reported as PT or OT, the clinician reports one of the "Other PT/OT" functional G-codes sets to report when one of the four PT/OT categorical code sets does not describe the beneficiary's functional limitation, as follows:

- a beneficiary's functional limitation that is not defined by one of the four categories;
- a beneficiary whose therapy services are not intended to treat a functional limitation; or
- a beneficiary's functional limitation where an overall, composite, or other score from a functional assessment tool is used and does not clearly represent a functional limitation defined by one of the above four categorical PT/OT code sets.

In addition, the subsequent "Other PT/OT" G-code set is only reported after the primary "Other PT/OT" G-code set has been reported for the beneficiary during the same episode of care.

For services typically reported as SLP services, the clinician uses the "Other SLP" functional G-code to report when the functional limitation being treated is not represented by one of the seven categorical SLP functional measures. In addition, the "Other SLP" G-code set is used to report where an overall, composite, or other score from an assessment tool that does not clearly represent a functional limitation defined by one of the seven categorical SLP measures.

B. Selecting the severity modifiers to use in functional reporting/documenting.

Each G-code requires one of the following severity modifiers. When the clinician reports any of the following a modifier is used to convey the severity of the functional limitation: current status, the goal status and the discharge status.

Modifier	Impairment Limitation Restriction
CH	0 percent impaired, limited or restricted
CI	At least 1 percent but less than 20 percent impaired, limited or restricted
CJ	At least 20 percent but less than 40 percent impaired, limited or restricted
CK	At least 40 percent but less than 60 percent impaired, limited or restricted

Modifier	Impairment Limitation Restriction
CL	At least 60 percent but less than 80 percent impaired, limited or restricted
CM	At least 80 percent but less than 100 percent impaired, limited or restricted
CN	100 percent impaired, limited or restricted

The severity modifier reflects the beneficiary's percentage of functional impairment as determined by the clinician furnishing the therapy services for each functional status: current, goal, or discharge. In selecting the severity modifier, the clinician:

- Uses the severity modifier that reflects the score from a functional assessment tool or other performance measurement instrument, as appropriate.
- Uses his/her clinical judgment to combine the results of multiple measurement tools used during the evaluative process to inform clinical decision making to determine a functional limitation percentage.
- Uses his/her clinical judgment in the assignment of the appropriate modifier.
- Uses the CH modifier to reflect a zero percent impairment when the therapy services being furnished are not intended to treat (or address) a functional limitation.

In some cases the modifier will be the same for current status and goal status. For example: where improvement is expected but it is not expected to be enough to move to another modifier, such as from 10 percent to 15 percent, the same severity modifier would be used in reporting the current and goal status. Also, when the clinician does not expect improvement, such as for individuals receiving maintenance therapy, the modifier used for projected goal status will be the same as the one for current status. In these cases, the discharge status may also include the same modifier.

Therapists must document in the medical record how they made the modifier selection so that the same process can be followed at succeeding assessment intervals.

C. Documentation of G-code and Severity Modifier Selection.

Documentation of the nonpayable G-codes and severity modifiers regarding functional limitations reported on claims must be included in the patient's medical record of therapy services for each required reporting. (See Pub. 100-04, Medicare Claims Processing Manual, chapter 5, section 10.6 for details about the functional reporting requirements on claims for therapy services, including PT, OT, and SLP services furnished in CORFs.)

Documentation of functional reporting in the medical record of therapy services must be completed by the clinician furnishing the therapy services:

- The qualified therapist furnishing the therapy services

- The physician/NPP personally furnishing the therapy services
- The qualified therapist furnishing services incident to the physician/NPP
- The physician/NPP for incident to services furnished by qualified personnel, who are not qualified therapists.

The qualified therapist furnishing the PT, OT, or SLP services in a CORF

230 - Practice of Physical Therapy, Occupational Therapy, and Speech-Language Pathology

(Rev. 63, Issued: 12-29-06, Effective: 01-01-07, Implementation: on or before 01-29-07)

A. Group Therapy Services. Contractors pay for outpatient physical therapy services (which includes outpatient speech-language pathology services) and outpatient occupational therapy services provided simultaneously to two or more individuals by a practitioner as group therapy services (97150). The individuals can be, but need not be performing the same activity. The physician or therapist involved in group therapy services must be in constant attendance, but one-on-one patient contact is not required.

B. Therapy Students

1. General

Only the services of the therapist can be billed and paid under Medicare Part B. The services performed by a student are not reimbursed even if provided under "line of sight" supervision of the therapist; however, the presence of the student "in the room" does not make the service unbillable. Pay for the direct (one-to-one) patient contact services of the physician or therapist provided to Medicare Part B patients. Group therapy services performed by a therapist or physician may be billed when a student is also present "in the room".

EXAMPLES:

Therapists may bill and be paid for the provision of services in the following scenarios:

- The qualified practitioner is present and in the room for the entire session. The student participates in the delivery of services when the qualified practitioner is directing the service, making the skilled judgment, and is responsible for the assessment and treatment.
- The qualified practitioner is present in the room guiding the student in service delivery when the therapy student and the therapy assistant student are participating in the provision of services, and the practitioner is not engaged in treating another patient or doing other tasks at the same time.

- The qualified practitioner is responsible for the services and as such, signs all documentation. (A student may, of course, also sign but it is not necessary since the Part B payment is for the clinician's service, not for the student's services).

2. Therapy Assistants as Clinical Instructors

Physical therapist assistants and occupational therapy assistants are not precluded from serving as clinical instructors for therapy students, while providing services within their scope of work and performed under the direction and supervision of a licensed physical or occupational therapist to a Medicare beneficiary.

3. Services Provided Under Part A and Part B

The payment methodologies for Part A and B therapy services rendered by a student are different. Under the MPFS (Medicare Part B), Medicare pays for services provided by physicians and practitioners that are specifically authorized by statute. Students do not meet the definition of practitioners under Medicare Part B. Under SNF PPS, payments are based upon the case mix or Resource Utilization Group (RUG) category that describes the patient. In the rehabilitation groups, the number of therapy minutes delivered to the patient determines the RUG category. Payment levels for each category are based upon the costs of caring for patients in each group rather than providing specific payment for each therapy service as is done in Medicare Part B.

230.1 - Practice of Physical Therapy

(Rev. 176, Issued: 12-13-13, Effective: 01-07-14, Implementation: 01-07-14)

A. General

Physical therapy services are those services provided within the scope of practice of physical therapists and necessary for the diagnosis and treatment of impairments, functional limitations, disabilities or changes in physical function and health status. (See Pub. 100-03, the Medicare National Coverage Determinations Manual, for specific conditions or services.) For descriptions of aquatic therapy in a community center pool see section 220C of this chapter.

B. Qualified Physical Therapist Defined

Reference: 42CFR484.4

The new personnel qualifications for physical therapists were discussed in the 2008 Physician Fee Schedule. See the Federal Register of November 27, 2007, for the full text. See also the correction notice for this rule, published in the Federal Register on January 15, 2008.

The regulation provides that a qualified physical therapist (PT) is a person who is licensed, if applicable, as a PT by the state in which he or she is practicing unless

licensure does not apply, has graduated from an accredited PT education program and passed a national examination approved by the state in which PT services are provided. The phrase, "by the state in which practicing" includes any authorization to practice provided by the same state in which the service is provided, including temporary licensure, regardless of the location of the entity billing the services. The curriculum accreditation is provided by the Commission on Accreditation in Physical Therapy Education (CAPTE) or, for those who graduated before CAPTE, curriculum approval was provided by the American Physical Therapy Association (APTA). For internationally educated PTs, curricula are approved by a credentials evaluation organization either approved by the APTA or identified in 8 CFR 212.15(e) as it relates to PTs. For example, in 2007, 8 CFR 212.15(e) approved the credentials evaluation provided by the Federation of State Boards of Physical Therapy (FSBPT) and the Foreign Credentialing Commission on Physical Therapy (FCCPT). The requirements above apply to all PTs effective January 1, 2010, if they have not met any of the following requirements prior to January 1, 2010.

Physical therapists whose current license was obtained on or prior to December 31, 2009, qualify to provide PT services to Medicare beneficiaries if they:

- graduated from a CAPTE approved program in PT on or before December 31, 2009 (examination is not required); or,
- graduated on or before December 31, 2009, from a PT program outside the U.S. that is determined to be substantially equivalent to a U.S. program by a credentials evaluating organization approved by either the APTA or identified in 8 CFR 212.15(e) and also passed an examination for PTs approved by the state in which practicing.

Or, PTs whose current license was obtained before January 1, 2008, may meet the requirements in place on that date (i.e., graduation from a curriculum approved by either the APTA, the Committee on Allied Health Education and Accreditation of the American Medical Association, or both).

Or, PTs meet the requirements who are currently licensed and were licensed or qualified as a PT on or before December 31, 1977, and had 2 years appropriate experience as a PT, and passed a proficiency examination conducted, approved, or sponsored by the U.S. Public Health Service.

Or, PTs meet the requirements if they are currently licensed and before January 1, 1966, they were:

- admitted to membership by the APTA; or
- admitted to registration by the American Registry of Physical Therapists;
or

- graduated from a 4-year PT curriculum approved by a State Department of Education; or
- licensed or registered and prior to January 1, 1970, they had 15 years of full-time experience in PT under the order and direction of attending and referring doctors of medicine or osteopathy.

Or, PTs meet requirements if they are currently licensed and they were trained outside the U.S. before January 1, 2008, and after 1928 graduated from a PT curriculum approved in the country in which the curriculum was located, if that country had an organization that was a member of the World Confederation for Physical Therapy, and that PT qualified as a member of the organization.

For outpatient PT services that are provided incident to the services of physicians/NPPs, the requirement for PT licensure does not apply; all other personnel qualifications do apply. The qualified personnel providing PT services incident to the services of a physician/NPP must be trained in an accredited PT curriculum. For example, a person who, on or before December 31, 2009, graduated from a PT curriculum accredited by CAPTE, but who has not passed the national examination or obtained a license, could provide Medicare outpatient PT therapy services incident to the services of a physician/NPP if the physician assumes responsibility for the services according to the incident to policies. On or after January 1, 2010, although licensure does not apply, both education and examination requirements that are effective January 1, 2010, apply to qualified personnel who provide PT services incident to the services of a physician/NPP.

C. Services of Physical Therapy Support Personnel

Reference: 42CFR 484.4

Personnel Qualifications. The new personnel qualifications for physical therapist assistants (PTA) were discussed in the 2008 Physician Fee Schedule. See the Federal Register of November 27, 2007, for the full text. See also the correction notice for this rule, published in the Federal Register on January 15, 2008.

The regulation provides that a qualified PTA is a person who is licensed as a PTA unless licensure does not apply, is registered or certified, if applicable, as a PTA by the state in which practicing, and graduated from an approved curriculum for PTAs, and passed a national examination for PTAs. The phrase, “by the state in which practicing” includes any authorization to practice provided by the same state in which the service is provided, including temporary licensure, regardless of the location or the entity billing for the services. Approval for the curriculum is provided by CAPTE or, if internationally or military trained PTAs apply, approval will be through a credentialing body for the curriculum for PTAs identified by either the American Physical Therapy Association or identified in 8 CFR 212.15(e). A national examination for PTAs is, for example the one furnished by the Federation of State Boards of Physical Therapy. These requirements

above apply to all PTAs effective January 1, 2010, if they have not met any of the following requirements prior to January 1, 2010.

Those PTAs also qualify who, on or before December 31, 2009, are licensed, registered or certified as a PTA and met one of the two following requirements:

1. Is licensed or otherwise regulated in the state in which practicing; or
2. In states that have no licensure or other regulations, or where licensure does not apply, PTAs have:
 - o graduated on or before December 31, 2009, from a 2-year college-level program approved by the APTA or CAPTE; and
 - o effective January 1, 2010, those PTAs must have both graduated from a CAPTE approved curriculum and passed a national examination for PTAs; or

PTAs may also qualify if they are licensed, registered or certified as a PTA, if applicable and meet requirements in effect before January 1, 2008, that is,

- they have graduated before January 1, 2008, from a 2 year college level program approved by the APTA; or
- on or before December 31, 1977, they were licensed or qualified as a PTA and passed a proficiency examination conducted, approved, or sponsored by the U.S. Public Health Service.

Services. The services of PTAs used when providing covered therapy benefits are included as part of the covered service. These services are billed by the supervising physical therapist. PTAs may not provide *evaluative or assessment services*, make clinical judgments or decisions; *develop, manage, or furnish skilled maintenance program services*; or take responsibility for the service. They act at the direction and under the supervision of the treating physical therapist and in accordance with state laws.

A physical therapist must supervise PTAs. The level and frequency of supervision differs by setting (and by state or local law). General supervision is required for PTAs in all settings except private practice (which requires direct supervision) unless state practice requirements are more stringent, in which case state or local requirements must be followed. See specific settings for details. For example, in clinics, rehabilitation agencies, and public health agencies, 42CFR485.713 indicates that when a PTA provides services, either on or off the organization's premises, those services are supervised by a qualified physical therapist who makes an onsite supervisory visit at least once every 30 days or more frequently if required by state or local laws or regulation.

The services of a PTA shall not be billed as services incident to a physician/NPP's service, because they do not meet the qualifications of a therapist.

The cost of supplies (e.g., theraband, hand putty, electrodes) used in furnishing covered therapy care is included in the payment for the HCPCS codes billed by the physical therapist, and are, therefore, not separately billable. Separate coverage and billing provisions apply to items that meet the definition of brace in §130.

Services provided by aides, even if under the supervision of a therapist, are not therapy services and are not covered by Medicare. Although an aide may help the therapist by providing unskilled services, those services that are unskilled are not covered by Medicare and shall be denied as not reasonable and necessary if they are billed as therapy services.

D. Application of Medicare Guidelines to PT Services

This subsection will be used in the future to illustrate the application of the above guidelines to some of the physical therapy modalities and procedures utilized in the treatment of patients.

230.2 - Practice of Occupational Therapy

(Rev. 176, Issued: 12-13-13, Effective: 01-07-14, Implementation: 01-07-14)

A. General

Occupational therapy services are those services provided within the scope of practice of occupational therapists and necessary for the diagnosis and treatment of impairments, functional disabilities or changes in physical function and health status. (See Pub. 100-03, the Medicare National Coverage Determinations Manual, for specific conditions or services.)

Occupational therapy is medically prescribed treatment concerned with improving or restoring functions which have been impaired by illness or injury or, where function has been permanently lost or reduced by illness or injury, to improve the individual's ability to perform those tasks required for independent functioning. Such therapy may involve:

- The evaluation, and reevaluation as required, of a patient's level of function by administering diagnostic and prognostic tests;
- The selection and teaching of task-oriented therapeutic activities designed to restore physical function; e.g., use of woodworking activities on an inclined table to restore shoulder, elbow, and wrist range of motion lost as a result of burns;
- The planning, implementing, and supervising of individualized therapeutic activity programs as part of an overall "active treatment" program for a patient with a diagnosed psychiatric illness; e.g., the use of sewing activities which



Nikki R. Huley
Governor

Catherine B. Templeton
Director

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



110 Centerview Drive
Post Office Box 11329
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Phone: (803) 896-4655
FAX: (803) 896-4719
www.llronline.com

Application of 40-45-110(A)(1) to Intra-Professional Interactions

In 1998, the General Assembly enacted Act 360 which constituted a major revision to the laws governing the licensing and regulation of physical therapists. Under this Act, the Board may take disciplinary action against a therapist who "in the absence of a referral from a licensed medical doctor or dentist provides physical therapy services beyond 30 days after the initial evaluation and/or treatment without referring the patient to a licensed medical doctor or dentist." See §40-45-110(A)(4).

The Board may also take disciplinary action against a therapist who "requests, receives, participates or engages directly or indirectly in the dividing, transferring, assigning, rebating or refunding fees received for professional services or profits by means of a credit or other valuable consideration including, but not limited to, wages, and unearned commission, discount, or gratuity with a person who referred a patient or with a relative or business associate of the referring person." See §40-45-110(A)(1). The statutes were discussed first in an opinion from the Attorney General for the State of South Carolina in March of 2004 and then by the Supreme Court of South Carolina in the case of Sloan v. South Carolina Board of Physical Therapy Examiners, 370 S.C. 452, 636 S.E. 2d 598 (2006).

