FORM 4

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

JUDGME[illegible] IN A CIVIL CASE

CASE NUMBER: 2012CP4002632

Kristin Joseph
Thomas N Joseph
PLAINTIFF(S)

SC Dept Of Labor Licensing And Regulation
South Carolina Board of Physical Therapy
DEFENDANT(S)

Submitted by: _____

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

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

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

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

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

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

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

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

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ **day of** _____, **20** _____ and a copy mailed first class or placed in the appropriate attorney's box on this 22 April 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Mary Elizabeth (Liz) Crum

Monteith Powell Todd
Emily Whitney Medlyn

S. Jahue Moore
John Robert Devlin Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Kristin Joseph P.T., Thomas N. Joseph, M.D., and William G. McCarthy, M.D., Plaintiffs, vs. South Carolina Department of Labor, Licensing and Regulation, South Carolina Board of Physical Therapy, Defendant, And South Carolina Chapter, American Physical Therapy Association, Joseph M. McKowen, PT, Sabrina Queen Bridges, PTA, and Amalia W. Kirby (PTA), Defendants-Intervenors.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Case No.: 2012-CP-40-2632 **ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

This matter came before the Court on cross-motions for summary judgment, filed by Plaintiffs and Defendants pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. The Court heard oral argument on the parties' cross-motions on January 16, 2014. For the reasons set forth herein, the Court hereby **DENIES** Plaintiffs' motion for summary judgment and **GRANTS** the motions for summary judgment filed by the Defendants.

FACTUAL AND PROCEDURAL HISTORY

This case stems from the 1998 passage of certain amendments to South Carolina Code §§ 40-45-5 *et seq.* (the "PT Act") that regulate physical therapists ("PTs") and physical therapist assistants ("PTAs"), the subsequent litigation over the interpretation of that statute, and the resulting South Carolina Supreme Court opinion in *Sloan v. S.C. Bd. of Physical Therapy*

Exam'rs, 636 S.E.2d 598 (S.C. 2006). The statutory provision that was at issue in *Sloan*, and is at issue in this matter, is S.C. Code Ann. § 40-45-110(A)(1), which states:

> (A) In addition to the other grounds provided for in Section 40-1-110, the [Board], after notice and hearing, may restrict or refuse to renew the license of a licensed person, and may suspend, revoke, or otherwise restrict the license of a licensed person who:
>
> > (1) requests, receives, participates or engages directly or indirectly in the dividing, transferring, assigning, rebating, or refunding of fees received for professional services or profits by means of a credit or other valuable consideration, including, but not limited to, wages, an unearned commission, discount, or gratuity with a person who referred a patient, or with a relative or business associate of the referring person; . . .

S.C. Code Ann. § 40-45-110(A)(1), as amended by § 1 of Act No. 360, 1998 S.C. Acts 2103-2119.

Much of the history relevant here is recounted in the *Sloan* opinion. In 2004, two state senators requested an opinion from the Attorney General regarding the scope and interpretation of § 40-45-110(A)(1). Specifically, the senators inquired whether the statute prohibited a PT from working for pay for a physician employer when the physician refers patients to the PT for services—or for a physician-owned professional corporation when a physician owner or employee of the corporation refers patients to the PT. The Attorney General issued an opinion concluding that the statute prohibited such employment relationships.

In a position statement, the South Carolina Department of Labor, Licensing and Regulation, South Carolina Board of Physical Therapy (the "Board") endorsed the Attorney General's opinion and announced that it would begin investigating complaints against PTs employed by referring physicians (the "2004 Position Statement"). Following the Board's 2004 Position Statement, a physician, Allen Sloan, filed a lawsuit against the Board. Dr. Sloan was eventually joined by the South Carolina Medical Association, Doctor's Care, P.A., Barry E.

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Fitch, Jerry O'Reilly, Oaktree Medical Centre, P.C., FirstChoice Healthcare, P.C., and Southern Orthopedic Sports Medicine, LLC. The South Carolina Association of Medical Professionals, and the South Carolina Orthopedic Association filed a separate suit against the Board, which was consolidated with the earlier action. These plaintiffs sought declaratory judgment relief based upon their interpretation of § 40-45-110(A)(1)—namely that physicians could employ a PT and refer patients to that PT without running afoul of the statute—as well as upon equal protection and due process grounds. On February 24, 2005, the circuit court granted summary judgment in favor of the Board on all of the issues and dismissed the plaintiffs' causes of action.

