

The Court of Appeals
of the
State of Washington
Division III

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REED & GIESA, P.S.

LORI E. DAVIS-BAILEY, et al.,

Respondents,

v.

AMERICAN MEDICAL RESPONSE
NORTHWEST, INC., et al.

Petitioner.

No. 27796-8-III

consol'd with no. 27965-1-III

COMMISSIONER'S RULING

American Medical Response Northwest, Inc. (AMR), et al., seeks discretionary review of the Spokane County Superior Court's March 27, 2009 "Order Denying Defendants' Motion for Decertification of Subclasses A-1, A-2, B and C or, in the alternative, to Create Additional Subclasses." Notice of Discretionary Review, no. 27965-1-III.¹

¹ This Court consolidated the notice of discretionary review in no. 27965-1-III with an earlier notice of discretionary review that AMR had filed from a different superior court order in this class action. The number this Court assigned to the earlier

No. 27796-8-III, consol'd with no. 27965-1-III

The superior court entered the order in an action the named plaintiffs had filed in 2005. The superior court had certified the action as a class action in 2006, with the named plaintiffs as the class representatives (plaintiffs). The complaint alleged that AMR had overcharged the plaintiffs, in breach of the terms of AMR's 1998 and 2003 contracts with the City of Spokane for 911-dispatched ambulance transport services. The complaint also alleged AMR had violated the Consumer Protection Act, and it asked for restitution from AMR for alleged unjust enrichment.

Each of the approximately 12,500 class members are residents of Spokane who AMR transported from a 911 emergency scene to a hospital or similar facility from December 1, 1999 through October 31, 2005. The contracts with the City stipulated that AMR would charge only the lower BLS (basic life support) rate when there was a SFD (Spokane Fire Department) paramedic ride-in. Instead, AMR allegedly charged the higher ALS (advanced life support) rate for transports with SFD ride-ins.

In its motion to decertify the class action, AMR argued that proof variations existed between the class representatives and the class members. And, if the action remained a class action, these variations would work to deprive AMR of its right to due process because defenses it had to certain class-members' claims would not apply to the

notice of discretionary review was 27796-8-III. The parties have advised the Court, in a writing signed by both, that they had settled their dispute as to the order that was the subject of the earlier notice of discretionary review.

No. 27796-8-III, consol'd with no. 27965-1-III

claims of class representatives. Specifically, to establish the CPA claim, the plaintiffs had to show they paid an amount they did not actually owe – i.e., the plaintiffs had to prove that the deceptive billing process actually induced them to pay. *See Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 170 P.3d 10 (2007). *See also Panag v. Farmers Ins. Co.*, -- Wn.2d --, 204 P.3d 885, 900 (2009) (“[W]hen the alleged injury is payment of an amount not actually owed, a plaintiff must prove the deceptive billing practice induced the payment to establish causation.”).

AMR asserted that the plaintiffs could not prove inducement. They cited the fact some class members never saw a bill because a third party payor – such as Medicare, a health insurer, or an automobile insurer under personal injury protection provisions of a policy – actually paid it. To ascertain these allegedly relevant facts, AMR argued that it would have to make individualized inquiries of each class member, which is not feasible in a class action.

AMR also argued that the voluntary payment doctrine applied to render the contract claims of the plaintiffs unsuitable for class treatment. I.e., some of the plaintiffs paid with knowledge that AMR had overcharged them.

AMR summarized, as follows: “These variations among the class members on the question of who received a bill, who paid a bill and who knew that the bill charged a rate not authorized by the City contracts, means that trial of the named plaintiffs’ cases will not fairly adjudicate the claims of class members.” Motion at 2. The result, according to

No. 27796-8-III, consol'd with no. 27965-1-III

AMR, is that the class certification did not satisfy CR 23(a) and (b)(3)'s requirements for commonality and dominance.

The superior court found that (1) the class included 12,500 members, so joinder was impractical; (2) numerous questions of law and fact were common to the class members, and those common questions were "dominant, central and overriding," Motion at A-7; (3) these common questions predominated over any questions that involved only an individual member of the class; and (4) several methods were available to the court and to the parties to resolve individual issues.

As to (4), the superior court specifically addressed the concerns of AMR. It stated, as follows:

There are several methods available to the court and the parties to resolve individual issues, if any actually arise under the defendants' theory of the case *regarding the CPA causation issue*² or under its contract claim affirmative defense of voluntary payment³ or otherwise. Such management methods include but are not limited to the creation of additional subclasses, if and when appropriate in the sound discretion of the court, pre-trial evidentiary rulings on proposed

² AMR complained that, "of the majority of absent class members who never received a bill or did not make payment to AMR (because Medicare or an insurer paid the bill), many likely experienced no pecuniary impact from the incorrect billing." AMR asserted that it would be foreclosed on all of the subclasses from presenting that defense because Ms. Davis-Bailey, the Bacons, and Mr. Bamonte did receive a bill and Ms. Davis-Bailey and Mr. Bamonte paid some or all of it.