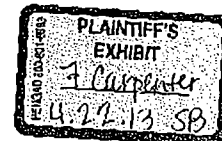
The purpose of §40-45-110(A)(1) is to "protect consumers as well as government-sponsored health care programs such as Medicare and Medicaid from actual and potential conflicts of interest which are likely to lead to overuse of medical services by physicians who, for their own financial gain rather than their patient's medical needs, refer patients to entities in which the physicians hold financial interest."

The question presented is whether or not a physical therapist or physical therapist assistant working in the same practice as another physical therapist can provide services to a patient during the 30 day window in which physical therapists can provide services to patients without a referral from a medical doctor or whether or not other physical therapists or physical therapist assistants in the group can provide physical therapy services upon referral by a medical doctor. The answer to these questions turns on the definition of the term "referral".

In Sloan, the South Carolina Supreme Court held that §40-45-110(A)(1) prohibits a physical therapist from receiving referrals or dividing fees if that physical therapist is part of the referring physician's practice. The South Carolina Supreme Court held that the term "refer" as used in the statute should be interpreted according to its plain meaning, which in this instance is "to send or direct for treatment, aid, information [or] decision [e.g.] a patient to a specialist." Webster's 3rd New International Dictionary 1907 (1981); Sloan 370 S.C. at 470, 636 S.E. 2d at 607-608.

In a group practice, a physical therapist or 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. Moreover, because each of the physical therapists or physical therapist assistants are providing the same medical treatment, a physical therapist who is unable to see a patient is not directing a patient for treatment or aid that that particular physical therapist was unable to provide and thus, would not be sending a patient to a specialist, as is the typical definition of a referral. To hold otherwise would produce

*Sloan only
addresses
referral*



the absurd result of requiring a patient to develop a new relationship with each physical therapist or physical therapist assistant who provides treatment to the patient within the 30 day window in which a physical therapist can treat without a referral from a physician, or in the situation of a physician referral, would require a separate referral for each and every physical therapist or physical therapist assistant who treats the patient. Having other physical therapists or physical therapist assistants in the same group covering for each other should not constitute a referral and should not violate §40-45-110(A)(1).

05-03-2011

Marilyn Swygert, PT, Chairperson
South Carolina Board of Physical Therapy Examiners
P.O. Box 11329
Columbia, S.C. 29211-1329

Re: Application of S.C. Code Ann. § 40-45-110(A)(1) to
Intra-Professional Interactions

Dear Marilyn:

As you know, in Sloan v. South Carolina Board of Physical Therapy Examiners, 370 S.C. 452, 636 S.E.2d 598 (S.C. 2006), the South Carolina Supreme Court held that South Carolina Code Ann. § 40-45-110(A)(1) prohibits a physical therapist from working as an employee of a physician when the physician refers patients to the physical therapist for services. I am writing on behalf of the South Carolina Chapter, American Physical Therapy Association (SCAPTA or Chapter) to ask the South Carolina Board of Physical Therapy Examiners (SCBPTE or Board) to issue a position statement advising how it interprets the statute by answering two questions set forth below.

As explained in the Court's opinion, the litigation was triggered by an opinion the Attorney General issued in 2004, which the Sloan opinion upheld. The Court ruled that the statutory prohibition applies when a physical therapist (PT) is employed by a physician who refers patients to the PT for the provision of physical therapy services – in short, an inter-professional referral. The Chapter understands that the Attorney General's office has received a request for an opinion as to whether the statutory clause covers intra-professional as well as inter-professional interactions. It appears that the Attorney General has received a request for an opinion on two questions, which are substantially as follows:

(#1) Does S.C. Code Ann. § 40-45-110(A)(1) prohibit a physical therapist or 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?

The Chapter hereby requests that the Board issue a position statement addressing these two questions. The Chapter believes that the correct answer to the two questions is that

the prohibition does not extend to a situation in which one physical therapist sends or directs a patient for treatment to another physical therapist who is employed by the sending therapist or by a professional corporation owned by the sending therapist. The Chapter intends to submit to the Board in the near future a legal analysis addressing the questions.

In addition, the Chapter hereby asks the Board to advise the Attorney General that it is considering these questions and to request the Attorney General to postpone issuing his opinion until the Board has had the opportunity to answer the questions. The Chapter believes that the Board is the appropriate agency to address the questions. As the Sloan opinion stated, "The construction of a statute by an agency charged with its administration is entitled to the most respectful consideration and should not be overruled absent compelling reasons." 370 S.C. at 469, 636 S.E.2d at 607. The Attorney General follows this admonition to give appropriate deference to an agency's interpretation of the law it administers. See Op. S.C. Atty. Gen., April 20, 2007, "This Office, just as the courts of this state, 'gives deference to the opinion of a state agency charged with the duty and responsibility of enforcing a state statute.'" See Op. S.C. Atty. Gen., July 1, 2004, "If the administrative interpretation is reasonable, courts will defer to that construction, even if it is not the only reasonable one or the one the court would have adopted in the first instance." The office of the Attorney General does not have primary responsibility for administering the physical therapy practice act. The Chapter believes it would be unfortunate if the Attorney General were to issue an opinion before the Board had the opportunity to state its position concerning the law it is charged to enforce.

Thank you for your attention to the Chapter's requests.

Respectfully,

Bob Carpenter, PT, ATC-L, CSCS



South Carolina Board of Physical Therapy Examiners

Koger Office Park, Kingstree Building
110 Centerview Drive
Post Office Box 11329
Columbia, SC 29211-1329

(803) 896-4655
FAX: (803) 896-4719

Robert Avery Carpenter, PT.
210 Scooter Bridge Road
Batesburg, SC 29006-8133

June 2, 2011

Re: Application of S.C. Code Ann. Sec. 40-45-110(A)(1) to
Intra-Professional Interactions

Dear Mr. Carpenter:

The answer to the two questions posed in your letter of May 3, 2011 is NO for the following reasons:

In 1998, the General Assembly enacted Act 360 which constituted a major revision to the laws governing the licensing and regulation of physical therapists. Under this Act, the Board may take disciplinary action against a therapist who "in the absence of a referral from a licensed medical doctor or dentist provides physical therapy services beyond 30 days after the initial evaluation and/or treatment without referring the patient to a licensed medical doctor or dentist." See Sec.40-45-110(A)(4).

The Board may also take disciplinary action against a therapist who "requests, receives, participates or engages directly or indirectly in the dividing, transferring, assigning, rebating, or refunding fees received for professional services or profits by means of a credit or other valuable consideration including, but not limited to, wages, and unearned commission, discount, or gratuity with a person who referred a patient or with a relative or business associate of the referring person." See Sec.40-45-110(A)(1). The statutes were discussed first in an opinion from the Attorney General for the State of South Carolina in March of 2004 and then by the Supreme Court of South Carolina in the case of Sloan v. South Carolina Board of Physical Therapy Examiners, 370 S.C. 452, 636 S.E.2d 598 (2006). The Sloan case provides the answer to your inquiry.

The purpose of Sec.40-45-110(A)(1) is to "protect consumers as well as government-sponsored health care programs such as Medicare and Medicaid from actual and potential conflicts of interest which are likely to lead to overuse of medical services by physicians who, for their own financial gain rather than their patient's medical needs, refer patients to entities in which the physicians hold financial interest.

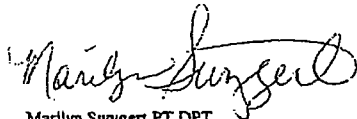
The question presented is whether or not a physical therapist or physical therapist assistant working in the same practice as another physical therapist can provide services to a patient during the 30 day window in which physical therapists can provide services to patients without a referral from a medical doctor or whether or not other physical therapists or physical therapist assistants in the group can provide physical therapy services upon referral by a medical doctor. The answer to these questions turns on the definition of the term "referral"

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PLAINTIFFS' MSJ - EXHIBIT # 4

In Sloan, the South Carolina Supreme Court held that Sec40-45-110(A)(1) prohibits a physical therapist from receiving referrals or dividing fees if that physical therapist is part of the referring physician's practice. The South Carolina Supreme Court held that the term "refer" as used in the statute should be interpreted according to its plain meaning, which in this instance is "to send or direct for treatment, aid, information [or] decision (e.g.) a patient to a specialist." Webster's 3rd New International Dictionary 1907 (1981); Sloan, 370 S.C. at 470, 636 S.E.2d at 607-608.

In a group practice, a physical therapist or physical therapist assistant providing services to a patient of that practice should not fall within this definition of "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 for another member of the group. Moreover, because each of the physical therapists or physical therapist assistants are providing the same medical treatment, a physical therapist who is unable to see a patient is not directing a patient for treatment or aid that that particular physical therapist was unable to provide and thus, would not be sending a patient to a specialist, as is the typical definition of a referral. To hold otherwise would produce the absurd result of requiring a patient develop a new relationship with each physical therapist or physical therapist assistant who provides treatment to the patient within the 30 day window in which physical therapist can treat without referral from a physician, or in the situation of a physician referral, would require a separate referral for each and every physical therapist or physical therapist assistant who treats the patient. Having other physical therapists or physical therapist assistants in the same group covering for each other should not constitute a referral and should not violate Sec. 40-45-110(A)(1).



Marilyn Swygert, PT, DPT
SC Board of Physical Therapy Chair

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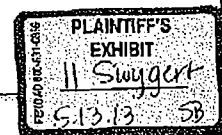
AGENDA
South Carolina Board of Physical Therapy Examiners
Board Meeting
10:00 a.m., July 14, 2011
Synergy Business Park
Kingstree Building
110 Centerview Drive, Conference Room 108
Columbia, South Carolina

1. Meeting Called to Order Ms. Swygert

Public notice of this meeting was properly posted at the S. C. Board of Physical Therapy Examiners, Synergy Business Park, Kingstree Building and provided to all requesting persons, Organizations, and news media in compliance with Section 30-6-80 of the South Carolina Freedom of Information Act.
2. Approval of the Agenda-TAB 1
3. Approval of the April 14, 2011 Meeting Minutes - TAB 1
4. New Business - TAB 2

Application Hearings:
 - a. Brandi Riggins
 - b. Jeffrey Thibodeau
Request for Approval of NPTE 3rd Administration:
 - a. Sumitra Stewart
5. Prescribed Medication in the Physical Therapy Office
6. Administrator's Remarks, For Information
 - a. HRC Report - Mr. Love
 - b. OGC Report - Office of General Counsel
 - c. Financial Report
 - d. OIE Report
7. Discussion Topics - TAB 3
 - a. Lisa K. Saladin (Provisional License for New Graduates)
 - b. Intra-Professional Interactions
 - c. Approval of Application Process

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PLAINTIFFS' MSJ - EXHIBIT # 5

8. Adjournment

The next meeting of the S.C. Board of Physical Therapy Examiners is scheduled for October 13, 2011, Room 108, 10:00 a.m., 110 Centerview Drive, Kingstree Building, Columbia, SC 29210.

57261502
Joseph V. SCLAR, III
ES

SOUTH CAROLINA DEPARTMENT OF LABOR, LICENSING & REGULATION
South Carolina Board of Physical Therapy Examiners
Thursday, July 14, 2011, 10:00 a.m.
Synergy Business Park, Kingstree Building
110 Centerview Drive, Room 108
Columbia, SC 29211

Board Members Present

Marilyn Swygert, P.T., Member, Chairperson
Jane E. Julian, P.T., Vice Chairperson
E. Dargan Ervin, Jr., P.T. Member
Cindy Ellis Witherspoon, P.T., Member
Darlene Pope, P.T., Member
Roy Christopher Junkins, P.T.A. Member
James A. O'Leary, M.D., Member
W. Dixon Reeves, P.T.A., Member

Others Present

James C. Saxon, Office of General Counsel
David Love, Office of Investigations and Enforcement
Veronica Reynolds, Administrator
Mack Williams, Board Assistant

Public notice of this meeting was properly posted at the SC Board of Physical Therapy Examiners Office, the lobby Kingstree Building, and provided to all requesting persons, organizations, and news media in compliance with Section 30-4-80 of the South Carolina Freedom of Information Act. A quorum was present at all times.

CALL TO ORDER

Ms. Swygert, Chairperson, called the meeting to order at 10:05 a.m. The meeting was held in Room 108, Kingstree Bldg., 110 Centerview Drive, Columbia, South Carolina.

ADOPTION OF AGENDA

The July 14, 2011 agenda was presented for review and approval.

Motion: Ms. Julian made a motion to approve the July 14, 2011 agenda as amended. The motion was seconded and approved.

APPROVAL OF MINUTES

The Minutes of the April 14, 2011 meeting were presented for review and approval.

Motion: Ms. Julian made a motion to accept the minutes of the April 14, 2011 meeting. The motion was seconded and approved.

5726/1502
Joseph v. SCLLR, et al
07

NEW BUSINESS

Application Hearing:

1. Braudi Riggins: Mrs. Riggins made a personal appearance before the Board and was represented by Counsel Robert W. Wilkins, Esquire. The purpose of the application hearing is to request Mrs. Riggins be granted a license to practice physical therapy in South Carolina.

Ms. Pope asked to be recused she is a personal acquaintance of the Mrs. Riggins family.

Motion: Ms. Julian made a motion the Board go into Executive Session to receive legal advice under Section 30-4-70 of the South Carolina Freedom of Information Act. The motion was seconded and approved.

Motion: Ms. Julian made a motion to come out of Executive Session. The motion was seconded and approved.

Motion: In open session, Ms. Witherspoon made a motion the Board grant Mrs. Riggins a license to practice physical therapy in South Carolina. The motion was seconded and approved.

2. Jeffrey Thibodeau: Mr. Thibodeau made a personal appearance before the Board and was not represented by legal counsel. The purpose of the application hearing is the applicant answered "No" on his application that he did not have a disciplinary order or a prior arrest in another state.

Motion: In open session, Mr. Ervin made a motion to grant Mr. Thibodeau a physical therapy license pending verification of good standing from Maine. The motion was seconded and approved.

3. Anna Schoderbek: Ms. Schoderbek made a personal appearance before the Board and waived her rights to be represented by Counsel. The purpose of the application hearing is to request an extension or additional time to complete her 1000 hours of onsite clinical supervision.

Motion: Ms. Julian made a motion that the Board go into Executive Session. The motion was seconded and approved.

Motion: Ms. Julian made a motion to come out of Executive Session. The motion was seconded and approved.

Motion: In open session, Ms. Julian made a motion Ms. Schoderbek be granted a license with the following conditions: she must complete two hundred hours on site supervised practice prior to the end of 2012 and that she provide evidence from a medical doctor satisfactory to the Board in its discretion that she is competent to return to unsupervised physical therapy duties. The motion was seconded and approved.

Request for Approval of NPTE 3rd Administration

1. Sumitra Stewart: Ms. Stewart made a personal appearance before the Board. Ms. Stewart requested the Board approve her to sit for the third (3rd) and final administration of the National Physical Therapy Examination (NPTE).

Motion: In open session, Mr. Ervin made a motion to approve Ms. Stewart to sit for the third (3rd) and final administration of the National Physical Therapy Examination (NPTE). The motion was seconded and approved.

Prescribed Medication in the Physical Therapy Office

Ms. Bundrick, Administrator and Ms. Sanders, Inspector from the Board of Pharmacy addressed questions regarding the Pharmacy Board practice act regarding clarification of outpatient physical therapists with legend and compounded drugs stored and administered in physical therapy offices. The Board requested the laws regarding the reference to medications in the physical therapy office be posted on the Boards' website for information purpose and under frequently asked questions. Mr. Ervin suggested the professional Association should also make the information available to its members.

Investigative Review Committee (IRC) Report: Mr. Love presented a statistical report for the years 2009, 2010 and through June 28, 2011. He also reported the IRC recommended two letters of caution and two formal complaints.

Motion: In open session, Ms. Witherspoon made a motion to accept the IRC Report. The motion was seconded and approved.

Office of General Counsel (OGC) Report: Ms. Reynolds presented the report from the OGC with three open cases and as of January 1, 2010 the total of ten (10) cases was closed.

DISCUSSION TOPICS:

Provisional License for New Graduates:
Lisa K. Saladin

Motion: Ms. Julian made a motion to table Ms. Saladin request until she contacts the Board and request to make an appearance to present her presentation. The motion was seconded and approved.

Intra-Professional Interactions

Ms. Swygert presented a letter to the Board written in response to a question received from Robert Carpenter, PT regarding intra-professional interactions. The Board discussed the content of the letter and whether it should be developed into a frequently asked question (FAQ) on the website.

Motion: Ms. Witherspoon made a motion that the letter from Ms. Swygert to Mr. Carpenter would be used to develop a frequently asked question. Six voted to approve and two dissented. The motion was seconded and approved.

