

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Richland County
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2014-001115

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S.C. Supreme Court

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.

FINAL BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	4
ARGUMENT	9
I. The South Carolina Supreme Court in <u>Sloan v. South Carolina Board of Physical Therapy Examiners</u> , 370 S.C. 452, 469, 636 S.E.2d 598 (2006), Incorrectly Interpreted Section 40-45-110(A)(1) to Prohibit a Physical Therapist From Being Employed by and Receiving and Treating Patients Referred By a Physician or a Physician’s Group	9
II. SECTION 40-45-110(A)(1), as interpreted in <u>Sloan</u> , Violates the Equal Protection Clauses of the South Carolina Constitution, art. I, sec. 3, and the United States Constitution, amend. XIV, sec. 1, By Classifying Physical Therapists Differently Than All Other South Carolina Licensed Health Care Providers for Prohibited Referrals.	17
III. Section 40-45-110(A)(1), as interpreted in <u>Sloan</u> , Violates the Substantive Due Process Clauses of the South Carolina Constitution, art. I, sec. 3, and the United States Constitution, amend. XIV, sec. 1, by Denying Physical Therapists the Right to be Employed by the Employer of Their Choosing.	23
IV. The Lower Court’s Erred in Finding that Appellants’ Interpretation of S.C. Code Ann. § 40-45-110(A)(1) in the First and Second Causes of Action Would Not Advance Its Legislative Purpose and Would Harm the Practice of Physical Therapy	25
A. The Section 40-45-110(A)(1) Referral Prohibition Is Not Limited to Gatekeeper Physicians and Includes PTs or PTOG	26
B. Applying the Referral Prohibition to PTs Is Consistent with the Legislative Purpose and Does Not Create an Absurd Result	29
1. “Refer” applies to Intra- and Inter-professional relationships	30
2. Appellants’ interpretation of “referral” advances the legislative intent	31
3. Appellant’s interpretation does not produce an unintended consequence or absurd result	34
V. The Lower Court Erred in Its Application of the Concept of “Coverage”	36

VI. The Lower Court Erred in Finding that the 2011 Position Statement Was not Adopted in Violation of the APA	39
VII. The Lower Court Erred in not Holding that <u>Sloan</u> forecloses Appellants Equal Protection Claims.....	41
VIII. The Lower Court Erred in Holding that Appellants' Substantive Due Process Right Were Addressed In Sloan and the 2011 Position Statement Does Not Deprive Them of Anything.....	45
IX. The trial court erred in opinions contained in the Affidavit of John P. Stearns.....	47
CONCLUSION	49

TABLE OF AUTHORITIES

CASES

<u>Baird v. Charleston Cty.</u> , 511 S.E.2d 69, 78 (S.C. 1999)	35
<u>Berkebile v. Outen</u> , 311 S.C. 50, 53, 426 S.E.2d 760, 762 (1993)	13
<u>Broome v. Truluck</u> , 270 S.C. 227, 230, 241 S.E.2d 739, 740 (1978)	18
<u>Brown v. S.C. State Bd. Of Educ.</u> , 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990)	23
<u>Browning v. Hoffman</u> , 90 W.Va. 568, 111 S.E. 492 (1922)	37
<u>Busby v. St. Paul Fire & Marine Insurance Company</u> , 290 So.2d 701, 705 (1974)	37
<u>Carll v. South Carolina Jobs-Econ. Dev. Autho.</u> , 284 S.C. 438, 445, 327 S.E.2d 331, 336 (1984)	43
<u>Catawba Indian Tribe of South Carolina v. State of South Carolina</u> , 378 S.C. 519, ___, 642 S.E.2d 751, 754 (2007)	10
<u>Charleston Cnty. Sch. Dist. V. Harrell</u> , 393 S.C. 552, 558, 713 S.E.2d 604, 608 (2011)	18
<u>City of Beaufort v. Holcombe</u> , 369 S.C. 643, 648 632 S.E.2d 894, 897 (2006)	42
<u>Columbia Physical Therapy, Inc., v. Benton Franklin Orthopedic Assocs., PLLC</u> , 168 Wn2d 421; 228 P.3d 1260; 2010	22
<u>Curtis v. State</u> , 345 S.C. 557, 574, 549 S.E.2d 591, 600 (2001)	42
<u>Dantzler v. Callison</u> , 230 S.C. 75, 92, 94 S.E.2d 177, 186 (1956)	23
<u>Deese v. South Carolina State Bd. Of Dentistry</u> , 286 S.C. 182, 185, 332 S.E.2d 539, 541 (1985)	46
<u>Ed Robinson Laundry and Dry Cleaning, Inc., v. South Carolina Department of Revenue</u> , 356 S.C. 120, 588 S.E.2d 97 (2003)	45
<u>Grimsley v. South Carolina Law Enforcement Div</u> , 396 S.C. 276, 283, 721 S.E.2d 423, 417 (2012)	46
<u>Hanvey v. Oconee Mem’l Hosp.</u> , 308 S.C. 1, 5, 416 S.E.2d 623, 625 (1992)	18
<u>Hatcher v. South Carolina District Council of Assemblies of God, Inc.</u> , 267 S.C. 107, 226 S.E.2d 253 (1976)	46
<u>Hendrix v. Taylor</u> , 353 S.C. 542, 549, 579, S.E.2d, 320, 323 (2002)	42
<u>Hitachi Data Sys. Corp. v. Leatherman</u> , 309 S.C. 174, 178, 420 S.E. 2d 843, 846 (1992)	10
<u>Hodges v. Rainey</u> , 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)	9
<u>Home Health Serv., Inc.</u> , 312 S.C. at 329, 440 S.E.2d at 378	40
<u>Johnson v. Ward</u> , 288 S.C. 603, 610-11, 344 S.E.2d 166 (1986)	37
<u>Kiriakides v. United Artists Commc’ns, Inc.</u> , 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) .	10
<u>Laurens County School Districts 55 and 56 v. Cox</u> , 308 S.C. 171, 417 S.E.2d 560 (1992)	10

<u>Martin v. Saint Mary’s Dept. Social Services</u> , 346 F.3d 502, C.A.4 (Md. 2003).....	46
<u>Ryder Truck Lines, Inc. v. United States</u> , 716 F.2d 1369, 1377 (11 th Cir.1983).....	40
<u>Sloan v. Department of Transportation</u> , 379 S.C. 160, 174, 666 S.E.2d 236, 243 (2008)	26
<u>Sloan v. South Carolina Board of Physical Therapy Examiners</u> , 370 S.C. 452, 469, 636 S.E.2d 598 (2006).....	1-3, 5, 7-11, 13, 16-28, 30, 31, 35, 37, 41, 43-45, 49
<u>South Carolina State Ports Authority v. Jasper County</u> , 368 S.C, 388, 398, 629 S.E.2d 624, 629 (2006).....	10
<u>TNS Mills, Inc. v. South Carolina Dept. of Revenue</u> , 331 S.C. 611, 503 S.E.2d 471 (1998)	10
<u>Turbeville v. Morris</u> , 203 S.C. 287, 26 S.E.2d 821 (1943).....	46
<u>Wadsworth v. McRea Drug Co.</u> , 203 S.C. at 543, 28 S.E.2d at 419	35
<u>Worsley Companies, Inc. v. Town of Mount Pleasant</u> , 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000).....	23, 46

STATUTES

26 U.S.C. § 501(C)(6).....	7
42 C.F.R. § 424.518(b)(vii)	33
42 U.S.C. §§ 1320a-7a to -7d (---).....	15
42 U.S.C. §§ 1320 a-7b(b)(3)(B).....	15
42 U.S.C 1395nn (e)(2).....	15
Patient Protection and Affordable Care Act, 42 U.S.C. § 1866(j)(2)(3)	33
S.C. Code Ann. § 1-23-10 et seq. (South Carolina Administrative Procedures Act)	2
S.C. Code Ann. § 1-23-10(4) (2005)	39
S.C. Code Ann. §§ 1-23-110 to -160 (2005).....	39
S.C. Code Ann. § 40-1-10(A).....	24
S.C. Code Ann. § 40-1-10(B)(4).....	25
S.C. Code Ann. § 40-45-20.....	28
S.C. Code Ann. § 40-45-20(3).....	15-16, 27
S.C. Code Ann. § 40-45-20(4)	27
S.C. Code Ann. § 40-45-20(5)	27, 36
S.C. Code Ann. § 40-45-20(9).....	21
S.C. Code Ann. § 40-45-60 (2011).....	39
S.C. Code Ann. § 40-45-110.....	27, 28

S.C. Code Ann. § 40-45-110(A)	46
S.C. Code Ann. § 40-45-110(A)(1)	1-2, 4-11, 13-20, 22-31, 36, 38-41, 43-44, 47
S.C. Code Ann. § 40-45-110(A)(2)	16
S.C. Code Ann. § 40-45-110(A)(4)	16, 27-28
S.C. Code Ann. § 40-45-110(D)	16, 27
S.C. Code Ann. § 40-45-300.....	36
S.C. Code Ann. § 40-45-300 (B)	36
S.C. Code Ann. § 40-45-310.....	27
S.C. Code Ann. § 40-45-320.....	27
S.C. Code Ann. § 40-45-320(B)	16
S.C. Code Ann. § 40-47-20(36).....	21
S.C. Code Ann. § 44-7-130(10)	48
S.C. Code Ann. § 44-113-20(1)	13
S.C. Code Ann. § 44-113-20(5) (2002)	14
S.C. Code Ann. § 44-113-30 (1993).....	12
S.C. Code Ann. § 44-113-30(A)	14
S.C. Code Ann. § 44-113-30(A)(1)	14
S.C. Code Ann. § 44-113-40.....	13, 14
S.C. Code Ann. § 44-113-40(A)	14
S.C. Code Ann. § 44-113-40(I).....	13
S.C. Code Ann. Reg. 101-9.....	32
S.C. Code Ann. Reg. 101-11.....	27
Section 1877 of the Social Security Act (the Act) (42 U.S.C. 1395nn) commonly referred to as the “Stark Law”.....	11, 14, 15, 25, 49
South Carolina Code of Laws, Title 40	13, 18
South Carolina Rules of Civil Procedure, Rule 702	47
South Carolina Rules of Civil Procedure, Rule 59(e).....	3, 4

