

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 14, 2026 Session

**KALYN DOXLEY, ET AL. v.
CLARENCE L. “BUZZ,” NABERS, JR., DDS, ET AL.**

**Appeal from the Circuit Court for Knox County
No. 2-91-20 William T. Ailor, Judge**

No. E2025-01016-COA-R3-CV

This is a healthcare liability action, governed by Tennessee Code Annotated section 29-26-101, *et seq.*, stemming from care rendered by a dentist. The defendant dentist seeks review of a class certification order entered by the trial court pursuant to Tennessee Code Annotated section 27-1-125. Section 27-1-125 grants an appeal as of right from an order granting or denying class certification under Rule 23 of the Tennessee Rules of Civil Procedure. Tenn. Code Ann. § 27-1-125(a). Because, based on the record before us, we cannot conclude that the trial court applied the correct legal standards and also cannot conclude that the class proponent met her burden of establishing that the requirements of Rule 23 of the Tennessee Rules of Civil Procedure have been met, we must vacate the trial court’s certification decision.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Vacated; Case Remanded.**

JOHN W. MCCLARTY, P.J., E.S., delivered the opinion of the court, in which VALERIE L. SMITH and WILLIAM E. PHILLIPS II, JJ., joined.

Jeffrey C. Smith, Memphis, Tennessee, and Heidi A. Barcus and Meagan Davis Collver, Knoxville, Tennessee, for the appellants, Clarence L. Nabers, Jr., DDS, *et al.*

Dan Channing Stanley, G. Madison Roberts, V, and Eric B. Foust, Knoxville, Tennessee, for the appellee, Kalyn Doxley.

OPINION

I. BACKGROUND

Clarence L. “Buzz” Nabers, Jr., D.D.S. (“Dentist”), during the relevant period, had two dental offices in Knox County—a downtown Knoxville location and a west Knoxville location. Kalyn Doxley (“Patient”) received treatment at the downtown practice.

In December 2019, Dentist sent a letter to all patients seen by him at both locations between September 15, 2016, and September 15, 2019. The letter advised patients regarding “the very remote possibility” that they may have been exposed to infection because of Dentist’s sterilization techniques during that period. Dentist provided patients with a copy of the recommended blood tests and necessary diagnostic codes. Shortly after receiving the December 2019 letter, Patient was twice tested for an infectious disease panel with negative results. The record reveals that no patients have been diagnosed with any of the infectious diseases listed in the December 2019 letter.

Patient initiated this action on March 20, 2020, by filing a class action complaint (“Complaint”) asserting violations of mandatory sterilization and infection-control standards at Dentist’s practices. The Complaint alleged that Patient and thousands of similarly situated patients had been exposed to serious infectious diseases.¹ Patient alleged medical battery, negligent infliction of emotional distress, and negligence for alleged failure to sterilize dental instruments used during treatments received at Dentist’s practice. Patient later was granted leave to amend to add an intentional infliction of emotional distress claim. The primary claim raised by Patient appears to be alleged emotional distress resulting from the December 2019 letter informing all patients that they were possibly exposed to disease. Patient’s complaint sought \$50,000,000 in damages for herself and a proposed class of some 8,000 dental patients treated by Dentist at both locations.

In response, Dentist challenged the sufficiency of both the class and Patient’s individual healthcare liability allegations. Dentist contended the proposed class involved “differing issues of law and fact for many of the class members,” including whether and when any proposed class member suffered any injury. Dentist argued that despite the proposed class spanning a three-year time period, the statute of limitations for each of the claims asserted by the Patient is only one year. *See* Tenn. Code Ann. § 28-3-104. Dentist asserted that in order to resolve the statute of limitations questions, the court would have to consider evidence related to the date of the injury from each individual member. Significantly, Dentist also argued that

¹ Dentist’s license was placed on probation in 2019 upon investigation by the Board of Dentistry of the Tennessee Department of Health.

the proposed class likely included claims barred by the applicable statute of limitations and statute of repose provisions of the Tennessee Health Care Liability Act (“THCLA”).

The case moved through trial court proceedings until November 2024, at which time Patient filed a Motion for Class Certification. Dentist again argued that individualized issues predominated and that the THCLA barred or severely limited class treatment. A hearing was held in this matter on April 22, 2025. Counsel for Patient identified nine questions

common to all the class members[:] . . . whether the Defendant failed to sterilize essential instruments, failed to properly train employees, failed to supervise, failed to establish appropriate policies, whether the Defendant established quality control, whether he was negligent with respect to sterilization of dental instruments, whether these actions constitute negligent infliction of emotional distress or intentional infliction of emotional distress, and the type and amount of relief that the Plaintiffs and the class members are entitled to.