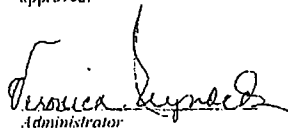
Ms. Swygert appointed Mr. Ervin and Ms. Witherspoon as a committee to develop the FAQ's to be placed on the Board's website for the two items discussed on the agenda. First, the issue involving prescribed medications in physical therapy office settings. Second, the letter addressed to Mr. Carpenter in response to his question on Intra-Professional Interactions. Ms. Swygert stated that she wants both individuals to work with the Board Administrator to get the questions on the Board website.

Approval of Application Process: Ms. Reynolds explained the current process of having the Board review all criminal background check even when there is a misdemeanor charges over five years old. Ms. Reynolds explained it would expedite the process if there were no additional charges within that five year and the administrator could administrative review and approve.

Motion: Mr. Ervin made a motion that for any incidents that require criminal background checks and they are misdemeanor charges with no additional charges have occurred within a five year period can be reviewed by the administrator for approval and if necessary for assistance refer to appointed committee.

ADJOURNMENT

There being no further business, Mr. Jenkins made a motion to adjourn the meeting. The motion was seconded and approved.


Administrator

8/22/2011
Date

Next meeting is scheduled October 13, 2011, Kingstree Building, Room 108, 10:00 a.m.

E726/1502
Joseph v. SCLLR, et al
C10

4

AGENDA
South Carolina Board of Physical Therapy Examiners
Board Meeting
9:00 a.m., August 17, 2011
Synergy Business Park
Kingstree Building
110 Centerview Drive, Conference Room 204
Columbia, South Carolina

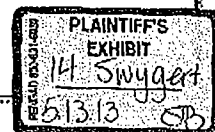
1. Meeting Called to Order Ms. Swygert

Public notice of this meeting was properly posted at the S. C. Board of Physical Therapy Examiners, Synergy Business Park, Kingstree Building and provided to all requesting persons, organizations, and news media in compliance with Section 30-4-80 of the South Carolina Freedom of Information Act.
2. Approval of the Agenda
3. Approval of the July 14, 2011 Meeting Minutes
4. Continued Business
 - a. Intra-Professional Interactions Statement
 - b. Public Comments
5. New Business

Disciplinary Hearings
 - a. Lisa Hill
 - b. Jenna Thom
 - c. Kirsten Thompson
 - d. Wendie Reeves
6. Adjournment

The next meeting of the S.C. Board of Physical Therapy Examiners is scheduled for October 13, 2011, Room 108, 10:00 a.m., 115 Centerview Drive, Kingstree Building, Columbia, SC 29210.

5/20/1502
Joseph v. SWIGERT, et al
81



PLAINTIFFS' MSJ - EXHIBIT # 6

SOUTH CAROLINA DEPARTMENT OF LABOR, LICENSING & REGULATION
South Carolina Board of Physical Therapy Examiners
Wednesday, August 17, 2011, 9:00 a.m.
Synergy Business Park, Kingstree Building
110 Centerview Drive, Room 204
Columbia, SC 29211

Board Members Present

Marilyn Swygert, P.T., Member, Chairperson
Jane E. Julian, P.T., Vice Chairperson
E. Dargan Ervin, Jr., P.T., Member
Cindy Ellis Witherspoon, P.T., Member
Roy Christopher Jenkins, P.T.A., Member
W. Dixon Reaves III, P.T.A., Member

Excused Absence

Darlene Pope, P.T., Member

Others Present

Denn Grigg, Advice Counsel
Paula Magargle, Office of General Counsel
Veronica Reynolds, Administrator
Mack Williams, Board Assistant

Public notice of this meeting was properly posted at the SC Board of Physical Therapy Examiners Office, the lobby Kingstree Building, and provided to all requesting persons, organizations, and news media in compliance with Section 30-4-30 of the South Carolina Freedom of Information Act. A quorum was present at all times.

CALL TO ORDER

Ms. Swygert, Chairperson, called the meeting to order at 9:14 a.m. The meeting was held in Room 204, Kingstree Bldg., 110 Centerview Drive, Columbia, South Carolina.

ADOPTION OF AGENDA

The August 17, 2011 agenda was presented for review and approval. Mr. Ervin made a motion to adopt the agenda. The motion was seconded and approved.

APPROVAL OF MINUTES

The Minutes of the July 14, 2011 meeting were presented for review and approval.

Motion: Mr. Jenkins made a motion to accept the July 14, 2011 minutes. The motion was seconded and approved.

57261502
Joseph v. SCHLR, et al
02

Continued Business:

Intra-Professional Interactions Statement

Motion: Mr. Ervin made a motion the Board go into Executive Session to receive legal advice under Section 30-4-70 of the South Carolina Freedom of Information Act. The motion was seconded and approved.

Motion: Mr. Ervin made a motion to come out of Executive Session. The motion was seconded and approved.

Motion: Ms. Witherspoon made a motion to rescind the previous adoption of the position statement regarding *Intra-Professional Interactions* and the previous vote regarding its publication. The motion was seconded and approved.

Motion: Mr. Ervin made a motion to revisit the position expressed in the June 2, 2011 letter regarding *Intra Professional Interactions* and accept the position stated within the letter. The motion was seconded and approved.

Public Comments: The floor was open for public comments and there were no comments made.

NEW BUSINESS

Disciplinary Hearings

1. Lisa Hill: Ms. Hill made a personal appearance before the Board and was represented by legal counsel.

Motion: Ms. Witherspoon made a motion the Board go into Executive Session to receive legal advice under Section 30-4-70 of the South Carolina Freedom of Information Act. The motion was seconded and approved.

Motion: Mr. Jenkins made a motion to come out of Executive Session. The motion was seconded and approved.

Motion: In open session, Mr. Ervin made a motion to dismiss the case and issue a letter of caution relative to communication and documentation in provision of services. The motion was seconded and approved.

2. Jenna Thom: Ms. Thom made a personal appearance before the Board and was not represented by legal counsel.

Motion: Ms. Witherspoon made a motion the Board go into Executive Session to receive legal advice under Section 30-4-70 of the South Carolina Freedom of Information Act. The motion was seconded and approved.

Motion: Mr. Ervin made a motion to come out of Executive Session. The motion was seconded and approved.

Motion: In open session, Ms. Julian made a motion to issue a public letter of reprimand with an expungement in five years if the respondent has no other actions taken against the license. The motion was seconded and approved.

3. Kirsten Thompson: Ms. Thompson made a personal appearance before the Board and was represented by legal counsel.

Motion: Ms. Witherspoon made a motion the Board go into Executive Session to receive legal advice under Section 30-4-70 of the South Carolina Freedom of Information Act. The motion was seconded and approved.

Motion: Mr. Ervin made a motion to come out of Executive Session. The motion was seconded and approved.

Motion: In open session, Ms. Julian made a motion to issue a public letter of reprimand with an expungement in five years if the respondent has no other actions taken against the license. The motion was seconded and approved.

4. Wendi Reeves: Ms. Reeves made a personal appearance before the Board and was represented by legal counsel

6/26/1302
Joseph S. CULF, et al
03

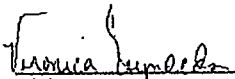
Motion: Mr. Ervin made a motion the Board go into Executive Session to receive legal advice under Section 30-4-70 of the South Carolina Freedom of Information Act. The motion was seconded and approved.

Motion: Mr. Jenkins made a motion to come out of Executive Session. The motion was seconded and approved.

Motion: In open session, Mr. Ervin made a motion to issue a public letter of reprimand and within one year complete a Board approved ethics course. The course must be an in-person organized program of instruction with faculty with the minimum of two days that will include reflection and completion of an essay. Ms. Reeves must continue employer supervision as outlined in the documents presented before the Board and submit quarterly reports from the supervisor. The motion was seconded and approved.

ADJOURNMENT

There being no further business, Ms. Witherspoon made a motion to adjourn the meeting at 8:19 p.m. The motion was seconded and approved.


Administrator

11/01/2011
Date

Next meeting is scheduled October 13, 2011, Kingsree Building, Room 108, 10:00 a.m.

[Print this page](#)

Kristen Joseph
Camden, SC 29020 (mailing address)

License number: 5004
License type: Physical Therapist
Original Issue Date: 12/15/2004
Status: Active
Expiration: 12/31/2014

Primary Source Verification of Graduation Certified

[File a Complaint against this Licensee](#)

PLAINTIFFS' MSJ – EXHIBIT # 7

1910 Lytleton Street
Camden, SC 29020

Phone 803-432-3967
E-mail josephklay@yahoo.com

Kristen T. Joseph

- Objective** I am a sincere, loyal and dedicated individual who has a great deal of ambition. Although I have extensive experience in the Physical Therapy industry, I love to learn and am always up to a challenge. I get along well with others, while also working efficiently on my own.
- Education** August 1992-June 1994 Georgia State University, Atlanta, Georgia
Bachelor of Science in Physical Therapy
August 1988-June 1992 Georgia College, Milledgeville, Georgia
Bachelor of Science in Biology
- Professional experience** August 2007-Present First Physical Therapy, Camden, SC
Clinical Supervisor
- Supervise and train staff
 - Responsible for DHEC compliance
 - Marketing liaison
 - Evaluation and treatment of patients
- November 2000-May 2002 Visiting Nurse Services, New York, New York
Physical Therapist
- Responsible for evaluation and treatment of patients
- November 1999-August 2000 Clinical Arts Home Care, Covington, Georgia
Physical Therapist
- Responsible for admissions, evaluation and treatment of home care patients
 - Training and supervision of staff
 - Participated in monthly Performance Improvement Committee meetings
- August 1998-November 1999 HealthSouth, New York, New York
Physical Therapist
- Responsible for evaluation and treatment of outpatient orthopaedic injuries
- April 1995-February 1998 Atlanta Center for Athletes, Atlanta Georgia
Physical Therapist
- Responsible for evaluation and treatment of outpatient orthopaedic and sports related injuries
 - Supervision of support staff

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**Continuing
Education**

- Assist in development of protocols for patient care
- Responsible for plan of care for college athletics and professional soccer team
- "Post-surgical Sports Rehab Knee & Shoulder: Module 6: Shoulder AC Injuries and Rotator Cuff Repair" 2010
- "Post-surgical Sports Rehab Knee & Shoulder: Module 2: Knee ACL" 2010
- "Post-surgical Sports Rehab Knee & Shoulder: Module 1: Post-surgical Management" 2010
- "Evaluation and Treatment of the Lumbar and Sacroiliac Spine: A Maitland Approach" 2008
- "Orthopaedic Physical Assessment: Module 5: Knee" 2008
- "Orthopaedic Physical Assessment: Module 1: Shoulder" 2008
- "Clinical Exercise-Pilates and More" 2006
- "Evaluation and Treatment of the Cervical & Thoracic Spine: A Maitland Approach" 2006
- "Rehabilitation of the Foot and Ankle" 1999
- "S-4 Functional Analysis and Management Lumbo-Pelvic-Hip Complex" 1998
- "S-1 Introduction to Spinal Evaluation and Manipulation" 1998
- "The Spine Mechanical-Diagnosis and Therapy: Part B: Cervical" 1997
- "The Spine Mechanical-Diagnosis and Therapy: Part A: Lumbar" 1997
- "The Non Sporting Shoulder Course" 1995
- "The Sacroiliac Joint and its Relation to Low Back Pain" 1995

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CURRICULUM VITAE
Thomas Nimmer Joseph, M.D.
March 15, 2013

PERSONAL:

Birth Date: May 10, 1971
Address: 1910 Lyttleton St.
Camden, SC 29020
Home# (803) 432-3967
Office# (803) 432-4498
Fax# (803) 425-4123
Email: josephtnny@yahoo.com
Wife: Kristen Thompson Joseph
Children: Thomas Raad Joseph
Wren Anthony Joseph

EDUCATION:

Mercy Medical Center, Baltimore, MD
Foot and Ankle Reconstructive Surgery Fellowship
Mark S. Myerson, MD
2003-2004
NYU-Hospital for Joint Diseases, New York, NY
Orthopaedic Surgery Residency
1997-2003
Medical University of South Carolina, Charleston, SC
Doctor of Medicine
1993-1997
Georgetown University, Washington, DC
Bachelor of Science in Biology
Magna Cum Laude
1989-1993

AWARDS/HONORS:

Marian Frauenthal Sloane Award: Resident clinical research
award, 2000.
Eleanor Kaufman Pediatric Orthopaedic Resident Award: 2000.
Fullerton Foundation Scholarship Recipient: Full 4 year
award. First Med Univ of SC recipient.
Alpha Omega Alpha: Inducted as junior, 1995.

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PLAINTIFFS' MSJ – EXHIBIT # 10

Social chairman: 1995; Vice President: 1996.
Sigma Xi, Scientific Research Society: Elected to
Membership 1993.

SOCIETY MEMBERSHIPS:

American Academy of Orthopaedic Surgeons, Active Fellow
American Orthopaedic Foot and Ankle Society member
South Carolina Medical Association member
South Carolina Medical Association- PAC Board Member 2011-13;
MedPAC Vice Chairman 2012-present
South Carolina Orthopedic Association- Secretary/Treasurer 2010-11,
Vice President, 2011-12, President-elect 2012-13
Kershaw County Medical Society- Treasurer 2004-05, President
2005-2013
Clinical Orthopedic Society- Board Member 2010-13
KershawHealth Hospital Foundation-Board Member 2012-2015

RESEARCH/ PUBLICATIONS:

Decision making in the treatment of hallux valgus. Joseph TN,
Mroczek KJ. *Bull NYU Hosp Jt Dis.* 2007;65(1):19-23.

Correction of multiplanar hindfoot deformity with osteotomy,
arthrodesis, and internal fixation. Joseph TN, Myerson MS. *Instr
Course Lect* 2005 Feb; 54: 269-76.

Assessment of clavicular translation after arthroscopic Mumford
procedure: direct versus indirect resection--a cadaveric study. Miller
CA, Ong BC, Jazrawi LM, Joseph T, Heywood CS, Rosen J, Rokito
AS. *Arthroscopy.* 2005 Jan;21(1): 64-8.

Use of talectomy in modern foot and ankle surgery. Joseph TN,
Myerson MS. *Foot Ankle Clin.* 2004 Dec; 9(4): 775-85.

Use of Antibiotic-Impregnated Cement in Total Joint Arthroplasty.
Joseph TN, Chen AL, Di Cesare PE. *J Am Acad Orthop Surg* 2003
Jan-Feb;11(1): 38-47.

Rheumatoid Arthritis of the Shoulder. Joseph TN, Chen AL,
Zuckerman JD. *J Am Acad Orthop Surg* 2003 Jan-Feb;11(1): 12-24.

PIfRsppt01stRFP_000077

Fixation stability of comminuted humeral shaft fractures: locked intramedullary nailing versus plate fixation. Chen AL, Joseph TN, Wolinsky PR, Teiwani NC, Kummer FJ, Egol KA, Koval KJ. *J Trauma* 2002 Oct;53(4):733-7.

The effect of distal screw orientation on the intrinsic stability of a tibial intramedullary nail. Chen AL, Teiwani NC, Joseph TN, Kummer FJ, Koval KJ. *Bull Hosp Jt Dis* 2001-2002; 60(2):80-3.

The effect of posterior sag on the fixation stability of intertrochanteric hip fractures. Joseph TN, Chen AL, Kummer FJ, Koval KJ. *J Trauma* 2002 Mar; 52(3):544-7.

Midterm clinical and radiographic results with the genesis I total knee prosthesis. Chen AL, Mujtaba M, Zuckerman JD, Jeong GK, Joseph TN, Wright K, Di Cesare PE. *J Arthroplasty* 2001 Dec; 16(8):1055-62.

Efficacy of combined technetium-99m sulfur colloid/indium-111 leukocyte scans to detect infected total hip and knee arthroplasties. Joseph TN, Mujtaba M, Chen AL, Maurer SL, Zuckerman JD, Maldjian C, Di Cesare PE. *J Arthroplasty* 2001 Sep; 16(6):753-8.

AAOS 2002 Poster:

Stability of Locked Intramedullary Nailing Versus Plate Fixation of Comminuted Humeral Shaft Fractures

Andrew L. Chen, MD, Thomas N. Joseph, MD, Nirmal Teiwani, MD, Frederick J. Kummer, PhD, Kenneth J. Koval, MD.

