

**THE STATE OF SOUTH CAROLINA  
In The Supreme Court**

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Allen Sloan, M.D.; Doctor's Care, P.A.; Barry E. Fitch, P.T.; Jerry O'Reilly, P.T.A.; Oaktree Medical Centre, P.C.; FirstChoice Healthcare, P.C.; Southern Orthopaedic Sports Medicine, LLC; and South Carolina Medical Association, Plaintiffs,

Of Whom Doctor's Care, P.A.; Barry E. Fitch, P.T.; Jerry O'Reilly, P.T.A.; Oaktree Medical Centre, P.C.; FirstChoice Healthcare, P.C.; and Southern Orthopaedic Sports Medicine, LLC, are Appellants,

v.

South Carolina Board of Physical Therapy Examiners; South Carolina Chapter, American Physical Therapy Association; and the Attorney General of the State of South Carolina, Respondents,

and

South Carolina Association of Medical Professionals and South Carolina Orthopaedic Association, Appellants,

v.

South Carolina Board of Physical Therapy Examiners, Respondent.

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Appeal from Richland County  
J. Ernest Kinard, Jr., Circuit Court Judge

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Opinion No. 26209  
Heard June 7, 2006 – Filed September 25, 2006

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**AFFIRMED**

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James G. Long, III, and Manton M. Grier, Jr., both of Nexsen Pruet Adams Kleemeier, LLC, of Columbia, for Appellants Doctors Care, P.A.; Barry E. Fitch, P.T.; Jerry O'Reilly, P.T.A.; Oaktree Medical Centre, P.C.; FirstChoice Healthcare, P.C.; and Southern Orthopaedic

Sports Medicine, LLC.

Stephen P. Bates and Mary Margaret Hyatt, both of McAngus, Goudelock & Courie, LLC, of Columbia, for Appellants South Carolina Association of Medical Professionals and South Carolina Orthopaedic Association.

Monteith P. Todd of Sowell Gray Stepp & Laffitte, LLP, of Columbia, for Respondent South Carolina Board of Physical Therapy Examiners.

R. Bruce Shaw and Alice V. Harris, both of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Respondent South Carolina Chapter, American Physical Therapy Association.

Henry D. McMaster, T. Stephen Lynch, Robert D. Cook, and C. Havird Jones, all of the South Carolina Office of Attorney General, of Columbia, for Respondent Attorney General of the State of South Carolina.

Charles E. Carpenter, Jr., and Carmen V. Ganjehsani, both of Richardson, Plowden, Carpenter & Robinson, P.A., of Columbia, for Amicus Curiae American Association of Orthopaedic Surgeons.

William J. Watkins, Jr., and Sandra L. W. Miller, both of Womble Carlyle Sandridge & Rice, LLC, of Greenville, for Amicus Curiae William Davis, Barry Cohen, Bruce Carlson, and George Todd.

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**JUSTICE BURNETT:** In this appeal, we are asked to decide the novel issue of whether a physical therapist in South Carolina is statutorily prohibited from working as an employee of a physician who refers patients to the physical therapist for services.

### **FACTUAL AND PROCEDURAL BACKGROUND**

The arrangement at issue, known within the medical profession as a physician-owned physical therapy service, or POPTS, has generated debate nationwide since the mid-1970s. The debate is driven in part by money, *i.e.*, whether physicians or physical therapists will primarily benefit from fees paid by therapy patients, and in part by ethical concerns about actual and potential conflicts of interest. The debate also implicates issues of control and prestige among medical professionals. Two position statements from leading organizations on both sides of the issue offer a beneficial summary of the concerns.

The American Physical Therapy Association (APTA) opposes physician-owned physical therapy services.