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

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

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

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

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

In reaching this decision, the Supreme Court observed that § 40-45-110(A)(1) was designed to prevent "overuse of physical therapy services by physicians who, for their own financial gain rather than their patients' medical needs, refer patients to therapists employed by the physician who will generate additional fees for the physician." *Id.* at 614; *see also id.* at 607, 612.

Following the Supreme Court's decision in *Sloan*, two bills were introduced that attempted to amend or repeal the statutory prohibition on PTs working for physician-owned practices. These bills were: (i) S 1031, introduced on January 12, 2010; and (ii) H 4329, introduced on January 13, 2010. The General Assembly held hearings on these bills. Two of the named Plaintiffs in this lawsuit, Dr. McCarthy and Ms. Joseph, testified in a legislative hearing on a proposed bill. Despite the lobbying efforts of physicians and physician groups, including the South Carolina Orthopedic Association, in favor of the two proposed bills, both of them failed to pass.

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

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

The Chair of the Board responded to Mr. Carpenter by letter dated June 2, 2011, stating her view that the answer to the questions was "no." At a Board meeting on August 17, 2011, the Board

voted to accept the position stated in the Chair's letter, and a position statement (the "2011 Position Statement") was posted on the Board's website. The 2011 Position Statement says:

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

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

On April 12, 2012, the Plaintiffs Kristin Joseph, Thomas Joseph, and William McCarthy filed a Declaratory Judgment Action/Complaint against the Board, seeking a declaration that would allow PTs to be employed in practices owned by physicians.[1] Kristin Joseph is a practicing PT. PT Joseph alleges that she has filed this lawsuit because she seeks the right to be employed by a physician or in a physician's practice. Dr. Joseph alleges that he is a licensed orthopedic surgeon in South Carolina. He alleges that he seeks to employ physical therapists in his practice. Plaintiff Dr. William McCarthy also alleges that he is a licensed orthopedic surgeon in South Carolina. He alleges that he, too, seeks to employ physical therapists in his practice, as he claims physicians were allowed to do before *Sloan*.

The Board moved to dismiss the case because, among other things, the Seventh through Ninth Causes of Action sought to "argue against precedent," namely *Sloan*. This Court agreed, finding that, "[a]s a matter of law, this Court is bound by the Supreme Court's decision in *Sloan*

[1] Plaintiffs testified that the South Carolina Orthopedic Association, one of the parties in *Sloan*, is paying their legal fees in this suit. *See* T. Joseph Dep. 26:7-24; McCarthy Dep. 25:14-22.

and has no authority to overrule *Sloan*." This Court thus dismissed the Seventh through Ninth Causes of Action.

On May 2, 2013, a motion to intervene as party defendants was filed by SCAPTA, Joseph M. McKowen, PT, Sabrina Queen Bridges, PTA, and Amalia W. Kirby, PTA (collectively, the "Defendant-Intervenors"). SCAPTA is a professional association that represents South Carolina's PTs, PTAs, and student PTs and PTAs. It is affiliated with the national professional organization, the American Physical Therapy Association. Defendant-Intervenor McKowen is a PT and the sole owner of a practice that employs both PTs and PTAs. Defendant-Intervenors Bridges and Kirby are licensed PTAs. The other parties consented to the intervention, and the Court granted the motion.

On May 24, 2013, Plaintiffs filed an Amended Declaratory Judgment Action/Complaint. Plaintiffs' remaining claims in their Amended Complaint purport to challenge the 2011 Position Statement, in that they ask this Court to "determine that the 2011 Position Statement . . . violates the provisions of the PT Act and the Constitutions of South Carolina and the United States."

In their First Cause of Action, Plaintiffs allege that when a PT sends or directs a patient to another PT who is employed by the same physical therapy practice, this constitutes a prohibited "referral" under § 40-45-110(A)(1) of the PT Act.[2] Similarly, in their Second Cause of Action, Plaintiffs contend that the 2011 Position Statement misconstrued the word "refer" in § 40-45-110(A)(1) in determining that a "[PT] or [PTA] seeing a patient at the request of another [PT] in the same group does not constitute a 'referral.'" Plaintiffs thus ask that the "Court issue a declaratory order stating that an employed PT who is assigned patients for treatment by a physical therapist or physical therapy group employing the PT is not providing 'coverage' but

[2] This allegation naturally extends to PTAs, as both PTs and PTAs are "licensed persons" equally subject to § 40-45-110(A)(1). S.C. Code Ann. § 40-45-20(5).

receiving referrals in contravention of S.C. Code Ann. § 40-45-110(A)(1) and stating that such PT is subject to discipline by the Board."