OTHER

<u>Black’s Law Dictionary</u> , Eight Ed., (2004)	12, 30
<u>Fed. Reg.</u> , Vol. 76, No. 22, Feb. 2, 2011	33

“Increased Costs and Rates of Use in the California Workers’ Compensation System as a Result of Self-Referral by Physicians,” <i>New England Journal of Medicine</i> , Vol. 327, pgs. 1502-1506 (1992).....	49
Merriam Webster On-line Dictionary, July 10, 2014 http://www.merriam-webster.com/dictionary/discount	12
Merriam Webster On-line Dictionary, July 10, 2014 http://www.merriam-webster.com/dictionary/gratuities	12
Merriam Webster On-line Dictionary, July 10, 2014 http://www.merriam-webster.com/dictionary/unearned	12
Merriam Webster On-line Dictionary, July 10, 2014 http://www.merriam-webster.com/dictionary/wage	12
“Physician Ownership of Physical Therapy Services”, <i>JAMA</i> , Vol. 268, No. 15, pgs. 2055-2059 (1992).....	49
S.C. Attorney General Op. dated March 30, 2004 (2004 WL 736934).....	5
South Carolina Constitution, Art. I, Sec. 3	1, 17, 23, 41, 42, 46
“Questionable Billing for Medicare Outpatient Therapy Services” (December, 2010) http://oig.hhs.gov/oei/reports/oei-04-09-0054-.pdf	33
United States Constitution, Amend. XIV, Sec. 1.....	1, 17, 23, 41, 42, 46

STATEMENT OF ISSUES ON APPEAL

SHOULD THE SUPREME COURT REVERSE ITS DECISION IN SLOAN V. SOUTH CAROLINA BOARD OF PHYSICAL THERAPY EXAMINERS, 370 S.C. 452, 469, 636 S.E.2d 598 (2006), HOLDING THAT SECTION 40-45-110(A)(1) PROHIBITS A PHYSICAL THERAPIST FROM BEING EMPLOYED BY AND RECEIVING AND TREATING PATIENTS REFERRED BY A PHYSICIAN OR A PHYSICIAN'S GROUP?

SHOULD THE SUPREME COURT REVERSE ITS DECISION IN SLOAN V. SOUTH CAROLINA BOARD OF PHYSICAL THERAPY EXAMINERS THAT SECTION 40-45-110(A)(1), DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSES OF THE SOUTH CAROLINA CONSTITUTION, ART. I, SEC. 3, AND THE UNITED STATES CONSTITUTION, AMEND. XIV, SEC. 1, BY CLASSIFYING PHYSICAL THERAPISTS DIFFERENTLY THAN ALL OTHER SOUTH CAROLINA LICENSED HEALTH CARE PROVIDERS FOR PROHIBITED REFERRALS?

SECTION 40-45-110(A)(1), AS INTERPRETED IN SLOAN, VIOLATES THE SUBSTANTIVE DUE PROCESS CLAUSES OF THE SOUTH CAROLINA CONSTITUTION, ART. I, SEC. 3, AND THE UNITED STATES CONSTITUTION, AMEND. XIV, SEC. 1, BY DENYING PHYSICAL THERAPISTS THE RIGHT TO BE EMPLOYED BY THE EMPLOYER OF THEIR CHOOSING.

THE PT BOARD'S 2011 POSITION STATEMENT IS CONTRARY TO THE PLAIN MEANING OF S.C. CODE ANN. § 40-45-110(A)(1), EXCEEDS THE PT BOARD'S STATUTORY AUTHORITY, AND CONSTITUTES AN *ULTRA VIRES* ACT.

STATEMENT OF THE CASE

This is an appeal from the lower court's granting Respondents' Motion for Summary Judgment and denying Appellants' Motion for Summary Judgment regarding the efficacy of the Respondent South Carolina Department of Labor, Licensing and Regulation, South Carolina Board of Physical Therapy's ("Respondent Board") August 17, 2011 adoption of the "Application of 40-45-110(A)(1) to Intra-Professional Interactions" ("2011 Position Statement") interpreting S.C. Code Ann. § 40-45-110(A)(1) of the Physical Therapy Act ("PT Act"). (R. 358).

Kristin Joseph P.T. ("PT Joseph"), Thomas N. Joseph, M.D. ("MD Joseph"), and William G. McCarthy, M.D ("MD McCarthy") (collectively "Appellants"), on April 12, 2012, filed their Declaratory Judgment Action/Complaint ("Complaint") with the Clerk of Court for Richland County and served the Complaint on the Respondent Board. Appellants' first six causes of action requested a declaratory judgment that the Respondent Board's adoption of the 2011 Position Statement permitting physical therapists (PT) to refer patients to other PTs or PT assistants (PTA) (PTs and PTAs are collectively referred to as "Licensed Persons") employed by the referring PT or his/her physical therapy group is contrary to the plain language of the statute, exceeds the agency's authority, in violation of Appellants' state and federal constitutional rights to due process and equal protection, in violation of the South Carolina Administrative Procedures Act ("APA") and, alternatively, if the "coverage" exception is a proper interpretation of § 40-45-110(A)(1), it should be applied equally to physician and physician owned practices. Causes of Action Seven through Nine sought to argue against the precedent set in Sloan.

On May 25, 2012, Respondent Board filed its Answer and a Motion to Dismiss. The Answer denied each cause of action, contended that Appellants did not present a valid, justifiable controversy and that Plaintiffs' claims were not ripe and Sloan was dispositive of the action.

The Motion to Dismiss was argued on August 7, 2012, before the Honorable Judge G. Thomas Cooper Jr. During argument, counsel for Appellants conceded that the lower court did not have the authority to overturn the Sloan decision. The Order denying the motion as to the first six causes of action and granting partial summary judgment as causes of action seven through nine was entered and filed¹ on December 4, 2012. (R. 5). Respondent Board moved for reconsideration pursuant to Rule 59(e), SCRPC, (R. 19) which motion was denied by order dated January 9, 2013. (R. 37).

On May 2, 2013, South Carolina Chapter, American Physical Therapy Association ("SCAPTA") and three individuals, Joseph M. McKowen, PT, Sabrina Queen Bridges, PTA, and Amalia W. Kirby, PTA, (collectively "Individual Respondents") (collectively referred to as APTA Respondents") filed a Motion to Intervene. (R. 39). Appellants and on May 13, 2013 filed their proposed Answer (R. 60) raising the same defenses and affirmative defenses as raised by Respondent Board. Thereafter, Appellants and Respondent Board consented, and on June 11, 2013, the order granting intervention was entered. Pursuant to a consent order, dated July 1, 2013, Appellants filed their Amended Declaratory Judgment/Complaint. (R. 73).

The parties filed summary judgment motions, Appellants on November 1, 2013 (R. 114), Respondent Board on November 7, 2013 (R. 116), and SCAPTA Respondent

¹ Per Judge Cooper's request, the parties filed proposed orders on August 24 and 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 order was not entered and filed until December 4, 2012.

on November 14, 2013 (R. 118). On December 13, each of the parties filed their respective memoranda in support of their motions (R. 121, R. 160, R. 182) and on January 10, 2014, the parties filed their respective memoranda in opposition to the other parties' motions. (R. 211, R. 223, R. 235, R. 252).

On January 16, 2014, the lower court heard argument on the cross-motions for Summary Judgment and on April 22, 2014, Judge Cooper entered an Order Granting Defendants' Motions for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment, received on April 28, 2014. (R. 260). Appellants filed a SCRCP Rule 59 Motion to Reconsider, Alter, or Amend on May 8, 2014 (R. 284), APTA Respondents opposed the Motion (R. 292) and the court denied the motion on May 14, 2014 (R. 296).

Appellants filed Notice of Appeal on May 23, 2014. On June 16, 2014, Appellants requested from the Court of Appeals an extension until July 10, 2014 to file their Initial Brief and Designation of Matter, which was granted on June 25, 2014.

STATEMENT OF FACTS

This case arises from the Respondent Board's 2011 Position Statement interpretation the fee for referral prohibition contained in S.C. Code Ann. § 40-45-110(A)(1) as being inapplicable to individual PTs or associated PT groups employment of other PTs or PTA. Section 40-45-110(A)(1) allows the Board to take disciplinary action against a physical therapist who

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) (emphasis added). This is the second time that the Board has adopted a position statement regarding its interpretation of Section 40-45-110(A)(1). The Respondent Board first adopted a position statement, adopting S.C. Atty. Gen. Op. dated March 30, 2004 (2004 WL 736934) (2004 Position Statement) concluding that a PT would in violation of Section 40-45-110(A)(1) if he/she was employed by a physician or physician groups and accepted wages for treatment of patients referred by the employing physician or group. The 2004 Position Statement was subject to a declaratory judgment action in the Sloan case. 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 the physician or his group employed. 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.