Counsel next argued that the Patient and the proposed class members all received dental treatment during the relevant period and “[t]hey all received a letter or [were] otherwise notified, and they all experienced emotional distress.” Counsel declared:

I think that the emotional distress is – it’s just obvious that, you know, receiving a letter, you know, stating that you could have contracted, you know, something like HIV and then telling you to get tested would absolutely cause emotional distress to any reasonable person.

In response to Dentist’s counsel’s assertions, Patient’s counsel argued:

Whether anyone contracted a disease is not the proper question to be asked., This is emotional distress from a letter that they got saying that they were exposed to the disease. . . .

At the hearing, the trial court determined that “the class is so numerous that joinder of all members is impracticable.” The court declared that “the questions set out by” Patient were “common to the class.” The court related that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” Specifically, the trial court observed: “With regard to emotional distress in looking at the letter that Dr. Nabers sent out and the potential exposures that the class members would have been exposed to, clearly, that letter would rise to the level that the court finds adequate to meet that burden.” Further, the trial court held that “the representative parties will fairly and adequately protect the interests of the class.” The court announced as Rule 23.02 of the Tennessee Rules of Civil

Procedure requires:

[A] question of law or fact common to the members of the class predominate[s] over any questions affecting only individual members and that a class action is superior to other available methods for fair and efficient adjudication of the controversy[;] clearly, with the number of potential plaintiffs, it would be far superior for a class action to proceed as opposed to 8,000 potential plaintiffs.

The trial court entered a written order on July 2, 2025, granting Patient's Motion for Class Certification. The court's order identified the Rule 23 requirements, concluding that numerosity, commonality, typicality, adequacy of representation, predominance, and superiority were satisfied based on the record before it. Dentist timely filed a Notice of Appeal from the class certification order pursuant to Tennessee Code Annotated section 27-1-125.

II. ISSUES

The issues raised by the Dentist in this appeal are restated as follows:

1. Whether the trial court erred in certifying a class where each member of the proposed class asserts claims against a healthcare provider under the THCLA?
2. Whether the trial court erred in certifying a class in this action where the proposed class representative did not present evidence that any other proposed class member complied with the THCLA's pre-suit notice requirement?
3. Whether the trial court failed to conduct the "rigorous analysis" required under Rule 23 of the Tennessee Rules of Civil Procedure before certifying the class action?
4. Whether the trial court erred in concluding a proposed class of 8,000 dental patients who received different types of treatments at different times over a three-year time span shared common questions of law or fact capable of eliciting a common class-wide answer based on common evidence?
5. Whether the trial court erred in concluding that common questions predominated over any questions affecting only individual members of the proposed 8,000 dental patient class who received treatments at any time during a three-year time span?
6. Whether the trial court erred in certifying a proposed class that

includes both injured and uninjured class members?

III. STANDARD OF REVIEW

“Tennessee Code Annotated § 27-1-125 vests [the appellate court] with the authority to ‘hear appeals from orders of trial courts granting or denying class certification’ under Tennessee Rule of Civil Procedure 23.” *Rogers v. Adventure House LLC*, 617 S.W.3d 542, 549-550 (Tenn. Ct. App. 2020) (quoting Tenn. Code Ann. § 27-1-125).

A trial court’s decision on class certification is reviewed under the abuse of discretion standard. *Walker v. Sunrise Pontiac-GMC Truck Inc.*, 249 S.W.3d 301, 308 (Tenn. 2008). It is entitled to deference. *See Meighan v. U.S. Sprint Communs. Co.*, 924 S.W.2d 632, 637 (Tenn. 1996). Where a decision is said to lie within the trial court’s discretion, appellate review includes determining whether the trial court correctly applied the appropriate legal standards and based on the preponderance of the evidence. *D. v. K.*, 917 S.W.2d 682, 685 (Tenn. Ct. App. 1995). In *Adventure House LLC*, we observed:

Appellate courts review a trial court’s discretionary decision to determine “(1) whether the factual basis for the decision is properly supported by evidence in the record, (2) whether the lower court properly identified and applied the most appropriate legal principles applicable to the decision, and (3) whether the lower court’s decision was within the range of acceptable alternative dispositions.” [*Lee Med., Inc. v. Beecher*], 312 S.W.3d 515 at 524-25 (Tenn. 2010) (citing *Flautt & Mann v. Council of Memphis*, 285 S.W.3d 856, 872-73 (Tenn. Ct. App. 2008)). We review the trial court’s legal conclusions *de novo* with no presumption of correctness. *Id.* at 525 (citing *Johnson v. Nissan N. Am., Inc.*, 146 S.W.3d 600, 604 (Tenn. Ct. App. 2004); *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 212 (Tenn. Ct. App. 2002)). We review the trial court’s factual conclusions under the preponderance of the evidence standard. *Id.*

Adventure House LLC, 617 S.W.3d at 550.