In the Third Cause of Action, Plaintiffs argue, in the alternative, that if this Court disagrees with their argument in the first two Causes of Action, then it should declare that when a patient is "sent" to a PT by a physician or physician group employing that PT, the PT is engaged in "coverage," and the physician's sending of the patient to the PT does not constitute a "referral" within § 40-45-110(A)(1). ("[A] PT seeing a patient at the request of physician in the same group does not constitute a 'referral,' but is rather a PT providing coverage for a physician or other member of the group.").

Finally, Plaintiffs allege in their Fourth through Sixth Causes of Action that the 2011 Position Statement violates the Administrative Procedures Act ("APA"), as well as Plaintiffs' equal protection and substantive due process rights.

On November 1, 2013, the Plaintiffs moved for summary judgment on all remaining causes of action. On November 7, 2013, the Defendant South Carolina Board of Physical Therapy moved for summary judgment on all remaining causes of action. The Defendant-Intervenors subsequently moved for summary judgment as well. All parties thus agree that this case of statutory interpretation is ripe for decision.

STATUTORY AND REGULATORY BACKGROUND

This case involves the interpretation of the PT Act, which created the Board to license both PTs and PTAs. S.C. Code Ann. § 40-45-10. The Act defines "physical therapist" to mean "a person who has met all the conditions of this chapter and is licensed in this State to practice physical therapy." *Id.* § 40-45-20(4). It defines "physical therapist assistant" to mean "a person who is licensed by the [B]oard to assist a physical therapist in the practice of physical therapy

and whose activities are supervised and directed by a physical therapist whose license is in good standing." *Id.* § 40-45-20(5).

A PTA thus must function under the supervision of a licensed PT. The supervising PT is professionally and legally responsible for patient care given by a PTA. § 40-45-300(A-B). The initial evaluation of a patient must be performed by a PT, and a PTA may perform duties only after the PT has conducted the initial evaluation. The PT may delegate to a PTA and supervise selected acts, tasks, or procedures that fall within the practice of physical therapy but that do not exceed the education or training of a PTA. Any alteration of a patient plan of care must be approved in advance and in writing by a licensed PT. Periodically, a PT must reevaluate every patient and reapprove the plan of care.

In general, a PT may not evaluate or treat a patient unless a licensed medical doctor or dentist has made a "referral." The PT Act authorizes the Board to discipline a PT or PTA who:

> (4) in the absence of a referral from a licensed medical doctor or dentist, provides physical therapy services beyond thirty days after the initial evaluation and/or treatment date without the referral of the patient to a licensed medical doctor or dentist;

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

STANDARD OF REVIEW

Where "plain, palpable, and indisputable facts exist on which reasonable minds cannot differ," summary judgment is proper. *Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing, and Regulation*, 523 S.E.2d 795, 799 (S.C. Ct. App. 1999) (quoting *Rothrock v. Copeland*, 409 S.E.2d 366, 368 (S.C. 1991)). Summary judgment should therefore be granted when the "pleadings, depositions, answers to interrogatories, and admissions on file, together

with the affidavits" show that there is "no genuine issue" as to any material fact and that the moving party is "entitled to judgment as a matter of law." *Connor Holdings, LLC v. Cousins*, 644 S.E.2d 58, 60 (S.C. 2007).

DISCUSSION

Defendants are entitled to summary judgment because the pleadings, depositions, and record before the Court show that Plaintiffs' remaining claims fail as a matter of law and undisputed fact.

I. Plaintiffs' Claims

A. First and Second Causes of Action

In their First and Second Causes of Action, Plaintiffs claim that the transitions in treatment of patients from PT to PT occurring within a group physical therapy practice constitute prohibited "referrals" under § 40-45-110(A)(1), and that the 2011 Position Statement thus misinterpreted the PT Act. As a matter of law and undisputed fact, the Court finds that these claims are mistaken, and that Plaintiffs' proposed interpretation of the PT Act would harm the practice of physical therapy in South Carolina without advancing the legislative purpose of the statute. Defendants are thus entitled to summary judgment.

