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No. 69821-4
(for consolidation with No. 69724-2)

COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE

O.S.T., by and through his parents, G.T. and E.S.; and L.H., by and through
his parents, M.S. and K.H., each on his own behalf and on behalf of all
similarly situated individuals,

Plaintiffs/Respondents,

v.

REGENCE BLUESHIELD, a Washington corporation,

Defendant/Petitioner.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. John P. Erlick)

**REGENCE BLUESHIELD'S REPLY
IN SUPPORT OF
MOTION FOR DISCRETIONARY REVIEW**

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I. INTRODUCTION

Plaintiffs ignore the uncontradicted evidence in asserting Regence “misclassified” L.H.’s claims. None of L.H.’s claims indicated any DSM condition. In addition, Plaintiffs can point to no competent evidence that L.H. was diagnosed with a DSM-listed condition, as diagnosis requires a license not possessed by his records reviewer or former speech therapist. It was error to rule on summary judgment that L.H. has standing. This Court should grant review.

On class certification, Plaintiffs ignore they cannot establish liability based on class-wide proof. This precluded the finding that a common issue would predominate over issues requiring individualized proof, such as diagnosis and medical necessity. Plaintiffs take Judge Lasnik’s comments in *Z.D. v. Group Health* regarding IRO review out of context and ignore his comments in the context of superiority. It was error to conclude (b)(3) class treatment was superior to IRO review—which is designed to address individual damages claims—where both liability and damages depend on individualized proof.

Plaintiffs attack a straw-man argument on standing of class members. The issue is not that Plaintiffs must prove each class member’s standing at this stage, but that the class must be limited to those who *could* have standing. The class certified here includes persons not even potentially damaged. In addition, although insureds themselves might be

able to tell whether they fit within the class definition should they somehow receive notice and thus have the opportunity to read it, neither the court nor anyone else can identify persons who “require” neurodevelopmental therapy but have never submitted a claim and provide them due process in the form of notice and an opportunity to opt out.

Regence has demonstrated obvious or at least probable error in the rulings on standing and class certification, and those rulings will impact the ongoing proceedings severely, resulting in needless litigation, administrative burden, and expense. This Court should grant discretionary review and consolidate this appeal with Regence’s pending appeal.

II. REPLY ARGUMENT

A. Plaintiffs Mischaracterize the Discretionary Review Standard.

As this Court knows well, either RAP 2.3(b)(1) or (b)(2) may apply here. Although subsection (b)(2)’s “probable error” standard was originally intended to apply to injunctions, in practice that distinction “immediately disappeared.” *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 463 n.6, 232 P.3d 591 (2010), citing G. Crooks, *Discretionary Review of Trial Court Decisions under the Wash. Rules of App. Proc.*, 61 WASH. L. REV. 1548, 1545-46 (1986). This Court will accept review where the trial court has committed either a probable or obvious error; the essence of the criteria is an inverse relationship between the certainty of error and its impact on the proceeding. *Id.*

Here, Regence has demonstrated at least probable error, and due to the administrative burden and expense that will flow from the trial court's certification of a large class and the related ongoing litigation, the impact is great. In addition, it makes sense to grant review here because the appeal can be consolidated with Regence's pending appeal.

B. The Ruling that L.H. Has Standing Is Contrary to the Uncontradicted Evidence.

Plaintiffs do not dispute that L.H. lacks standing unless he was diagnosed with a DSM-listed mental disorder and Regence denied claims that listed a billing code with a DSM counterpart. The uncontradicted evidence established Regence properly covered L.H.'s speech-therapy claims and did not "misclassify" them as medical rather than mental health. L.H.'s claims listed only medical billing codes with no DSM counterparts. MA 399, 424; *see also* MA 342-51 (chart indicating DSM codes that correspond to ICD-9 billing codes). Plaintiffs can point to no contrary evidence.

Nor did Plaintiffs present any competent evidence that L.H. was diagnosed with a mental disorder. Diagnosis is the practice of medicine, which requires a specific license. RCW 18.71.011(1), .021.¹ Ignoring the statutory requirements, Plaintiffs assert L.H. was diagnosed by records

¹ In its Motion for Discretionary Review, Regence incorrectly cited the chapter as 18.17 rather than 18.71. Plaintiffs were not prejudiced as Regence correctly cited the statute in its briefing to the superior court.

reviewer Patricia Moroney (without seeing him) and his former speech therapist, Lauren Bonifant. But Plaintiffs do not dispute that neither therapist is licensed.² A purported diagnosis by an unqualified person cannot establish a right to benefits and thus cannot confer standing.