EXPERIENCE:

Team Physician North Central High School 2009-present

Team Physician: Lugoff-Elgin High School, 2004-2009

House Physician (1999-2003): Madison Square Garden, New York Mets, Alvin Ailey Dance Theatre

Lecturer: Sir Robert Jones Lecture: Research Presentations. October 2000

PlfRespt01stRFP_000078

Provided emergency and subsequent treatment of victims of
September 11, 2001 at Bellvue Hospital

Instructor: AO/ASIF Team Approach to Orthopedic Trauma Basic
Course, Smithtown, NY June 21-22, 2002

Lecturer: AO/ASIF Team Approach to Orthopedic Trauma Basic
Course, Smithtown, NY June 21-22, 2002 "Surgical Management of
Pediatric Fractures"

Lecturer: Baltimore Foot and Ankle Alumnus Meeting, March 15-18,
2007 "Tibiotalocalcaneal Fusion"

CURRENT STATUS:

Private practice- Board Certified,
General Orthopaedics/ Foot and Ankle:
Camden Bone and Joint
1112 Mill St.
Camden, SC 29020

Board Certified- July 28, 2006

Participate in orthopaedic resident education:
University of South Carolina School of Medicine
Columbia, SC

ADDITIONAL EXPERIENCE:

Testified to SC House of Representatives subcommittee on Podiatry
Bill H 3745 May 11, 2011

Testified to SC Senate subcommittee on Podiatry bill H 3405: May
2005

Testified to SC House of Representatives on Podiatry bill H 3741:
May 2, 2007

Guest Speaker Greenville County Medical Society: "Physician on
Call, from Bellvue 9-11 to Camden, SC"; January 16, 2007

PIfRespt01stRFP_000079

Guest Speaker Anderson County Medical Society: "Physician on Call, from Bellvue 9-11 to Camden, SC"; August 14, 2007

Guest Speaker Spartanburg Medical Society and Medical Alliance: "Physician on Call, from Bellvue 9-11 to Camden, SC"; September 20, 2007

Kershaw County delegate- South Carolina Medical Association Annual Meeting; 2008, 2010, 2011, 2012
Committee Chairman-Reports/Constitution and Bylaws/Miscellaneous 2012

South Carolina Orthopedic Association delegate- South Carolina Medical Association Annual Meeting; 2009, 2010, 2011, 2012

HOSPITAL LEADERSHIP:

Chairman, Surgical Services Committee: 2006-09
Member, Peer Review Committee: 2006-12

OTHER ACTIVITIES:

Interviewer Georgetown University Admissions 2006-present

Georgetown University Alumni Club of South Carolina, Treasurer, 2008-09, 2009-10, Vice President 2010-11, President 2011-12

Testified as expert witness in Federal Civil Rights case 1/27/11

PlfRespto1stRFP_000080

STATE OF SOUTH CAROLINA)

) THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND)

KRISTEN JOSEPH, PT,)

) C.A. NO.: 12-CP-40-2632

THOMAS N. JOSEPH, MD, AND)

WILLIAM G. MCCARTHY, MD,)

Plaintiffs,)

v.)

SOUTH CAROLINA DEPARTMENT)

OF LABOR, LICENSING AND)

REGULATION, SOUTH CAROLINA)

BOARD OF PHYSICAL THERAPY,)

Defendant.)

and)

SOUTH CAROLINA CHAPTER,)

AMERICAN PHYSICAL THERAPY)

ASSOCIATION, JOSEPH M.)

MCKOWEN, PT, SABRINA QUEEN)

BRIDGES, PTA, AND AMALIA W.)

KIRBY (PTA),)

Defendants-Intervenors)

Deposition of

THOMAS N. JOSEPH, M.D.

June 17, 2013

PLAINTIFFS' MSJ – EXHIBIT # 11

Page 2

1 Deposition on oral examination of THOMAS N. JOSEPH,
2 M.D., reported by Lisa F. Huffman, Verbatim Court
3 Reporter and Notary Public in and for the State of South
4 Carolina; said deposition taken pursuant to notice of
5 deposition, by agreement and in accordance with South
6 Carolina Rules of Civil Procedure, at The McNair Law
7 Firm, 1221 Main Street, Suite 1800, Columbia, South
8 Carolina, on June 17, 2013, at the hour of 9:01 a.m.

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APPEARANCES

1

2

3 M. ELIZABETH CRUM, ESQUIRE

4 The McNair Law Firm

5 1221 Main Street, Suite 1800

6 Columbia, South Carolina 29201

7 ATTORNEY FOR PLAINTIFFS, KRISTIN JOSEPH, PT; THOMAS N.

8 JOSEPH, M.D.; AND WILLIAM G. MCCARTHY, M.D.

9

10 EMILY T. WHITNEY, ESQUIRE

11 Devlin & Parkinson, P.A.

12 Post Office Box 10387

13 Greenville, South Carolina 29203

14 ATTORNEY FOR DEFENDANTS, JOSEPH M. MCKOWEN, PT; SABRINA

15 QUEEN BRIDGES, PTA; AND AMALIA W. KIRBY (PTA)

16

17 JOHN C. BRADLEY, ESQUIRE

18 Moore, Taylor & Thomas, P.A.

19 1700 Sunset Boulevard

20 West Columbia, South Carolina 29169

21 ATTORNEY FOR DEFENDANT, SOUTH CAROLINA CHAPTER, AMERICAN

22 PHYSICAL THERAPY ASSOCIATION

23

24

25

Page 4

1 MONTEITH P. TODD, ESQUIRE

2 Sowell, Gray, Stepp & Laffitte, LLC

3 1310 Gadsden Street

4 Columbia, South Carolina 29201

5 ATTORNEY FOR DEFENDANT, SOUTH CAROLINA DEPARTMENT OF

6 LABOR, LICENSING AND REGULATION, SOUTH CAROLINA BOARD OF

7 PHYSICAL THERAPY

8

9 Also Present:

10 Sara McCartha

11 Kristin T. Joseph, PT

12

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* * * * *

1 Q. When did you -- where are you currently practicing?

2 A. Camden, South Carolina.

3 Q. And who do you practice with?

4 A. Jim Nichols and Andrew Piasecki.

5 Q. What's the name of your group?

6 A. Camden Bone and Joint.

7 Q. How long have you been with them?

8 A. Since 2004, so ten years.

9 Q. So you came from them straight out of your
10 residency?

11 A. Straight out of my fellowship.

12 Q. I'm sorry.

13 A. Yes, sir.

14 Q. How many orthopedists in that group?

15 A. Three, including myself.

16 Q. When you started practicing, did that group employ
17 any physical therapists?

18 A. No, sir.

19 Q. Has that group ever employed physical therapists?

20 A. No, sir.

21 Q. When you started practicing, if you needed a
22 patient to receive physical therapy, what did you
23 do?

24 A. We would refer them out to a physical therapist.

25 Q. And where would -- was there a particular group any

Page 10

1 --

2 A. There's several groups in town. And the hospital
3 also provides physical therapy services.

4 Q. What were the groups -- and you say in town, in
5 Camden?

6 A. In Camden, yes, sir. In the county, yeah, in
7 Kershaw County.

8 Q. What were the groups?

9 A. The group is -- you know, of course the hospital,
10 and then there's a private group called Camden
11 Rehab, and then there's First Physical Therapy.
12 I'm not aware of any other ones in the county.

13 Q. Now your wife is with you today?

14 A. She is.

15 Q. And when you get -- you bring your wife to the
16 deposition, you've got to know our anniversary
17 date. When did you get married?

18 A. August 12th, 2000.

19 (Off-the-record discussion.)

20 Q. Now, is she a physical therapist?

21 A. She is, yes, sir.

22 Q. And who is she with?

23 A. First Physical Therapy.

24 Q. Have you received any training in physical therapy?

25 A. Yes, sir.

1 Q. What training have you received?

2 A. As a resident in orthopedic surgery, that's part of
3 standard orthopedic training.

4 Q. Have you ever -- do you ever perform physical
5 therapy on your patients?

6 A. Absolutely.

7 Q. What do you do?

8 A. Often.

9 Q. Do you bill at the physical therapy rate?

10 A. No, sir.

11 Q. Why not?

12 A. Because we don't have the time to meet billing
13 requirements.

14 Q. What do you mean by that?

15 A. We do not provide enough to -- the physical therapy
16 that we perform is usually a brief physical
17 therapy. Most of the time in the context of
18 providing patients information in how to perform
19 physical therapy properly so they can do it on
20 their own. Sometimes patients don't have enough
21 money to go to physical therapy. Sometimes they
22 don't have insurance. So usually the physical
23 therapy that we do is educational, for the most
24 part. It's very -- it's fairly brief.

25 Q. So when you say --

Page 12

1 A. It's not as extensive as the physical therapist who
2 would do physical therapy for 30 minutes, 45
3 minutes, an hour, which would be more billable, as
4 far as I know. We -- we don't bill for physical
5 therapy services.

6 Q. Have you ever billed for physical therapy?

7 A. No, sir.

8 Q. Do you know of any orthopedist who bills for
9 physical therapy services?

10 A. Do I know of any? No. Not personally.

11 Q. Now let me get a little better understanding. When
12 you say the physical therapy you do is brief and
13 educational --

14 A. Brief. It has an educational component to it, like
15 all physical therapy does.

16 Q. And when you say it's educational, what does that
17 mean?

18 A. It's not only am I performing it on them, I also
19 show them how to do it so that they can do it on
20 their own.

21 Q. And this is a general question because I'm assuming
22 that there's lots of body parts and there's lots of
23 different physical therapy. But what would be the
24 type of brief physical therapy that you would do,
25 just an example.

1 A. Say for plantar fasciitis, for instance. Somebody
2 needs to know how to appropriately stretch their
3 Achilles tendon, would demonstrate it for them.
4 I'll help them do that stretching, under my
5 guidance. And I would show them how to perform
6 appropriate stretching exercises, how to wear, say,
7 a night splint. In the case of rotator cuff
8 tendinitis, for instance, I'll perform range of
9 motion exercises, I'll show them how to strengthen
10 their shoulder. And we also have several physical
11 therapy handouts that we'd give them to -- to go
12 home with that reinforces those physical therapy --
13 that reinforces the physical therapy that I
14 provided and showed them.

15 Q. And about how much time are you talking about
16 spending?

17 A. Five/ten minutes.

18 Q. And do you bill -- I'm assuming you bill for an
19 orthopedic visit.

20 A. Yes, sir.

21 Q. And so the physical therapy that you performed
22 would be billed within the context of the office
23 visit?

24 A. Yes, sir.

25 Q. Or if it was in the hospital --

Page 28

1 not. I don't know what the future could hold for
2 me.

3 Q. Have you been in any discussions with any groups
4 outside of South Carolina about accepting
5 employment?

6 A. No, sir.

7 Q. You been involved in any studies involving the
8 provision of physical therapy?

9 A. Involved in any studies?

10 Q. Yes, sir.

11 A. Not that I can recall.

12 Q. Have you had any -- have you ever -- well, let me
13 back up. When you refer a case to a physical
14 therapist, general question, how do you make that
15 referral? And the question's so general, I'm going
16 to give you a little background. It may be too
17 general for you to answer. Do you write the
18 referral, "evaluate and treat"? Or do you write a
19 referral and set forth the treatment that you want?
20 Or does it vary from case to case?

21 A. I usually do both, but it does vary from case to
22 case.

23 Q. So with one patient it may be "evaluate and treat"
24 and leave it to the physical therapist?

25 A. I -- I -- I always give a diagnosis. And I always

1 give recommendations about what I want, with some
2 flexibility usually.

3 Q. Do you set forth the number of visits?

4 A. I usually do, yes.

5 Q. And how do you determine the number of visits?

6 A. Based on my estimate of how much they would
7 probably need in other similar situations by other
8 similar patients.

9 Q. Do you understand the role or the relationship
10 between a physical therapist and a physical
11 therapist assistant?

12 A. I understand there is a relationship and they help
13 one another out, but I'm not -- I'm not a physical
14 therapist or physical therapist assistant, so not
15 much. I assume the physical therapist assistant
16 assists physical therapists.

17 Q. Do you know what supervision is required by the
18 physical therapist of the physical therapist
19 assistant?

20 A. I don't.

21 Q. Do you know under what circumstances the physical
22 therapist's assistant can provide services?

23 A. I don't know the laws in that regard.

24 Q. Now are you a member of -- you're a member of the
25 South Carolina Orthopaedic Association. Are you --

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1 question.

2 A. I don't recall.

3 Q. Now you've read the 2011 position statement, what

4 --

5 A. Yes, sir.

6 Q. -- we're referred to? Does that have any impact on
7 your practice as an orthopedist?

8 A. Yes, sir.

9 Q. How does it?

10 A. Because we are not allowed to provide the same --
11 or allowed to have a physical therapist provide the
12 same coverage for physical therapy services, as a
13 physical therapist would be allowed to have a
14 physical therapist cover for physical therapy
15 services. It impacts our ability to oversee
16 physical therapy services. So yes.

17 Q. Do you currently employ any physical therapists?

18 A. No, sir.

19 Q. And you've never employed any physical therapists.

20 A. Correct.

21 Q. So since you don't employ physical therapists, how
22 is the application of that position statement
23 affecting you?

24 A. It affects our ability to coordinate care with
25 physical therapy. It affects our ability to

1 provide direct oversight to the provision of
2 physical therapy services. It affects our ability
3 to improve patient outcomes. It affects our
4 ability to improve patient satisfaction and patient
5 convenience.

6 Q. Since you don't employ physical therapists, how is
7 it that -- I mean, how is it that it affects any of
8 those things you just listed?

9 A. It affects all the things that I just listed.

10 Q. You don't employ physical therapists; we've
11 established that. Correct?

12 A. Correct.

13 Q. You've never employed physical therapists.

14 A. Correct.

15 Q. So how can you say that it has any impact on you
16 when you have not employed physical therapists ever
17 in your career and you currently do not?

18 A. It impacts our ability to improve patient outcomes.
19 It affects our ability to provide direct oversight
20 and provision of physical therapy services. It
21 impacts our ability to provide convenient physical
22 therapy services. It impacts our ability to
23 improve outcomes by direct oversight of physical
24 therapy services.

25 Q. So I got -- I think you listed -- but I'm going to

Page 44

1 list them. See if I got them right. Improve
2 physical therapy outcomes?

3 A. Yes, sir.

4 Q. To provide direct oversight?

5 A. Direct oversight.

6 Q. And convenient PT services. Is that the three?

7 A. Say what you have.

8 Q. Improve physical therapy outcomes.

9 A. Improve physical therapy outcomes.

10 Q. Have direct oversight.

11 A. In order to improve physical therapy outcomes.

12 Q. And provide convenient PT services.

13 A. In order to improve physical therapy, the
14 satisfaction of the patients, improve patient
15 satisfaction -- improve patient satisfaction.

16 Q. Now you refer patients to --

17 A. And coordination of care, improve coordination of
18 care. That's another good one.

19 Q. Got any others? Any others?

20 A. No, I think that's it. That's all I can think of
21 right now.

22 Q. Do you refer patients to your wife's group?

23 A. I do.

24 Q. You get any complaints from your patients about the
25 provision of physical therapy services --

1 A. On occasion.

2 Q. And what kind of complaints do you get?

3 A. The usual thing such as they had to pay a co-pay.

4 One time a physical therapist wasn't paying them

5 enough attention. One time a physical therapist

6 wasn't -- didn't spend enough time with them. A

7 physical therapist went too fast and hurt them.

8 Yes, we get a lot of complaints.

9 Q. You get complaints about your wife's care?

10 A. Occasionally.

11 Q. What complaints you get about her care?

12 A. I don't recall the exact complaints. But those are

13 just complaints that we get about the provision of

14 physical therapy services.

15 Q. Now the co-pay, would it be any difference if the

16 physical therapist is employed by you?

17 A. I don't know how the codes work and how the

18 payments work. I don't know.

19 Q. Now, when you say provide direct oversight, what

20 are you talking about?

21 A. I'm talking about employing a physical therapist so

22 that we can directly coordinate care with them and

23 oversee their provision of physical therapy

24 services.