1. Physicians Are the Gatekeepers for Physical Therapy Services.

It is well-settled that the "cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Barton v. S.C. Dep't of Probation Parole & Pardon Servs.*, 745 S.E.2d 110, 121 (S.C. 2013); *see also McClanahan v. Richland Cnty Council*, 567 S.E.2d 240, 242 (S.C. 2002) ("All rules of statutory construction are subservient to the one that legislative intent must prevail if it can reasonably be discovered in the language used, and that language must be construed in light of the intended purpose of the statute."). As a result, a

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

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

2. Physicians Are the Gatekeepers for Physical Therapy Services.

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

3. Section 40-45-110(A)(1) Targets Referrals by Gatekeeper Physicians.

Because *Sloan* already has interpreted the statute, the starting point for this Court is the Supreme Court's analysis of the Legislature's purpose in enacting § 40-45-110(A)(1). As

explained in *Sloan*, the referral restrictions in the PT Act are designed to eliminate the temptation for a gatekeeper physician to order more physical therapy treatment than a patient might need where the physician has a financial interest in that treatment. 636 S.E.2d at 607, 612, 614. Because physicians hold the keys to care, there is concern about "overuse of physical therapy services" when physicians can make money by making referrals to PTs. *Id.* at 614. Thus, while the PT Act does not define the terms "referred" or "referral," the Supreme Court has already determined that the intent of § 40-45-110(A)(1) was the: "avoidance of overuse of physical therapy services ***by physicians*** who, for their own financial gain rather than their patients' medical needs, refer patients to therapists ***employed by the physician*** who will generate additional fees for the ***physician.***" *Id.* (emphases added); *see also id.* at 607, 612. Plaintiffs have acknowledged—as they must—that this was the legislative purpose articulated by the South Carolina Supreme Court in *Sloan.*

4. Plaintiffs Interpret the Referral Restrictions in § 40-45-110(A) to Prohibit the Group Practice of Physical Therapy.

Plaintiffs nonetheless argue that the term "referred" in § 40-45-110(A)(1) applies not just to the gatekeeping referrals from physicians to PTs addressed in *Sloan*, and referenced in § 40-45-110(A)(4), but also to patient transitions in the group practice of physical therapy. Plaintiffs would have the Court interpret the PT Act to prevent a PT from being "assigned patients for treatment by a physical therapist or physical therapy group employing the PT. Such an interpretation would effectively eliminate the ability of PTs to work for other PTs or join together in group practice.

5. Plaintiffs' Interpretation of "Refer" Ignores Its Context in § 40-45-110(A).

In the context of § 40-45-110(A), and the PT Act as a whole, it is clear that the referral being referenced in § 40-45-110(A)(1) is the same gatekeeping referral from the physician

referenced in § 40-45-110(A)(4), the referral that PTs are required to have in order to provide physical therapy services to any patient beyond an initial 30-day window. The Court declines to adopt Plaintiffs' interpretation, which would expand the operation of § 40-45-110(A)(1) effectively to ban the group practice of physical therapy. *See, e.g., Carolina Alliance*, 523 S.E.2d at 802 ("The court may not resort to subtle or forced construction to . . . expand a statute's operation.").

6. Prohibiting Patient Transitions Occurring in the Group Practice of Physical Therapy Would Not Advance Legislative Intent.

To support their position that the Legislature intended § 40-45-110(A)(1) to apply to patient transitions within a physical therapy practice group, Plaintiffs argue that there is the potential for waste, fraud, and abuse in the practice of physical therapy. Granted, PTs are not immune to the temptation to over-treat patients. Plaintiffs' argument fails, however, because that temptation exists for PTs who practice solo just as much as for PTs who practice in a group.

Plaintiffs discuss Medicare and Medicaid rules and guidance applicable to PTs. The crux of their argument is that, just as physicians could be tempted to over-refer if they were able to profit from doing so, PTs can be tempted to provide excessive treatment for their own good rather than that of their patients. But Plaintiffs have presented no evidence that this risk is increased by the shared treatment of patients by PTs in group practice.[3] PTs working together in group practice and PTs working separately in solo practice have the same opportunities and incentive to over-treat patients. There is no reason—and certainly no evidence—to believe that a

[3] In addition, the Court is not persuaded that the evidence advanced by Plaintiffs is sufficient to demonstrate that, in 1998, the Legislature intended to make § 40-45-110(A)(1) applicable to the patient transitions from one PT to another in the same group practice. That evidence, which dates from 2010, is better addressed to the Legislature than to this Court.

patient going to a group physical therapy practice is any more likely to be over-treated than a patient going to a PT in solo practice.