³ AMR complains that the superior court's ruling also limits AMR's voluntary payment affirmative defense. Specifically, because application of the voluntary payment doctrine will vary between the named plaintiffs and the subclass members they purportedly represent, AMR argues that common liability issues do not predominate.

exhibits, a pre trial order under CR 16 and/or a case management order under CR 23 (d) to creatively address any special pre trial or trial or management matters, case management orders under CR 23 (d) to creatively address any special, bifurcation or sequencing of issues for trial, special interrogatories to the jury, stipulations and master's hearings.

(Emphasis added.) Motion at A-10.

For this Court to accept discretionary review of the decision that denied AMR's motion to decertify, AMR must fit the review within one of the grounds set forth in RAP 2.3(b)(1) or (2). I.e., AMR must establish that the superior court committed obvious error that renders further proceedings useless or probable error that substantially alters the status quo or substantially limits the freedom of a party to act.

In deciding whether AMR has satisfied either of the above cited grounds for review, the Court has in mind the following: (1) "Washington courts favor a liberal interpretation of CR 23 as the rule avoids multiplicity of litigation, 'saves members of the class the cost and trouble of filing individual suits[,] and ... also frees the defendant from the harassment of identical future litigation.'" *See Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 250, 63 P.3d 198 (2003) (quoting *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 318, 54 P.3d 665 (2002) (quoting *Brown v. Brown*, 6 Wn. App. 249, 256-57, 492 P.2d 581 (1971))). (2) The standard of review of a superior court decision on class certification is abuse of discretion. *Id.* And, (3) a party seeking decertification has the burden of showing the action no longer meets the requisites of CR 23. *See Gonzales v. Arrow Fin'l. Servs. LLC*, 489 F. Supp.2d 1140, 1154 (S.D. Cal. 2007). In this latter

regard, one opinion has observed that a court should reverse its decision to certify a class only for good cause, as the parties can be expected to have changed their position in reliance on the court's certification of the class. *See Cook v. Rockwell Int'l*, 181 F.R.D. 473, 478 (D. C. Colo. 1998).

The Court is of the opinion that AMR has not shown the superior court obviously or probably abused its discretion when it denied its motion to decertify the class. *See Sitton* at 250. AMR does not dispute that it sent bills to class members or their third party payors for amounts the class members did not legally owe. In every case, AMR collected from either the class member or his or her personal health care benefits provider, or it turned the account over to collection.⁴ Even if the collateral source rule⁵ does not apply in CPA actions, AMR's acts arguably injured the plaintiffs. If the health care benefits provider paid the bill, the plaintiff was still liable for the percentage of the bill that his or her health insurance did not cover. If an automobile insurer paid the bill under the

⁴ CR 23(a) provides in pertinent part that "[o]ne or more members of a class may sue . . . as representative parties on behalf of all only if . . . (2) there are questions of law or fact common to the class, [and] (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class" CR 23(b)(3) provides that an action may be maintained as a class action if, among other things, "[t]he court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members"

⁵ "The collateral source rule is an evidentiary principle that enables an injured party to recover compensatory damages from a tortfeasor without regard to payments the injured party received from a source independent of a tortfeasor." *Johnson v. Weyerhaeuser Co.*, 134 Wn.2d 795, 798, 953 P.2d 800 (1998).

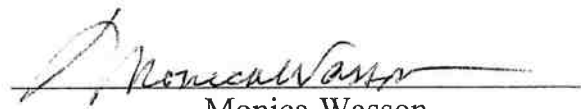
No. 27796-8-III, consol'd with no. 27965-1-III

personal injury protection benefits of an insured's policy, that payment diminished the PIP amount available to the plaintiff for other expenses. And, if AMR turned the bill over to collection for failure to pay, that referral affected the person's credit.

Further, as the class representatives point out, AMR did not establish other than by general allegations that the lynchpin of its decertification motion - i.e., that not all patients were directly billed - was factually true.⁶ And, AMR failed to show that the claimed basis for its motion was anything that it could not have known at the time the superior court originally certified the sub-classes, subsequently enlarged them, or subsequently clarified them. Accordingly,

IT IS ORDERED, the motion for discretionary review is denied.⁷

July 1, 2009


Monica Wasson
Commissioner

⁶ Plaintiffs assert they have a pending motion in superior court to sanction AMR for failing to produce patient billing records. Without the records, the plaintiffs cannot dispute AMR's claims.

⁷ The Court also grants plaintiffs' motion for leave to file an over-length answer to AMR's second motion for discretionary review.