Physical therapy referral for profit describes a financial relationship in which a physician, podiatrist, or dentist refers a patient for physical therapy treatment and gains financially from the referral. A physician can achieve financial gains from referral by (a) having total or partial ownership of a physical therapy practice, (b) directly employing physical therapists, or (c) contracting with physical therapists. The most common form of referral for profit relationship in physical therapy is the physician-owned physical therapy service, known by the acronym

“POPTS.” The problem of physician ownership of physical therapy services was first identified by the physical therapy profession in the journal *Physical Therapy* in 1976. While POPTS relationships were still limited in number in 1982, Charles Magistro, former APTA President, characterized POPTS as, “a cancer eating away at the ethical, moral and financial fiber of our profession.”

For many years, the [APTA] has opposed referral for profit and physician ownership of physical therapy services, taking the position that such arrangements pose an inherent conflict of interest impeding both the autonomous practice of the physical therapist and the fiduciary relationship between the therapist and patient. . . . However, in recent years, facing pressures of decreasing revenues and increased costs of malpractice insurance premiums, and aided by weakening of federal antitrust legislation, physicians have accelerated the addition of POPTS to their practice. APTA’s push to achieve autonomous practice and direct access are in conflict with the medical profession’s renewed push to subsume physical therapy as an ancillary service for financial gain.

At the center of the clash between these two opposing forces are two questions: First, should one profession be able to claim financial control over another? Second, what are the real and potential consequences of referral-for-profit relationships and, more specifically, POPTS?

“Position on Physician-Owned Physical Therapy Services (POPTS),” An American Physical Therapy Association White Paper 1 (January 2005) (available at <http://www.apta.org/POPTS%20White%20Paper%20final.pdf>) (footnotes omitted).

In its position statement, the APTA asserts that a physical therapist employed by a physician creates an inevitable conflict of interest, results in a loss of consumer choice in selecting a therapist, and drives up health care costs because physicians in self-referral relationships prescribe or continue therapy based more on financial gain than patient needs. “Having a financial interest in other services to which a physician refers a client may cloud the physician’s judgment as to the need for the referral, as well as the length of treatment required. Similarly, the physical therapist employed by a physician may face pressure to evaluate and treat all patients referred by the physician, without regard to the patient’s needs.” APTA White Paper, *supra*, at 3.

In contrast, the American Association of Orthopaedic Surgeons (AAOS) views physical therapy as an ancillary service offered by physicians and contends POPTS benefit patients, physicians, and therapists.

POPTS gives physicians a greater role in the physical therapy services provided to patients. In-office therapy allows therapists and physicians to work together as a team, exchanging information and sharing ideas. The frequency and immediacy of feedback allow for the fine-tuning of therapeutic protocols that serves to improve patient outcomes. A study comparing on-site physical therapy delivered in physician offices versus other sites concluded that patients who receive on-site physical therapy lose less time from work and resume normal duties more quickly.

Frequent and timely feedback between therapists and physicians also reduces over-utilization of services. . . . [T]he ability to exchange information on a patient in a frequent and timely fashion serves to reduce errors. . . .

POPTS offers patients direct and immediate access to Physical Therapists after the physician has seen them. Moreover, patients have the ability to schedule physician and physical therapy appointments at or near the same time and in the same office. . . .

Recently, there have been attempts by some groups to add language, as well as interpret existing statutory language, to state Physical Therapy Practice Acts that would prohibit Physical Therapists from working for physicians and physician group practices. These activities seem to be motivated more by the financial interests of those providing care than by what is in the best interests of patients. . . .

The [AAOS] believes that patients should have access to quality, comprehensive and non-fragmented care. Doctors, nurses, physician's assistants, Physical Therapists and other health practitioners work together, often in the same office, to provide comprehensive care to patients. Separation of these services would only serve to disrupt a patient's treatment and further inconvenience them.

"Position Statement on Physician-Owned Physical Therapy Services," American Association of Orthopaedic Surgeons (December 2004) (available at <http://www.aaos.org/wordhtml/papers/position/1166.htm>) (footnotes and bold/italic fonts omitted). An amicus brief filed by the AAOS in the present case echoes these same arguments and recites portions of the group's position statement.