As the record in this case shows, the transition of patients from one PT to another PT within a group practice normally occurs as a simple function of scheduling and patient request or convenience. While Plaintiffs contend that re-scheduling a patient from one location to another for the convenience of the patient is an "example of potential abuse" at which the statutory prohibition is aimed, the Court does not believe that the Legislature never intended to prohibit a PT or his/her practice group from accommodating the needs of a patient by scheduling appointments at a convenient time or place, even if that necessitates the patient being treated by another PT.

There is no evidence that PTs send or direct patients to other PTs in their group in order to establish a new plan of care or create additional care. To the contrary, it is physicians—not PTs—who write the referrals and are the gatekeepers with respect to the breadth and frequency of physical therapy services. Accordingly, a PT sending or directing a patient to another PT (or a PTA) for treatment within a group practice does not implicate the potential abuse that the Legislature sought to curtail in enacting the prohibition on self-interested "referrals" in § 40-45-110(A)(1), namely overuse of physical therapy services.

7. Plaintiffs' Interpretation Would Produce Unintended Results.

Plaintiffs' requested interpretation would produce results not intended by the Legislature. Many PTs in South Carolina currently work in a group practice setting. If Plaintiffs' interpretation of the PT Act were adopted, PTs could be forced to operate as solo practitioners in order to continue their practice. Defendants have presented evidence that requiring PTs to

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practice in isolation would create inefficiencies, increase the cost of care, lower the quality of care, and produce patient inconvenience throughout the State.

Defendants contend that Plaintiffs' interpretation of § 40-45-110(A)(1) could have the consequence of eliminating the jobs of PTAs in South Carolina. Both PTs and PTAs are "licensed persons" subject to § 40-45-110(A)(1). If Plaintiffs are correct, that any sending or directing of a patient to a licensed person for treatment is a covered "referral," then situations in which PTs send or direct patients to PTAs they employ or PTAs employed in the same practice would be prohibited "referrals." Thus, under Plaintiffs' proposed interpretation of "referral," PTAs could not work for the PTs or physical therapy practices from whom they receive patients. PTAs, however, are required by the PT Act to be "supervised and directed" by a PT whose license is in good standing. *See* S.C. Code Ann. § 40-45-20(5). Furthermore, PTAs cannot submit reimbursement requests to obtain payment for physical therapy services from government and private health insurers; they rely on their PT employers to do so for them. PTAs cannot work on their own but rather must work in a setting where (1) PTs can direct and supervise them, and (2) PTs can submit reimbursement requests for their services to government and private payors. Plaintiffs' proposed interpretation of "referral" would have the PT Act prohibit PTAs from working for PTs, while the same Act expressly requires PTAs to practice only under the direction and supervision of PTs.

Plaintiffs' response to the Defendants' argument concerning PTAs is that the PTAs are "exempt" from the prohibition in § 40-45-110(A)(1). Plaintiffs invoke the principle of statutory interpretation that, in the event of a conflict between two provisions, the more specific provision will be deemed an exception to the more general. Plaintiffs argue that § 40-45-300 is "the specific provision in the PT Act that deals with the ability of a PT to supervise and delegate

patients to a PTA" and that this section "expressly authorizes PTs to employ, supervise and direct patients to PTA[s]." They contend that the referral prohibition in § 40-45-110(A)(1) is the "general statutory provision that deals with the sanctions" applicable to licensed persons. But Plaintiffs' proposed "exemption" for PTAs is only partial, since they argue that a PTA may accept "wages" from a supervising PT or the company that employs the supervising PT, but the PTA may not accept "a credit or other valuable consideration including such things as 'an unearned, commission, discount, or gratuity.'"

The Court finds that Plaintiffs' proposed interpretation of "referral" for purposes of § 40-45-110(A)(1) would yield unworkable results for PTAs. Plaintiffs' arguments that PTAs are "exempt" from § 40-45-110(A)(1) are simply not supported by the language of the PT Act. The Court is not persuaded that § 40-45-300 is more specific than § 40-45-110(A)(1); a statutory provision that regulates clinical practice is not intrinsically more "specific" than one that lists potential grounds for discipline. Furthermore, Plaintiffs' assertion that § 40-45-300 expressly authorizes PTs to "employ" PTAs is not supported by the language of the section, which makes no reference to employment of PTAs. For example, Plaintiffs maintain that § 40-45-110(A)(1) is still partially applicable to a PT's delegation of a patient to a PTA because the PTA may not receive any "credit or valuable consideration" from the employer other than the "wages" he/she is permitted to accept, but that, "[o]f course, the amount of wages received by the PTA being delegated the patients must be within the industry norm." None of this is found in the PT Act. This analysis can be avoided by an interpretation limiting the application of § 40-45-110(A)(1) to the "referrals" of gatekeeper physicians, consistent with the rest of § 40-45-110(A) and the intent of the Legislature as determined in *Sloan*.

