No. 101561-5

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 82800-2
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

P.E.L., a minor, and P.L. and J.L., a married couple and guardians of P.E.L.,

Plaintiffs/Respondents,

v.

PREMERA BLUE CROSS, a Washington health carrier,

Defendant/Petitioner.

RESPONDENTS' ANSWER TO BRIEF OF AMICUS CURIAE BREAKING CODE SILENCE

Eleanor Hamburger, WSBA #26478
Daniel S. Gross, WSBA #23992
SIRIANNI YOUTZ SPOONEMORE HAMBURGER PLLC
3101 Western Ave., Ste. 350
Seattle, WA 98121
Tel. (206) 223-0303
ehamburger@sylaw.com
dgross@sylaw.com

Marlena Grundy, WSBA #47026
PNW STRATEGIC LEGAL SOLUTIONS, PLLC
1408 140th Pl. NE, Ste. 170
Bellevue, WA 98007
Tel. (425) 223-5710
marlena@pnwsls.com

Attorneys for Plaintiffs/Respondents

The brief of Amicus Curiae Breaking Code Silence ("BCS") does not address any of the legal or specific factual issues at stake in this dispute. *See* BCS brief, p. 3. On that basis alone the Court should disregard the brief. It does not offer any helpful information for the Court's consideration of whether the RAP 13.4 standards for review are met.

This case is about whether, under the specific terms of the Premera contract and the Affordable Care Act's mental health parity requirements, Premera was required to evaluate P.E.L.'s claims for treatment at Evoke Cascades for medical necessity rather than automatically applying a blanket exclusion of all coverage for wilderness treatment. This case is a fairly straightforward contract case – not a referendum on whether or not wilderness programs or other residential mental health treatment should exist.[1]

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[1] BCS is opposed to all residential mental health treatment, without regard to medical necessity. BCS brief, pp. 2–3.

Plaintiff/Respondent P.E.L. had a very positive experience at Evoke Cascades in Bend, Oregon.[2] The facility was properly licensed to deliver behavioral health treatment in the state of Oregon – a recent federal district court decision confirms it. *J.G. v. Boeing Co. Master Welfare Plan,* No. C20-1510RSL, 2023 U.S. Dist. LEXIS 11308, at *8–11 (W.D. Wash. Jan. 23, 2023). P.E.L.'s treatment team and several independent experts opined, under oath, that her treatment there was medically appropriate and effective. CP 994, ¶9; CP 996–1017; 1054–58. Publicly available data shows that independent medical reviewers frequently conclude that wilderness programs can be medically necessary. CP 455–473. And Premera has approved and paid for treatment at Evoke Cascades in the past. *S.L. v. Premera Blue*

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[2] It is unlikely that Evoke Cascades in Bend, Oregon is the program described in the unsworn statement by Shira Reichman, since the allegations are inconsistent with the express statutory and regulatory requirements for wilderness programs in Oregon. *See* BCS brief, pp. 5–10, 13 (a different program, Evoke Entrada in Utah, has been the focus of BCS's complaints); *compare* ORS §§ 418.205–.327.

Cross, 2020 U.S. Dist. LEXIS 149764, at *2 (W.D. Wash. August 17, 2020) (Premera paid for treatment at Evoke for another enrollee). Most importantly for this case, Plaintiffs/Respondents credit Evoke Cascades with providing P.E.L. with successful treatment that placed her on a path to wellness. *See* CP 400–401.

Substantial evidence offered by Plaintiffs/Respondents shows that licensed and accredited wilderness programs can and do provide medically necessary, appropriate mental health treatment. As described by Michael Gass, Ph.D., LFMT, one of Plaintiffs'/Respondents' experts, licensed and accredited wilderness programs (also known as "outdoor behavioral health" or "OBH" programs) consist of clinical mental health and therapeutic interventions delivered by licensed professionals and experienced staff under their supervision in an outdoor setting. CP 997–998, ¶3. This treatment modality is recognized by the American Hospital Association's National Uniform Billing Committee since 2017. *Id.* It is also recognized as potentially

medically necessary by Premera's vendor for medical necessity criteria, Interqual. *See* CP 2800–09. Even Premera has developed criteria for approving coverage of wilderness therapy as medically necessary, stating in a recent Utilization Management Guideline that "[e]xcept when excluded by member contract, treatment in wilderness therapy/outdoor behavioral health care residential wilderness programs is considered to be medically necessary as follows….", Premera Blue Cross Utilization Management Guideline – 3.01.522, Effective Date December 1, 2022, p. 3, *available at* https://www.premera.com/medicalpolicies/3.01.522.pdf (last viewed on March 1, 2023).

Dr. Gass described the extensive empirical evidence that supports wilderness programs, *see* CP 998, ¶4, and notes that many licensed brick-and-mortar residential treatment facilities often recommend that patients enroll in wilderness programs first, before they are admitted to residential treatment. *Id.*

Dr. Gass also addressed the empirical evidence of the efficacy and safety of OBH programs. CP 999, ¶5. The empirical data show that the injury rate at accredited OBH facilities was ***lower than*** the national average for adolescent injuries in the general population. *Id.* Dr. Gass further identified multiple studies that demonstrate the effectiveness of OBH programs. CP 1000–1008.

Dr. Gass then engaged in the medical necessity review of P.E.L.'s specific needs that Premera failed to do. CP 1008–1013, ¶¶6–12. Dr. Gass concluded that P.E.L.'s treatment at Evoke Cascades met Premera's medical necessity standard for coverage, and explained in detail why the treatment was appropriate.

