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No. 68726-3-I

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DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

A.G., by and through his parents, J.G. and K.G.,

Plaintiff-Respondent,

v.

PREMERA BLUE CROSS and LIFEWISE OF WASHINGTON,
Washington corporations,

Defendants-Appellants.

ON NOTICE OF DISCRETIONARY REVIEW FROM
KING COUNTY SUPERIOR COURT
(Hon. Michael Trickey)

**PREMERA BLUE CROSS AND LIFEWISE OF WASHINGTON'S
MOTION FOR DISCRETIONARY REVIEW**

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I. IDENTITY OF THE PARTIES

Defendants/Appellants Premera Blue Cross and Lifewise of Washington (collectively, “Defendants”) respectfully ask this Court to accept discretionary review of the trial court Order described below.

II. DECISIONS BELOW

On April 17, 2012, the trial court (Hon. Michael Trickey) entered an Order (1) Granting Plaintiff’s Motion for Partial Summary Judgment; (2) Denying Defendants’ Motion to Dismiss; and (3) Issuing Preliminary Injunction (the “Order”). On April 27, 2012, the trial court certified the Order for possible discretionary review pursuant to RAP 2.3(b)(4) (the “Certification Order”). Both orders are included in the Appendix.¹

III. ISSUES PRESENTED

The Neurodevelopmental Therapy Mandate, RCW 48.44.450, permits individual health benefit plans to exclude neurodevelopmental therapy benefits. The trial court invalidated a neurodevelopmental therapy exclusion in Plaintiff A.G.’s plan on the grounds that it violated the Mental Health Parity Act, RCW 48.44.341. The issues are:

1. Did the Mental Health Parity Act implicitly repeal, supersede and/or abrogate the Neurodevelopmental Therapy Mandate so that individual health benefit plans can no longer exclude coverage for neurodevelopmental therapy benefits?

¹ Defendants have submitted the relevant portions of the trial court record in an Appendix to this motion. The papers and orders have been reproduced in chronological order, indexed by “Appendix Exhibit” or “AE” numbers.

2. Even if the Mental Health Parity Act does apply to neurodevelopmental therapy, did A.G. satisfy his burden on summary judgment of presenting undisputed facts to show that neurodevelopmental therapy is medically necessary to treat autism?

IV. STATEMENT OF THE CASE

A. Factual Background

A.G. is thirteen years old, and is a beneficiary of an individual health benefit plan A.G.'s parents purchased from Defendants in 2004. J.G. Decl. (AE 7), ¶ 2. In October 2006, A.G. was diagnosed with autism and mixed expressive-receptive language disorder. *Id.*, ¶ 3. A.G. submitted no medical records or medical opinion to the trial court, but, according to A.G.'s father, A.G.'s pediatrician recommended A.G. visit a clinic to determine if he would benefit from neurodevelopmental therapy. *Id.*, ¶ 4. According to A.G.'s father, two therapists recommended that A.G. receive weekly speech and occupational therapy. *Id.*, ¶ 5. A.G. began receiving speech and occupational therapy in 2007. *Id.*, ¶ 9.

A.G.'s individual health benefit plan contains an express exclusion for neurodevelopmental therapy benefits ("Neurodevelopmental Therapy Exclusion"). Duffy Decl. (AE 9), Exh. A, pp. 30-31. As discussed below, although an insurance mandate requires *group* health plans to provide neurodevelopmental therapy benefits to individuals under the age of seven (the "Neurodevelopmental Therapy Mandate"), the legislature has not expanded the Mandate to *individual* health plans. Individual plans are more expensive than group plans and, to remain affordable, tend to

provide very basic coverage. Tedford Decl. (AE 12), ¶ 3. The legislature apparently understood this, and thus excluded individual plans from various insurance mandates, like the Neurodevelopmental Therapy Mandate, in an effort to keep certain options affordable. *Id.*, ¶¶ 3-4.

