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**SUPREME COURT OF KENTUCKY  
DOCKET NO. 2007-SC-000756-D**

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**DUBIN ORTHOPAEDIC CENTRE, P.S.C.**

**APPELLANT**

v.

Kentucky Court of Appeals No. 2006-CA-001173-MR  
Franklin Circuit Court No. 05-CI-00210

**COMMONWEALTH OF KENTUCKY**

**APPELLEE**

**MOTION OF THE KENTUCKY MEDICAL ASSOCIATION AND  
THE AMERICAN MEDICAL ASSOCIATION FOR LEAVE  
TO FILE AN *AMICUS CURIAE* BRIEF**

The Kentucky Medical Association (“KMA”) and the American Medical Association (“AMA”) hereby move the Court, pursuant to Rule 76.12(7) and Rule 7.02 of the Kentucky Rules of Civil Procedure, for permission to file the *amicus curiae* brief that it is tendering with this Motion. This brief is timely as it has been filed within 15 days of the June 16, 2006 filing of appellant’s brief. KRCP 76.12(7).

Nature of Movants’ Interest

The KMA is a Kentucky, non-profit, non-stock, membership Kentucky corporation organized under KRS Chapter 273. Initially organized in 1851, the KMA was first incorporated in 1929. The KMA currently includes among its membership Dr. Dubin and 4,545 other physicians actively engaged in the practice of medicine in Kentucky. Among its purposes is the enforcement of just medical laws, the protection of its members against unjust encroachments on their professional care of patients, and the enlightenment of public opinion with regard to matters of great import to Kentucky physicians and their patients.

The AMA is an Illinois private, non-profit corporation. With more than 240,000 physicians, residents, and medical students as members, it is the largest medical society

in the United States. Its members practice in all fields of specialization and in all states, including Kentucky. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health.<sup>1</sup> Additionally, the AMA is the creator and owner of Current Procedural Terminology® (“CPT”), a systematic listing and coding of procedures and services performed by physicians and other health care professionals.<sup>2</sup> CPT is intended to simplify the reporting of health care services, and is the subject of much of the debate in this particular case.

#### Points to be Presented

The Franklin Circuit Court denied the Kentucky Board of Physical Therapy’s (“Board”) request for a permanent injunction prohibiting Appellant from using certain CPT billing codes in the claims that it submits to third-parties for reimbursement of physical therapy services. On appeal, the Board argued that KRS 327.020(3) allows only licensed physical therapists to bill for physical therapy services. The Court of Appeals reversed the Franklin Circuit Court’s opinion, finding that 1) physicians may not refer to any treatment they provide as “physical therapy,” and that 2) physicians may not bill for physical therapy services. Court of Appeals Opinion at p. 9. The Court Of Appeals reached this ruling even though it concedes that physicians licensed in the Commonwealth of Kentucky are authorized to provide physical therapy services. *Id.* at 7.

In the attached *amicus curiae* brief, the KMA and AMA advocate that the Court of Appeals has improperly interpreted the Physical Therapy Practice Act, as codified at

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<sup>1</sup> The AMA submits this brief on its own behalf and as a member of the Litigation Center of the AMA and the State Medical Societies. The Litigation Center is a coalition of the AMA and the medical societies of every state and the District of Columbia. The mission of the Litigation Center is to be an effective legal advocate in representing the interests of the medical profession in the courts by bringing cases of broad impact and by serving as an information and advocacy clearinghouse for medical societies.

<sup>2</sup> The AMA’s ownership interests in CPT are manifested through copyright and trademark registration and protection.

KRS Chapter 327, in a manner that contradicts the Kentucky Medical Practice Act, as KRS Chapter 311, and confers the Board of Physical Therapy with the authority to regulate the practice of medicine. The Court of Appeals failed to give appropriate weight to the specific language in KRS 327.020(1), which excludes physicians from the restrictions and limitations found in all of KRS Chapter 327, including any restrictions on billing found in KRS 327.020(3). The statutory interpretation adopted by the Court of Appeals should be reversed because it leads to an unreasonable result, restricts physicians' ability to truthfully communicate with their patients, and is preempted by federal law.