In 2011 Mr. Jim Stoker, then president of Respondent SCAPTA found out that the South Carolina Orthopaedic Association was seeking an Attorney General’s opinion as to whether the word “person” in § 40-45-110(A)(1) is equally applicable to PTs as it is to physicians, thus prohibiting PTs being employed by and receiving referrals from other

PT, their relatives or groups they are associated with (collectively known as ‘PT Owned Groups” or “PTOG”). Stoker had a conversation with Mr. Jack Bennett, General Counsel of the American Physical Therapy Association (“APTA”). (R. 464). Mr. Stoker contemporaneously summarized his conversation with Mr. Bennett, which provides, in 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.

(R. 473(emphasis added)). Mr. Stoker and Mr. Bennett discussed four (4) options for dealing with the SCOA opinion request regarding § 40-45-110(A)(1), including: 1) dealing directly with the Attorney General; 2) getting the Board to issue another Position Statement; 3) initiating a complaint against an employed PT that the Board would investigate and rule on; and 4) getting the Board to issue a regulation. *Id.*

SCAPTA/APTA recruited a S. C. licensed PT, Robert Carpenter, PT, ATC, CSCS, to submit a letter that Mr. Bennett wrote, to the Board Chairman requesting the Board to issue a position statement regarding the two questions pending before the Attorney General concerning the application of “person” in § 40-45-110(A)(1) to PTs. (R. 475-477). The two questions were whether § 40-45-110(A)(1) prohibited: 1) a licensed person from working for pay for a PT referring patients to the licensed person; and 2) a licensed person from working for pay for professional corporation owned by one or more PTs who refer patients to the employed PT. (R. 360, Ex. 3, p. 1) On May 3,

2011, Carpenter sent a series of letters, first submitted on behalf of SCAPTA (R. 596) and finally on his own behalf, as instructed by SCAPTA, (R. 360) to the Board Chairman requesting the 2011 Position Statement. (R. 429-435). Carpenter notified Stoker and Bennett that he had sent the letter to the Board. (R. 599). After receipt of the Carpenter position statement request, the Board Chairman e-mailed Stoker asking if he knew Carpenter had e-mailed the request (on behalf of the SCAPTA) and then withdrawn it, to which Stoker answered “yes”. (R. 482-483).

On June 2, 2011, Respondent Board Chairman Marilyn Swygert responded to the Carpenter Letter with a letter titled “Application of S.C. Code Ann. Sec. 40-45-110(A)(1) to Intra-Professional Interactions”. (R. 362; R. 430-431; and R. 601). 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 but focused on the meaning of “referral” within the Act. *Id.* E. Dargan Ervin, Jr. was the only Board member Swygert consulted prior to sending her letter. (R. 436; R. 440-441; R. 605). Ervin called outside counsel, Monteith P. Todd, Esquire to assist with Swygert’s response to the Carpenter Letter. (R. 427-428; R. 445). Mr. Todd was paid from the South Carolina Board of Physical Therapy Legal Defense Fund² for his assistance with the Swygert Letter. *Id.*; See also, (R. 609).

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”. (R. 364). 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. (R. 437). The topic “Intra-Professional

² In 2004, the Department of Labor, Licensing and Regulation (LLR) refused to approve Board or LLR funds to be used to hire outside counsel. (R. 611). 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 501(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”.

Relations” was again on the Board’s agenda for its August 17, 2011 meeting. (R. 370). At the August 17, 2011 Board meeting, the Board adopted the Swygert Letter as the 2011 Position Statement, for the second time interpreting the PT Act to prohibit physicians from employing PTs and referring patients to them and prohibiting PTs from being employed by physicians while allowing PTs and PTOG to employ licensed persons. *Id.* The 2011 Position Statement determined, *inter alia*:

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.”³ (sic) ...

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. ... 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).

Id. (R. 362).

Appellant PT Joseph is licensed by the Board to practice physical therapy. (R. 374; R. 375) and is subject to the requirements of the PT Act. Appellants Dr. Joseph and Dr. McCarthy are South Carolina licensed orthopaedic surgeon, Diplomates, American Board of Orthopaedic Surgeons, and provide medical services to their patients through their respective practices, Camden Bone & Joint, LLC. (R. 377; R. 386) and Carolina Orthopaedic Surgery Associates, PA (R. 397; R. 405-406). Drs. Joseph and McCarthy

³ While not cited, the quotation is taken directly from Sloan. See: Sloan 370 S.C. at 469, 636 S.E.2d at 607, excepting the quote omits the word “a” before “financial interest.”

treat patients through 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. (R. 410-411; R. 413-415; R. 420). Appellant physicians’ medical licenses authorize them to provide and they do physical therapy services to patients as part of their practice. (R. 387-390; R. 420; R. 411-412; R. 416-417). Dr. McCarthy and Carolina Orthopaedic Surgery Associates, PA employed South Carolina licensed PTs until the Sloan case was decided and the practice was forced to terminate the PTs’ employment. (R. 407-409).

ARGUMENT

I. The South Carolina Supreme Court in Sloan v. South Carolina Board of Physical Therapy Examiners, 370 S.C. 452, 469, 636 S.E.2d 598 (2006), Incorrectly Interpreted Section 40-45-110(A)(1) to Prohibit a Physical Therapist From Being Employed by and Receiving and Treating Patients Referred By a Physician or a Physician’s Group.

The Supreme Court’s interpretation of S.C. Code Ann. § 40-45-110(A)(1) to prohibit an employment arrangement between a physician or physician group and a PT or PTA ignores the purpose of the statute, which is to regulate unethical behavior on the part of PTs or PTAs. Further, it creates an absurd situation where only employment relationships between physicians and PTs are prohibited.

“The cardinal rule of statutory construction is to determine and effectuate the intention of the Legislature.” Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Where the plain and ordinary meaning of the words used in a statute “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,” the courts will reject that meaning. Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). Because statutes dealing with the same subject matter are *in pari materia*, to resolve a statute’s ambiguity, courts should read them together to produce a single, harmonious result, if possible. Sloan, 370 S.C. at 487, 636 S.E.2d at 616 (Toal, C.J. dissenting). “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, 525-526, 642 S.E.2d 751, 754 (2007) “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 SE2d 624, 629 (2006).

Section 40-45-110(A)(1) allows the Board to take disciplinary action against a physical therapist who

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) (emphasis added). The legislative intent in enacting Section 40-45-110(A)(1) is to regulate the ethical behavior (“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” *Id.*) of PTs and PTAs and to prohibit fee for service arrangements that encourage overutilization of or provision of unnecessary physical therapy services that increase the cost of health care to the public and government payors and there is no statutory basis to limit this fee for service prohibition just to employing physicians.

A. The Statute is Ambiguous and the Majority Impermissibly Expands Its Operation. The majority in Sloan found that the above statute specifically prohibits physician–physical therapist employment relationships and is intended to protect consumers and government-sponsored health care plans from conflicts of interest that may lead to the “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. at 469, 636 S.E.2d at 607. While recognizing the existence of statutes dealing with the same subject matter—the South Carolina Provider Self-Referral Act, the federal Anti-Kickback Statute, and federal Stark law—the majority found there was no ambiguity in Section 40-45-110(A)(1) that warranted consideration of those statutes. *Id.*

The majority opinion relied upon the inclusion of the word “wages” to support its conclusion a PT could not be employed by a physician or physician group. Sloan, 370 S.C. at 469, 636 S.E.2d at 607. The majority interpreted “wages” in isolation and not in context with the other enumerated impermissible compensation fee arrangements detailed in the statute—unearned commissions, discounts, and gratuities. Contrary to the majority holding, the inclusion of the word “wages” in the phrase “by means of a credit or other

valuable consideration including, but not limited to, wages, an unearned commission, discount, or gratuity” creates an ambiguity. Further, the majority opinion’s interpretation impermissibly expands the intent of the Legislature from regulating conduct within an employment relationship to prohibiting an employment relationship with one class of licensed employers only—physicians or physician groups.

The common meaning of “wages” is: “payment for labor or services, usu. based on time worked or quantity produced; specif., compensation on an employee based on time worked or output of production.” Black’s Law Dictionary, Eighth Ed., p. 1610 (2004) “Wages” is also defined as “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*, July 10, 2014 <http://www.merriam-webster.com/dictionary/wage>. “Wages” typically connotes payment for the value/time of services rendered and nothing more. Unlike “wages,” “unearned⁴ commissions,” “discounts⁵,” and “gratuities” are not tied to the value of the services rendered.⁶ The Legislature intended to prohibit PTs or PTAs from participating in schemes where they are paid an amount for their professional services that does not equate to the value of the services, *i.e.* the fair market value of the services. Interpreting “wages” in context with the other statutorily prohibited methods of reimbursement, the Legislature intended to prohibit wages over and above those to compensate for the work actually performed.⁷ It

⁴ “Unearned” is defined as “not gained by labor, service, or skill.” *Merriam Webster On-line Dictionary*, July 10, 2014, <http://www.merriam-webster.com/dictionary/unearned>.

⁵ “Discount” is defined as “a reduction made from the gross amount or value of something”. *Merriam Webster On-line Dictionary*, July 10, 2014, <http://www.merriam-webster.com/dictionary/discount>.