Notwithstanding the Neurodevelopmental Therapy Exclusion in A.G.'s plan, when A.G.'s therapists sought payment for speech and occupational therapy, Defendants initially paid the claims up to twenty visits per year. J.G. Decl. (AE 7), ¶ 9. This happened because A.G.'s therapists submitted the claims using Current Procedural Terminology ("CPT") codes not commonly associated with neurodevelopmental therapy. As a result, Defendants' automated claims software processed and automatically paid—or "auto adjudicated"—those claims as routine rehabilitation benefits, which are covered under A.G.'s policy for up to twenty visits per year. Moore Decl. (AE 10), ¶¶ 2-5, 7-8; Moat Decl. (AE 11), ¶ 3; Duffy Decl. (AE 9), Exh. A, pg. 25. None of those auto adjudicated claims were ever reviewed by Defendants for "medical necessity." Moore Decl. (AE 10), ¶¶ 2, 3 & 10; Moat Decl. (AE 11), ¶ 3.

Beginning in 2009, A.G.'s therapists submitted some claims using a CPT code associated with neurodevelopmental therapy benefits. Defendants therefore denied those claims, but continued to automatically pay claims submitted using CPT codes associated with rehabilitation benefits. Moore Decl. (AE 10), ¶¶ 7-8; Moat Decl. (AE 11), ¶ 4. During a later claims review, however, Defendants discovered that the speech and occupational therapy claims previously paid as a rehabilitation benefit by

Defendants' automated claims software were actually claims for neurodevelopmental therapy. Moore Decl. (AE 10), ¶ 9; Moat Decl. (AE 11), ¶ 4. Under A.G.'s plan, rehabilitation therapy does not include neurodevelopmental therapy. Duffy Decl. (AE 9), Exh. A, pg. 26. Defendants notified A.G.'s parents that all such claims submitted after January 1, 2010 were denied pursuant to the Neurodevelopmental Therapy Exclusion. Moore Decl. (AE 10), ¶ 9; J.G. Decl. (AE 7), ¶¶ 10, 13.

Defendants did not consider A.G.'s neurodevelopmental therapy to be a mandated benefit under the Mental Health Parity Act (the "Parity Act" or "Act"). The Act requires health plans to provide coverage for services that are "medically necessary" to treat mental health conditions, but allows plan medical directors to determine medical necessity. RCW 48.44.341(4). Medical necessity decisions are made by physicians and health care professionals, and include an assessment of accepted standards of medical care, clinical appropriateness, efficacy and credible scientific data published in peer-reviewed literature, generally recognized by the medical community. Whether a particular service is medically necessary is a complex determination that is based on input from medical professionals and sources in the relevant field. Moat Decl. (AE 11), ¶ 6.

According to Defendants' Medical Director, the premise that neurodevelopmental therapy is medically necessary to treat autism is not uniformly accepted in the medical community. Services provided by speech, occupational and physical therapists are not considered behavioral health, psychiatric or psychological care, and the practice of these

practitioners is not directed towards treatment of mental health disorders. For example, the CPT code used by A.G.'s providers which triggered review by Defendants' claims department, described above, is educational in nature, and Defendants do not view it as medically necessary for individuals with autism. Moat Decl. (AE 11), ¶ 7.

B. Procedural Background

In September 2011, A.G., by and through his parents, filed suit against Defendants for breach of contract, declaratory relief, violation of the Consumer Protection Act and an injunction. *See* Compl. (AE 1). All of the claims are premised on the theory that Defendants' denial of coverage for neurodevelopmental therapy violates the Parity Act. *Id.*, ¶¶ 27, 29, 31 & 35. A.G.'s attorneys also sought certification for a class that would include all persons insured under a non-ERISA health plan issued by Defendants who "have received, require, or are expected to require behavioral and/or neurodevelopmental therapy" for a mental health condition. *Id.*, ¶ 13. A.G.'s motion for class certification is pending and, by agreement between the parties, Defendants have not yet responded.