It was error to rule that L.H. has standing to seek declaratory and injunctive relief. Unless discretionary review is granted, the superior court may proceed to grant relief to L.H. and class members premised on his standing. The superior court ruled the other class representative, O.S.T., lacks standing to seek injunctive relief. This Court should grant review.

C. CR 23(b)(3) Is Not Available Where (1) Liability Cannot Be Established Class Wide, (2) IRO Review Exists to Adjudicate Individual Claims, and (3) the Class Includes Persons Who Lack Damage Claims and Cannot Be Identified.

1. Plaintiffs Ignore Their Inability to Establish Liability Class Wide, Which Defeats Predominance.

Plaintiffs do not dispute that liability to each class member, *i.e.*, the fact of damage, depends on individualized evidence of diagnosis and medical necessity. *See Motion* at 12. Nor do they address any of the multitude of cases where courts held it is error to certify a class where liability is not susceptible to class-wide proof, including specifically where it depends on individualized diagnosis and medical necessity. *See Motion*

² The initials following the providers' names, while notable, must not be mistaken as indicating possession of any license; M.A. denotes a master's degree, while CCC-SLP denotes certification by the American Speech-Language-Hearing Association.

at 12-13 (citing several cases). Instead, Plaintiffs rely solely on *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 63 P.3d 198 (2003), and assert that Judge Lasnik's refusal to certify a (b)(3) class is unpersuasive because Washington has an "expansive and liberal" view of the (b)(3) predominance requirement. *Response* at 11.

Washington's subsection (b)(3) is identical to the federal rule, and there is no indication the federal courts apply a more stringent standard of predominance. In fact, the Supreme Court recently held in the context of an extensive (b)(3) predominance analysis that, "[b]ecause CR 23 is identical to its federal counterpart, 'cases interpreting the analogous federal provision are highly persuasive.'" *Schnall v. AT&T Wireless Svcs., Inc.*, 171 Wn.2d 260, 271, 259 P.3d 129 (2011), quoting *Schwendeman v. USAA Cas. Ins. Co.*, 116 Wn. App. 9, 19 n.24, 65 P.3d 1 (2003) and citing numerous federal decisions. Even *Sitton*, in defining the predominance standard, relied on the Newberg treatise, which mainly addresses federal law. *See Sitton*, 116 Wn. App. at 255-56, quoting at length NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS, §§ 4.23, 4.25 (3d ed. 1992).³

Plaintiffs fail to address Regence's analysis distinguishing *Sitton* on the basis that the insurer there had already determined individual medical necessity, and liability could be determined based on class-wide proof. *Motion* at 11. Although *Sitton* observed that a single common

³ A separate chapter of Newberg addresses class actions in state courts.

issue may predominate, and the management tools exist to deal with individualized determination of the amount of damages once liability is established, *id.* at 254-55, no management tool can overcome inability to establish liability class wide. *See, e.g., Schwendeman*, 116 Wn. App. 20-22, and other cases cited in *Motion* at 12-13.

In sum, more apt here than *Sitton* is the analysis of the state and federal courts that have concluded the predominance requirement cannot be satisfied where liability to each class member depends on individualized proof of diagnosis and medical necessity. *See Motion* at 12-13. The superior court's failure to conclude likewise was error.

2. Plaintiffs Take Judge Lasnik's Comments Out of Context and Ignore His Actual Comments on the Superiority of the IRO Review Process.

While contending Judge Lasnik's predominance analysis is unpersuasive here, Plaintiffs are quick to embrace some of his comments regarding the IRO claim review process. *See Response* at 15-16. But they fail to disclose that those comments were made in the context of ruling on a subsection (b)(1) or (b)(2) class—not a (b)(3) class—and ignore Judge Lasnik's superiority analysis.

The plaintiffs in *Z.D. v. Group Health* proposed two classes: *first*, a class of persons seeking declaratory and injunctive relief under (b)(1) or (b)(2), and *second*, a class of persons seeking monetary damages under (b)(3). 2012 WL 1977962 at *1 (MA 353). In the context of (b)(1) and

(b)(2), Group Health argued that the plaintiffs' decision to pursue litigation rather than the IRO process raised doubts whether their interests were aligned with those of other proposed class members. *Id.* at *5 (MA 360). The court rejected this argument, observing that the IRO process was not a proper forum to seek declaratory or injunctive relief. *Id.* at *6 (MA 361). The court granted certification under (b)(1) and (b)(2), neither of which includes a superiority requirement. *Id.* at *6-8 (MA 362-65).