#### Relevance to Disposition of Case

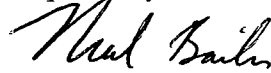
The KMA is greatly troubled not only by the adverse impact that the Court of Appeals ruling will have upon the defendant<sup>3</sup>, but also the far reaching adverse consequences for all Kentucky physicians and for the practice of medicine throughout the Commonwealth. Physicians who are licensed to provide physical therapy services will now be forced to inaccurately describe their professional services in the bills they submit to third-party payors such as Medicare, thus exposing themselves to prosecution for the submission of false claims. The KMA and AMA have an interest in allowing physicians to practice freely in any manner that involves the diagnoses, treatment, prevention, or correction of disease, injury, or infirmity, and to be paid appropriately for their services. The AMA also has an interest in making sure that governmental bodies, such as this Court, understand the proper uses and limitations of CPT billing codes.

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<sup>3</sup> Dr. Dubin is a member of the Kentucky Medical Association, but the KMA's brief addresses concerns applicable to all Kentucky physicians.

Accordingly, the KMA and the AMA respectfully ask this Court to accept and consider its *amicus curiae* brief attached hereto.

Respectfully submitted,



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July 1, 2008

## CERTIFICATE OF SERVICE

I hereby certify that true copies of this Motion of the Kentucky Medical Association and the American Medical Association for Leave to File an Amicus Curiae Brief, were served by United States Mail, first class postage prepaid, this 1st day of July, 2008, upon:

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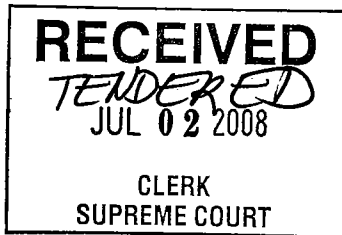
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**SUPREME COURT OF KENTUCKY  
DOCKET NO. 2007-SC-000756-D**

**DUBIN ORTHOPAEDIC CENTRE, P.S.C.**

**APPELLANT**

v.

Kentucky Court of Appeals No. 2006-CA-001173-MR  
Franklin Circuit Court No. 05-CO-00210

**COMMONWEALTH OF KENTUCKY,  
STATE BOARD OF PHYSICAL THERAPY**

**APPELLEE**

***AMICUS CURIAE BRIEF OF THE KENTUCKY MEDICAL ASSOCIATION  
AND THE AMERICAN MEDICAL ASSOCIATION***

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of this Amicus Curiae Brief was served via U.S. Mail, postage prepaid, on this Amicus Curiae Brief 1<sup>st</sup> day of July, 2008 to the Honorable Phillip J. Shepherd, Judge, Franklin Circuit Court, Division One, 214 St. Clair Street, Frankfort, Kentucky 40601; Mr. Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. Mark Brengelman, Assistant Attorney General, Office of the Attorney General, 700 Capital Avenue, Suite 118, Frankfort, Kentucky 40601-3449; John J. Bennett, Esq., Co-Counsel for the American Physical Therapy Association, 1111 North Fairfax Street, Alexandria, Virginia 22314-1488; Jeffrey A. Darling, Esq., Co-Counsel for the American Physical Therapy Association, Darling & Reynolds, PSC, 429 North Broadway, Lexington, Kentucky 40508; and Lisa English Hinkle, Esq., Christopher J. Shaughnessy, Esq., and T. Cornelius Sturgill, Jr., Esq., McBrayer, McGinnis, Leslie & Kirkland, PLLC, 201 East Main Street, Suite 1000, Lexington, Kentucky 40507, Counsel for Dubin Orthopaedic Centre, P.S.C.

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## STATEMENT OF THE CASE

The practice of medicine in Kentucky is exclusively regulated, not by the Kentucky Board of Physical Therapy (“Appellee” or “Board”), but by the Kentucky Board of Medical Licensure (“KBML”), pursuant to the Medical Practice Act codified at KRS Chapter 311. In this case, the Court of Appeals adopted the Board’s misguided interpretation of KRS 327.020 and found that Ronald S. Dubin, M.D. and his medical practice, Dubin Orthopaedic Centre, P.S.C. (“Dubin”), may not bill for physical therapy evaluations and/or re-evaluations by using certain codes contained in the American Medical Association’s Current Procedural Terminology Coding Manual<sup>1</sup> (“CPT”). The Court of Appeals reached this decision even though it conceded and both parties agreed that a licensed physician may perform physical therapy services within the scope of his or her medical license. In other words, the Court of Appeals found that KRS 327.020(1) only protects physicians from KRS 327.020(3)’s<sup>2</sup> restriction against practicing physical therapy, but does not permit physicians to bill for “physical therapy” services actually performed. The Court of Appeals’ decision that KRS Chapter 327 protects licensed physical therapists from competition from all other health care providers, even physicians, in so far as the ability to bill for physical therapy services is reserved solely to licensed physical therapists, is in error and should be overturned by this Court.