Defendants moved to dismiss, arguing that the more specific Neurodevelopmental Therapy Mandate allowed Defendants to exclude neurodevelopmental therapy benefits from A.G.'s individual health plan, and that the more general Parity Act did not repeal or supersede the Mandate. *See* Motion to Dismiss (AE 2). A.G. cross-moved for partial summary judgment and a preliminary injunction. *See* Motion for Partial Summary Judgment and Preliminary Injunction (AE 6). A.G. sought a

declaration that the Neurodevelopmental Therapy Exclusion violated the Parity Act and an order enjoining Defendants from applying the exclusion to deny A.G.'s claims for neurodevelopmental therapy benefits. *Id.*

The trial court heard argument on March 2, 2012. In a letter ruling dated March 27, 2012, the court denied Defendants' motion to dismiss, and granted A.G.'s motion for partial summary judgment and preliminary injunction. The letter was incorporated by reference in the court's April 17, 2012 Order. *See* Order (AE 16). As it related to the enforceability of the plan's Neurodevelopmental Therapy Exclusion, the Order stated:

1. Given the broad mandate regarding mental health services in the Mental Health Parity Act, RCW 48.44.341, and pursuant to Washington's Declaratory Judgment Act, RCW 7.24, *et seq.*, Plaintiff A.G. is entitled to a declaration that the exclusion in Defendants' policies for "[s]ervices, therapy and supplies related to the treatment of ... developmental delay or neurodevelopmental disabilities" violates Washington public policy and the Mental Health Parity Act. The Court declares the exclusion void and unenforceable in this case.

2. Under the Mental Health Parity Act, Defendants must provide coverage for all medically necessary "mental health services" to the same extent as they provide coverage for other medical and surgical services. Neurodevelopmental therapies are "mental health services" designed to treat autism, a mental disorder listed in the DSM-IV. Since neurodevelopmental therapies may be medically necessary to treat autism, Defendants cannot use a blanket exclusion to deny coverage for those therapies.

3. The Court does not have to invalidate RCW 48.44.450, the Neurodevelopmental Therapy Act, to reach this result. RCW 48.44.450 only creates a minimum level of required coverage. Both the Neurodevelopmental Therapy Act and the Mental Health Parity Act can be read

together and harmonized. Defendants must meet the requirements of both Acts.

Id., pp. 3-4. Defendants promptly moved the trial court to certify the Order for discretionary review. Over A.G.'s objection, the trial court granted Defendants' motion to certify on April 27, 2012. *See* Certification Order (AE 17). Defendants filed a timely notice of discretionary review.

V. ARGUMENT

This Court should accept discretionary review because the trial court (a) certified the Order under RAP 2.3(b)(4) and, in any event, (b) committed obvious or probable error that renders further proceedings useless and/or substantially alters the status quo. RAP 2.3(b)(1) & (2). Discretionary review is needed not only to reverse the trial court's erroneous holding in this case, but also to bring clarity to the entire insurance industry. This appeal presents an important issue of first impression. Like Defendants, most Washington insurers did not consider the Parity Act applicable to neurodevelopmental therapy and many expressly excluded neurodevelopmental therapy benefits from coverage. A.G.'s counsel has filed nearly identical suits against several of these insurers to challenge such exclusions.² Swift appellate review would resolve these parallel actions (or at least eliminate unnecessary litigation) and ensure uniform application of Washington insurance law.

² In addition to Defendants, Plaintiff's counsel has filed suit against at least two other insurers to challenge neurodevelopmental therapy exclusions. *See Z.D. v. Group Health Coop.*, No. 2:11-cv-01119-RSL (W.D. Wash.) and *O.S.T. v. Regence BlueShield*, No. 11-2-34187-9 SEA (King County).

A. The Trial Court Properly Certified The Order Pursuant To The Criteria Set Forth In RAP 2.3(b)(4).

In certifying this matter, the trial court sent an unmistakable signal that it believed immediate review was appropriate, and outweighed the traditional policy against interlocutory appeals. This Court may accept discretionary review where a trial court certifies that a ruling:

... involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b)(4). The trial court expressly found that the Order satisfies these factors. *See* Certification Order (AE 17). That determination alone satisfies RAP 2.3(b)(4); this Court does not need to undertake any independent inquiry. But even if it does, all three factors are present here.