Congress engaged in a similar debate in recent years, resulting in the enactment in 1989 and 1993 of the federal self-referral "Stark laws," named for their primary sponsor, Congressman Fortney "Pete" Stark. These provisions generally prohibit, with limited exceptions, physicians from referring patients to various types of facilities in which they are owners or investors, including clinical laboratories, centers with medical scanning equipment, and physical and radiation therapy facilities. The acts were "designed to address the strain placed on the Medicare Trust fund by the overutilization of certain medical services by physicians who, for their own financial gain rather than their patients' medical need, referred patients to entities in which the physicians held a financial interest." American Lithotripsy Soc. v. Thompson, 215 F. Supp. 2d 23, 26-28 (D.D.C. 2002) (discussing enactment and purposes of Stark laws, codified at 42 U.S.C. § 1395nn); Eighty-Four Min. Co. v. Three Rivers Rehabilitation, Inc., 721 A.2d 1061, 1063-67 (Pa. 1998) (discussing interplay between federal and state self-referral statutes in context of a worker's compensation case involving physical therapy services).

South Carolina's Legislature in 1993 enacted the "Provider Self-Referral Act," codified at South Carolina Code Ann. §§ 44-113-10 to -80 (2002). This Act generally prohibits a health care provider from referring a patient to an entity in which the provider has an investment interest, with certain exceptions and disclosure requirements, and also prohibits a health care provider from accepting a kickback for patient referrals.

In 1998, the Legislature substantially amended various statutes governing the licensing and regulation of physical therapists. Act No. 360, 1998 S.C. Acts 2103-2119 (presently codified at S.C. Code Ann. §§ 40-45-5 to -330 (2001)). Among the amendments was a new provision contained in Section 40-45-110(A)(1), which states:

(A) In addition to the other grounds provided for in Section 40-1-110,[1] the [South Carolina Board of Physical Therapy Examiners], after notice and hearing, may restrict or refuse to renew the license of a licensed person, and may suspend, revoke, or otherwise restrict the license of a licensed person who:

(1) requests, receives, participates or engages directly or indirectly in the dividing, transferring, assigning, rebating, or refunding of fees received for professional services or profits by means of a credit or other valuable consideration, including, but not limited to, wages, an unearned commission, discount, or gratuity with a person who referred a patient, or with a relative or business associate of the referring person; . . .

In December 1998, seven months after the effective date of the new statute, the South Carolina Board of Physical Therapy Examiners (Board) issued a written statement:

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

From 1998 to 2004, for reasons not apparent from the record, the Board did not attempt to apply the new

statute to prevent a physical therapist from working for or receiving referrals from a physician employer.[2]

In 2004, at the suggestion of the South Carolina chapter of the American Physical Therapy Association (SCAPTA), two state senators requested an opinion from the Attorney General regarding the scope and interpretation of Section 40-45-110(A)(1). Specifically, the senators inquired whether the statute prohibited a physical therapist from working for pay for a physician employer when the physician refers patients to the physical therapist for services. The Attorney General issued an opinion concluding the statute prohibited such employment relationships, relying in part on legal authority called to the Attorney General's attention by APTA's general counsel. S.C. Atty. Gen. Op. dated March 30, 2004 (2004 WL 736934).

The Board, following discussion of the issue and a vote at a regularly scheduled meeting, endorsed the Attorney General's opinion and announced it would begin investigating complaints against physical therapists employed by referring physicians. The Board granted a ninety-day grace period during which physical therapists and physicians could modify or terminate arrangements in violation of the statute.

Appellants, who are physicians and physical therapists they employ opposed to the Board's decision, brought an action in circuit court seeking a declaratory judgment that a physician may lawfully employ a physical therapist and refer patients to that physical therapist. Appellant physicians asserted they stand to lose substantial sums they have spent to purchase equipment, prepare facilities, and hire physical therapists. SCAPTA and the Attorney General sought to intervene in the lawsuit and their motions were granted.