Plaintiffs'/Respondents' other expert, Stephen T. Glass, M.D., concurred. Dr. Glass opined, "[a]n extensive body of evidence-based literature, including prospective and retrospective studies along with meta-analyses establish, without question, the efficacy of such programs for a wide variety of

mental health diagnoses." CP 1055. Dr. Glass further noted that OBH programs often provide treatment "directed to more challenging mental health and neurobehavioral issues" and often treat patients who have been unsuccessful in treatment at brick-and-mortar facilities. *Id.* Dr. Glass further notes that OBH programs realize clinical benefit not by demanding compliance, but rather by establishing a "creative and collaborative relationship between treater and client" in an outdoor setting. CP 1056. Dr. Glass concludes that for some patients, OBH programs lead to a therapeutic result "in a more motivated, intensive and committed manner, and thereby, understandably, provid[e] documented long-term benefit." *Id.*

In contrast to the sworn testimony by Plaintiffs'/Respondents' experts and extensive non-hearsay evidence, BCS offers only irrelevant and inflammatory unsworn statements and unproven allegations that were never considered by the trial court or the Court of Appeals. The sole point made in the BCS brief seems to be that, in its author's view, wilderness

programs should not exist. This case, however, is not a vehicle to address BCS's issue, which is in the purview of state legislatures and regulators.

The Court of Appeals decision does not require any broad systemic change or address significant public policy. If the Court of Appeals decision is allowed to stand, this case simply proceeds to trial on the Plaintiffs'/Respondents' individual breach of contract and bad faith claims. It does not require any insurer to cover wilderness programs or mandate the existence of OBH programs. *See* BCS brief, p. 5. And, if Plaintiffs/Respondents succeed at trial, the decision will simply permit P.E.L. and her parents to recover the cost of her successful mental health treatment at Evoke Cascades, any bad faith damages assessed by the jury and attorney fees and costs.

Just like other health care facilities, most wilderness programs are licensed, accredited, and staffed with skilled mental health providers who are genuinely focused on improving the mental health of the patients in the program. It is true that some

patients do not have the successful experience that P.E.L. had. To paraphrase BCS, to treat all wilderness programs like the ones described in the BCS brief that fall below statutory, regulatory and accreditation standards "does a grave injustice to legitimate" licensed and accredited OBH programs.

BCS claims to offer the perspective of former patients of wilderness programs on the parties' issues (BCS Mot. at 2) but the only issues in this case are whether Premera may impose a blanket exclusion of coverage of medically necessary treatment at a licensed, accredited wilderness program delivering mental health treatment within the scope of that license. BCS does not address that issue at all. And, BCS ignores a critically important issue for former patients of OBH programs. P.E.L., as one former patient of a licensed and regulated wilderness program, would like her insurance to cover the cost of her successful mental health treatment. BCS ignores this perspective entirely.

That some patients of different wilderness programs have a negative experience – even a very negative experience – is

ultimately irrelevant to the issues in this case. BCS's brief should be given little or no weight or consideration by the Court.

CERTIFICATE OF COMPLIANCE

Pursuant to RAP 18.17(b), the undersigned counsel for Appellants hereby certify that the foregoing document contains 1,275 words, exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images (e.g., photographs, maps, diagrams, and exhibits).

RESPECTFULLY SUBMITTED: March 1, 2023.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC

/s/ Eleanor Hamburger
Eleanor Hamburger, WSBA # 26478
Daniel S. Gross, WSBA # 23992
3101 Western Ave., Ste. 350
Seattle, WA 98121
Tel. (206) 223-0303
ehamburger@sylaw.com;
dgross@sylaw.com

PNW STRATEGIC LEGAL
SOLUTIONS, PLLC

/s/ Marlena Grundy
Marlena Grundy, WSBA # 47026
1408 140th Pl. NE, Ste. 170
Bellevue, WA 98007
Tel. (425) 223-5710
marlena@pnwsls.com

Attorneys for Plaintiffs/Respondents

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on March 1, 2023, I served a copy of this document, via Appellate Courts' Portal e-mail, on the following parties/counsel of record:

Gwendolyn C. Payton
John R. Neeleman
KILPATRICK TOWNSEND & STOCKTON LLP
1420 Fifth Ave., Ste. 3700
Seattle, WA 98101
Tel. (206) 467-9600
gpayton@kilpatricktownsend.com
jneeleman@kilpatricktownsend.com
irountree@kilpatricktownsend.com
Counsel for Premera Blue Cross

Adam H. Charnes
KILPATRICK TOWNSEND & STOCKTON LLP
2001 Ross Avenue, Suite 4400
Dallas, TX 75201
acharnes@kilpatricktownsend.com
Counsel for Premera Blue Cross

Gretchen J. Hoog
CORR DOWNS PLLC
100 W. Harrison St., Suite N440
Seattle, WA 98119
(206) 962-5040
ghoog@corrdowns.com
dhutchings@corrdowns.com
Counsel for Breaking Code Silence

Lenore Silverman
FAGEN FRIEDMAN & FULFROST LLP
6300 Wilshire Blvd., Suite 1700
Los Angeles, CA 90048
(510) 550-8216
lsilverman@f3law.com
Counsel for Breaking Code Silence

DATED: March 1, 2023, at Seattle, Washington.

/s/ Eleanor Hamburger
Eleanor Hamburger (WSBA #26478)
Email: ehamburger@sylaw.com

SIRIANNI YOUTZ SPOONEMORE HAMBURGER

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Seattle, WA, 98121
Phone: (206) 223-0303

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