1. Controlling Question of Law. The issue upon which the parties cross-moved is a “controlling question of law.” It is “controlling” because Defendants’ motion to dismiss, if granted, would end the case in its entirety, and extinguish A.G.’s claims for declaratory, injunctive and monetary relief. It is a “question of law” because the meaning of and conflict between the Neurodevelopmental Therapy Mandate and the Parity Act is an issue of statutory interpretation, which is a question of law reviewed *de novo* on appeal, as is a trial court’s determination that there is no genuine issue of material fact to preclude summary judgment. *Venwest Yachts, Inc. v. Schweickert*, 142 Wn. App. 886, 893, 176 P.3d 577 (2008).

2. Substantial Ground For Difference of Opinion. “A substantial ground for difference of opinion exists where reasonable jurists

might disagree on an issue's resolution, not merely where they have already disagreed." *Reese v. BP Exploration (Alaska), Inc.*, 643 F.3d 681, 688 (9th Cir. 2011). For this reason, "a novel issue may be certified for interlocutory appeal without first awaiting development of contradictory precedent." *Id.*³ To be sure, the issue here is a close one. In certifying the issue, the trial court recognized that Defendants' arguments are reasonable and potentially meritorious. But more than that, neurodevelopmental therapy exclusions are common, and the effect of the Parity Act on those exclusions is an important issue—not just to insurers, but also to insureds, mental health providers and advocates. The issue has not been resolved, much less considered, by any appellate court, and it is only now trickling its way through the trial courts. The entire industry will benefit from conclusive appellate review of this novel and debatable issue.

3. *Materially Advance Termination Of The Litigation.* For the same reason identified above, if this Court accepts review and reverses the Order, this case will be over, and both the trial court and the parties will be spared from having to devote significant resources litigating this matter further. And even if this Court grants discretionary review, but ultimately affirms the Order, there is no harm to A.G. as a result of the hiatus in trial court proceedings. In granting A.G.'s motion, the trial court ordered Defendants to "review any new claims submitted by Plaintiff A.G.

³ RAP 2.3(b)(4) was adapted from 28 U.S.C. § 1292(b). 2A Karl B. Tegland, *Wash. Practice: Rules Practice*, at 161 (6th ed. 2004). This Court may look to federal cases to interpret analogous state rules. *See Am. Mobile Homes of Wash., Inc. v. Seattle-First Nat'l Bank*, 115 Wn.2d 307, 796 P.2d 1296 (1990).

and/or his providers for neurodevelopmental therapy as a mental health benefit and consistent with all other provisions in Plaintiff A.G.'s contract, including medical necessity." *See* Order (AE 16), pg. 8. Defendants will perform that review. If, as A.G. insists, his claims for neurodevelopmental therapy benefits are medically necessary, then Defendants will cover those benefits during appeal. In short, interlocutory appeal can only advance termination of the litigation, but will not delay A.G. the relief he seeks.

B. The Trial Court's Order Constitutes Obvious Or Probable Error That Renders Further Proceedings Useless And/Or Substantially Alters The Status Quo.

Discretionary review is also proper under RAP 2.3(b)(1) or (b)(2) because the trial court committed obvious or probable error that renders further proceedings useless and/or substantially alters the status quo.⁴

1. Defendants' Neurodevelopmental Therapy Exclusion Does Not Violate The Mental Health Parity Act.

The trial court concluded that the Neurodevelopmental Therapy Exclusion in A.G.'s plan was "void and unenforceable" because it violated the Parity Act. Order (AE), pg. 3. That conclusion was erroneous. The Neurodevelopmental Therapy Exclusion does not violate the Parity Act because it is not subject to the Act. Rather, neurodevelopmental therapy benefits are subject to a different mandate—the Neurodevelopmental

⁴ The trial court also erred in granting A.G.'s motion for a preliminary injunction. *See* Order (AE 16), pp. 4-8. Without waiving its right to appeal that issue, Defendants do not separately seek discretionary review of that ruling because it was premised entirely on the court's conclusion that the Neurodevelopmental Therapy Exclusion violated the Parity Act. Review and reversal of that core issue will therefore result in reversal of the injunction.