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<sup>1</sup> The CPT Coding Manual is a comprehensive listing of descriptive terms and identifying codes used by health care providers and health insurance plans for reporting medical services and procedures. Any physician billing a third party (e.g., private health insurance plan) for medical services must select the most appropriate CPT code to describe the services provided. Individual physicians do not have the luxury or burden of modifying the descriptive language of the CPT codes in claim submissions, because only CPT codes (e.g., 97001) are reported.

<sup>2</sup> The Board relies on the following language in KRS 327.020(3) to support its position: “It shall be unlawful for any person . . . to use . . . the words “physical therapy,” . . . or any other words, letters, abbreviations or insignia . . . to bill for physical therapy unless such physical therapy is provided by or under the supervision of a physical therapist. . . .” (internal quotations added.)

The Franklin Circuit Court disagreed with the Board's interpretation of KRS Chapter 327, and denied the Board's request for a permanent injunction in its May 12, 2006 Opinion and Order. Commonwealth of Kentucky v. Dubin Orthopaedic Centre, P.S.C., No. 05-CI-00210 (Franklin Cir. Ct. May 12, 2006) ("Franklin Circuit Court Order"). The Board had originally sought an injunction against Dubin which would have prevented it from billing for certain physical therapy evaluation services when the services are provided by a licensed physician, rather than a licensed physical therapist. Relying on language in KRS 327.020(3), the Board took the position that only a licensed physical therapist may bill for services described as "physical therapy" (whether directly or through the use of a medical billing code) even though it does not dispute that physicians licensed in the Commonwealth of Kentucky are authorized to provide physical therapy services.

In its May 12, 2006 Order and Opinion, the Franklin Circuit Court concluded that:

Dubin is duly authorized and legally allowed to provide these [physical therapy] services and as a result is entitled to compensation for the specific treatments provided. This Court will not undertake an exhaustive review of every CPT [billing] code that may be applicable to these services. The purpose of the Board's statutory title protection in the term "physical therapy" as granted by KRS 327.020(3) is to prevent a person from holding themselves out to the public as a licensed physical therapist. Dubin's use of CPT codes 97001 [physical therapy evaluation] and 97002 [physical therapy re-evaluation] presents no danger of this. These codes are merely used for billing purposes and the invoices contain no explanatory language detailing which specific services the codes stand for. It is up to the physician and third party payors to determine which billing codes accurately describe the medical services provided to patients.

Franklin Circuit Court Order, pp. 2-3 (emphasis added).

Notwithstanding its agreement that physicians may perform and furnish physical therapy services, the Court of Appeals reversed the opinion of the Franklin Circuit Court, finding that:

[A] licensed physician may perform and furnish to patients services that are the same or similar to the services performed by a licensed physical therapist. However, we also conclude that KRS 327.020(1) and (3) clearly mandate that no person, including a physician, may represent or hold himself out as being a physical therapist or as providing physical therapy services. Moreover, KRS 327.020(3), likewise, plainly prohibits any person, including a physician, from billing for physical therapy services. Thus, while a physician may utilize the same or similar treatment modalities as a physical therapist, he may not refer to the treatment as physical therapy or bill for physical therapy services. As such we are of the opinion that utilization of CPT Codes 97001 and 97002 by a physician violates KRS 327.020.

Court of Appeals Opinion, p. 7.

The Kentucky Medical Association (“KMA”) and the American Medical Association (“AMA”) submit this Amicus Curiae Brief in support of the Appellant’s request to reverse the decision of the Court of Appeals and affirm the Opinion and Order of the Franklin Circuit Court.