But in the context of (b)(3) certification, where monetary damages would be sought on behalf of the class, the *Z.D.* court recognized that liability to individual class members could not be determined class wide, and the IRO process is a superior means of adjudicating individual claims because that is what it is designed to do. *Id.* at *12-13 (MA 372-72); 2012 WL 5033422 at *13 (MA 396). Armed with a declaratory judgment, individual members of the (b)(1)/(b)(2) class could voluntarily seek IRO review if appropriate. 2012 WL 19779962 at *12 (MA 371-72).

Unlike in *Z.D.*, Plaintiffs chose in this case to seek certification of a single class for declaratory, injunctive, *and* monetary relief—a class they concede could not have been certified under (b)(1) or (b)(2). *See Response* at 11 (observing that *Sitton* “clos[ed] the CR 23(b)(2) door” where non-incidental monetary damages are sought). The fact that Plaintiffs made that choice does not render Judge Lasnik’s superiority

analysis any less compelling, as they could have sought (b)(2) certification for declaratory and injunctive relief only.

Class treatment cannot be superior where individual class members' claims depend on proof unique to each class member and a legislatively created forum exists specifically to adjudicate such claims. It was error to conclude (b)(3) class treatment was superior to other means of adjudication where both liability and damages depend on individualized proof. This Court should grant review.

3. The Issue on Standing Is Not that Plaintiffs Must Prove Each Class Member's Standing at This Stage, but that the Class Must Be Limited to Those Who *Could* Have Standing.

Plaintiffs miss the point on standing and attack a straw man. Regence does not contend Plaintiffs were required to *prove* each class member has standing before certification. The problem is that the certified class includes persons who, by definition, have suffered no damages and have no breach of contract claim because Regence never denied their claims. This precludes certification of a (b)(3) class. *See Batas v. Prudential Ins. Co. of Am.*, 37 A.D.3d 320, 321, 831 N.Y.S.2d 371 (2007).

Plaintiffs' authorities do not state otherwise. Section 3:7 of the Newberg treatise relates only to "class actions certified under 23(b)(2)," which by definition include persons without individualized claims for damages. Section 2:3 merely states that passive class members need not

affirmatively demonstrate standing, and notes that “[c]lass definition is properly considered a separate topic.” In *O’Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 320 (C.D. Cal. 1998), the court noted the plaintiffs were not required to *prove* each class member’s injury for class definition purposes. Again, that is not the issue here. Plaintiffs omit that the *O’Connor* court then analyzed whether the proposed class was narrowly drawn such that its members could have been affected by contamination the defendants’ allegedly caused. *Id.* at 320-27. No similar analysis was done here and, as a result, the class includes persons not even potentially damaged by Regence’s alleged contract breach or other conduct.

Turning to ascertainability, the issue is not whether insureds can “identify *themselves*” as class members, *Response* at 13 (emphasis added), but whether the court can identify them and provide the “best notice practicable” under CR 23(c)(2). This is a due process issue because they will be bound whether they receive notice or not. It is impossible to identify persons who “require” neurodevelopmental therapy but have never submitted a claim, just as it was impossible in *Rios v. Marshall* to identify farmworkers who were deterred by the defendants’ alleged discrimination from applying for jobs. 100 F.R.D. 395, 403 (S.D. N.Y. 1983). Plaintiffs’ assertion that no individualized determination of medical necessity will be required for declaratory or injunctive relief, *Response* at 14, ignores their election to seek damages for the same class.

It was error to certify a class that includes persons who (1) by definition have suffered no damages and have no contract claim and (2) can never be identified and given notice. This Court should grant review.

D. In the Alternative, This Court Should Stay the Superior Court Proceedings Pending Regence's Appeal From the Partial Summary Judgment.

Although Regence believes the trial court proceedings should be stayed for efficiency and economy, that is not the "real reason" Regence is seeking discretionary review. *Response* at 2. Should this Court decline to grant review, it should stay the superior court proceedings to permit orderly review of the partial summary judgment and prevent a potentially needless expenditure of resources on continued litigation.

III. CONCLUSION

The superior court committed obvious or at least probable error in its rulings on standing and class certification, and those rulings will have a severe impact on the ongoing proceedings. This Court should grant review and consolidate this appeal with Regence's pending appeal.

DATED this 7th day of February, 2013.

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REGENCE BLESFIELD, a
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Appellant.

DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I am over the age of 18 years and competent to be a witness herein. On February 7, 2013, I served via *legal messenger* true and correct copies of *Regence Blueshield's Reply in support of Motion for Discretionary Review* and *Declaration of Service* on counsel of record as follows:

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DATED this 7th day of February, 2013.


Patti Saiden, Legal Assistant