Therapy Mandate—and that mandate expressly permits individual health plans, like A.G.’s, to exclude coverage for such therapy.

a. The Mandate Permits Individual Health Plans To Exclude Neurodevelopmental Therapy Benefits.

In 1989, the Washington legislature enacted an insurance mandate requiring some health plans to cover “neurodevelopmental therapies.” The Neurodevelopmental Therapy Mandate has three key aspects: (1) it covers “neurodevelopmental therapies,” which it defines as “occupational therapy, speech therapy, and physical therapy”; (2) it applies only to group health benefit plans; and (3) it requires those group plans to cover neurodevelopmental therapy only for children through the age of six. *See* RCW 48.44.450. Critically, there is not, and has never been, a mandate for individual health plans. And, as discussed below, both before and after enactment of the Parity Act, the legislature has repeatedly refused to expand the Neurodevelopmental Therapy Mandate. In reliance on the Mandate, Defendants and other insurers offer (and price) individual health plans that expressly exclude neurodevelopmental therapy benefits.

The Neurodevelopmental Therapy Mandate, not the Parity Act, controls. A.G. seeks coverage for speech and occupational therapy. *See* J.G. Decl. (AE 7), ¶¶ 5, 9-12. Both are “neurodevelopmental therapies” as defined by the Mandate. RCW 48.44.450(2). The legislature determined that group plans must cover these therapies for children under the age of seven, but it refused to require individual plans to do so. While Defendants can offer health plans that provide coverage greater than what

is mandated, they are not required to do so. *Liljestrand v. State Farm Mut. Auto Ins. Co.*, 47 Wn. App. 283, 290 (1987). Like any non-mandated benefit, Defendants may exclude neurodevelopmental therapy benefits, and A.G.'s parents were free to choose a different plan if they wanted more coverage. In short, the Neurodevelopmental Therapy Exclusion cannot violate Washington law because it is permitted by the Mandate.

b. The Mental Health Parity Act Does Not Apply To Neurodevelopmental Therapy Benefits.

The trial court concluded that neurodevelopmental therapy benefits were also subject to the Parity Act, and that the Neurodevelopmental Therapy [Mandate] and the Mental Health Parity Act can be read together and harmonized.” Order (AE 16), pp. 2-3. Not so. The Parity Act was enacted in 2005, but did not apply to individual health plans until 2008. 2007 Laws, ch. 8. The Act requires plans that cover medical and surgical services to also cover “mental health services.” RCW 48.44.341(1). The term “mental health services” is not defined as any particular type of service, but only as “medically necessary outpatient and inpatient services provided to treat mental disorders” listed in the DSM-IV. *Id.* The trial court concluded that neurodevelopmental therapies are or at least may be “mental health services” under the Parity Act. Order (AE 16), pg. 3.

That construction creates an impermissible conflict between the Neurodevelopmental Therapy Mandate and the Parity Act. On one hand, the Mandate permits individual plans *to exclude* neurodevelopmental therapy for members with a DSM-IV condition. On the other, if it applied,

the Parity Act would require the same plans *to cover* such therapy for the same members. The Act forbids what the Mandate would permit, thereby effectively nullifying the Mandate in many cases. There is no reason to believe the legislature intended such a drastic result. The legislature is “presumed to have full knowledge of existing statutes affecting the matter upon which they are legislating.” *State v. Conte*, 159 Wn.2d 797, 808 154 P.3d 194 (2007) (citation and quotes omitted). Yet there is no reference to neurodevelopmental therapy or the Mandate (which pre-dates the Parity Act by 16 years) in the text of the Parity Act, the legislature’s findings, or its bill reports. *See* 2007 Laws, ch. 8; RCW 48.44.341; Duffy Decl. (AE 9), Exh. D. It is simply implausible that the legislature intended to override a long-standing mandate without specifically saying so.