25 Q. Are you going to go down to the physical therapist

CURRICULUM VITAE
WILLIAM G. MCCARTHY, JR., M.D.
Updated: March 2013

CURRENT OFFICE ADDRESS:

Main Office: Carolina Orthopaedic Surgery Associates, P.A.
134 Professional Park Drive
Rock Hill, South Carolina 29732
(803) 329-3130

Other Office Locations:

1690 Hwy 161 West
Fort Mill, South Carolina 29708
(803) 329-3130

6237 Carolina Place
Suite 313
Indian Land, South Carolina 29707
(803) 329-3130

HOME ADDRESS:

1903 Farrow Drive
Rock Hill, SC 29732
(803) 328-6365

PERSONAL DATA:

Date of Birth: May 13, 1955
Place of Birth: Blue Island, Illinois
Family: Wife, 2 children

EDUCATION:

St. Ignatius College Prep
Chicago, Illinois
1969-1973

Tulane University
New Orleans, Louisiana
1980
B.S. Biology

Louisiana State University School of Medicine
New Orleans, Louisiana
1980 - 1985

PlfRespt01stRFP_001867

PLAINTIFFS' MSJ - EXHIBIT # 12

Curriculum Vitae
William G. McCarthy, Jr., M.D.
Page 2

Doctor of Medicine

Charity Hospital of Louisiana
Louisiana State University Affiliated
New Orleans, Louisiana
Internship-Categorical (rotating)
1984 - 1986

Charity Hospital of Louisiana
Louisiana State University Affiliated
New Orleans, Louisiana
Residency-Orthopaedic Surgery
1986 - 1990

EMPLOYMENT HISTORY:

Carolina Orthopaedic Surgery Associates, P.A.
134 Professional Park Drive
Rock Hill, SC 29732
Private Practice
August 6, 1990 - present

LICENSURE:

South Carolina	15174	1990 to Present
North Carolina	56633	1990 to Present

BOARD CERTIFICATION:

American Board of Orthopaedic Surgery
Certified: July 10, 1992
Expires: December 31, 2014

HOSPITAL AFFILIATIONS:

Piedmont Medical Center
222 South Herlong Avenue
Rock Hill, SC 29732
1990 - present
Active

Elliott White Springs Memorial
800 West Meeting Street
Lancaster, SC 29720
1990 - present

PlfRespt01stRFP_001868

Courtesy

Carolinas Medical Center / Mercy Hospital
800 Vail Avenue
Charlotte, NC 28210
1993 - present
Courtesy

Chester County Hospital
1 Medical Park Drive
Chester, SC 29706
1990 - 2003
Resigned hospital staff - stopped practicing in Chester County

Curriculum Vitae
William G. McCarthy, Jr., M.D.
Page 3

PROFESSIONAL ORGANIZATIONS:

American Academy of Orthopaedic Surgeons
South Carolina Orthopaedic Association
American Medical Association
South Carolina Medical Association
York County Medical Society

PUBLICATIONS:

**Anterior Cruciate Ligament Reconstruction Using Freeze Dried Ethylene Oxide Sterilized,
Bone-Patellar Tendon-Bone Allografts**
Drez, DJ; McCarthy, WG; Robert, TS; Paine, R
Submitted: American Journal of Sports Medicine

**Anterior and Posterior Dislocation, Hip Dislocation with Associated Femoral Shaft Fractures;
A Case Report and Literature Review**
McCarthy, WG; Murphy C
Submitted: Orthopedics

PRESENTATIONS:

**Anterior Cruciate Ligament Reconstruction Using Freeze Dried Ethylene Oxide Sterilized,
Bone-Patellar Tendon-Bone Allografts**
Fifth Annual Residents' and Fellows' Conference
Southern Orthopaedic Association

P15Respt01stRFP_001869

New Orleans, Louisiana
November 5, 1988

Anterior and Posterior Dislocation, Hip Dislocation with Associated Femoral Shaft Fractures;
A Case Report and Literature Review
Twenty-Second Annual Residents' Conference
American Orthopaedic Association
Rochester, New York
March 29 - April 1, 1989

COURSE INSTRUCTOR:

Upper Extremity Trauma
American Academy of Orthopaedic Surgeons
New Orleans, Louisiana
May 14-16, 1987

Transpedicular Fixation of the Spine An International Update
New Orleans, Louisiana
October 13-15, 1988

PlfRespt01srRFP_001870

STATE OF SOUTH CAROLINA	)	
	)	THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
KRISTEN JOSEPH, PT,	)	C.A. NO.: 12-CP-40-2632
THOMAS N. JOSEPH, MD, AND	)	
WILLIAM G. MCCARTHY, MD,	)	
Plaintiffs,	)	
v.	)	
SOUTH CAROLINA DEPARTMENT	)	
OF LABOR, LICENSING AND	)	
REGULATION, SOUTH CAROLINA	)	Deposition of
BOARD OF PHYSICAL THERAPY,	)	WILLIAM G. MCCARTHY, M.D.
Defendant.	)	
and	)	June 17, 2013
SOUTH CAROLINA CHAPTER,	)	
AMERICAN PHYSICAL THERAPY	)	
ASSOCIATION, JOSEPH M.	)	
MCKOWEN, PT, SABRINA QUEEN	)	
BRIDGES, PTA, AND AMALIA W.)	)	
KIRBY (PTA),	)	
Defendants-Intervenors)	)	
_____	)	

Page 2

1 Deposition on oral examination of WILLIAM G.
2 MCCARTHY, M.D., reported by Lisa F. Huffman, Verbatim
3 Court Reporter and Notary Public in and for the State of
4 South Carolina; said deposition taken pursuant to notice
5 of deposition, by agreement and in accordance with South
6 Carolina Rules of Civil Procedure, at The Center for
7 Orthopaedic Surgery, 118 Professional Park Drive, Rock
8 Hill, South Carolina, on June 17, 2013, at the hour of
9 4:27 p.m.

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APPEARANCES

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8

9 Also Present:

10 Sara McCartha

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* * * * *

Page 6

1 S T I P U L A T I O N S

2 It is hereby stipulated and agreed by and
3 between counsel for the respective parties that the
4 Witness will not waive the reading and signing of the
5 deposition transcript.

6 Whereupon,

7 WILLIAM G. MCCARTHY, M.D.,
8 having been first duly sworn,
9 was examined and testified as follows:

10 DIRECT EXAMINATION

11 (By Mr. Todd)

12 Q. Your name, please.

13 A. William G. McCarthy, Jr., M.D.

14 Q. And your occupation?

15 A. Orthopedic surgery.

16 Q. How long have you practiced as an orthopedist?

17 A. Hold for just a second. Let me put this -- turn my
18 beeper off.

19 (Off the record.)

20 Q. How long have you been an orthopedist?

21 A. Twenty-three years, I've been here.

22 Q. And when you say "here," you've been with this same
23 group --

24 A. Yes, sir.

25 Q. -- for 23 years? Are you counting from when you

1 finished your residency?

2 A. Yes, sir.

3 Q. Where did you do your residency?

4 A. LSU School of Medicine in New Orleans.

5 Q. How about med school?

6 A. Same.

7 Q. From New Orleans. Are you from Louisiana
8 originally?

9 A. No, sir.

10 Q. Where are you from originally?

11 A. Chicago.

12 Q. How many partners do you have in your current
13 practice?

14 A. There are seven full-time partners.

15 Q. Any part time?

16 A. Dr. McQueen.

17 Q. How many locations do you have?

18 A. Three.

19 Q. And where are they?

20 A. Rock Hill, Fort Mill and Indian Land.

21 Q. Now you have a surgery center here in Rock Hill.

22 Do you have surgery centers in any of the other --
23 or outpatient surgery centers in any of the other
24 locations?

25 A. No, sir.

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1 Q. Do you have a physical therapy practice located in
2 or adjacent to any of your offices?

3 A. Yes, sir.

4 Q. Which one?

5 A. This office in Rock Hill and Indian Land.

6 Q. What's the name of that practice?

7 A. Palmetto Physical Therapy.

8 Q. Do you employ any of those physical therapists?

9 A. No, sir.

10 Q. Do you know who the owner is?

11 A. Janie Julian.

12 Q. Is she on the Board of Physical Therapy?

13 A. I don't know. I know she was at one time.

14 Q. Did you have -- and when I say the Sloan case, do
15 you know what I'm referring to?

16 A. Yes, sir.

17 Q. Did you have any involvement in the Sloan case? In
18 other words, were you monitoring that case? Have
19 any input into who the lawyers were?

20 A. No, sir.

21 Q. Were you aware that there was a case pending before
22 the Supreme Court issued its opinion in the Sloan
23 case?

24 A. I'm sorry, I'm not quite sure I understand that.

25 Q. Before the South Carolina Supreme Court issued an

1 opinion, there was litigation over the meaning of
2 the statute.

3 A. Yes, sir.

4 Q. Were you aware of the litigation prior to the
5 Supreme Court issuing its opinion?

6 A. Yes, sir.

7 Q. And how were you aware of it?

8 A. Because at the time we were employing physical
9 therapists.

10 Q. What was the name of the group that you were
11 employing?

12 A. Well, they were employees of ours, Carolina
13 Orthopaedic Surgery Associates.

14 Q. And how many physical therapists did you employ?

15 A. I'm not sure of the exact number.

16 Q. Where did you have physical therapists located,
17 what offices?

18 A. In this Rock Hill office.

19 Q. Now, I'll go back to 2006. Where did you have
20 offices in 2006?

21 A. Rock Hill, Fort Mill, Lancaster, and I cannot
22 remember exactly, we -- we had an office in Chester
23 and I -- it may have been closed at that point; I
24 cannot remember.

25 Q. Did you close the Lancaster office and move it to

Page 10

1 Indian Land?

2 A. Yes, sir.

3 Q. When did you do that?

4 A. We closed the Lancaster office towards the --

5 sometimes last year late in the year, as I

6 remember.

7 Q. Did you -- and when I say you -- okay, so at one

8 time you had an office in Lancaster and Indian

9 Land?

10 A. Yes, sir.

11 Q. You weren't a plaintiff in the Sloan case, were

12 you, you or this practice you're with, the

13 orthopedic practice? Did y'all have any role as

14 being a party in the Sloan case?

15 A. I don't recall.

16 Q. When did you -- when you learned about the Supreme

17 Court's decision in the Sloan case, what did you do

18 with the physical therapist that you employed?

19 What happened?

20 A. Well, they stopped being our employees.

21 Q. And in 2006, what offices were the employees

22 working? Were they working just out of Rock Hill?

23 A. Yes, sir.

24 Q. At that time, was there any kind of purchase of

25 assets by the physical therapists from the

1 orthopedist?

2 A. As I remember, the equipment was sold to them.

3 Q. What kind of equipment, in sort of a general
4 description, and what are we talking about?

5 A. Well, the exercise equipment that's used in the
6 scope of their practice, the weights and machines
7 and the tables that they use.

8 Q. About how many physical therapists were you
9 employing at the time?

10 A. I don't recall the exact number.

11 Q. Can you give me an estimate?

12 A. Five, maybe.

13 Q. I'm going to put that down as an estimate. Now
14 once the Sloan decision came out, did those
15 physical therapists continue to practice in the
16 same location that they had been practicing before?

17 A. Yes, sir.

18 Q. And did you enter into a lease agreement with them?

19 A. Yes, sir.

20 Q. When the Sloan case was decided, did that change in
21 any way the way you prescribed physical therapy?

22 A. Yes, sir.

23 Q. How did it change?

24 A. Well, one of the main changes was in the regards to
25 patients that had no insurance.

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1 Q. How did it change?

2 A. Well when they were our employees, we could
3 prescribe physical therapy and they would perform
4 their services. Once they were no longer
5 employees, then if the patients couldn't make
6 satisfactory financial arrangements with the
7 patients, then the therapy wasn't performed by
8 them.

9 Q. Have you had any discussion with Ms. Julian about
10 providing physical therapy to your patients who
11 have no insurance?

12 A. The subject came up back then.

13 Q. Do you remember what the result of the discussion
14 was?

15 A. Well since nothing changed, I -- I don't have exact
16 recall of what the -- of what the conversation
17 involved. At the time, Dr. Fleischer was president
18 of the group, and that was sort of his purview.

19 Q. Do you refer patients to the -- is it Palmetto
20 Physical Therapy?

21 A. Yes, sir.

22 Q. Do you refer patients to them who do not have
23 insurance today?

24 A. No, sir.

25 Q. If you have a patient who does not have insurance

1 and needs physical therapy, to whom do you refer
2 them?

3 A. Well, typically, a discussion's had with them about
4 the financial costs of what that would involve.
5 And oftentimes, it falls to me to instruct them in
6 an exercise program to give them certain handouts
7 and pursue it in that regard.

8 Q. Have you had any discussions with Ms. Julian or any
9 of the physical therapists and have a conversation,
10 "Well, if we're going to send you our paying
11 patients, then you've also got to take our non-
12 paying patients"?

13 A. Not that I recall.

14 Q. Have they ever refused to take a patient without
15 insurance, they being Palmetto Physical Therapy?

16 A. I cannot answer that. I don't know.

17 Q. How was it that you came to be a Plaintiff in this
18 lawsuit?

19 A. Well, as a member of the South Carolina Orthopaedic
20 Association and as someone who had been employing
21 physical therapists, it was felt that I would be
22 someone who was -- how shall I put it -- someone
23 who has been through the experience and it was
24 always our desire to have them have the ability to
25 employ physical therapists again. So that's why I

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1 became part of it.

2 Q. Now, who do you -- if you have a patient who needs
3 physical therapy, you'll refer them to Palmetto
4 Physical Therapist?

5 A. Well, they -- for those patients that have
6 insurance, we have women that are -- do pre-
7 certification. Some insurance plans require them
8 to go to different physical therapy companies.

9 Q. And what I was asking, what physical therapy
10 practices do you refer patients to?

11 A. Many. Not by name. Like I said, it goes to the --
12 sometimes patients have requests about where they
13 want their physical therapy done because they've
14 had experience with other physical therapy groups.
15 So typically I just write an order for the physical
16 therapy to occur, and then it goes from there, I
17 don't do any directing, "Oh, you need to go here or
18 you need to go there."

19 Q. How do you do it? You just say "physical therapy"?

20 A. Yes.

21 Q. And then somebody else in your office will decide
22 where that person goes?

23 MS. KIRK: Object to the form of the
24 question.

25 Q. Or which physical therapy practice that person will

1 go?

2 A. Well, as I said earlier, they check with their
3 insurance plan benefits. Like I say, some have
4 contractual relations with different physical
5 therapy organizations. If it's workers' comp,
6 that's another one. They have their own places
7 that they use, so --

8 Q. This is when you're dealing with insurance
9 companies, is the physical therapist in the
10 network, out of the network, that --

11 A. Right.

12 Q. -- kind of thing? And I imagine that was the case
13 even before the Sloan case was decided.

14 A. Yes, sir.

15 Q. So even though you employed physical therapists,
16 you didn't refer -- there may be times when you
17 would not send the patient to the physical
18 therapist you employ.

19 A. That's correct.

20 Q. Because they may not accept your -- well, the
21 insurance company may not accept your physical
22 therapist.

23 A. That's correct.

24 Q. So really, has anything changed in the way that
25 you're prescribing physical therapy, other than the

Page 16

1 physical therapist? You say that you don't refer
2 out patients who don't have insurance.

3 A. Also, patients of Medicaid. Previously we would do
4 them, do their services here. And afterwards, they
5 had to have their own physical therapy done at the
6 hospital.

7 Q. And is that -- whose decision is that? Is that
8 Medicaid-driven? Or is that physical therapy
9 practice driven?

10 A. That I can't answer.

11 Q. And would you say, if somebody's on Medicaid, they
12 have to go to the hospital to get physical therapy?

13 A. That's where their physical therapy was being done,
14 yes, sir.

15 Q. Is that true today?

16 A. I would assume so. I don't -- I -- I don't know of
17 any change.

18 Q. Has there been any change since Sloan where
19 Medicaid patients would get their physical therapy?

20 A. Well, we would do Medicaid patients in our -- when
21 they were our employees, they would be done here.

22 Q. So since that time, you refer them to the hospital.

23 A. Yes, sir.

24 Q. Any other changes since Sloan?

25 A. As far as?

1 relationship is between a physical therapist and a
2 physical therapy assistant?

3 A. The assistant's supposed to work under the
4 direction of the physical therapist.

5 Q. Do you know whether or not the physical therapist
6 has to be present when the physical therapy
7 assistant is doing the hands-on care or not?

8 A. I couldn't answer that.

9 Q. What relief are you looking to get out of this
10 lawsuit? What would you like for the Court to do?

11 A. To grant us the ability to employ physical
12 therapists again, like we did in the past.

13 Q. Anything else that you're looking for out of this
14 lawsuit?

15 A. No, sir.

16 Q. Do you have any training in physical therapy?

17 A. As part of our training in orthopedics, you
18 certainly learn exercise programs that are
19 prescribed for injuries or post-surgical care. As
20 part of our training, we did have interaction with
21 physical therapists on a regular basis.