⁶ “Gratuity” is defined as “something given voluntarily or beyond obligation usually for some service.” *Merriam Webster On-line Dictionary*, July 10, 2014, <http://www.merriam-webster.com/dictionary/gratuities>.

⁷ See discussion below regarding the application of S.C. Code Ann. 44-113-30 (1993).

is the wage compensation arrangement itself that is regulated, not the employer providing the wage.

“Wage” does not always contemplate employment. Wages are usually paid according to contract and on an hourly, daily, or piecework basis. Applying “wage” in this manner to § 40-45-110(A)(1), it prohibits episodic or piecemeal referral of patients to a PT when the referral is related to the compensation. As the dissent in Sloan stated:

The Legislature’s use of the word “wages” is indicative of their desire to prohibit only those payment’s received directly for work done on specific patients referred to the physical therapist; in other words, a referral-for-pay arrangement. In my view, this interpretation of the statute comports with the legislative purpose of protecting consumers as well as government-sponsored health care programs from conflicts of interest and potential misuse of medical services.

Sloan, 370 S.C. at 488, 636 S.E.2d at 617 (Toal, C.J., dissenting). Such a cohesive reading comports with the clear purpose of the statute—to regulate the ethical practices of physical therapists, not to regulate by whom a licensed person may be employed.

"A basic presumption exists that the legislature has knowledge of previous legislation when later statutes are passed on a related subject." Berkebile v. Outen, 331 S.C. 50, 53, 426 S.E.2d 760, 762 (1993). The PT Act was amended in 1998 to add, *inter alia*, Section 40-45-110(A)(1). The majority opinion ignores that fact that there was already another State law—the Provider Self-Referral Act of 1993 (“Self-Referral Act”)—was in effect. The fact that the Section 40-45-110(A)(1) prohibition against referral for profit arrangements is on a related subject is exemplified by § 44-113-20(1) which defined “board” as “any of the boards created pursuant to Title 40, as amended, to license, certify, or register health care professionals.” Section 44-113-40 regulates the referral of patients by a health care professional to an entity in which he/she has an economic interest. Section 44-113-40(I) requires that Respondent Board encourage its

licensees to seek an advisory opinion to determine the applicability of the section to the licensee's employment situation. It was not the Legislature's intent to duplicate an existing statutory provision when it used the word "wages" in Section 40-45-110(A)(1).

B. Application of Provider Self-Referral, Anti-Kickback and Stark Laws.

The intention to prohibit only referral for profit compensation arrangements and not prohibit employment arrangements between physicians and PTs is evident particularly when considering the relevant, similar statutes. The Self-Referral Act, the federal Anti-Kickback Stark law are all enacted for the same reason the majority opinion found Section 40-45-110(A)(1) was enacted—to protect consumers and government-sponsored health care plans from the abuses by health care providers attempting to profit on the basis of referrals. Each of those laws provide that *bona fide* employment relationships do not violate their prohibitions, presumably because a *bona fide* employment relationship does not create the same risks of fraud and abuse as a "referral-for-pay" relationship creates.

The Self-Referral law prohibits health care providers from referring patients to entities in which they have an investment interest unless the investment interest falls within one of the statutory exemptions. S.C. Code Ann. § 44-113-30(A). Section 44-113-30(A)(1) exempts health care providers who have investment interests in their own entities⁸ from the patient referral prohibition. Section 44-113-40(A) authorizes a physician to refer patients to an entity in which he is an investor for provision of designated health services,⁹ provided certain conditions are met. A physician or a

⁸ An "entity" is "individual, partnership, firm, corporation, or other business entity". S.C. Code Ann. 44-113-20(5) (2002)

⁹ "Designated health services" are "means any health care procedure, service, or item provided by a health care provider." *Id.*, (4). Physical therapy is a designated health service.

physician group that is an professional association or a limited liability corporation is an entity and as long as the physician having an investment interest in the entity meets the requirements of § 44-113-40, the Self-Referral Act authorized a physician to employ a PT and refer patients to the PT for treatment. The Self-Referral Act is applicable to health care providers regardless of the payor source, while the Anti-Kickback and Stark laws are only applicable to patients covered by government sponsored reimbursement.

The Anti-Kickback statute prohibits a health care provider, including physicians, physical therapists, hospitals, etc., from receiving anything of value (a kickback) for referring patients covered by Medicare or Medicaid. 42 U.S.C. §§ 1320a-7a to -7d (----) However, the Anti-Kickback regulations exempt a salary paid by an employer to an employee. 42 U.S.C. 1320 a-7b(b)(3)(B).

The Stark Laws are aimed specifically at physicians and limiting physicians referral of patients for treatment through designated health services to entities in which the physician has an ownership or investment interest. However, the Stark Law creates a safe harbor for *bona fide* employer-employee relationships. 42 U.S.C. 1395nn (e)(2).

Reading Section 40-45-110(A)(1) *in pari materi* with the Self-Referral, Anti-Kickback and Stark laws, it is clear that the evil sought to be regulated by the Legislature was the referral for profit remuneration, not the employment relationship between physician and PT. Section 40-45-110(A)(1) does not prohibit an employment relationship between a physician and a physical therapist and this Court should so hold.

C. The Majority Opinion Reaches an Absurd Result. In its opinion, the majority substituted the word “physician” for “person” as used in Section 40-45-110(A)(1). The word “person” is defined as “an individual”. S.C. Code Ann. §40-45-

20(3). When the Legislature meant to limit “person” to an individual that is also a doctor/physician, it did so in express terms. In Section 40-45-110(A)(2) the Legislature authorized the Board to discipline any licensed person¹⁰ who treats a patient beyond the PT scope of practice and fails to refer the patient to a “licensed medical doctor or dentist”. See also Sections 40-45-110(A)(4), 40-45-110(D) and 40-45-320(B).

In reaching its conclusion that § 40-45-110(A)(1) prohibits physician employment of and referral of patients to PTs, the majority found that the “Legislature is free to further restrict [physician and PT employment] relationships regardless of a related state statute or federal laws, ...” Sloan, 370 S.C. at 47, 636 S.E.2d at 609. However, the majority opinion did not address the fact that the PT Act definition of “person” does not have the effect of “further restricting relationships” between healthcare providers.

Following the majority’s opinion to its logical conclusion, using “person referring” instead of “physician referring”, no individual or a relative or business associate of the individual may employ a PT, refer patients to the PT for treatment and pay the PT wages for services rendered to the patient without the PT being subject to Board sanctions. As argued by the Respondents and as found by the lower court (R. 260) such interpretation would reach an absurd result not intended by the Legislature.¹¹

The majority’s interpretation creates an absurd situation where physician–physical therapist employment relationships strictly are verboten, with no consideration given to the facts of the relationship and the actual ethical implications or on the patient wellbeing. The Legislature did not intend to prohibit all employment relationships between physicians and physical therapists—such an overreaching prohibition on

¹⁰ For purposes of this Initial Brief, “licensed person” refers to PTs and PTAs.

¹¹ Note Appellants argument regarding the lower court’s finding in sections IV(B) below.

employment among licensed, regulated professionals is arbitrary and not calculated to avoid the legislative purpose of prohibiting “the unethical behavior of receiving or giving illegal kickbacks and participating in referral-for-pay arrangements.” Sloan, 370 S.C. at 489, 636 S.E.2d at 617 (Toal, C.J., dissenting).

Thus, reading “wages” contextually in Section 40-45-110(A)(1) and *in pari materi* with the above statutes and regulation produces the single, harmonious result that it is not the prohibition of employment of PTs by physicians, but of compensation arrangements inducing unnecessary or over utilized physical therapy services. Based on the foregoing, Appellants respectfully assert the Sloan majority incorrectly held that Section 40-45-110(A)(1) prohibits any physician–PT employment relationship. This Court should overrule its prior decision in Sloan, allow physicians to employ licensed persons and licensed persons to be employed by physicians or their relatives and business associates. Section 40-45-110(A)(1) only prohibits those arrangements in which the physical therapist engages in a “referral-for-pay” arrangement.

II. Section 40-45-110(A)(1), as interpreted in Sloan, Violates the Equal Protection Clauses of the South Carolina Constitution, art. I, sec. 3, and the United States Constitution, amend. XIV, sec. 1, By Classifying Physical Therapists Differently Than All Other South Carolina Licensed Health Care Providers for Prohibited Referrals.

The Sloan majority’s interpretation of § 40-45-110(A)(1) violates the Equal Protection Clauses of the South Carolina Constitution, art. I, sec. 3, and the United States Constitution, amend. XIV, sec. 1, because it contains an arbitrary classification that treats PTs differently than other health care providers for self-referral purposes. This Court should overrule the Sloan majority and hold that there is no rational basis for prohibiting only physical therapists from being employed by and receiving referrals from physicians.

“To satisfy equal protection, the classification must (1) bear a reasonable relation to the legislative purpose sought to be achieved, (2) members of the class must be treated alike under similar circumstances, and (3) the classification must rest on some rational basis.” Hanvey v. Oconee Mem’l Hosp., 308 S.C. 1, 5, 416 S.E.2d 623, 625 (1992). “While the General Assembly has the power in passing legislation to make a classification of its citizens, the constitutional guaranty of equal protection of the law requires that all members of a class be treated alike under similar circumstances and conditions, and that any classification cannot be arbitrary but must bear a reasonable relation to the legislative purpose sought to be effected.” Broome v. Truluck, 270 S.C. 227, 230, 241 S.E.2d 739, 740 (1978). “A classification is arbitrary, and therefore unconstitutional, if there is no reasonable hypothesis to support it.” Charleston Cnty. Sch. Dist. v. Harrell, 393 S.C. 552, 558, 713 S.E.2d 604, 608 (2011).