The trial court tried to reconcile this conflict by suggesting that the Mandate “only creates a minimum level of coverage,” which the Parity Act can extend. Order (AE 16), pg. 4. But the Mandate does far more. An insurer is “permitted to limit its liability unless inconsistent with ... some statutory provision.” *Mutual of Enumclaw Ins. Co. v. Wiscomb*, 97 Wn.2d 203, 210, 643 P.2d 441 (1982). In defining what coverage an insurer must provide, the Mandate defines what coverage it may exclude. *Hodge v. Raab*, 151 Wn.2d 351, 356-58, 88 P.3d 959 (2004). To suggest that the Mandate does not show legislative intent to allow exclusion of neurodevelopmental therapy ignores its text and history—which, as discussed below, shows that the legislature understands that insurers have relied on the Mandate to exclude coverage for most neurodevelopmental

therapy benefits. In sum, if neurodevelopmental therapy is deemed a “mental health service,” then the Mandate conflicts with the Parity Act.

This conflict can be avoided by simply applying the Mandate, not the Parity Act, where the coverage at issue involves neurodevelopmental therapy. In cases of apparent conflict, courts must prefer a more specific statute over a general one. This is true even if the general statute is passed after the specific statute. *See Wark v. Wash. Nat'l Guard*, 87 Wn.2d 864, 867, 557 P.2d 844 (1976) (if “passed before the general statute, the special statute will be construed as ... an exception to its terms”). The Neurodevelopmental Therapy Mandate is specific in scope, and mandates insurance coverage for neurodevelopmental therapy. The Parity Act is general in scope, and mandates coverage for unspecified “mental health services” which, unlike the Mandate, it does not define. The trial court should have resolved the inherent conflict between the Mandate and the Parity Act by construing the Mandate as an exception to the Parity Act or, to put it differently, by concluding that neurodevelopmental therapy is not a covered “mental health service” under the Parity Act.

c. Legislative History and Agency Analysis Confirm The Limited Scope Of The Parity Act.

Subsequent legislative history confirms that the legislature did not intend the Parity Act to supersede the Mandate when it comes to neurodevelopmental therapy. “[I]n interpreting conflicting statutory language, a court may ascertain legislative intent by examining the legislative history of particular enactments.” *Gorman v. Garlock, Inc.*,

155 Wn.2d 198, 211, 118 P.3d 311 (2005). Further, courts can and do consider subsequent amendments and bills, even those that fail, as a legitimate tool to ascertain legislative intent. *Costanich v. Dep't of Soc. and Health Servs.*, 164 Wn.2d 925, 932, 194 P.3d 988 (2008); *Impecoven v. Dep't of Revenue*, 120 Wn.2d 357, 362, 841 P.2d 752 (1992). If the Parity Act was intended to expand the “minimum level” of coverage required by the Mandate, as the trial court concluded, further legislation regarding neurodevelopmental therapy would be unnecessary.

Yet, *after* enactment of the Parity Act in 2005, there have been repeated efforts to expand the Mandate. Some bills would have required group plans to cover neurodevelopmental therapy for individuals up to age eighteen. *See* Duffy Decl. (AE 9), Exh. E (SB 5750 (2007)); Exh. F (SB 5756 (2011)). Another bill would have expressly required plans to cover neurodevelopmental therapy to treat autism. *Id.*, Exh. G (HB 1412 (2009)). Even other bills would have required group plans to specifically cover treatments for autism, including “services provided by a speech therapist, occupational therapist or physical therapist”—the very same neurodevelopmental therapy addressed in the Mandate. *Id.*, Exh. H (SB 5203 (2009)); Exh. I (SB 5059 (2011)). None of these bills passed. Of course, there would be no need for any of this legislation if the Parity Act actually mandated such coverage in the first place. It didn't.