22 Q. In your practice today, do you perform physical
23 therapy on your patients?

24 A. Well, as I discussed earlier, oftentimes we will
25 get patients who do not have the resources or don't

Page 22

1 want to incur the expense of going to physical
2 therapy, and instruct them in -- in exercises and
3 give them certain handouts to illustrate those to
4 them.

5 Q. When you do that, you're basically educating them
6 in the exercises that they need to do?

7 A. Yes, sir.

8 Q. And do you bill for that as a physical therapy
9 service?

10 A. No, sir.

11 Q. Do you know of any orthopedist who practices
12 primarily in the area of physical therapy?

13 A. None that I know of, sir.

14 Q. Do you know of any orthopedist who perform and bill
15 for physical therapy services?

16 A. Not that I know of.

17 Q. Now, are you on the South Carolina Orthopaedic
18 Association executive committee?

19 A. No.

20 Q. Have you ever held any leadership positions in the
21 South Carolina Orthopaedic Association?

22 A. No, sir.

23 Q. Am I getting the names right? Is that it?

24 A. Yes.

25 Q. What about the American Academy of Orthopaedics, is

1 see you, as opposed to some of your other partners.

2 A. Yes, sir.

3 Q. And if you're out of town or unavailable or in
4 surgery and they need to be seen, how would that
5 person be seen?

6 A. Assuming that I couldn't see them?

7 Q. Assuming that you couldn't see them.

8 A. They would be seen by typically the doctor on-call.

9 Q. Now have you -- the position statement that was
10 rendered by Board of Physical therapy in 2011, have
11 you reviewed that position statement?

12 A. No, sir.

13 Q. Do you have any -- do you take any issue with if a
14 physical therapist is on vacation, having another
15 physical therapist who may be in that same practice
16 seeing that physical therapist's patients?

17 A. I'm sorry?

18 Q. Yeah. Suppose you have -- how many physical
19 therapists work in this office in Rock Hill?

20 A. I think there's four and then two assistants; it
21 fluctuates.

22 Q. And when you write a referral for physical therapy,
23 and this is an involved question, so you have to --
24 I'll say it's a broad question. Do you write
25 "evaluate and treat"? Or do you write "see this

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1 patient for this number of times and provide this
2 physical therapy"? Or is it somewhere in-between?

3 MS. KIRK: I Object to the form.

4 Q. Or does it vary from patient to patient?

5 A. It varies from patient to patient.

6 Q. It could be anywhere within that sort of spectrum?

7 A. It may range from a one time evaluation and given a
8 home exercise program to -- certain surgeries have
9 protocols that are set up for their physical
10 therapy. So it varies from patient to patient.

11 Q. And there will be times when the patient has to go
12 back for more than one visit, I'm assuming. More
13 than one physical therapy visit for certain --

14 A. Yes, sir.

15 Q. If the physical therapist -- if the patient is
16 supposed to see a physical therapist at two o'clock
17 on a Tuesday and that physical therapist is called
18 away to tend to a sick child or has to go to a
19 funeral, do you have any problem with another
20 physical therapist who works in your office seeing
21 that patient?

22 A. No, sir.

23 Q. Have you ever had to file a complaint against any
24 physical therapist with the South Carolina Board of
25 Physical Therapy?

STATE OF SOUTH CAROLINA

COUNTY OF YORK

AFFIDAVIT OF WILLIAM G. MCCARTHY, JR., M.D.

Before me, the undersigned Notary Public in and for said County and State, personally appeared William G. McCarthy, Jr., M.D., known to me and being first duly sworn, deposes and says:

1. My name is William G. McCarthy, Jr., M.D., and I am a licensed orthopaedic surgeon in South Carolina and practice in York County. I am a Diplomate, American Board of Orthopaedic Surgeons, and a member of Carolina Orthopaedic Surgery Associates, PA, a South Carolina professional association, whose physicians provide professional medical services in York and Lancaster Counties, South Carolina, in the field of general orthopaedics, and who employ physicians and physician assistants. Previously, we employed physical therapists.

2. I have provider agreements with: 1) CMS to provide Medicare services to Medicare patients; 2) SCDHHS to provide Medicaid services to Medicaid patients; and 3) with numerous other third party payors to provide services to covered patients.

3. As part of my scope of practice, I have provided and do provide physical therapy services to my patients, and I educate them on how to do physical therapy exercises.

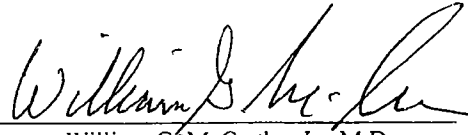
4. I have had difficulty getting physical therapists or physical therapy groups to see and provide services patients whose only source of health care coverage is Medicaid.

FURTHER AFFIANT SAITH NOT.

[signature on following page]

COLUMBIA 1134710v1

PLAINTIFFS' MSJ – EXHIBIT # 14



William G. McCarthy, Jr., M.D.

SWORN to before me this 5 day
of December, 2013

May G. Ellens

(L.S.)

Notary Public for South Carolina

My Commission Expires: 01/25/2018

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF RICHLAND

KRISTIN JOSEPH, P.T., THOMAS N. JOSEPH, M.D.,
AND WILLIAM G. MCCARTHY, M.D.,

Plaintiff(s),
vs.

Case No.: 2012-CP-40-2632

SOUTH CAROLINA DEPARTMENT OF LABOR,
LICENSING AND REGULATION, SOUTH CAROLINA
BOARD OF PHYSICAL THERAPY,

Defendant(s).

D E P O S I T I O N

WITNESS: MARILYN M. SWYGERT

DATE: Monday, May 13, 2013

TIME: 3:10 p.m.

LOCATION: McNair Law Firm
1221 Main Street, 18th Floor
Columbia, South Carolina

TAKEN BY: Attorneys for the Plaintiffs

REPORTED BY: SHERI L. BYERS
Registered Professional Reporter

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PLAINTIFFS' MSJ - EXHIBIT # 17

Electronically signed by Sheri Byers

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19

20

21 ALSO PRESENT:

22 JOHN C. BRADLEY, JR., ESQUIRE, FOR SCAPTA

23

24

25 (INDEX AT REAR OF TRANSCRIPT)

Page 8

1 A. Probably 50 percent.

2 Q. Okay. What about TRICARE?

3 A. I do not know.

4 Q. Is it your understanding that it is within a
5 physician's scope of practice to be able to provide
6 physical therapy services to a patient?

7 A. I believe that they can themselves provide
8 services.

9 Q. Okay. When were you first appointed to the
10 PT board?

11 A. I believe it was in 2004.

12 Q. What positions have you -- what positions
13 have you held -- office positions have you held on the
14 PT board?

15 A. Board member and board chair.

16 Q. When did you become board chair?

17 A. I believe it was in 2007.

18 Q. As a physical therapist, do you consider
19 yourself a health care provider?

20 A. Yes, ma'am.

21 Q. Are you active in SCAPTA? Am I saying that
22 correctly?

23 A. You are. I am active in that I try to attend
24 their meetings. I've been more active in the past.

25 Q. What positions have you held in SCAPTA in the

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1 A. The initial evaluation meaning that's
2 performed by the therapist?

3 Q. Yes, ma'am. Because I was looking at your
4 Web site, and you said there was an initial one-hour
5 evaluation.

6 A. Okay. That means that when the patient comes
7 in they're seen for an initial evaluation, which
8 typically takes an hour. And then according to what
9 the therapist that sees them determines in
10 coordination, if they have a referral with what the
11 physician has requested, they're then put on that
12 therapist's schedule for the next visits.

13 Q. Does a physician typically request a specific
14 physical therapist?

15 A. Sometimes they have.

16 Q. What's typical?

17 A. That they don't.

18 Q. Okay. So when a physician does not request a
19 specific physical therapist, how is a patient assigned
20 to a physical therapist for treatment?

21 A. The admin staff -- the office staff calls
22 them and schedules them according to their -- their --
23 their time, you know, if they work. They put them in
24 wherever the opening is that best suits their time.

25 Q. And when you say "their," you're talking

1 about the patient's need?

2 A. Yes, patient's needs.

3 Q. Okay. What is the concept of coverage within
4 a PT physical therapy practice?

5 A. Coverage of the patient or coverage of an
6 office or --

7 Q. Either one.

8 A. Well, I'm not sure if I understand what
9 you're asking.

10 Q. As a PT board member, would you define
11 coverage in health care professions to mean having
12 another professional with the appropriate credentials
13 take call and see patients for a health care provider
14 who is unavailable for whatever the reason?

15 A. Yes. Like in the example of today patients
16 that were on my schedule are now being covered by other
17 therapists.

18 Q. That would be -- yes, ma'am.

19 A. Is that what you mean?

20 Q. Yes, ma'am.

21 A. Okay.

22 Q. And does that definition apply equally to
23 other health care professionals in your opinion?

24 A. Yes.

25 Q. Okay. I think you said you got on the board

Page 32

1 ways so I could get them to him on time.

2 MR. TODD: I don't need to discuss --

3 MS. CRUM: I won't ask anything else on that.

4 MR. TODD: All right.

5 (The Witness reenters the deposition room.)

6 BY MS. CRUM:

7 Q. Ms. Swygert, in the middle of the page you
8 see an e-mail sent June 13th, 2011, from Mr. Ervin to
9 you?

10 A. Yes.

11 Q. Do you recognize that as an e-mail you
12 received?

13 A. Yes.

14 Q. Okay. Was that an e-mail asking Mr. -- I'm
15 sorry, was that an e-mail from Mr. Ervin telling you he
16 had money in the account to pay for Mr. Todd's services
17 regarding Mr. Robert Carpenter's opinion request?

18 A. Yes.

19 Q. Okay. When did you all hire Mr. Todd to
20 provide assistance with Mr. Carpenter's opinion
21 request?

22 A. I would venture to -- it was probably right
23 after I got the initial request from Mr. Carpenter, so
24 sometime between -- after May 2nd.

25 Q. With whom did you consult prior to hiring

1 Mr. Todd to assist the board with the opinion request?

2 A. I don't recall consulting with anybody.

3 Q. Did you talk to any of the other board
4 members?

5 A. No.

6 Q. Okay. How did you know to hire Mr. Todd?

7 A. I contacted Dargan to get his name because he
8 had worked on this particular case that had the same --
9 the Sloan case.

10 Q. Because he worked on the Sloan case?

11 A. Yes.

12 Q. Okay. So you contacted Mr. Dargan to get his
13 name?

14 A. Well, I contacted Mr. Dargan to get his name,
15 and he said he would call him for me.

16 Q. Okay. Do you know Mr. Jim Stoker?

17 A. I do.

18 Q. How do you know Mr. Stoker?

19 A. He was past president of SCAPTA.

20 Q. Were you serving on the SCAPTA board when he
21 was president?

22 A. I don't think so, no.

23 Q. When were you president of SCAPTA?

24 A. I knew you were going to ask that question.

25 In the '90s.

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1 is that correct?

2 A. Could be. I mean, apparently so.

3 Q. That's what it says?

4 A. Yeah. That's what it says, right.

5 Q. Okay. Look on over and see if you recognize
6 the next two pages. It's a letter dated May 3rd, 2011,
7 and it is from Mr. Carpenter to you. Is that correct?

8 A. Yes.

9 Q. Okay. Do you know Mr. Carpenter?

10 A. Yes, I've met him before.

11 Q. Okay. Let's look at the contents of the
12 letter a minute. Look at the second paragraph. About
13 halfway down, a little over halfway down it says, "The
14 Chapter understands that the Attorney General's Office
15 has received a request for an opinion as to whether the
16 statutory clauses covers intra-professional as well as
17 inter-professional interactions."

18 When you got this letter, had you had any
19 discussions with anyone that the Attorney General's
20 Office had an opinion request pending?

21 A. No.

22 Q. Had you received a call from Mr. Carpenter,
23 Mr. Stoker, or anyone else that the Chapter was going
24 to send an opinion request to the board prior to your
25 receiving this letter?

1 A. I don't remember.

2 Q. Were you surprised to receive this letter?

3 A. Not necessarily.

4 Q. Do you normally just get opinion requests out
5 of the blue like this?

6 A. Well, I think it's been fairly common
7 knowledge that the Orthopedic Association is not happy
8 with this decision.

9 Q. When you say "this decision," you're talking
10 about the Sloan decision?

11 A. Sloan decision, yes. So it's just been a
12 matter of what next, you know. What their plan is
13 next. So I had heard rumors that there was either
14 going to be legislation introduced or something to try
15 to block or to try to change the Sloan decision.

16 Q. But to the best of your recollection, you did
17 not know that there was an opinion request pending
18 before the attorney general until you received this
19 letter from Mr. Carpenter on May the 3rd; is that
20 correct?

21 A. That is correct.

22 Q. Okay. What is the difference between
23 intra-professional interactions and inter-professional
24 interactions?

25 A. It's a good question. That was one that I

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1 needed help in clarifying.

2 Q. Okay.

3 A. I would guess that one meant within the
4 physical therapy profession versus within the health
5 care profession.

6 Q. Look on over on the last page of Exhibit 7,
7 please, ma'am. See that last paragraph beginning with,
8 "In addition, the Chapter hereby asks the board to
9 advise the Attorney General that is considering these
10 questions and to request the Attorney General to
11 postpone issuing his opinion until the board has had
12 the opportunity to answer the questions."

13 Did the board ever have any interaction with
14 the Attorney General regarding either Mr. Carpenter's
15 request or any request that might have been pending
16 before the AG's office?

17 A. No, not that I'm aware of.

18 Q. Okay. Do you think as chairman you would
19 have been aware of any interaction on behalf of the
20 board?

21 A. I would think so.

22 Q. Okay. What is your understanding of the
23 difference between intra-professional and
24 inter-professional interactions now?

25 A. That one is within the -- one is of the

1 smaller venue versus outside that venue.

2 MS. CRUM: Okay.

3 (PLF. EXH. 8, E-Mails Dated May 3, 2011, with
4 Attachment, was marked for identification.)

5 BY MS. CRUM:

6 Q. Now, Ms. Swygert, we had just looked at
7 Exhibit 7, which was an e-mail from Mr. Carpenter to
8 you at 4:50 a.m. on May the 3rd. Now, I'm showing you
9 an e-mail at 7:06 p.m. from Mr. Carpenter to you and
10 Ms. Reynolds. Do you recognize that e-mail?

11 A. Are these not one in the same?

12 Q. I'm actually going to ask you about that.

13 A. Oh.

14 Q. I was just asking you right now if you
15 recognize the e-mails.

16 A. As being two different e-mails or the same
17 or --

18 Q. Two different e-mails.

19 A. I recall --

20 Q. Okay. I'm sorry.

21 A. I recall getting two and getting an e-mail
22 that -- I forget why now.

23 Q. Look at the second -- look at the second page
24 of Exhibit 8 that I just handed you. You got the third
25 page. This is Exhibit 8 right here.

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1 A. Okay. The second page?

2 Q. Yeah. The second page. Read the first one,
3 please, ma'am.

4 A. "Sorry for the second e-mail. Been a long
5 day. Don't allow me to --" "-- did not allow me to
6 attach my letter."

7 Okay.

8 Q. Ms. Swygert, if you would look at the first
9 page of Exhibit 8. Now, the first page of Exhibit 8 is
10 an e-mail dated May 3rd, 2011, at 7:06 p.m. Is that
11 correct?

12 A. That's what it says.

13 Q. Okay. Is the second page of the e-mail --
14 I'm sorry, of the exhibit, an e-mail dated May 3rd,
15 2011, at 7:08 p.m.?

16 A. Okay.

17 Q. Are those the two e-mails that you were just
18 referencing where you said you got one and then you got
19 another e-mail that said forget that one, here's this
20 one?

21 A. I guess.

22 Q. Are these --

23 A. Yes.

24 Q. -- e-mails that you received, Ms. Swygert, as
25 chairman of the Board of Physical Therapy Examiners?

1 A. Yes.

2 Q. Now, look at the third page, which is
3 dated -- it's got a date May 3rd, 2011, at the top. Do
4 you know if that is the first thing you got in response
5 to the e-mail -- the second letter, the May 3rd letter,
6 that is an identical letter, isn't it, to the one
7 that's in Exhibit 7?

8 A. Let me look.

9 It appears to be the same.

10 Q. Now, if you will flip on over to the next
11 page in Exhibit 8, and the page after that, is this the
12 signed letter that you got from Mr. Carpenter,
13 according to his e-mail, at 7:08 p.m. on May 3rd, 2011?