The majority’s interpretation carves out PTs from the entirety of all other South Carolina licensed medical professionals for disparate treatment under a self-referral statute.¹² In identifying PTs as the pertinent class for the equal protection analysis, the majority determined the legislative purpose behind § 40-45-110(A)(1) “is 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” and that “the statutory prohibition on employment relationships between physicians and physical therapists bears a reasonable relation to that purpose.” Sloan, 370 S.C. 482, 636 S.E.2d 614.

¹²Title 40 of the South Carolina Code provides for licensure of some eighteen (18) different types of health care professionals. None of these other licensed health care professionals are burdened by the standard the majority applied to PTs.

The majority addressed the reasonable relationship to the legislative purpose by articulating a different legislative purpose than it had previously articulated in its interpretation § 40-45-110(A)(1). In its rational relationship analysis, the majority identified the legislative purpose as “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.” Sloan, 370 S.C. at 482, 636 S.E.2d at 614. This statement is much more narrow than the legislative purpose articulated in the majority’s analysis interpreting § 40-45-110(A)(1)—“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. at 469, 636 S.E.2d at 607.

Physicians routinely employ other licensed health care professionals and refer to them.¹³ There are numerous other licensed health professionals that are employed by physicians and are dependent of referrals from physicians to practice their chosen profession. By erroneously narrowing the purpose of Section 40-45-110(A)(1) from the regulation of physical therapists’ ethical practices down to “the avoidance of overuse of physical therapy services by physicians,” the majority was able to craft a “reasonable relation[ship]” between the legislative purpose sought to be achieved and the classification of PTs apart from other medical professionals. Sloan, 370 S.C. at 482, 636

¹³ For example, physicians employ nurse practitioners, physician’s assistants, occupational therapists, audiologists or opticians and refer patients to the employed allied health professional.

S.E.2d at 614. The statute says nothing about avoiding the overuse of physical therapy services by physicians, so the majority's interpretation is artificially narrow. In enacting the 1998 amendments to the PT Act, the Legislature knew that the Self-Referral Act was in place and further regulation of the PT/physician relationship was unnecessary. The majority's reasoning fails the first element of the equal protection analysis.

The majority tackled the second element of the equal protection analysis by stating that "all physical therapists are barred from such employment relationships." Sloan, 370 S.C. at 482, 636 S.E.2d at 614. The majority misses the import of the classification and provides a skewed view of what "treated alike under similar circumstances" means. Under the majority analysis, all PTs are barred from entering into employment relationships with physicians. The majority's focus should have been on the fact that under its analysis **PTs are barred from receiving referrals from all employers, only physician employers**. Thus, not every member of the classified group is treated similarly under like circumstances. This analysis bears no relation to the obvious purpose of § 40-45-110(A)(1), to regulate the ethical practices of Licensed Persons¹⁴. The majority's reasoning fails the second element of the equal protection analysis.

In addressing the third element, the majority relied upon its stated legislative purpose as the rational basis for the classification. Sloan, 370 S.C. at 482, 636 S.E.2d at 614. The Sloan majority found that, because of the variations in the medical field, it would be unwise to require the Legislature to "aggregate different medical professionals into broadly based categories for purposes of analyzing an equal protection claim arising

¹⁴ As discussed in Section IV(B), Respondent Board locked onto this loophole and created a situation, under the guise of "coverage," based upon the majority's reasoning, PTs may accept referrals for wages from other PTs or PTOGs.

from a self-referral statute.”¹⁵ Sloan, 370 S.C. at 481, 636 S.E.2d at 613. The majority notes that the differences among “the needs and wishes of various medical and allied health professionals” have prompted lawmakers “to enact numerous complicated statutes governing different professions” Sloan, 370 S.C. at 481–82, 636 S.E.2d at 613–14. The majority fails to recognize that the State and federal laws discussed in Section I provide an exception for *bona fide* employment relationships. Thus, even though the substantive regulations of each profession will necessarily vary from each other, self-referral issues, which all address over or unnecessary utilization and excess cost to the public, are not regulated differently in the Self-Referral Act among the professions. As the dissent states, there is no articulated—or articulable—reason **not** to treat all medical professionals the same for purposes of a self-referral statute, and it is “difficult to envision any aspect of physical therapy which is so different from other health care services that it warrants separate classification for self-referral purposes.” Sloan, 370 S.C. at 493, 636 S.E.2d at 619 (Toal, C.J., dissenting).

South Carolina’s broad definition of the practice of medicine, which readily encompasses all acts constituting the statutory definition of the practice of physical therapy, further illustrated that physical therapy does not warrant separate classification for self-referral purposes. Among other things, the definition of the practice of medicine includes “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”. S. C. Code Ann. § 40-47-20(36). The practice of physical therapy is defined in S.C. Code Ann. 40-45-20(9) to mean

¹⁵ Of course, the Self-Referral Act is applicable to all licensed State health care providers.

the evaluation and treatment of human beings to detect, assess, prevent, correct, alleviate, and limit physical disability, bodily malfunction, and pain from injury, disease, and any other bodily or mental condition and includes the administration, interpretation, documentation, and evaluation of physical therapy tests and measurements of bodily functions and structures; the establishment, administration, evaluation, and modification of a physical therapy treatment plan which includes the use of physical, chemical, or mechanical agents, activities, instruction, and devices for prevention and therapeutic purposes; and the provision of consultation and educational and other advisory services for the purpose of preventing or reducing the incidence and severity of physical disability, bodily malfunction, and pain.

The physical therapy licensing statute effectively permits non-physicians to engage in a limited practice of medicine without liability for the unauthorized practice of medicine.

Columbia Physical Therapy, Inc. v. Benton Franklin Orthopedic Assocs., PLLC, 168 Wn.2d 421; 228 P.3d 1260, (2010).

As such, physical therapy is part of the practice of medicine, and by extension, part of the same classification for purposes of fraud and abuse. Their patients needing PT services are covered by the third party payors. As discussed below, the provision of PT services is within a physician's scope of practice.

There is no reasonable relationship between the purpose of the statute that is discernable from its language and the separate employment classification of Licensed Persons. PTs are employed by other PTs or PTOGs (R. 426; 442-444; R. 451-452; and R. 457-459). There exists no rational basis for carving out PTs employed by physicians from PTs employed by other individual health care providers for self-referral purposes. Section 40-45-110(A)(1), as interpreted by the Sloan majority, treats PTs differently from similarly situated health care professionals, such as speech therapists, occupational therapists, nurse practitioners or audiologists, for purposes of a self-referral statute. The classification is arbitrary and violates the Equal Protection clauses. This Court should

overrule the Sloan majority and find that the 2004 Position Statement violates the Equal Protection Clauses of the South Carolina Constitution, art. I, sec. 3, and the United States Constitution, amend. XIV, sec. 1.

III. Section 40-45-110(A)(1), as interpreted in Sloan, Violates the Substantive Due Process Clauses of the South Carolina Constitution, art. I, sec. 3, and the United States Constitution, amend. XIV, sec. 1, by Denying Physical Therapists the Right to be Employed by the Employer of Their Choosing.

The Sloan majority's interpretation of Section 40-45-110(A)(1) violates Appellant PT Joseph's rights under the Substantive Due Process Clauses of the South Carolina Constitution, art. I, sec. 3, and the United States Constitution, amend. XIV, sec. 1, of by restricting her right to be employed by the employer of her choosing. Therefore, this Court should overrule the Sloa majority and hold that there is no legitimate state interest in prohibiting physical therapists from being employed by physicians.

"Substantive due process protects a person from being deprived of life, liberty or property for arbitrary reasons." Worsley Companies, Inc. v. Town of Mount Pleasant, 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000). "A plaintiff must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law." Id. "There is no reasonable doubt that the rights of those who have been duly licensed to practice medicine or other professions are property rights of value which are entitled to protection." Dantzler v. Callison, 230 S.C. 75, 92, 94 S.E.2d 177, 186 (1956). "The right to hold specific employment and the right to follow a chosen profession free from unreasonable governmental interference come within the liberty and property interests protected by the Due Process Clause." Brown v. S.C. State Bd. of Educ., 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990).

The Sloan majority held that prohibiting employment relationships between physicians and PTs is not a violation of substantive due process because the prohibition bears a reasonable relationship to a legitimate governmental interest. Sloan, 370 S.C. at 484, 636 S.E.2d at 615. The governmental interest articulated by the majority is the “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. at 469, 636 S.E.2d at 607. The majority found that while PTs clearly have a property right in the practice of their profession, that right is “subject to the Legislature’s police power to enact statutes and regulations aimed at enhancing the public welfare in the practice of medicine and related professions.” *Id.*

The majority’s reasoning suffers because the prohibition on physician–physical therapist employment is arbitrary when the very same employment relationship between a physician and any other health care professional is allowed. Appellants do not assert that the government lacks a legitimate interest in protecting consumers and government-sponsored health care plans. Rather, Appellants assert that the arbitrary classification of PTs under Section 40-45-110(A)(1) is without reason, arbitrary and capricious and therefore violates Appellant PT Joseph’s substantive due process rights.