8. Plaintiffs' Reliance on "Plain Meaning" Is Misplaced.

Plaintiffs contend that the plain meaning of the PT Act compels the conclusion that a PT who sends a patient to another PT or a PTA employed by that PT or in the same group practice has made a "referral" prohibited by § 40-45-110(A)(1). I disagree.

Plaintiffs contend, and Defendants do not contest, that every PT is an individual and therefore a "person" within the definition in § 40-45-20(3). But the definition of "person" is not at issue, and that definition does not clarify whether a PT who sends a patient to another PT or a PTA in the same group practice a person who "referred" the patient for purposes of § 40-45-110(A)(1). While the PT Act does not specifically define the term "refer," the *Sloan* opinion interpreted the term "according to its "plain meaning, which in this instance is 'to send or direct for treatment, aid, information, [or] decision, [e.g.,] a patient to a specialist.'" Webster's Third New International Dictionary 1907 (1981)." 636 S.E.2d at 607-608. The opinion also cited the Provider Self-Referral Act ("PSRA"), S.C. Code Ann. § 44-113-20(12), which "defines the term 'referral' according to its plain and ordinary meaning," i.e., "the forwarding of a patient by a health care provider to another health care provider." *Id.* at 608. When a "statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed." *Barton*, 745 S.E.2d at 120-21. However, if a statute is "susceptible to more than one interpretation," a court must utilize the rules of statutory interpretation to discover the legislature's intent. *Id.* at 121.

Unlike *Sloan*, the plain meaning rule does not help the Court apply "refer" in this case because, as applied to individuals working in a physical therapy group practice, the term is "susceptible of more than one interpretation" and is thus "ambiguous." In particular, although Plaintiffs base their "plain meaning" argument on the two extrinsic sources cited in *Sloan*,

Webster's Dictionary and the PSRA, these two sources give conflicting answers to questions involving the application of the prohibition in § 40-45-110(A)(1). For example, under the literal reading of the Webster's definition posited by Plaintiffs, an unlicensed member of a practice's administrative staff who schedules a patient to see a PT has made a "referral" by sending or directing the patient to a PT for treatment. The Webster's definition imposes no limitation on the individuals who make "referrals" by "sending or directing" a patient to a PT. Thus, under one "plain meaning" analysis, PTs could not employ unlicensed personnel to make their patient appointments. On the other hand, the PSRA definition limits "referrals" to the "forwarding" of patients by "health care providers," and thus would not appear to reach appointment scheduling by administrative staff.

As this example illustrates, the "plain meaning" of "refer" does not provide a single definite answer to the question of interpretation raised by the Amended Complaint—namely what type of "sending or directing" of a patient to a licensed person constitutes a "referral" under the statute. In order to effectuate the legislative intent of § 40-45-110(A)(1), the Court must thus take into account the context in which the term is used, whether the proposed interpretation would advance the legislative purpose, and whether the interpretation would offend common sense by producing absurd results. *See Barton*, 745 S.E.2d at 120-23. As discussed above, all those factors lead the Court to conclude that the "referrals" targeted by § 40-45-110(A)(1) are the referrals of gatekeeping physicians, consistent with the rest of § 40-45-110(A) and the intent of the Legislature as determined in *Sloan*.

For all of the foregoing reasons, Plaintiffs' First and Second Causes of Action fail as a matter of law.

B. Third Cause of Action

In their Third Cause of Action, Plaintiffs make the alternative argument that, even if the Board's 2011 Position Statement properly interpreted the PT Act, PTs should be able to work for referring physicians because their treatment of referred patients would merely be "coverage" for the referring physician. The issue of whether PTs can work for physicians, however, was already decided in *Sloan*. The Court is bound by that case and thus finds that Plaintiffs' claim fails as a matter of law.

Plaintiffs' claim is premised on the notion that it makes no difference whether the person who sends a patient to a PT is a physician gatekeeper or another PT. The Plaintiffs reason that if every time a PT sends a patient to another PT that act is "coverage"—and therefore not a violation of § 40-45-110(A)(1)—the same must be true with regard to each and every time a physician sends a patient to a PT employed by the practice for which the physician works.[4] However, an analysis of the legislative intent makes clear that the statute does not apply to a PT's sending a patient to a PT (or PTA) employed by the same practice, without regard to whether the PT (or PTA) who receives the patient is providing coverage.