14 A. Yes, this is. This is the one, yes.

15 Q. Now, this letter is requested on
16 Mr. Carpenter's behalf and not on behalf of the
17 South Carolina Association of Physical Therapists,
18 isn't it?

19 A. Yes.

20 Q. Did you have any conversations with
21 Mr. Carpenter as to why he sent you a first letter
22 requesting an opinion on behalf of the SCAPTA and a
23 second letter only on behalf of himself?

24 A. Not that I -- no. I don't remember having
25 any conversation with him regarding that.

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1 Q. Okay. All right. This letter, the second
2 letter in Exhibit 8, the signed letter --

3 A. Uh-huh.

4 Q. -- when you got that letter, did you send
5 copies of that letter to the other board members?

6 A. No.

7 Q. To whom did you send a copy of the letter?

8 A. I sent a copy of it to Dargan to give to
9 Monty Todd.

10 Q. And Dargan is Mr. Ervin, and he's a member of
11 the board?

12 A. Mr. Ervin, yes.

13 Q. Okay. Did you call any of the other board
14 members other than Mr. Ervin to talk to them about the
15 opinion request?

16 A. No.

17 MS. CRUM: Okay.

18 (PLF. EXH. 9, E-Mails Dated January 22, 2013,
19 June 2, 2011, and June 3, 2011, was marked for
20 identification.)

21 BY MS. CRUM:

22 Q. In the middle of the page, you see an e-mail
23 that's from you to Bob. Is that Bob Carpenter?

24 A. In the middle, I'm sorry, of this page?

25 Q. The first page. It's dated June 2, 2011, at

1 12:10 p.m.

2 A. Yes. Yes, it is.

3 Q. Okay. And did you attach the signed letter
4 that we looked at in Exhibit 8 to this e-mail back to
5 Mr. Carpenter sending him the board's opinion letter?

6 A. Did I attach his letter?

7 Q. No, ma'am. Your letter.

8 A. My letter?

9 Q. Yes, ma'am.

10 A. Yeah, I think I did.

11 Q. It says, "See attached in response to your
12 question."

13 A. Yes. That would have been my letter.

14 Q. Okay.

15 A. Right.

16 Q. And that was the letter of June the 2nd,
17 answering his question?

18 A. Correct.

19 Q. Okay. In between May the 3rd and when you
20 responded to Mr. Carpenter on June the 2nd, did you
21 talk to anyone about your response other than Mr. Ervin
22 and Mr. Todd?

23 A. Also in-house attorney.

24 Q. Okay. And who was the in-house attorney?

25 A. Jamie Saxon.

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1 Q. Okay. And the board voted to develop the
2 information in your letter and to frequently asked
3 questions; is that correct?

4 A. Yes.

5 Q. And was the purpose of developing the answer
6 and to frequently asked questions so that licensed PTs
7 in South Carolina would understand how the board
8 interpreted the law?

9 A. Yes.

10 Q. Okay. A committee was appointed comprised of
11 Mr. Ervin and Ms. Witherspoon to develop the frequently
12 asked questions. Did that ever occur?

13 A. I don't believe it did.

14 Q. Okay. You said a majority of the board
15 agreed with the position taken in your letter of June
16 the 3rd -- I'm sorry, June 2nd, 2011, back to Mr.
17 Carpenter. Who didn't agree with it?

18 A. I believe it was Mr. O'Leary and Mr. Reeves.

19 Q. Mr. O'Leary and who?

20 A. Mr. Reeves.

21 MS. CRUM: Reeves. Thank you.

22 (PLF. EXH. 13, Special Conference Call Board
23 Meeting Agenda Dated July 22, 2011, was marked for
24 identification.)

25 BY MS. CRUM:

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF RICHLAND

KRISTIN JOSEPH, P.T., THOMAS N. JOSEPH, M.D.,
AND WILLIAM G. MCCARTHY, M.D.,

Plaintiff(s),
vs.

Case No.: 2012-CP-40-2632

SOUTH CAROLINA DEPARTMENT OF LABOR,
LICENSING AND REGULATION, SOUTH CAROLINA
BOARD OF PHYSICAL THERAPY,

Defendant(s).

D E P O S I T I O N

WITNESS: E. DARGAN ERVIN, JR.

DATE: Monday, May 13, 2013

TIME: 9:06 a.m.

LOCATION: McNair Law Firm
1221 Main Street, 18th Floor
Columbia, South Carolina

TAKEN BY: Attorneys for the Plaintiffs

REPORTED BY: SHERI L. BYERS
Registered Professional Reporter

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PLAINTIFFS' MSJ - EXHIBIT # 18

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Page 2

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26 ALSO PRESENT:

27 JOHN C. BRADLEY, JR., ESQUIRE, FOR SCAPTA

28 (INDEX AT REAR OF TRANSCRIPT)

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1 Physical Therapy Association, yes, I am a member of the
2 state chapter of the -- of the South Carolina chapter.

3 Q. Would anybody ever be, I guess, a member of
4 one but not the other --

5 A. You can't --

6 Q. -- or is it just sort of a package deal?

7 A. You can't be a member of one and not the
8 other.

9 MR. TODD: You're doing a good job of
10 anticipating her questions --

11 THE WITNESS: I'm sorry.

12 MR. TODD: -- she can't get you talking at
13 the same time.

14 THE WITNESS: Thank you.

15 BY MS. KIRK:

16 Q. Did you have any conversations with
17 Mr. Stoker prior to receiving Mr. Carpenter's May 3rd
18 letter we marked as Exhibit 1?

19 A. I did not.

20 Q. Did you talk with Mr. Stoker at all about
21 that letter?

22 A. I did not.

23 Q. Did the board have a meeting to discuss
24 responding to Mr. Carpenter's letter?

25 A. No. There was no meeting relative to this or

1 where we dealt with this issue.

2 Q. Did you have any involvement in responding to
3 Mr. Carpenter?

4 A. Other than being the intermediary to send
5 this to Monty for his interpretation and send Monty's
6 response back to Marilyn, that was my only -- I was a
7 conduit, essentially, for moving information back and
8 forth.

9 Q. Okay. Did the board meet and vote on whether
10 or not -- or to respond or not?

11 A. No, we did not.

12 Q. I'm going to hand you the June 2nd, 2011,
13 letter from the board responding to Mr. Carpenter. Do
14 you recognize that letter?

15 A. I do.

16 Q. Who wrote that letter?

17 A. I mean, the signatory is Marilyn. I'm
18 assuming that when I sent it back to Marilyn, there was
19 some advice counsel was involved with it, as well. But
20 I don't know for sure.

21 Q. Okay. Did you approve that letter before it
22 went out?

23 A. Did I?

24 Q. Uh-huh.

25 A. I did not.

1 A. Yes.

2 Q. -- Atlantic joined and became additional
3 locations of?

4 A. Yes.

5 Q. Okay. What is your understanding of the
6 board's definition of "coverage"?

7 A. I don't know that we've ever, you know, had a
8 definition of coverage. I mean, my understanding is
9 like I'm here today, so I have two PT assistants who
10 are covering my patients back in North Myrtle Beach.
11 But it's just, you know, from my personal experience is
12 we have therapists who are going to look at my
13 patients, look at my documentation, and continue the
14 care that keeps them moving towards their goal.

15 Q. Okay. Can you explain to me the difference
16 between a referral of a patient and coverage of a
17 patient.

18 A. Looking at Sloan, referral would be
19 intra-professional. I mean, you have a physician
20 who -- or a nurse practitioner or a PA who, you know,
21 determines that physical therapy is going to help with
22 whatever problem the patient has and then says, "I'm
23 referring you or sending you over to the physical
24 therapists where coverage is."

25 You know, I've evaluated a patient, I

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1 developed a plan of care based on physical therapy
2 foundations, what we want to work on. And then if I am
3 not there, someone else can pick up my record and
4 follow that plan of care that was developed by me.

5 Q. Okay. And what would be the difference
6 between referral of a patient and -- what would be the
7 difference between referral of a patient and directing
8 a patient for treatment?

9 A. Directing a patient for treatment. I mean, I
10 would see a physician could direct them and that be a
11 referral. I could see they could be similar whereas
12 I'm going to be out and I'm directing an assistant to
13 see someone. I see them as -- as can be very separate,
14 but can be same thing.

15 Q. What about not when you're out here doing
16 your deposition, but if you direct a patient to a
17 specialist PT for some sort of specialized area that
18 you don't do, is that a referral?

19 MR. TODD: Objection.

20 MS. KIRK: You can still answer.

21 THE WITNESS: I don't see it as a referral.

22 BY MS. KIRK:

23 Q. Okay. Why not?

24 A. Because it's still physical therapy. There
25 are -- I mean, I've had a total knee replacement and

1 there are therapists who want me to see total knee
2 replacement patients just because I can relate to them,
3 I can talk to them. And I think it's sometimes good to
4 have another set of eyes as a physical therapist, I may
5 have missed something. But it's consultation but not a
6 referral because, again, that's coming from, you know,
7 someone outside the profession I see as a referral.

8 Q. Is there any situation or an example you can
9 give me of a PT referring to another PT?

10 MR. TODD: Objection.

11 MS. KIRK: You can still answer.

12 THE WITNESS: I mean, if someone leaves town.

13 I refer folks to -- but, again, they walk in there with
14 that physician's order, I make sure before they leave
15 they have the same referral that I got. But in North
16 Myrtle Beach we have a large number of transients. We
17 have folks from Canada, folks from Ohio. And they go
18 home when the weather turns hot. And so they have to
19 pick up their care there, but, you know, I make sure
20 they have their order that they came from the physician
21 with when they came to see me before they go.

22 BY MS. KIRK:

23 Q. Okay. You say that 99 percent of your
24 patients have physician orders, how does the other 1
25 percent of patients access your services?

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1 And so I made a donation.

2 Q. Did Atlantic Physical Therapy have the option
3 to do salary deferral to make donations to the fund?

4 A. No.

5 Q. I'm going to show you an e-mail from 2011 and
6 see if you recognize that.

7 A. Yes, I do.

8 MS. KIRK: Can we mark this as an exhibit.

9 (PLF. EXH. 7, E-Mails, was marked for
10 identification.)

11 BY MS. KIRK:

12 Q. Can you identify Exhibit 7?

13 A. Yes. It's an e-mail -- it's a string with
14 the last one being from me to Marilyn regarding the
15 account.

16 Q. Okay. Was this account used in 2011 in
17 responding to the inquiry from Mr. Carpenter?

18 A. It was.

19 Q. Okay. Is it being used right now?

20 A. Unless the attorney has a very little bit of
21 time I could buy with it. There's probably a hundred
22 dollars, so I would say no.

23 Q. Okay. Your e-mail to Marilyn -- is it
24 Swygert?

25 A. It is.

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF RICHLAND

KRISTIN JOSEPH, P.T., THOMAS N. JOSEPH, M.D.,
AND WILLIAM G. MCCARTHY, M.D.,

Plaintiff(s),

vs.

Case No.: 2012-CP-40-2632

SOUTH CAROLINA DEPARTMENT OF LABOR,
LICENSING AND REGULATION, SOUTH CAROLINA
BOARD OF PHYSICAL THERAPY,

Defendant(s).

D E P O S I T I O N

WITNESS: CYNTHIA WITHERSPOON

DATE: Friday, June 7, 2013

TIME: 9:09 a.m.

LOCATION: McNair Law Firm
1221 Main Street, 18th Floor
Columbia, South Carolina

TAKEN BY: Attorneys for the Plaintiffs

REPORTED BY: SHERI L. BYERS
Registered Professional Reporter

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PLAINTIFFS' MSJ - EXHIBIT # 19

Electronically signed by Sheri Byers

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10 (INDEX AT REAR OF TRANSCRIPT)

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1 referral from a physician. They will walk in our door
2 or call and say, "I have a shoulder problem, can you
3 see me?" I'm just saying. And we put them on the
4 schedule.

5 We ask -- when they come in, we ask for their
6 insurance card or the secretaries usually try to ask
7 for all that information up front and verify their
8 insurance and/or if they are going to be self pay.
9 Some are self pay, some are insurance.

10 And when they come in the door, they are
11 designated on a physical therapist's schedule. The
12 physical therapist sees them, evaluates them, treats
13 them, does a treatment plan, and takes them through the
14 course of service.

15 Q. You said that the patient is designated on a
16 physical therapist's schedule. Who makes those
17 designations?

18 A. Secretary.

19 Q. Is the secretary the same as or different
20 from Ms. Hoover?

21 A. Absolutely. Ms. Hoover is the office
22 manager.

23 Q. So your secretary, who's that?

24 A. Well, every office has the front desk person.
25 Taylor Street is Misty Dunning.

1 Q. Okay.

2 A. Sunset's is Nichole Gilmore. And Garners
3 Ferry, we just hired a new one, Kimberly. I can't tell
4 you.

5 Q. That's okay. I just saw somebody riding up
6 in the elevator who works here, and I didn't have a
7 clue who it was, so ...

8 So the secretary serves as your schedulers?

9 A. Correct.

10 Q. Okay. If somebody walks in to the Sunset
11 office and wants to see you but you're booked, what
12 happens?

13 A. The secretary will schedule them in to an
14 appointment that I have on my books where I'm
15 available.

16 Q. Okay.

17 A. And the person is available.

18 Q. Would the secretary ever schedule the patient
19 at another one of your facilities?

20 A. Not if they want to see me because I'm not
21 there.

22 Q. Okay. Well, if they walk in to the Sunset
23 office and they walk in to Ellis Therapy and they say,
24 "I want to see a therapist," and they don't know
25 anything about the therapists and your secretary says

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1 could be a physician within the facility themselves
2 that is not orthopedic in nature and they could refer
3 somebody to me. It is always put on my schedule when
4 I'm there either Monday or Wednesday.

5 Q. But the patients at SCDC and DJJ are not
6 direct access; is that correct?

7 A. No.

8 Q. Okay. Any other exclusive contracts for the
9 provision of physical therapy?

10 A. Not that I'm aware of.

11 Q. As a PT board member, what is your definition
12 of referral?

13 A. I go back to Sloan, and that definition is if
14 you send or direct to a specialty, a specialist or
15 whatever, that's the general crux of it. That's my
16 definition of a referral. To send or direct the care
17 of a patient to a specialty. Something like that.

18 Q. Is physical therapy a specialty?

19 A. Physical therapy is, I believe, yes.

20 Q. What is -- as a board member, what is your
21 definition of coverage?

22 A. Coverage is when I -- take me personally. I
23 went on vacation, let's say, in April. I cannot be
24 there to see my patients. I call Kimberly, tell her
25 the dates I am going to be off, and that I'm in need of

1 coverage. One of my other physical therapists or my
2 physical therapy assistant will come cover my clinic
3 for me.

4 Q. Can your physical therapy assistant cover
5 your clinic when there is not a physical therapist
6 onsite at the clinic?

7 A. Yes.

8 Q. Tell me how that works.

9 A. I am an ORF.

10 MR. TODD: You might have to spell ORF.

11 THE WITNESS: Yeah. I am a -- what's it
12 stands for? Outpatient rehabilitation facility. And
13 that allows -- and I'm a part A provider which is rare.

14 BY MS. CRUM:

15 Q. Okay.

16 A. And that allows a physical therapy assistant
17 to be in the facility treating patients without a
18 physical therapist on the premises. I bill through
19 part A, get covered through part B.

20 Q. Doesn't the South Carolina Practice Act
21 require supervision of a physical therapist assistant
22 by a physical therapist?

23 A. Correct. It does.

24 Q. Can that be done remotely?

25 A. Yes, it can.

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1 Q. Right. I think I'm just about finished.

2 Have you talked to the other members of the
3 board about this lawsuit when your attorney was not --
4 when one of your attorneys was not present?

5 A. No, not that I ever recall. No.

6 Q. Have you had any e-mail communications with
7 the other board members about this suit when your
8 attorney was not present?

9 A. No.

10 Q. After 30 days, there has to be a physician
11 order for you to continue to treat a patient, correct?

12 A. Medical doctor or dentist, correct.

13 Q. Right.

14 A. Yes. Or physician extender, yes.

15 Q. Okay. Now, when that order is given, does
16 the order say how frequently you have to report back to
17 the physician or the dentist?

18 A. No, it totally depends upon the person who's
19 referred to. Sometimes I will get one that says
20 evaluate and treat. Some will say three times a week
21 for two weeks. Some will say three times a week for
22 four weeks.

23 Q. It's kind of across the board?

24 A. It's across the board.

25 Q. Okay. If you know, under the Medicare

1 guidelines, is there a requirement as to how often a PT
2 has to report to a physician during the entire cap
3 period?