The majority adduced no reason to explain why prohibiting physician–physical therapist employment relationships is “necessary for the preservation of the health, safety, and welfare of the public,” and instead only says that it “bears a reasonable relationship to a legitimate government interest.” First, this finding does not comport with the express legislative safeguard of licensed professions. Section 40-1-10(A) protects the right of PTs to engage in their profession in a lawful manner and prohibits

the State from abridging that right “except as a reasonable exercise of its police powers when it is clearly found that abridgement is necessary for the preservation of the health, safety, and welfare of the public.” Section 40-1-10(B)(4) further provides that the State cannot impose a restriction upon a profession “except for the exclusive purpose of protecting the public interest when the ... public is not effectively protected by other means.” The test is not whether the prohibition is “reasonable relationship to a legitimate government interest” but whether the “abridgment is necessary for the preservation of the health, safety, and welfare of the public” and the “public is not effectively protected by other means.”

The purpose of 40-45-110(A)(1) is to regulate the ethical behavior of PTs not the over prescribing of PT services by physicians for their own gain. The majority holding that the prohibition is reasonably related to a legitimate government interest is arbitrary because the public is already effectively protected by other means through the Self-Referral Act and the Anti-Kickback and Stark laws. The majority articulated the government interest is the potential for overuse of medical services by physicians, and the prohibition of employment relationships with PTs is not reasonably related to that goal. For the above reasons, Appellant PT Joseph respectfully request this Court to overrule Sloan and hold that the Sloan majority’s interpretation of Section 40-45-110(A)(1) violates her substantive due process rights.

IV. The Lower Court’s Erred in Finding that Appellants’ Interpretation of S.C. Code Ann. § 40-45-110(A)(1) in the First and Second Causes of Action Would Not Advance Its Legislative Purpose and Would Harm the Practice of Physical Therapy.

Appellants’ First and Second Causes of Action contends that the 2011 Position Statement is contrary to the plain meaning of, exceeds the Board’s statutory authority,

and constitutes an ultra vires act. The lower court erred both in relying on Sloan and in misinterpreting § 40-45-110(A)(1). Section 40-45-110(A)(1) prohibits a fee for referral employment arrangement between PTs, PTOGs and other PTs. The PT Act does not limit the fee for referral employment arrangement just to physicians and PTs. The legislative intent of protecting the public and the health care system from over or unnecessary utilization of physical therapy services for personal gain and does not lead to an absurd result.

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. Sloan v. Department of Transportation, 379 S.C. 160, 174, 666 S.E.2d 236, 243 (2008). The lower court erred in its ruling that PTs are not subject to the employment prohibition and an “intra-professional” direction of a patient from one PT to another PT is coverage and not a referral. The Court should reverse the Order, find that the Legislative intent of § 40-45-110(A)(1) was to prohibit PT to employed PT referrals and find that the 2011 Position Statement exceeds the Board’s authority and is an *ultra vires* act.

A. The Section 40-45-110(A)(1) Referral Prohibition Is Not Limited to Gatekeeper Physicians and Includes PTs or PTOG.

Relying on Sloan, the lower court erroneously ruled that the legislative intent of § 40-45-110(A)(1) is only to prohibit “Targets Referrals by Gatekeeper Physicians”. (R. 269-271). In this State, patients have “direct access” to physical therapy services for the first 30 days of physical therapy and a PT or PTA, under the supervision of a PT, can provide physical therapy services without a physician referral, 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.

The PT Act only regulates Licensed Persons. 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); see also, S.C. Code Ann. §§ 40-45-20(4), 40-45-20(5), 40-45-110(D), and 40-45-320. Neither the lower court nor the Respondents dispute that Licensed Persons are “persons” under the PT Act. (R. 276). A PT is an individual and therefore constitute a “person who referred a patient” to Licensed Persons. (R. 276; R. 553).

Relying on the Sloan decision, the Order held that physicians are “gatekeepers for physical therapy services” and Section 40-45-110 “targets referrals by gatekeeper physicians.” (R. 269-271). The Order misapprehends and expands the majority holding in Sloan. Relying on Sloan to conclude that the referral restriction in § 40-45-110(A)(1) is only intended to apply to gate keeper physicians (R. 271) and not to other licensed health care persons constitutes reversible error. Sloan only addressed the issue of physician employment of and referral to Licensed Persons and not whether other licensed health care persons are also subject to the referral prohibition.

The Order’s findings also ignore the following: 1) Section 40-45-110(A)(1) regulates the ethical behavior of PTs; 2) the legislative purpose of protecting public consumers and government-sponsored health programs applies equally to any licensed health care provider that has the potential of referring patients to employed PTs, be it a physician, a dentist, non-physician practitioner (“NPP”), other PT or PTOG for physical therapy services; 3) nothing in the PT Act 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; 4) when the Legislature meant to refer specifically to a “physician” or “doctor” in the Act, as opposed to a “person”, it did so; 5) the fact that the State allows patients direct access to PTs for thirty (30) days without a physician or dentist referral; 6) the fact that PTs are prohibited by § 40-45-110(A)(4) from treating PTs can only treat a patient for thirty (30) day period without a physician or dentist referral does not impact the legislative intent to protect the public and government-sponsored health programs from referral for profit; and (7) the Sloan majority found that the word “refer” was unambiguous (Sloan, 370 S.C. at 470-471, 636 S.E.2d at 607) yet, the lower court found “refer” was ambiguous (R. 276-277).

The legislative history from Act 360 Acts and Joint Resolutions, 1998 (the “1998 amendment”) to the PT Act makes it clear that the purpose of § 40-45-110(A)(1) is to regulate the ethical behavior specifically of PTs. The Board sent a bullet point explanation of the proposed amendments (“Bullet”) to all of the members of the General Assembly. (R. 583-587; R. 591; R. 611). One of the “significant” changes in the bill was the “Establishment of Board authority to deal with physical therapists practicing in referral for profit environments¹⁶.” (R. 584). 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.” (R. 585). Nowhere in the Bullet is there mention of a physician or a doctor of medicine¹⁷ with

¹⁶ “[P]racting in referral for profit environments” is much broader than “practicing in a physician’s office.” Not even the Board, when it sent the Bullet, interpreted the 1998 Amendments to prohibit only physician employment of PTs. Clearly the intent was to prohibit PTs from practicing in a referral for profit environment where the employer was an individual or relative or business associate of the referring person.

¹⁷ The bullet for § 40-45-20 does reference the fact that the bill would delete the requirement for treatment of a patient by prescription of a physician or dentist.

regard to referral for profit. (R. 584-587).¹⁸ The fact that a physician referral is required before a PT can be paid to treat a patient does not lessen the possibility that PTs or PTOG can over or unnecessarily utilize PT services within the first thirty (30) days without a physician or dentist referral or, even with a physician referral, develop a plan of care relied upon by the referring doctor that provides for over or unnecessary PT services for the PT or PTOG profit as discussed below. The lower court erred in limited the prohibition of § 40-45-110(A)(1) only to physician gatekeeper and not including PTs or PTOG in the prohibition.

B. Applying the Referral Prohibition to PTs Is Consistent with the Legislative Purpose and Does Not Create an Absurd Result.

The 2011 Position Statement creates the legal fiction of “inter-professional” versus “intra-professional” direction of a patient within the same group holding that the inter-professional direction of a patient within a group from 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. (R. 358) The lower court found that all parties agree that a PT is an individual and a person under the PT Act but that the issue is not whether a PT is a person but whether a PT sending a patient to another PT within the same group constitutes a referral. (R. 276). Finding that the meaning of the word “refer” in 40-45-110(A)(1) was ambiguous (*Id.*), the lower court found it must interpret “refer” by: 1) taking into account the context of the term; 2)

¹⁸ The Bullet also identified a most significant change as “[e]limination of the prescription requirement for physical therapy services.” (R. 584). The Board’s proposal to eliminate the prescription requirement was not enacted. See Act 360.

whether the interpretation advances the legislative purpose; and 3) whether the interpretation produces an absurd result. (R. 277).

1. “Refer” applies to Intra- and Inter-professional relationships. The PT Act does not differentiate between inter- and intra-professional referrals. The Board’s 1997 Bullet to the Legislature specifically references PTs “practicing in referral for profit environments.” The use of the word “person” not physician or dentist in § 40-45-110(A)(1) also evidences the Legislature’s intent to apply the referral prohibition broadly to both inter- and intra-professional relationships. In Sloan, the majority defined “refer” as “‘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. Again, the lower court, as did the 2011 Position Statement, erroneously relied upon the Sloan definition of “refer” to apply it only to physicians, not to “referring persons”. “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.”¹⁹ Sloan also noted that the definition of “referral” in the Self-Referral Act “does not draw a distinction between ‘outside’ and ‘in-house’ referrals as Appellants contend.” Sloan, 370 S.C. at 470, 636 S.E.2d at 607. Just as the Self-Referral Act does not draw a distinction between “outside” and “in-house”

¹⁹ The lower court opined that the plain meaning of “refer” would lead to the absurd result that a receptionist could not schedule a patient. (R. 277) This holding ignores the statutory requirement that the “referring person” must pay “wages” to the PT. The plain meaning of “refer” has to be read in context of the statute.

referrals, the PT Act does not draw a distinction between inter-professional and intra-professional referrals.