According to Plaintiffs, the Board's 2011 Position Statement "carve[d] out an exception to the fee for referral prohibition in § 40-45-110(A)(1)." Plaintiffs claim that this supposed exception should permit PTs, in the guise of "coverage," to work for physicians:

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[4] Plaintiffs offer no legal or factual support for the proposition that a PT can "cover" for a physician. The law expressly prohibits PTs from practicing medicine. *See* S.C. Code Ann. § 40-45-310; *see also id.* § 40-45-110(A)(2). And although both PTs and physicians are qualified to provide physical therapy services, the plaintiff Physicians have testified that the physical therapy services physicians offer are brief and educational in nature. *See* T. Joseph Dep. 11:22-12:5 ("So usually the physical therapy that we do is educational, for the most part. It's very – it's fairly brief . . . . It's not as extensive as the physical therapist who would do physical therapy for 30 minutes, 45 minutes, an hour . . . ."); McCarthy Dep. 22:5-16 (indicating that he merely educates patients in the exercises that they need to perform).

> The Court should [] declare that a PT seeing a patient at the request of a physician in the same group does not constitute a "referral," but is rather a PT providing coverage for a physician or other member of the group.

Am. Compl. ¶ 54. Neither this Court nor the Board has the authority to declare conduct lawful that *Sloan* declared unlawful. Under the PT Act, as decided in *Sloan*, PTs cannot work for or with the physicians who refer patients to them. In granting summary judgment as to the Seventh through Ninth Causes of Action, this Court has already recognized that it will not—and cannot—create a backdoor around *Sloan*. *See* Dec. 4, 2012 Order Granting Partial Summary Judgment as to Causes of Action Seven Through Nine, at 12. For this reason, Plaintiffs' Third Cause of Action fails, and Defendants are entitled to summary judgment.

C. Fourth Cause of Action

In their Fourth Cause of Action, the Plaintiffs claim that the 2011 Position Statement is intended to have the force of law, will be applied by the Board as a regulation, and violates the Administrative Procedures Act ("APA"). The Court disagrees.

The plaintiffs in *Sloan* made this same argument with regard to the Board's 2004 Position Statement, and these arguments were rejected by the Supreme Court. In *Sloan,* the Court stated:

> The Board's . . . [2004 position statement] was nothing more than a policy or guidance statement which does not have the force or effect of law in any individual case. The Board's statement regarding its interpretation of Section 40-45-110(A)(1) is not a regulation or the equivalent of a regulation. The Board stated in 2004, in essence, "This interpretation is what we believe the law means and we direct our staff to enforce it accordingly, beginning ninety days after our vote today."

636 S.E.2d at 610.

As in *Sloan*, the Board's 2011 statement regarding its interpretation of § 40-45-110(A)(1) is not a regulation or the equivalent of a regulation. Just like the 2004 Position Statement, the Board's 2011 Position Statement did not prescribe practice requirements for PTs in more detail

than set forth in the statute. Instead, the Position Statement was merely a policy or guidance statement that set forth the Board's understanding of the statute's meaning. For this reason, Defendants are entitled to summary judgment as to Plaintiffs' Fourth Cause of Action.

D. Fifth and Sixth Causes of Action

In their Fifth and Sixth Causes of Action, Plaintiffs claim that the 2011 Position Statement violated their constitutional rights to equal protection and due process by "allowing [PTs] to be employed by a physical therapist or a physical therapy group and provide physical therapy services to patients referred by the employer when *Sloan* does not allow PTs to be employed by a physician or physician group and provide physical therapy services to the employer's referred patient." The Court will enter judgment dismissing these claims.

1. Equal Protection

To begin, Plaintiffs' equal protection claim is foreclosed by the Supreme Court's decision in *Sloan*. There, the Supreme Court rejected the argument that there is no rational basis for treating different healthcare professionals—e.g., physicians and PTs—differently under the law. *See Sloan*, 636 S.E.2d at 613 ("it would not be appropriate to hold that the Legislature must, for purposes of self-referral issues, treat all health care providers and allied health professionals as similarly situated."). There is thus no merit to the claim that physicians and PTs are similarly situated and must be treated the same for purposes of § 40-45-110(A)(1), particularly when physicians—and not PTs—act as the legal gatekeepers for physical therapy services.