4 A. No.

5 Q. Okay.

6 A. I'm not aware of that.

7 Q. Okay. You're not aware or there's not, I'm
8 sorry?

9 A. I'm sorry. I'm not aware of a stipulation by
10 Medicare that says I have to report back -- wait a
11 minute. Wait a minute.

12 Maybe there's a 30-day or 90-day rule that I
13 have to. I don't know.

14 Q. Okay. Under current Medicare reimbursement,
15 am I correct that there's a cap of 90 days that PT can
16 be provided without some sort of waiver?

17 A. That could be. I mean, I never go 90 days,
18 so I haven't been concerned about it.

19 Q. Okay.

20 A. I'm never in with a physician. I know every
21 ten visits I have to do another G code for Medicare,
22 and I don't usually see anybody that long, so I --

23 Q. What is a G code?

24 A. G codes are codes that -- conditioning codes
25 that you have to do a code on evaluating the patient

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF RICHLAND

KRISTIN JOSEPH, P.T., THOMAS N. JOSEPH, M.D.,
AND WILLIAM G. MCCARTHY, M.D.,

Plaintiff(s),
vs.

Case No.: 2012-CP-40-2632

SOUTH CAROLINA DEPARTMENT OF LABOR,
LICENSING AND REGULATION, SOUTH CAROLINA
BOARD OF PHYSICAL THERAPY,

Defendant(s).

D E P O S I T I O N

WITNESS: ROY CHRISTOPHER JUNKINS

DATE: Wednesday, May 1, 2013

TIME: 1:55 p.m.

LOCATION: McNair Law Firm
1221 Main Street, 18th Floor
Columbia, South Carolina

TAKEN BY: Attorneys for the Plaintiffs

REPORTED BY: SHERI L. BYERS
Registered Professional Reporter

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PLAINTIFFS' MSJ - EXHIBIT # 20

Electronically signed by Sheri Byers |

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Page 2

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20 SOUTH CAROLINA DEPARTMENT OF LABOR,
21 LICENSING AND REGULATION:

22 SOUTH CAROLINA DEPARTMENT OF LABOR, LICENSING
23 AND REGULATION
24 BY: SARA MCCARTHA, ADVICE COUNSEL
25 OFFICE OF ADVICE COUNSEL
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Columbia, South Carolina 29210
sara.mccartha@llr.sc.gov

26 ALSO PRESENT:

27 JOHN C. BRADLEY, JR., ESQUIRE, FOR SCAPTA

28 (INDEX AT REAR OF TRANSCRIPT)

1 Q. As a PT Board member, what is your
2 understanding of the Board's definition of "referral"?

3 A. My understanding is it's -- when it's
4 referred to a specialist in an area that has a
5 different kind of a specialty to treat the patient.

6 Q. When you say "a different kind of specialty
7 to treat the patient," what are you talking about?

8 A. Like a general physician is just a general
9 physician. He may refer a patient to an orthopaedic
10 doctor who has more knowledge of orthopaedics and
11 joints and those kind of things.

12 Q. Okay. As a PT Board member, would you define
13 coverage in terms of health care professionals as
14 having another professional with the appropriate
15 credentials taking calls and seeing patients for a
16 health care provider who for some reason is
17 unavailable?

18 A. In our practice, that's -- we have a PT who's
19 out and their patients need to be seen, then they are
20 covered by another PT within our practice.

21 Q. Do you think that that definition of coverage
22 fits with other health care professionals?

23 A. It would seem likely. I can't answer for all
24 practices. But within our practice, it does.

25 Q. Okay. What is the difference between a

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1 referral of a patient and coverage of a patient?

2 A. Again, to me, referral would be that you were
3 sending a patient to a specialist to help them with a
4 certain problem they have. Coverage is, within our
5 practice, where we're just covering for somebody who is
6 out to continue the care that that patient has been
7 getting.

8 Q. Okay. When a patient comes in to Doshier to
9 receive physical therapy treatment, walk me through the
10 steps -- assume the patient is a self-referred patient.

11 A. Okay.

12 Q. Walk me through the steps that the patient
13 would go through to be assigned to a PT and seek and
14 get treatment.

15 A. Okay. In our practice, when they come in for
16 their first appointment, the -- actually, go back.
17 They will call to make an appointment. The secretary
18 will look at the schedule, see who has an open slot and
19 will put the patient in that open slot of the
20 therapist. When they come in to be seen that day, that
21 therapist will bring them back, do their evaluation,
22 and treat them that day.

23 Q. Okay. So how do you end up treating
24 patients?

25 A. We work as teams. We have a PT and a PTA.

1 We have two teams, actually. Two PTs and two PTAs.

2 And so the second visit when they come back, if the
3 therapist is busy with other patients, then I'll be
4 assigned that patient under -- you know, when we have
5 schedules of patients together as a team. So that's
6 how I get them.

7 Q. Okay. Do you always work with the same PT in
8 the team?

9 A. Always do unless that one is out, then I may
10 help the other therapist if that one is out.

11 Q. I think I asked you this, but do you all
12 receive referrals from occupational therapists?

13 A. No, ma'am.

14 Q. Speech therapists?

15 A. No, ma'am.

16 Q. Other PTs?

17 A. No. We don't receive -- no, ma'am.

18 Q. Does Doshier generally follow the APTA
19 standards, policies, and procedures that were approved
20 in 2012?

21 A. We try to.

22 Q. Okay. And I think you have already testified
23 that you didn't deal with the side of the business
24 regarding Medicaid or Medicare; is that right?

25 A. No. Our department, Kathy Gaines, handles

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF RICHLAND

KRISTIN JOSPEH, P.T., THOMAS N. JOSEPH, M.D.,
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Plaintiff(s),

vs.

Case No.: 2012-CP-40-2632

SOUTH CAROLINA DEPARTMENT OF LABOR,
LICENSING AND REGULATION, SOUTH CAROLINA
BOARD OF PHYSICAL THERAPY,

Defendant(s).

D E P O S I T I O N

WITNESS: JAMES PRICE STOKER

DATE: Thursday, May 23, 2013

TIME: 12:06 p.m.

LOCATION: McNair Law Firm
Poinsett Plaza
104 South Main Street
Suite 700
Greenville, South Carolina

TAKEN BY: Attorney for the Plainiffs

REPORTED BY: JEANNE M. McLAREN
Registered Merit Reporter

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PLAINTIFFS' MSJ - EXHIBIT # 21

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18 803.929.1400

19 ALSO PRESENT:

20 JOHN C. BRADLEY, JR., ESQUIRE, FOR SCAPTA
21 EMILY T. WHITNEY, ESQUIRE

22 (INDEX AT REAR OF TRANSCRIPT)

23

24

25

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1 MS. CRUM: Okay. I just hadn't said that at the
2 beginning. So if anybody needs to take a break including
3 the court reporter, just raise your hand.

4 (Off-the-record discussion.)

5 BY MS. CRUM:

6 Q. Let me go back to your affidavit, Exhibit 3.

7 A. Okay.

8 Q. One quick question, first of all, what percentage
9 of CSMR's patients are direct access patients?

10 A. I don't know the number. I know it's very small.

11 Q. For Medicare and Medicaid, before someone at CSMR
12 can see a patient, does there have to be a physician order
13 or prescription?

14 A. There has to be a signed plan of care --

15 Q. Okay.

16 A. -- and at least a verbal order.

17 Q. Okay. But an order and a prescription are the
18 same thing, correct?

19 A. Yes.

20 Q. Okay.

21 A. I imagine -- Medicare has different terminology, I
22 believe, but yes, I would say so, for all practice purposes.

23 Q. Under state law for a physical therapist to see a
24 patient beyond 30 days --

25 A. Um-hum.

1 Q. -- there has to be a physician or dentist
2 prescription, correct?

3 A. Correct.

4 Q. And of common parlance, that would be the same as
5 an order?

6 A. Yes, I believe so.

7 Q. Okay. When a patient is referred to CSMR by a
8 physician --

9 A. Um-hum.

10 Q. -- does the physician refer the patient to CSMR or
11 to a specific licensed therapist within CSMR?

12 A. It's generally to CSMR.

13 Q. Okay. So when the patient gets to CSMR, walk me
14 through how the patient gets to a specific therapist.

15 A. They may walk up to the front desk or they may
16 call and say, "I need to make an appointment," and our front
17 desk is instructed to find the most convenient time for
18 them, the sooner the better.

19 Q. Okay. And so after they found a convenient time
20 for them, what happens?

21 A. They're scheduled. They come in and see -- and
22 have to come in for their appointment.

23 Q. And when they're scheduling a convenient time,
24 does someone make sure that the PT who happens to have that
25 time opening provides specifically the kinds of physical

1 that the chapter understood that the Attorney General had
2 received a request for an opinion. How did you find out
3 that the Attorney General had received a request for an
4 opinion?

5 A. It was -- I don't recall specifically; however, I
6 heard that they had received the request. I was first told
7 the Attorney General was going to be asked this question by
8 Dr. Steven Polletti.

9 Q. Okay. Look on over to page 24, please, sir.

10 A. Okay. Um-hum.

11 Q. This 24 and 25 up at the top is "Draft 4-29-2011."
12 Do you see that?

13 A. Yes, ma'am.

14 Q. Bennett -- that refers to Mr. Jack Bennett you
15 just talked about?

16 A. That's correct.

17 Q. Mr. Bennett drafted this letter, correct?

18 A. Yes, ma'am.

19 Q. Okay. Where did the board -- I'm sorry, where did
20 SCAPTA get the two questions -- did you see a copy of the
21 Attorney General's -- of the request of the Attorney
22 General?

23 A. Did I see a copy?

24 Q. Yes, sir.

25 A. No, I didn't.

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FIFTH JUDICIAL CIRCUIT

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

Plaintiffs,

v.

C/A No. 2012-CP-40-2632

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

Defendant.

D E P O S I T I O N

WITNESS: JOSEPH MARK McKOWEN

DATE: Friday, June 14, 2013

TIME: 11:00 a.m.

LOCATION: Physical Therapy Inc.
1445 North Limestone Street
Gaffney, South Carolina

TAKEN BY: Attorneys for the Plaintiffs

REPORTED BY: NISHA GORDON
Court Reporter

COMPUSCRIPTS, INC.
Client Focused. Deadline Driven.

CHARLESTON COLUMBIA HILTON HEAD GREENVILLE MYRTLE BEACH

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Page 2

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john@mttlaw.com

(INDEX AT REAR OF TRANSCRIPT)

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1 Q. How is it different?

2 A. I'm not really sure what you mean by
3 direct.

4 Q. Okay. I'm going to hand you your Affidavit
5 that was attached to the Motion to Intervene.

6 A. All right.

7 MS. KIRK: And I'd like to mark this as
8 Exhibit 1, please.

9 (Plaintiffs' Exhibit Number 1, Affidavit of
10 Joseph M. McKowen, Notarized April 30, 2013, was marked
11 for identification.)

12 BY MS. KIRK:

13 Q. If you direct your attention to
14 paragraph 7 --

15 A. Uh-huh.

16 Q. -- you've got, On occasion, physical
17 therapists in my practice send or direct a patient.

18 So I'm asking you in the context that you
19 used it in your affidavit, how do you define send or
20 direct?

21 A. I would say send or ask for assistance.

22 Q. Where are your other office locations?

23 A. Just here.

24 Q. So what do you mean by, To another physical
25 therapist in the practice who is located in the office

1 more convenient for the patient?

2 A. If I'm not going to be here, the -- that
3 would be the only case. If I'm not seeing the patient
4 myself. If I'm going to be out of town, to another
5 physical therapist.

6 We do have a PRN physical therapist. If we
7 have a referral come in and that patient ends up under
8 my schedule, and it's a vestibular patient, a balance
9 issue, she specializes in that and has some training in
10 that particular field. I would not see that patient,
11 but I would send it to her instead. But I would
12 never -- I wouldn't initiate the evaluation and then
13 send the patient.

14 If I do the evaluation, I would keep it or
15 ask one of the other assistants to help me. But if it's
16 a referral, that would be the only case. If I would
17 send it to the other physical therapist, it would be a
18 balance issue or if it's a vestibular patient.

19 Q. So you could refer a patient to another
20 physical therapist.

21 MR. BRADLEY: Object to the form.

22 MS. WHITNEY: Object to the form.

23 MR. DAVIS: Object to the form.

24 BY MS. KIRK:

25 Q. You can still answer the question. They

1 Did you search your e-mails and things like
2 that? What did you do to try to figure out whether or
3 not you had any responsive documents?

4 A. I mean, none of this wasn't familiar to me.
5 I mean, I hadn't had e-mails from anybody or any written
6 correspondence, faxes, anything.

7 Q. Has your only communication with
8 Mr. Bennett been via telephone, or did you meet with him
9 in person?

10 A. Yeah. It was one phone call.

11 Q. When was that?

12 A. Two or three months ago.

13 Q. Okay. Do you know Jim Stoker?

14 A. No.

15 Q. Do you know any of the members of the
16 Board?

17 A. No.

18 Q. Okay. Do you communicate by e-mail with
19 the gentleman that you said notified you about the case
20 being pending, Mr. Mike Daniel?

21 A. No.

22 Q. Okay. How do you communicate with
23 Mr. Daniel?

24 A. I don't.

25 Q. Okay. Are your physical therapists and

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
Kristin Joseph, PT, Thomas N. Joseph, MD,	)	
and William G. McCarthy, MD,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
South Carolina Department of Labor,	)	
Licensing and Regulation, South	)	
Carolina Board of Physical Therapy,	)	
	)	
Defendant.	)	
	)	

Civil Action No. 12-CP-40-2632

AFFIDAVIT

COMES NOW Applicant for Intervention Jim Stoker as representative for the South Carolina Chapter, American Physical Therapy Association, who swears and affirms as follows:

1. I am the Legislative Chair of the South Carolina Chapter, American Physical Therapy Association ("SCAPTA"), and as such I am authorized to act on SCAPTA's behalf and submit this affidavit to this Court.

2. The American Physical Therapy Association ("APTA") is the national professional organization that represents physical therapists ("PTs") and physical therapist assistants ("PTAs"). SCAPTA is the APTA's affiliated chapter for the State of South Carolina. The APTA and SCAPTA represent and promote the profession of physical therapy and seek to further the profession's role in the prevention, diagnosis, and treatment of movement dysfunctions in order to enhance the physical health and functional abilities of the public.

3. The APTA has more than 85,000 members throughout the United States. SCAPTA's membership includes over 700 PTs, over 100 PTAs, and over 200 physical therapy

PLAINTIFFS' MSJ – EXHIBIT # 23

students. SCAPTA's PT members, all of whom either live or work in South Carolina, account for about 24% of the licensed PTs in the State. SCAPTA is the only representative organization for PTs and PTAs in the State.

4. In 2003, serious concerns expressed over physician-owned physical therapy practices prompted the unanimous passage of a resolution opposing physician ownership of physical therapy services by the APTA House of Delegates.

5. In 2004, the Attorney General issued an opinion regarding the meaning of the existing statute prohibiting physician ownership of physical therapy services.

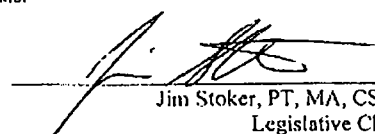
6. In *Stoun v. South Carolina Board of Physical Therapy Examiners*, 370 S.C. 452, 636 S.E.2d 598 (2006), SCAPTA moved to intervene and the circuit court granted SCAPTA's motion.

7. 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.

8. Many SCAPTA members are PTs who employ, or are employed by businesses that employ, PTAs to whom they sometimes send or direct patients.

9. PTAs are required by statute to work under the direction and supervision of PTs.

10. SCAPTA has members who take advantage of the South Carolina Professional Corporation Supplement, which allows PTs to form a professional corporation for the purpose of rendering physical therapy services and which allows such a professional corporation to provide such services through two or more licensed individuals.

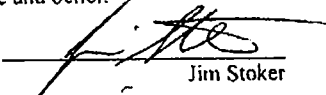
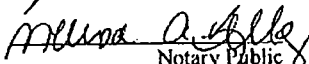

 Jim Stoker, PT, MA, CSCS
 Legislative Chair
 South Carolina Chapter
 American Physical Therapy Association

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

SUBSCRIBED AND SWORN

Being first duly sworn on April 24, 2013, Jim Stoker swears and affirms that the facts stated herein are true and correct to the best of her knowledge and belief.


Jim StokerPersonally appeared before me: Melissa A. Kelley
Notary Public 8

My commission expires:

9/25/2018