Two other Appellants, the South Carolina Association of Medical Professionals and the South Carolina Orthopaedic Association brought a separate declaratory judgment action against the Board, but also alleged equal protection and due process violations. The two cases were consolidated on the motion of these Appellants. Respondents include the Board, SCAPTA, and the Attorney General.

The parties filed respective motions for summary judgment. The circuit court denied Appellants' motions for summary judgment and granted Respondents' motions, ruling that a physical therapist is statutorily prohibited from working as an employee of a physician who refers patients to the physical therapist for services. The circuit court dismissed all Appellants' causes of action and lifted a temporary injunction previously entered which had barred the Board from taking action against physical therapists believed to be in violation of the statute. We certified this case for review from the Court of Appeals pursuant to Rule 204 (b), SCACR.

### STANDARD OF REVIEW

In a case raising a novel question of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court. l'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Const. art. V, §§ 5 and 9, S.C. Code Ann. § 14-3-320 and -330 (1976 & Supp. 2005), and S.C. Code Ann § 14-8-200 (Supp. 2005)); Osprey, Inc. v. Cabana Ltd. Partnership, 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000) (same); Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) (same). The appellate court is free to decide the question based on its assessment of which interpretation and reasoning would best comport with the law and public policies of this state and the Court's sense of law, justice, and right. Croft v. Old Republic Ins. Co., 365 S.C. 402, 408, 618 S.E.2d 909, 912 (2005); Antley v. New York Life Ins. Co., 139 S.C. 23, 30, 137 S.E. 199, 201 (1927) ("In [a] state of conflict between the decisions, it is up to the court to 'choose ye this day whom ye will serve'; and, in the duty of this decision, the court has the right to determine which doctrine best appeals to its sense of law, justice, and right.").

A trial court may properly grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56 (c), SCRCP; Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997). In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be

drawn from the evidence in the light most favorable to the non-moving party. Manning v. Quinn, 294 S.C. 383, 365 S.E.2d 24 (1988). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the appellant, the non-moving party below. Williams v. Chesterfield Lumber Co., 267 S.C. 607, 230 S.E.2d 447 (1976).

## ISSUES

I. Does South Carolina Code Ann. § 40-45-110(A)(1) (2001) prohibit a physical therapist from working as an employee of a physician when the physician refers patients to the physical therapist for services?

II. Does the Board's decision to begin enforcing Section 40-45-110(A)(1) after formally endorsing an opinion issued by the Attorney General regarding the proper interpretation of the statute constitute a new regulation that is void for failure to comply with the rule-making provisions of the state Administrative Procedures Act?

III. Does the Board's decision to enforce Section 40-45-110(A)(1) improperly infringe upon physicians' statutory right to practice medicine?

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

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

## LAW AND ANALYSIS

### I. INTERPRETATION OF SECTION 40-45-110(A)(1)

Appellants contend the circuit court erred in interpreting Section 40-45-110(A)(1) to prohibit physical therapists from working as an employee of a physician when the physician refers patients to the physical therapist for services. Appellants argue that, while the statute plainly is intended to prohibit kickbacks in which a therapist pays a physician for a referral, the Legislature did not intend to ban physical therapists from being employed by referring physicians.[3] We disagree.

It is a cardinal rule of statutory construction that the primary purpose in interpreting statutes is to ascertain the intent of the Legislature. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000); State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994).

A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. The real purpose and intent of the lawmakers will prevail over the literal import of particular words. Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992); Caughman v. Columbia Y.M.C.A., 212 S.C. 337, 341, 47 S.E.2d 788, 789 (1948). Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Bryant v. City of Charleston, 295 S.C. 408, 368 S.E.2d 899 (1988); State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). The construction of a statute by an agency charged with its administration is entitled to the most respectful consideration and should not be overruled absent compelling reasons. Emerson Elec. Co. v. Wasson, 287 S.C. 394, 397, 339 S.E.2d 118, 120 (1986).

We conclude Section 40-45-110(A)(1) prohibits a physical therapist from receiving referrals from or dividing fees with a physician employer. The statute allows the Board to suspend, restrict, or revoke the license of a