Washington agencies likewise recognize that neurodevelopmental therapy is not a “mental health service” under the Parity Act. *Anfinson v. FedEx Ground Package System, Inc.*, 159 Wn. App. 35, 41, 244 P.3d 32

(2010) (courts give great weight to agency interpretation of a statute). In a January 2009 report regarding “Treatment of Autism Spectrum Disorders,” which is a DSM-IV condition, the Department of Health (DOH) stated: “It is unclear at this time how much (if any) ASD treatment should be covered under this mandate.” Duffy Decl. (AE 9), Exh. L, pp. 8-9. Just as important, in addressing the apparent gap in coverage, the DOH recommended the legislature “[e]xpand the neurodevelopmental therapy mandate to,” among other things, raise the age limits, and “[e]xpand and/or clarify the mental health parity mandate to include treatment for ASD.” *Id.*, pp. 16-17. Thus, the DOH understood that, without amendment, the Parity Act did not require insurers to cover neurodevelopmental therapy benefits to treat a DSM-IV condition. As noted above, the legislature refused to act on those recommendations.

Similarly, in its initial December 2006 report, the Caring for Washington Individuals with Autism Task Force noted that “[m]any private insurance companies cover neurodevelopmental therapies only through the age of six, and ASD is often excluded from coverage because it is considered by insurance plans to be a non-medical condition that should be handled by the educational system.” *Id.*, Exh. J, pg. 32. In its final December 2007 report, the Task Force confirmed the lack of an existing mandate, and recommended that the legislature amend the Mandate to require insurers to cover a possible treatment for autism:

Children with autism commonly have a range of medical conditions for which they need treatment. ... There is no mandate for insurance coverage within Washington State.

* * *

3. Support policies that ensure neurodevelopmental therapy insurance benefits.
 - a. Extend neurodevelopmental therapy benefit including speech-language services, occupational and physical therapy to individuals aged 18 years. ...

Id., Exh. K, pp. 7-9 (underline added). Here too, there would be no need to extend the Neurodevelopmental Therapy Mandate if, as the trial court found, the legislature intended the Parity Act to achieve that result.

Finally, the Office of Insurance Commissioner (OIC) apparently agrees that the Parity Act does not apply to neurodevelopmental therapy. Washington law requires Defendants to submit their contract forms to the OIC for review. RCW 48.44.040; WAC 284-43-920(1)(a). This includes the individual plan containing the Neurodevelopmental Therapy Exclusion at issue here. The OIC has authority to disapprove a plan if it “contains unreasonable restrictions on the treatment of patients” or “violates any provision of this chapter”—including the Parity Act. RCW 48.44.020(2). The OIC has never disapproved Defendants’ individual health plan. The trial court erred in adopting a judicial construction of the Parity Act that conflicts with both legislative intent and agency interpretation.

2. The Trial Court Erred In Granting Summary Judgment In The Absence Of Any Evidence Of Medical Necessity.

Even if, as a matter of statutory construction, the Parity Act could apply to neurodevelopmental therapy, the trial court still erred in granting A.G. summary judgment. The Act only applies to “medically necessary ... services provided to treat mental disorders covered” by DSM-IV.

RCW 48.44.341(1). Thus, in A.G.'s case, the Neurodevelopmental Therapy Exclusion violates the Act only if neurodevelopmental therapy is "medically necessary" to treat autism. *Id.* A.G. wholly failed to carry his burden on summary judgment regarding that threshold element. A.G. did not support his motion with any testimony by a physician, therapist or other medical professional, nor did he submit even a single medical record to show medical necessity.⁵ Moreover, the diagnoses and statements allegedly made by A.G.'s pediatrician and therapists, described generally in the declaration of A.G.'s father (*see* J.G. Decl. (AE 7), ¶¶ 3-7), were inadmissible hearsay that cannot be considered on summary judgment. *Dunlap v. Wayne*, 105 Wn.2d 529, 535, 716 P.2d 842 (1986); CR 56(e).