As the Supreme Court ruled in *Sloan*, the prohibition on physician-owned physical therapy practices bears a reasonable relation to the legislative purpose of avoiding overuse of physical therapy services, 636 S.E.2d at 614. Plaintiffs concede that this is the legislative purpose of § 40-45-110(A)(1), but argue that this reasoning should apply equally to coverage,

co-treatment and other PT-to-PT and PT-to-PTA patient transitions occurring in physical therapy group practices. The Court disagrees. As previously explained, a PT directing a patient to another PT or a PTA within the same group practice is not a "referral" from a gatekeeper physician to a PT. No new course of treatment or additional care is authorized by such PT-to-PT and PT-to-PTA handoffs. Preventing PT-to-PT and PT-to-PTA handoffs occurring within a group practice thus does nothing to further the purpose of § 40-45-110(A)(1), which is to curb the potential overutilization of physical therapy services driven by the financial self-interest of referring physicians.

On the other hand, outlawing the group practice of physical therapy and eliminating the PTA profession is certainly not what the Legislature intended in adopting § 40-45-110(A)(1). Prohibiting PTs and PTAs from working together in a group practice would thus bear no relation to the legislative purpose behind § 40-45-110(A)(1), and would not serve the interests of "equal protection." Indeed, both *Sloan* and the 2011 Position Statement treat all physicians the same as all other physicians, and all PTs the same as all other PTs. They prohibit physicians from associating with PTs in a group practice, but they allow physicians to associate with other physicians and PTs to associate with other PTs.

2. Due Process

The Plaintiffs' substantive due process claim was likewise addressed in *Sloan*. 636 S.E.2d at 614-15. The 2011 Position Statement does not prohibit Plaintiffs from doing anything, and thus does not deprive them of any property right, with or without due process. Although Plaintiffs take issue with the prohibition on PTs' working for physicians, arguing that there is no rational basis to prohibit physical therapists from being employed by a physician or physician group and being paid to treat referred patients, this argument was considered—and rejected—in

Sloan. There, the South Carolina Supreme Court held that the prohibition on physicians employing PTs is based upon a "legitimate interest of government," namely the interest in "enhancing the public welfare in the practice of medicine and related professions." *Sloan*, 636 S.E.2d at 615. As such, Plaintiffs' due process rights have not been violated.

For these reasons, Plaintiffs' Fifth and Sixth Causes of Action fail as a matter of law, and the Defendants are entitled to summary judgment.

II. Standing

Having previously ruled by Order dated September 17, 2012 that Plaintiffs have standing to pursue this action, the Court need not repeat its position on this issue.

III. Supporting Expert Testimony

For the above stated reasons, I choose to adopt the opinion of the Defendants' expert[5] as a correct statement of policy that complies with *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, the 2011 Position Statement of the Board of Physical Therapy, and Section 40-45-110(A)(1) of the South Carolina Code of Laws as follows:

a. Within a group physical therapy practice where a patient may be evaluated by one therapist and subsequently treated by another, the transition of the patient's therapy from one therapist to another is not a referral. Unlike a referral from a physician to a therapist, the transition of care from one physical therapist to another physical therapist does not create a new course of treatment or authorize additional treatment.

b. If the Physical therapy Practice Act is interpreted to prohibit physical therapists from practicing together in a group practice owned by one or more physical therapists, this would create terrible inefficiencies, inconvenience, and barriers to care for patients in need of physical therapy services.

c. A physical therapist is not making a referral to a physical therapist assistant when directing that physical therapist assistant in the

[5] *See* Affidavit of John P. Stearns, December 12, 2013.

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provision of physical therapy services. No new course of treatment is created nor is any additional treatment authorized by this legally required supervision

d. If the Physical Therapy Practice Act is interpreted to prohibit physical therapist assistants from working with physical therapists, physical therapist assistants will, as a practical matter, not be able to work in South Carolina. This likely would result in substantial increases in the cost of physical therapy services and create inefficiencies and barriers to care for patients in need of physical therapy services.

e. Physical therapists cannot "cover" for physicians.

CONCLUSION

The Court finds that all of Plaintiffs' remaining claims fail as a matter of law and undisputed fact. For these reasons, the Court **DENIES** Plaintiffs' Motion for Summary Judgment and **GRANTS** the Motions for Summary Judgment filed by the Defendants. All of Plaintiffs' remaining claims are hereby dismissed with prejudice.

IT IS SO ORDERED.

Columbia, South Carolina
April 21, 2014

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