## ARGUMENT

### I. KRS 327.020(1) EXEMPTS LICENSED PHYSICIANS FROM THE RESTRICTIONS ON BILLING SET FORTH IN THE PHYSICAL THERAPY ACT

A licensed physician’s scope of practice is the most broad and complex of all the healthcare-related professions, due in large part to the highly competitive and extensive medical education and training required as a condition of licensure. Kentucky law vests the KBML with exclusive authority to regulate the “practice of medicine” in the Commonwealth of Kentucky and to establish the acceptable standards of medical

practice. The practice of physical therapy is regulated by the Board in accordance with the Physical Therapy Practice Act codified at KRS Chapter 327. KRS 327.020(1) generally restricts the practice of physical therapy to licensed physical therapists, although it also includes the following significant exclusion:

Provided, however, that *nothing contained in this chapter* shall prohibit any person licensed in this state under any other law from engaging in the practice for which such person is duly licensed.

(emphasis added). This language could not be more clear. Nothing in KRS Chapter 327 applies to licensed physicians engaging in the practice of medicine.

The Franklin Circuit Court properly interpreted this statutory framework when it found that “Dubin is duly licensed and legally allowed to provide these [physical therapy] services and as a result is entitled to compensation for the specific treatments provided.” Franklin Circuit Court Order, p. 2. The Circuit Court’s decision was based on a proper interpretation of the statutory framework of KRS Chapter 327, as well as the proper scope of the practice of medicine.

Shortly after the Franklin Circuit Court issued its opinion on May 12, 2006, the KBML issued an advisory opinion which specifically addressed the KBML’s position as to whether a licensed physician may properly perform and bill for physical therapy treatments provided to a patient under the scope of a physician’s medical license. See Kentucky Board of Medical Licensure Advisory Opinion, issued July 5, 2006 (“KBML Opinion”), at p. 3, at Appendix 3 to Appellant’s Brief. As the sole administrative body in the Commonwealth of Kentucky charged with regulation of the practice of medicine, the KBML Opinion is significant:

To the extent that a licensed physician provides medical treatment(s) to a patient, including treatment(s) commonly

referred to as physical therapy, the physician may lawfully demand reasonable payment for such treatment(s). The Board believes that obtaining reimbursement for professional services plainly falls within the lawful practice of medicine as authorized by KRS Chapter 311

If the patient is paying directly for the physician's services, KRS 327.020(1) would permit a licensed physician to use the term "physical therapy" in billing for treatment if such treatment(s) was actually provided as part of the physician's practice.

To the extent that the licensed physician is seeking payment from a third party payor, such reimbursement would be governed by the terms of the contract between the parties and the law(s) applicable to such contract. . . .

The Board must assume that any body reviewing the ability of licensed physicians to be reimbursed for providing treatment(s) commonly referred to as physical therapy would apply that section of KRS 327.020(1), which provides, ". . . nothing contained in this chapter shall prohibit any person licensed in this state under any other law from engaging in the practice for which such person is duly licensed."

As noted above, it is the Board's position that a licensed physician may provide treatment(s) commonly known as physical therapy, as part of their lawful practice, where medically appropriate. In similar manner, it is the Board's position that, where a licensed physician provides such treatment, the physician may lawfully advise the patient that the patient is being treated or referred for physical therapy. It would follow that, when a licensed physician provides the treatment(s) commonly referred to as physical therapy, the physician may properly obtain reasonable payment for such treatment and may refer to the treatment as physical therapy when seeking payment.

*Id.* (emphasis added).

The Court of Appeals' reliance on the restrictions against billing for physical therapy services found in KRS 327.020(3) is misplaced, and ignores the specific language in KRS 327.020(1) which excludes physicians from the restrictions and limitations found

in all of KRS Chapter 327, including KRS 327.020(3)'s billing restrictions. Not only does the Court of Appeals' opinion incorrectly confer the ability to regulate the practice of medicine upon the Board of Physical Therapy, it also directly contradicts the Kentucky Medical Practice Act. The Medical Practice Act defines the practice of medicine as "the diagnosis, treatment, or correction of **any and all** human conditions, ailments, diseases, injuries, or infirmities by **any and all** means, methods, devices, or instrumentalities." KRS 311.550(10) (emphasis added). The provision of physical therapy services is a legitimate and necessary option for treatment that is available to physicians pursuant to their encompassing license to diagnose and treat any and all human conditions by any and all means. Just as physicians are licensed to provide physical therapy services, they are similarly bestowed with the right to evaluate the medical necessity for either initial or ongoing physical therapy treatment.