Nor was the lay opinion of A.G.'s father sufficient. There is a difference between what A.G.'s parents perceive is beneficial to A.G. and a "mental health service" that is medically necessary. Moat Decl. (AE 11), ¶ 8. Whether a particular therapy is medically necessary is a complex medical issue beyond the everyday understanding of a lay person. *Id.*, ¶ 6. "In general, expert testimony is required when an essential element in the case is best established by an opinion which is beyond the expertise of a layperson." *Harris v. Robert C. Groth, M.D., Inc., P.S.*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983). Medical facts in particular must be proven by

⁵ A.G. pointed to the fact that Defendants previously paid some of his therapists' claims for neurodevelopmental therapy. But the undisputed evidence showed that Defendants' claims software mistakenly paid those claims because they were "auto-adjudicated" as a covered rehabilitation benefit; there was never any determination of "medical necessity." When Defendants discovered the error, they immediately denied the claims. *See* Moore Decl. (AE 10), ¶¶ 2-10.

expert testimony unless they are observable by a layperson's senses and describable without medical training. *Id.* Without expert testimony showing that neurodevelopmental therapy is a medically necessary treatment for autism, A.G. was not entitled to summary judgment.

Indeed, Defendants were the only party to submit evidence on medical necessity, and that evidence was more than sufficient to raise a genuine dispute of fact. The Parity Act gives Defendants' medical director discretion to make a clinical determination on medical necessity. RCW 48.44.341(4); WAC 284-43-130(17). According to Defendants' Medical Director, the notion that neurodevelopmental therapy is medically necessary to treat autism is not uniformly accepted in the medical community. Moat Decl. (AE 11), ¶ 7. Treatment is focused on improving co-morbid physical and communication problems that impact the functional status of the individual. *Id.* Thus, Defendants have determined that services provided by speech, occupational and physical therapists do not constitute behavioral health, psychiatric or psychological care, and the scope of practice of these practitioners is not directed towards treatment of mental health disorders. *Id.* At the very minimum, this testimony—which is the only evidence in the record regarding the threshold issue of medical necessity—was sufficient to defeat summary judgment.

3. The Order Renders Further Proceedings Useless And/Or Substantially Alters The Status Quo.

The Order satisfies the prudential considerations embodied in RAP 2.3(b)(1) & (2) because the Order finally determined the threshold legal

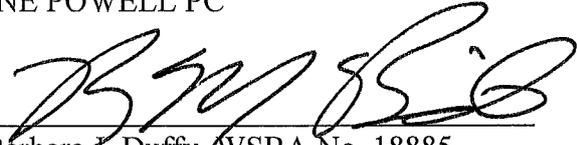
issue in this matter, leaving only the follow-on issues of class certification, individual medical necessity and, if necessary, damages. If review is accepted, and the Order reversed, all of A.G.'s claims will be dismissed and these further proceedings will be unnecessary. The Order also substantially alters the status quo because it enjoins Defendants from applying the Neurodevelopmental Therapy Exclusion to A.G. and, A.G. will likely seek to extend the injunction to members of the putative class. Lastly, the Order creates a real possibility that Defendants will be subject to an insurance mandate not recognized by or imposed on all insurers in the state. Immediate appellate review will ensure uniform application of the law and eliminate the potential for inconsistent judgments emanating from the various parallel lawsuits filed by A.G.'s counsel.

VI. CONCLUSION

This Court should grant Defendants' motion for discretionary review under RAP 2.3(b)(4) and RAP 2.3(b)(1) & (2).

RESPECTFULLY SUBMITTED this 29th day of May, 2012.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on May 29, 2012, I caused to be served a copy of the foregoing **Motion for Discretionary Review** on the following person(s) in the manner indicated at the following addresses:

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- by Facsimile Transmission
- by First Class Mail
- by Hand Delivery
- by Overnight Delivery

DATED this 29th day of May, 2012 at Seattle, Washington

/s/ Janet Wiley
Janet Wiley