2. *Appellants' interpretation of "referral" advances the legislative intent.* The Order erroneously held that Appellant's interpretation applying "referral" to PTOG does not advance the legislative intent of § 40-45-110(A)(1). Appellants' interpretation advances the legislative intent of protecting 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 [persons] who, for their own financial gain rather than their patients' medical needs, refer patients to entities in which the [persons] hold a financial interest." Sloan, 370 S.C. 469, 636 S.E. 2nd 607. In policing Licensed Persons, the Legislature intended to protect the health care consuming public and government-sponsored health care programs from PTs "who for their own financial gain rather than their patients' medical needs, refer patients to entities in which [they] hold a financial interest." The employment referral restriction for PTs is designed to eliminate the temptation for PTs to document the need for more physical therapy treatment than a patient might need where the PT has a financial interest in that treatment.

When physicians refer patients to PTs for treatment, the referral orders vary. Appellant physicians and a Board member testified that in referring a patient for therapy services, orders vary but usually contain a diagnosis, an evaluation and treatment plan, recommended treatments, usually with flexibility, or just "physical therapy. (R. 391-392; R. 418-419; R. 453-454). In many cases it may be the PTs through the plan of care ("POC"), progress reports, evaluation and recertification of POCs to physicians that set frequency and types of physical therapy utilization.

When a patient sees 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 POC to be followed in treating the patient. The POC must include: 1) treatment to be rendered; 2) frequency and duration of treatment; and 3) measurable goals. Except in the case of direct access patients, where a patient is covered by government sponsored reimbursement or certain private payors, the referring physician or NPP such as nurse practitioners or physician assistants must approve the POC. 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 site. S.C. Code Ann. Reg. 101-9 (2012) (R. 301). A PT can bill²⁰ for treating four (4) patients at once.

The PT or the PTOG is getting the revenue from the PTAs' provision of therapy services under his/her supervision. The PT Act requires a PT to reevaluate a 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. Respondent SCAPTA's expert admitted generally a 100% of a PT or PT Group's income comes from therapy services. The same is certainly not true with physicians or physician groups. (R. 625-626).

The responsible PT 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. If the PT fails to document progress appropriately, e.g. understates the patient's progress, then the PT can develop a new POC

²⁰ 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. (R. 301).

with more frequent services or therapy for a more extended time, to take to the physician or NPP for approval. Abuse in overutilization of services or providing services that are not medically necessary can and do occur.

The lower court erred in holding Appellants “presented no evidence that [the risk of providing excessive treatment for their own good rather than that of their patients] is increased by the shared treatment of patients by PTs in group practice.” (R. 272). Appellants produced evidence that CMS and the Office of Inspector General (“OIG”) adopted regulations to implement Sec. 1866(j)(2)(3) of the Patient Protection and Affordable Care Act (“ACA”), which required 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 and the OIG stated it:

will assign physical therapists (including physical therapy groups) to the moderate screening level. We believe this classification is supported, in part, by a recent OIG report entitled “Questionable Billing for Medicare Outpatient Therapy Services” (December 2010) (<http://oig.hhs.gov/oei/reports/oei-04-09-00540.pdf>), which found, among other things, that Miami-Dade County had three times, and nineteen other counties had at least twice, the national level on five of six questionable billing characteristics. Law enforcement has also identified fraudulent billing schemes involving

Id., p. 5874, 5886, and 5894. For screen purposes, CMS has listed PTs and PT groups as moderate risk for fraud, waste, and abuse. *Id.*, p. 5895. 42 C.F.R. §424.518(b)(vii). The fact CMS and OIG have put individual PTs and PTOGs into the moderate risk category for increased scrutiny for fraudulent or abusive billing activities is probative evidence

that there is an increased risk of PTs and PTOGs sharing treatment of patients providing excessive treatment for their own good rather than that of their patients. South Carolina Department of Health and Human Services (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.” (R. 616). SCDHHS categorizes PTs and PTOGs as moderate risk providers and physicians are low risk providers. *Id.*

The Order erroneously found that there is no greater risk for over-referrals from PTs to PTOGs. (R. 272). The legislative test is whether there is an employment relationship and a prohibited referral. Individual can employ PTA and refer. PTs and PTOGs can leverage the number of referrals and patients treated at any one time. In a group, a single PT can provide services for a patient and bill for three PTA treating patients. A single PT can only bill for treating one patient at a time. Prohibiting referrals in an intra-professional relationship advances the legislative purpose of prohibiting over or unnecessary utilization of PT services for personal gain.

3. *Appellant’s interpretation does not produce an unintended consequence or absurd result.* The Order found that if “Plaintiffs’ interpretation of the PT Act were adopted, PTs could be forced to operate as sole practitioners in order to continue their practice” (R. 273(Emphasis added)) and that Appellants’ interpretation of “refer” “would have the Court interpret the PT Act to prevent a PT from being ‘assigned patients for treatment by a physical therapist or physical therapist group employing the PT’ and “such

an interpretation would²¹ effectively eliminate the ability of PTs to work for other PTs or join together in group practice.” (R. 271(Emphasis added); R. 271-275). The lower court also found that Appellants’ interpretation of “referral” could result in PTAs no longer being able to work for PTs or PTOGs. (R. 274). These findings are in error.

While Sloan recognized there is a property interest in a licensed profession, it also recognized that through its police powers, that right is “subject to the Legislature’s police power to enact statutes and regulations aimed at enhancing the public welfare in the practice of medicine and related professions.” Sloan, 370 S.C. at 469, 636 S.E.2d at 607. Just as the State can prohibit physicians from being employed by a for profit corporation under the corporate practice of medicine doctrine (Supreme Court has held that a “corporation may not engage in the practice of medicine even through licensed employees.” Wadsworth v. McRae Drug Co., 203 S.C. at 543, 28 S.E.2d at 419; see also: Baird v. Charleston Cty., 511 S.E.2d 69, 78 (S.C. 1999)), the State can limit the employment relationship among PTs within reasonable bounds for the protection of the public. While Appellants disagree with the lower court’s findings, to the extent that the lower court is correct that Appellants’ interpretation of “referral” limits employment opportunities between PTs, PTOGs an PTA, the Legislature has done just that in order to protect the public from overutilization of physical therapy services.

The lower court’s holding that Appellants’ interpretation of “referral” would prohibit PTOG or PTs from employing Licensed Persons is simply incorrect. PTs can 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

²¹ The Order is internally inconsistent because in one place it states the Appellants’ interpretation of “refer” “could” have the effect of eliminating PTOG and in another place it states it “would” have the effect of eliminating PTOG.

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. (R. 301). 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.

As to the lower court's conclusion that PTAs could no longer be employed by PTs or PTOG under Appellants' theory, that again is contrary to the PT Act scheme. 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." 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(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. Section 40-45-300(B) is the specific section that dictates the conditions under which PTAs may provide physical therapy services—only under the direct supervision of a PT. This statutory authorization requiring PTs exempts them from the fee for profit prohibition of § 40-45-110(A)(1). The lower court held this theory failed because § 40-45-300(B) does not use the word "employ". However, the only reasonable interpretation of a statute requiring a PTA to work under the direct supervision of a PT is that the PT or PTOG can employ the PTA.

V. The Lower Court Erred in Its Application of the Concept of "Coverage".

The 2011 Position Statement determined that the internal directing of patients in a PTOG constituted “coverage” and not a “referral.” Appellants’ contend that the intra-professional directing of patients does not constitute “coverage” but that if it does, the concept of “coverage” is equally applicable to inter-professional directing of patients and physicians can direct patients to employed PTs under the theory of “coverage.” The lower court found that Appellants’ contention fails as a matter of law because Sloan decided that Licensed Persons cannot be employed by physicians. This finding misapprehends Sloan. The Sloan majority held simply that physicians could not employ Licensed Persons and “refer” patients to the. Sloan did not address whether physicians could employ PTs and direct patients to the under a “coverage” theory.

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). “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).

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. SCAPTA’s expert witness testified that the concept of “coverage” is the same for physicians and PT. (R. 631-632). “[T]he 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.”²² (R. 272). Transfer for convenience or a simple function of scheduling or patient request does not fall within the legally recognized definition of “coverage.” The lower court erred in failing to find that the PT or PTOG directing of patients under the guise of “coverage” for intra-professional relations does not create an exception to the referral prohibition of § 40-45-110(A)(1).

Assuming *arguendo* that the lower court properly 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, the lower court erred in failing to apply the “coverage” exception to Section 40-45-110(A)(1) to physicians and physician groups that employ PTs. As discussed above, the Medical Practice Act clearly indicates that the diagnosis of physical illness requiring physical therapy services and the provision of the physical therapy services are within the scope of a licensed medical doctor’s practice. It is uncontested that the provision of physical therapy services is a subset of the practice of medicine. (R. 388; R. 411-412; and R. 420) (R. 628-630); (R. 424). While the lower court found that Appellants “offered no legal or factual support for the proposition that a PT can ‘cover’ for a physician” (R. 278), the Order did not recognize that fact that physical therapy is a subset of the practice of medicine, PTs are licensed to provide the physical therapy subset of services and physicians can bill Medicare and Medicaid for their provision of PT services. (R. 633). A physician or physician group can employ a PT and direct the patient for PT services under the concept of coverage, provided the direction is limited to PT services. In this case, where a

²² Reasons given by the PT deponents during discover range from convenience of the patient to be seen at another location to scheduling conflicts. (R.467-469; R. 470; R. 449-450; and R. 425-426).

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 as long as the provision of PT services is within the scope of practice of the licensed provider.