**II. ALTERNATIVE CPT BILLING CODES ARE NOT AVAILABLE TO PHYSICIANS**

The Court of Appeals casually concluded that physicians, such as Dubin, could bill patients and health insurance companies for physical therapy services by using certain "evaluation and management" CPT codes, rather than the disputed codes (i.e., 97001 (physical therapy evaluation) and 97002 (physical therapy re-evaluation)). In a footnote to its opinion, the Court of Appeals makes the following inaccurate observation regarding the use of CPT codes: "We note there are other CPT Codes that may be utilized by a physician when billing for such services. For example, CPT Codes 99201-99215 may be utilized by a physician for his initial examination or re-examination of a patient for physical therapy or physical medicine services." Court of Appeals Opinion, p. 9, fn 3.

The Franklin Circuit Court considered and rejected this argument in its May 12,

2006 Opinion and Order:

The Board also claims that the CPT contains several alternative codes that could be used to bill for these services.

However, Dubin is duly licensed and legally allowed to provide these services and as a result is entitled to compensation for the specific treatments provided. This Court will not undertake an exhaustive review of every CPT code that may be applicable to these services. . . . It is up to the physician and third party payors to determine which billing codes accurately describe the medical services provided to patients.

Franklin Circuit Court Opinion, pp. 2-3.

However, for the sake of argument, if this Court decides to disregard the foregoing rationale of the Circuit Court, it would still be wrong to accept the Board's categorical assertion that Dubin and other physicians could properly bill patients and third party payors for physical therapy evaluations using alternative "evaluation and management" billing codes. No other CPT codes accurately describe the services provided by Dr. Dubin. CPT codes 97001 and 97002 are separate and distinct from various "evaluation and management" codes.

A December 2003 article in the *CPT Assistant* (also published by the American Medical Association), explained:

The physical medicine codes 97001, physical therapy evaluation, and 97002, physical therapy reevaluation, are different from the evaluation and management (E/M) codes. They do not include management services and are strictly for the purposes of a comprehensive evaluation and reevaluation needed to support *medical necessity* for further care.

American Medical Association, *Coding Communication: Physical Medicine and Rehabilitation Services, Part 1, CPT Assistant* (Dec. 2003) (emphasis added). (Franklin Circuit Court Record, Vol. II at 193.) This explanation and clarification in the *CPT Assistant* regarding the proper use of the codes 97001 and 97002 clearly contradicts the Court of Appeals' finding and the Board's assertion that physicians should or could simply use separate evaluation and management billing codes, rather than codes 97001 and 97002 to bill for physical therapy evaluations.

The CPT is nothing more than a codebook. It was never intended to be used as a predicate for dictating which healthcare providers are able to bill for a specific procedure. This is precisely communicated on the first page of the Introduction to the 2006 edition of the CPT:

It is important to recognize that the listing of a service or procedure and its code number in a specific section of this book does not restrict its use to a specific specialty group. Any procedure or service in any section of this book may be used to designate the services rendered by any qualified physician or other health care professional.

American Medical Association, *CPT 2006: Current Procedural Terminology*, 2006, at xiii.

### **III. THE COURT OF APPEALS' INTERPRETATION OF KRS 327.020 WOULD LEAD TO AN UNREASONABLE RESULT**

The Court of Appeals virtually ignored the significance of the exclusionary language contained in KRS 327.020(1) when it overturned the Opinion and Order of the Franklin Circuit Court. The Court of Appeals found that KRS 327.020(1) only protects physicians from KRS 327.020(3)'s restriction against practicing physical therapy, but does not permit physicians to bill for "physical therapy" services actually performed. This interpretation is contrary to the plain language of the statute and the statutory



framework and, if accepted, would lead to an absurd result. See Kentucky Indus. Utility Customers, Inc. v. Kentucky Utilities Co., 983 S.W.2d 493, 500 (Ky. 1998) (“A statute should not be interpreted so as to bring about an absurd or unreasonable result.”).

It is illogical to suggest that the General Assembly would pass a bill permitting a licensed physician to practice medicine (which includes the practice of physical therapy), but prohibiting him or her from billing for any physical therapy services actually performed. The broad, exclusionary language of KRS 327.020(1) protects physicians against precisely that unreasonable result. However, the Court of Appeals interpreted the billing restrictions in KRS 327.020(3) contrary to well-settled law that “in expounding a statute, [courts] must not be guided by a single sentence or member of a sentence, but must look to the provisions of the whole law, and to its object and policy.” Cabinet for Families and Children v. Cummings, 163 S.W.3d 425 (Ky. 2005).