As we further observed in *Adventure House LLC*, “a reviewing court cannot second-guess the lower court’s judgment or merely substitute an alternative it finds preferable.” *Lee Med.*, 312 S.W.3d at 524 (citing *Overstreet v. Shoney’s, Inc.*, 4 S.W.3d 694, 708 (Tenn. Ct. App. 1999)). “A reviewing court must instead affirm the discretionary decision so long as reasonable legal minds can disagree about its correctness.” *Adventure House LLC*, *Id.* at 550 (citing *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (citing *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000));

State v. Gilliland, 22 S.W.3d 266, 273 (Tenn. 2000)).

We also noted in *Adventure House LLC*:

A trial court's discretion is not unbounded. *Cf. Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981). A trial court must consider controlling legal principles and relevant facts when making a discretionary decision. *Beecher*, 312 S.W.3d at 524 (citing *Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 358 (Tenn. 2008); *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996)). A trial court abuses its discretion if it (1) applies an incorrect legal standard, (2) reaches an illogical or unreasonable decision, or (3) bases its decision on a clearly erroneous evaluation of the evidence. *Elliott v. Cobb*, 320 S.W.3d 246, 249-50 (Tenn. 2010) (citation omitted); *see also Walker v. Sunrise Pontiac-GMC Truck, Inc.*, 249 S.W.3d 301, 308 (Tenn. 2008) (citation omitted). Additionally, a trial court abuses its discretion if it "strays beyond the applicable legal standards or when it fails to properly consider the factors customarily used to guide the particular discretionary decision." *Beecher*, 312 S.W.3d at 524 (citing *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007)).

Adventure House LLC, 617 S.W.3d at 550.

When determining the meaning of statutes, our primary goal "is to carry out legislative intent without broadening or restricting the statute beyond its intended scope." *Johnson v. Hopkins*, 432 S.W.3d 840, 848 (Tenn. 2013) (quoting *Lind v. Beaman Dodge, Inc.*, 356 S.W.3d 889, 895 (Tenn. 2011)). We presume that every word in a statute has meaning and purpose and that each word's meaning should be given full effect as long as doing so does not frustrate the General Assembly's obvious intention. *Id. See Runions v. Jackson-Madison Cnty. Gen. Hosp. Dist.*, 549 S.W.3d 77, 85-86 (Tenn. 2018).

IV. DISCUSSION

RULE 23

"Class action status for a claim is not given as a right under Tennessee law." *Crouch v. Bridge Terminal Transp., Inc.*, No. M2001-00789-COA-R3-CV, 2002 WL 772998, at *2 (Tenn. Ct. App. Apr. 30, 2002) (citing *First Am. Nat'l Bank of Nashville v. Hunter*, 581 S.W.2d 655, 659 (Tenn. Ct. App. 1978)). The requirements of bringing and maintaining a lawsuit on behalf of a class of persons and the standards to be applied in determining whether to certify a particular class are set

out in Rule 23 of the Tennessee Rules of Civil Procedure. *Walker*, 249 S.W.3d at 307 (citing *Hamilton v. Gibson Cnty. Util. Dist.*, 845 S.W.2d 218, 225 (Tenn. Ct. App. 1992)).

The first subsection of Rule 23 allows an action to be brought as a class action if:

- (1) the class is so numerous that joinder of all members is impracticable,
- (2) there are questions of law or fact common to the class,
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
- (4) the representative parties will fairly and adequately protect the interest of the class.

Tenn. R. Civ. P. 23.01. These prerequisites are referred to as numerosity, commonality, typicality, and adequate representation; for a class to be certified and litigation to proceed as a class action, the party seeking certification must satisfy all four requirements. *Walker*, 249 S.W.3d at 307-08. The proponent must next establish at least one of the three requirements in Rule 23.02 of the Tennessee Rules of Civil Procedure, *id.* at 308, which allows class actions if:

- (1) The prosecution of separate actions by or against individual members of the class would create a risk of
 - a. Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for a party opposing the class, or
 - b. Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or would substantially impair or impede their ability to protect their interest; or
- (2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
- (3) The court finds that the question of law or fact common to the

members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action.