VI. The Lower Court Erred in Finding that the 2011 Position Statement Was not Adopted in Violation of the APA.

The lower court found that the 2011 Position Statement “is not a regulation or the equivalent of a regulation.” (R. 279). To the contrary, 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). 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. S.C. Code Ann. §§ 1-23-110 to -160 (2005). None of this occurred in the adoption of the 2011 Position Statement.

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.” (R. 370). 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. (R. 430-431). When asked how the public could understand what the “notice” on the agenda meant, she testified she did not know. (R. 430).

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. “When 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.” Home Health Serv., Inc., 312 S.C. at 329, 440 S.E.2d at 378.

Here, in responding to Carpenter’s concern that PT’s practicing in groups or employing other PTs or PTA could be subject to discipline, the Board intended PTs and PTOG to be able to rely on the 2011 Position Statement. (R. 596). 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).” (R. 358).

Relying on the Position Statement, PTs or PTOGs are free from prosecution for violation of § 40-45-110(A)(1) if they employ Licensed Persons and refer patients.

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 Order should be reversed and the Board’s adoption of the 2011 Position Statement violates the requirements of the APA and should be struck.

VII. The Lower Court Erred in not Holding that Sloan forecloses Appellants Equal Protection Claims.

The lower court found that Appellants equal protection claim is foreclosed by the Sloan decision. First, as argued in Section I, the court’s reliance on Sloan is misplaced, since the majority holding erred in not finding the 2004 Position Statement violates South Carolina Constitution, art. I, sec. 3 and the United States Constitution, amend. XIV, sec. 1. The lower court erred in not recognizing that Sloan dealt with the “referral” prohibition in § 40-45-110(A)(1) and the 2011 Position Statement found that intra-professional relations did NOT constitute a referral.

The 2011 Position Statement interpretation of § 40-45-110(A)(1) to allow PTs to be employed by other PTs or PTOGs and cover treatment of patients directed by those PTs or members of the group and not to allow PTs to be employed by physicians or physician groups and cover treatment of patients directed by these physicians or members of the group violates Plaintiff PT Joseph’s rights to equal protection. PT Joseph will be

providing the same range of physical therapy services for the PT and PTOG patients she would be providing for the physician or physician group patients referred for the same ailments or treatment. The 2011 Position Statement does not provide PT Joseph the same protection from sanctions for providing coverage to physician patients needing PT services as it does for providing coverage for PT or PTOG patients needing PT services.

Equally, Drs. Joseph and McCarthy will need PT coverage for patients needing the same range of physical therapy services that PTs or PT groups will be using covering PTs to provide services. Allowing employment of PTs to provide coverage in intra-professional relationships and not in inter-professional relationships, deprives Appellant doctors of their right to practice medicine in the best interest of their patients. This 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.

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 basing employment of PTs and directing of patients for coverage on the basis of intra-professional versus inter-professional interactions does not pass muster under the Equal Protection Clauses.

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.

The lower court denied Appellants' equal protection claims on the ground that "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" and no "new course of treatment is authorized and is does not further the purposes of the PT Act. (R. 281) As discussed above, the lower court's reliance on the majority Sloan "gatekeeper physician" interpretation of § 40-45-110(A)(1) is misplaced, the majority holding in error and the Court should reverse the majority holding in Sloan. As discussed above, there is the opportunity for overutilization in intra-professional PT-to-PT and PT-to-PTA hand-off as recognized and regulated by CMS and SCDHHS. See *supra* p. 4-16, Section I(B).

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 [persons] who, for their own financial gain rather than their patients' medical needs, ... " Sloan, 370 S.C. 469, 636 S.E. 2nd 607.

The lower court refused to recognize that 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 PTOGs 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 Appellants 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.

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 PTOGs) 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 lower court erred in failing to find that the 2011 Position Statement denies Appellants 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, particularly in light of the fact that since the Sloan case was decided, CMS and SCDHHS have each determined that PTs and PTOGs are to be screened in the moderate risk for fraud and abuse and physicians and physician groups are to be screened in the low risk for fraud and abuse.

VIII. The Lower Court Erred in Holding that Appellants' Substantive Due Process Right Were Addressed In Sloan and the 2011 Position Statement Does Not Deprive Them of Anything.

First, the Sixth Cause of Action (substantive due process) is only plead as to Respondent PT Joseph, not at to Respondent physicians. Sloan only addressed substantive due process as it applied to referral of patients to PTs employed by physicians. It did not address whether a PT can be employed by a physician and provide

coverage for physicians patients in need of PT services. The 2011 Position Statement's interpretation of Section 40-45-110(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); see also, Martin v. Saint Mary's Dept. Social Services, 346 F.3d 502, C.A.4 (Md. 2003). 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 cover directed patients and not to allow PT Joseph to be employed by a physician or physician group and be paid to cover directed referred patients. Coverage for PT services is coverage and long as the covering professional is practicing within the scope of his professional license. Who employees the professional does not change the nature of the coverage provided. Risk of fraud, waste and abuse, as determined by CMS and SCDHHS 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. 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.

IX. The trial court erred in opinions contained in the Affidavit of John P. Stearns.

Mr. Stearns has not shown that he possesses “scientific, technical, or other specialized knowledge” and has not been qualified as an expert. Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Mr. Stearns does not have the experience nor the education to provide testimony regarding the operations—including referral or coverage and the potential for abuse—in either physician owned physical therapy services (POPTS) or physical therapy outpatient practices. Mr. Stearns has only been qualified as an expert in one case that involved testimony where he was qualified in the area of health care operations and secondarily cost reports in an arbitration. (R. 667-668; R. 683-684). Mr. Stearns personal experience as a physical therapist is: (1) in a hospital setting; (2) in a skilled nursing facility company; (3) as a consultant in an Ernest and Young healthcare disputes and investigations practice; and (4) with Navigant Consulting. (R. 667-668; R. 683-684).

Mr. Stearns avers that he has “expertise in the management, operation, compliance, and reimbursement practices of health care facilities including physical therapy group practices.” (Emphasis added.) However, Mr. Stearns’ lack of expertise is at first glance evident in that, by definition, health care facilities do not include physical therapy group practices. See S.C. Code Ann. §44-7-130(10). Furthermore, Mr. Stearns claims no expertise in physical therapy practices such as the one that employs the Plaintiff Kristin Joseph P.T., which is not a physical therapy group practice, but is a practice owned by an unlicensed investor. (R. 375). Mr. Stearns has no identifiable “knowledge, skill, experience, training, or education” to qualify him as an expert in “the management, operation, compliance, and reimbursement practices of health care facilities including physical therapy group practices.” Numerous degree programs, certifications, and continuing education programs may assist an individual in developing expertise in “the management, operation, compliance, and reimbursement practices of health care facilities,” such as master’s degrees in health care administration, the Health Care

Compliance Association's Compliance Certification Board, the American Academy of Professional Coders, or board certification in healthcare management as an American College of Healthcare Executives Fellow (FACHE). Mr. Stearns does not possess any of these credentials.

Furthermore, Mr. Stearns' affidavit testimony is not based on accepted methodology, has not been subjected to peer review or publication, and has not been generally accepted within any relevant scientific community. In fact, Mr. Stearns relied upon and attached the following two publications regarding physician owned physical therapy services published in 1992—well over twenty years ago, about the same time as STARK I was effective and many years before STARK II or III took effect:

Jean M. Mitchell & Elton Scott, "Physician Ownership of Physical Therapy Services," *JAMA*, Vol. 268, No. 15, pgs. 2055-2059 (1992); and Alex Swedlow et al., "Increased Costs and Rates of Use in the California Workers' Compensation System as a Result of Self-Referral by Physicians," *New England Journal of Medicine*, Vol. 327, pgs. 1502-1506 (1992).

Given that Mr. Stearns bases his opinion on 21 to 22 year old articles that predate the current Stark law prohibitions on self-referrals, Mr. Stearns opinions are not reliable and the trial court's reliance upon and adoption of Mr. Stearn's opinions is reversible error.

CONCLUSION

For the reasons in this Initial Brief, the Appellants respectfully request this Court overturn the Sloan decision and reverse Judge Cooper's April 21, 2014 Order relying upon the same and granting Appellants the relief requested in their Declaratory Judgment/Amended Complaint.

Respectfully submitted,

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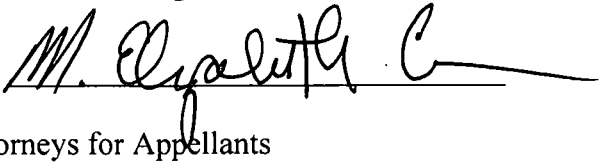
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October 27, 2014

Columbia, South Carolina

By: 
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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2014-001115

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

v.

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

and

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

CERTIFICATION

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b)
SCACR and the Supreme Court Order of August 13, 2007.


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This 27th Day of October, 2014

Attorneys for Appellants

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
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S.C. Supreme Court

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Appeal From Richland County
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

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South Carolina Board of Physical Therapy, ... Respondents,

and

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

CERTIFICATE OF SERVICE

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

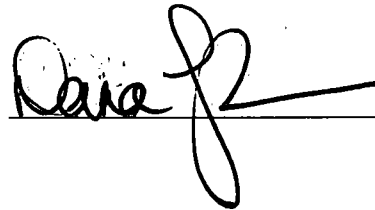
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A handwritten signature in black ink, appearing to read "Darra", is written over a horizontal line.

October 27, 2014
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