The ramifications of the Court of Appeals’ opinion are extreme. If physicians are stripped of the ability to bill under 97001 and 97002 and instead follow the Court of Appeals’ directive to bill under other evaluation and management codes, physicians will be forced into committing fraud via the submission of false claims. The evaluation and management (E/M) codes were designed to reimburse health care providers for management services, and physicians who bill under an E/M code are reimbursed in part for the management services they provide patients. American Medical Association, *Coding Communication: Physical Medicine and Rehabilitation Services, Part 1, CPT Assistant* (Dec. 2003) at Franklin Circuit Court Record, Vol. II, at 103. The codes 97001 and 97002 do not include management services. *Id.* Thus, if physicians must use an E/M code for reimbursement of a physical therapy evaluation or re-evaluation, they will be

forced into submitting a claim that falsely describes their provision of management services.

Physicians will be unable to avoid the above-mentioned false claims scenario. Federal law governs physicians' electronic claims submissions and requires all electronic claims to be submitted using standardized codes adopted by the Secretary for Health and Human Services. 42 U.S.C. § 1320d-1(a), 1320d-2. The AMA's CPT-4 system has been adopted as the universal claims coding system for all electronic claims submissions. 45 CFR § 162.1002(a)(5)(ii). The codes are standardized and cannot be personalized on a claim-by-claim basis. If the proper CPT codes for physical therapy evaluation and re-evaluation (i.e. 97001 and 97002) are no longer available to Kentucky physicians, they will be forced into the untenable situation of choosing between submitting a potentially false claim or entirely ceasing to provide the services described by the disputed codes.

Accordingly, the doctrine of conflicts preemption bars the Court of Appeals' interpretation of KRS 327.020 because no physician can possibly comply with both federal law and the terms of KRS 327.020 as interpreted by the Court of Appeals. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 204 (U.S. 1983). The conflict here is that on one hand, 97001 and 97002 are the codes which most accurately describe a physical therapy evaluation and re-evaluation, but on the other hand, KRS 327.020 bars physicians from using either of these codes. If the physician follows state law, he is directed to use an E/M code. If the physician follows federal law, he must choose the most accurate CPT or face civil and criminal penalties for a false. As both KRS 327.020 and federal law cannot be followed without a violation of a state or federal law, KRS 327.020 must be deemed preempted.

**IV. COURT OF APPEALS' INTERPRETATION OF KRS 327.020 WILL UNDULY RESTRICT A PHYSICIAN-PATIENT COMMUNICATIONS**

The Court of Appeals held that although physicians are fully trained and licensed to perform physical therapy, a physician may not refer to any treatment he/she provides as “physical therapy.” Court of Appeals Opinion, p. 7. This holding violates the First Amendment of the United States Constitution and infringes upon the physician-patient relationship, which is predicated upon the candid and full exchange of truthful information.

A basic tenet of the First Amendment is that the free flow of truthful information about lawful activity is not to be restricted. Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 95 (U.S. 1977). Courts consistently reject laws premised on the belief that people are better off with less information. Id. The Court of Appeals’ opinion bars physicians – who are licensed to provide physical therapy services – from telling patients that they can provide physical therapy services or evaluations. In other words, Kentucky law now suppresses information that a physician may provide to his patients.

Some patients may prefer to have their physical therapy provided by a physician given a physician’s superior training and education, and may particularly prefer that this treatment be rendered by a physician with whom they have a pre-existing relationship. By forcing physicians to conceal their ability to provide physical therapy services, prospective patients may be limited in their ability to fully consider and choose the source of their medical care. Id. Equally unsettling is that the Court of Appeals opinion sets forth a system whereby a physician can provide a physical therapy service to a patient, but must disguise from the patient that the service they are receiving is actually physical therapy.

In Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, the Supreme Court addressed a Virginia law that restricted pharmacists from advertising the prices of prescription drugs. 425 U.S. 748, 769 (1976). Virginia sought to suppress this information out of concern for the harm that would occur if such information was freely available to the public. Id. Virginia asserted that the law furthered the health and safety of its residents by preventing low-cost, low-quality pharmacists from driving reputable pharmacists out of business. Id. The fear was that consumers would bounce between pharmacists in pursuit of the lowest, advertised price, and that this would in turn destroy the pharmacist-customer relationship. Id. The Supreme Court declared the Virginia law unconstitutional, finding that no State has the option of choosing between the danger of suppressing information and the danger such information will be misused if freely available. Id. Rather, the First Amendment already made that choice, eschewing suppression. Id. Thus, the Supreme Court determined that Virginia could regulate its pharmacists but that such regulation could not be done in a manner that kept the public ignorant of the lawful terms offered by competing pharmacists. Id.

Here, the Board and the Court of Appeals express concern that the unsuspecting general public will be duped into seeking physical therapy services from an unlicensed and unqualified health care provider. Court of Appeal Opinion, p. 8. Alleviating that concern is purportedly furthered by limiting Kentucky physicians' ability to communicate to their patients that 1) the physician can create a comprehensive physical therapy plan for the patient; and 2) the physician can actually provide physical therapy for the patient. The constitutional violation here arises because Kentucky physicians are legally licensed and able to perform both of these services. Just as the Court in Virginia Pharmacy Board

held the Virginia law unconstitutional because it restricted the flow of truthful information, here, the Kentucky law is unconstitutional because it, too, would restrict patients from receiving truthful information from physicians regarding their ability to devise and implement a physical therapy plan.

In Central Hudson Gas v. Public Service Commission, the Supreme Court analyzed the government's right to restrict commercial speech. 447 U.S. 557 (1980). Although the KMA and AMA believe that the restriction of Dubin's speech is improper if analyzed under the Central Hudson framework, the KMA and AMA are entirely unwilling to categorize privileged physician-patient conversations as commercial speech. All matters within the physician-patient dialogue are entitled to the full protection of constitutionally guaranteed expression and should not be considered commercial speech. Commercial speech is speech which proposes a commercial transaction. Id. at 562. While a physician does provide services in exchange for monetary compensation, the selection and delivery of medical care is different than the purchase of a toothbrush or other consumer goods. The physician-patient relationship is fiduciary in nature, is most often not a one-visit relationship, and involves a continuing dialogue. For that dialogue to be meaningful, both parties must be candid and truthful in their communications. As such, if a physician is actually licensed to perform physical therapy services or evaluations, then patients should be made aware that they can have these services provided by a physician rather than a physical therapist.

The Court of Appeals had two options when interpreting 327.020. The first option was to harmonize KRS Chapter 327, the Physical Therapy Practice Act, with KRS Chapter 311, the Medical Practice Act, and conclude that nothing in the Physical Therapy

Practice Act was intended to restrict the rights afforded to physicians under the Medical Practice Act. The second option, which it actually chose, was to ignore 327.020(1)'s broad exemption for physicians and instead determine that 327.020(3) prohibits anyone but a licensed physical therapist from using the phrase "physical therapy" to describe a service provided by that person. That second option, but not the first, would infringe Dubin's constitutional right. If a court is asked to interpret a statute that could be reasonably interpreted in two competing manners, and one of the constructions would render the statute unconstitutional, then the court must adopt the construction that upholds and maintains the constitutionality of the statute. Yanero v. Davis, 65 S.W.3d 510, 525 (Ky. 2001). Here, rather than choosing to harmonize the Medical and Physical Therapy Practice Acts and give broad meaning to the exclusionary language in 327.020(1), the Court of Appeals chose to interpret the statute in a manner that violates Dubin's and other physicians' First Amendment rights to free expression. In so doing, the Court of Appeals erred. Public Citizen v. Department of Justice, 491 U.S. 440, 466 (1989).

### CONCLUSION

The KMA and AMA are greatly troubled not only by the adverse impact that the Court of Appeals ruling will have upon the defendant, but also the far reaching adverse consequences for all Kentucky physicians and for the practice of medicine throughout the Commonwealth. A physician's license encompasses the field of physical therapy, and the Board of Physical Therapy does not have the right to regulate the practice of medicine. The Court of Appeals' interpretation of KRS 327.020 should be overturned because it ignores the exclusionary language of KRS 327.020(1), leads to an

unreasonable result, infringes upon physicians' constitutional rights, and is preempted by federal law.

Respectfully submitted,



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