Tenn. R. Civ. P. 23.02. A trial court does not have discretion to certify a class unless the proponent of class certification has first proven she has satisfied the requirements of both Rules 23.01 and 23.02 of the Tennessee Rules of Civil Procedure. *See Emergency Med. Care Facilities P. C. v. BlueCross BlueShield of Tenn., Inc.*, 715 S.W.3d 273, 283 (Tenn. 2025); *Adventure House LLC*, 617 S.W.3d at 551.

Trial courts have a duty to conduct an independent and rigorous analysis whether the class action proponent has proven strict compliance with Rules 23.01 and 23.02 requirements. *Wofford v. M.J. Edwards & Sons Inc.*, 528 S.W.3d 524, 539-40 (Tenn. Ct. App. 2017). The trial court’s certification order “must identify sufficient facts upon which it based its decision.” *Am. Heritage Apartments, Inc. v. Hamilton Cnty. Water & Wastewater Treatment Auth.*, 494 S.W.3d 31, 51 (Tenn. 2016). As noted in *Wofford*:

The extent and components of a thorough or rigorous analysis necessary for a class certification decision depend upon the claims and defenses presented, the type of class certification requested, the issues raised regarding the compliance with the rules requirements, the members of the purported class, and other questions presented by the particular case and the requirements of Rule 23. The trial court must “understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.”

Id. 528 S.W.3d at 539-40 (internal citations omitted).

SCOPE

Patient claims Dentist asks this court to decide issues outside the proper scope of review on whether the trial court misapplied Rule 23. According to Patient,

the trial court identified and evaluated, after years of litigation, briefing, and argument, the Rule 23 prerequisites and articulated a rational basis for its conclusions. Patient claims the court's written order reflects that it identified and evaluated each Rule 23 prerequisite, including numerosity, commonality, typicality, adequacy of representation, predominance, and superiority. Patient contends that Rule 23 does not require a trial court to resolve contested disputed facts or weigh the ultimate merits of the claims, and the court did not abuse its discretion by declining to do so here. *See Wofford*, 528 S.W.3d at 532-533. *Id.* Section 27-1-125 provides that

[t]he court of appeals shall hear appeals from orders of trial courts granting or denying class certification under Rule 23 of the Tennessee Rules of Civil Procedure if a notice is filed within ten (10) days after entry of the order. All proceedings in the trial court shall be automatically stayed pending the appeal of the class certification ruling.

Tenn. Code Ann. § 27-1-125. Patient asserts the only issues properly before this court are whether the trial court correctly applied Rule 23 and whether it abused its discretion in certifying the class.

Dentist argues that the trial court did not conduct the “rigorous analysis” required by Rule 23. He maintains that the trial court’s certification order failed to “identify sufficient facts upon which it based its decision,” opting to state only that Patient had met her burden. *Hamilton Cnty. Water & Wastewater Treatment Auth.*, 494 S.W.3d at 51. Dentist contends that the trial court deferred to Patient’s proposed assertions without any rigorous examination whether any of those “common questions” yielded any meaningful common answers for the entire class on the same evidence. According to Dentist, the individualized nature of healthcare provided to 8,000 patients at two different office locations over a three-year span does not lend itself to common questions that predominate over questions specific to each patient’s particular treatment. Dentist’s principal contention is that the THCLA categorically prohibits class actions; he stresses that the THCLA contains a notice statute requiring a plaintiff who asserts a healthcare liability claim to notify the defendant of the action prior to filing the claim. Tenn. Code Ann. § 29-26-121.

The Tennessee Supreme Court has held that the pre-suit notice provision ensures a healthcare provider is given “timely notice . . . of a potential health care liability claim so it can investigate the merits of the claim and pursue settlement negotiations before the start of litigation.” *Runions v. Jackson-Madison Cnty. Gen. Hosp. Dist.*, 549 SW.3d 77, 87 (Tenn. 2018). The stated objective of the notice statute is to “facilitate early resolution of healthcare liability claims” and to “equip[] defendants with the actual means to evaluate the substantive merits of a plaintiff’s claim by enabling early discovery of potential co-defendants and early access to a

plaintiff's medical records.”). *Stevens v. Hickman Cmty. Health Care Servs., Inc.*, 418 S.W.3d 547, 554 (Tenn. 2013). Another goal of a pre-suit notice requirement is to reduce litigation costs. *Jenkins v. Marvel*, 683 F. Supp. 2d 626, 638 (E.D. Tenn. 2010) (quoting *Hill v. Russell*, 247 S.W.3d 356, 360 (Tex. Ct. App. 2008) (citing *De Checa v. Diagnostic Ctr. Hosp., Inc.*, 852 S.W.2d 935, 938 (Tex 1993))). The notice itself must comply with two separate statutory requirements: (1) the express notice requirement and (2) the content requirement. Section 29-26-121(a)(1) provides:

Any person, or that person's authorized agent, asserting a potential claim for health care liability shall give written notice of the potential claim to each health care provider that will be a named defendant at least sixty (60) days before the filing of a complaint based upon health care liability in any court of this State.

The notice must contain:

- (A) The full name and date of birth of the patient whose treatment is at issue;
- (B) The name and address of the claimant authorizing the notice and the relationship to the patient, if the notice is not sent by the patient;
- (C) The name and address of the attorney sending the notice, if applicable;
- (D) A list of the name and address of all providers being sent a notice; and
- (E) A HIPAA complaint medical authorization permitting the provider receiving the notice to obtain complete medical records from each other provider being sent a notice.

Id. § 29-26-121(a)(2).

Patient's "NOTICE OF CLAIM FOR HEALTH CARE LIABILITY" advised Dentist "**of a claim against you for health care liability by Kalyn Doxley . . . who is the patient whose treatment is the subject of this notice of claim.**"

(Emphasis added). Dentist asserts that although Patient had attached her pre-suit notification as part of her original complaint to show she had satisfied all conditions precedent for bringing a healthcare liability action under Tennessee Code Annotated section 29-26-121, she did not submit a single written pre-suit notification from any proposed class members. As to class certification, Dentist argues that Patient did

not attempt to show any other proposed class member had likewise satisfied all conditions precedent under Section 29-26-121. According to Dentist, only Patient has complied with THCLA's pre-suit notice requirement. Dentist claims the trial court did not independently look beyond Patient's pleadings to require proof that any class members had timely complied with the pre-suit notice requirement. Dentist maintains that nothing in the THCLA permits Patient's pre-suit notice to exempt the other patients from complying with the condition precedent. Also, according to Dentist, Patient did not assert any "extraordinary cause" that should excuse any proposed class members from complying with the condition precedent. *See Martin v. Rolling Hills Hosp., LLC*, 600 S.W.3d 322, 331 (Tenn. 2020).

We note that the notice statute, Tennessee Code Annotated section 29-26-121, which requires a plaintiff to give the defendant notice of the claim before it is filed, ostensibly so the defendant can participate in early access to discovery and pre-suit settlement, is not unique. *See Myers v. AMISUB (SFH), Inc.*, 382 S.W.3d 300, 309 (Tenn. 2012). As of 2023, at least ten other states had pre-suit notice requirements for healthcare liability actions, including California, Florida, Massachusetts, Michigan, Mississippi, Ohio, South Carolina, Texas, Utah, and West Virginia, along with the District of Columbia. CAL. CIV. PROC. CODE § 364 (2023); FLA. STAT. § 766.106(2) (2023); MASS. GEN. LAWS ch. 231, § 60L (2023); MICH. COMP. LAWS § 600.2912b (2023); MISS. CODE ANN. § 15-1-36(15) (2023); OHIO REV. CODE ANN. § 2305.113(B)(1) (2023); S.C. CODE ANN. § 15-79-125 (2023); TEX. CIV. PRAC. & REM. CODE ANN. § 74.251 (2023); UTAH CODE ANN. § 78B-3-412 (2023); W. VA. CODE § 55-7B-6 (2023); D.C. CODE § 16-2802 (2023). In *Jenkins*, a Tennessee federal court observed:

[The provisions contained within the THCLA] have been in effect for some time [in other states] and Texas state and federal courts have produced case law on the purpose of the notice requirement. Although not in any way binding on this Court, the interpretations do provide some guidance in determining the appropriate application of Tennessee's similar statute.

683 F. Supp. 2d at 638. While the healthcare liability schemes in Texas and Tennessee are very similar, there is one major difference—the statute of limitations.

Dentist argues that the THCLA does not permit Patient to use her individual pre-suit notice to exempt 8,000 other patients from complying with the condition precedent to bringing a health care liability action if those proposed class members failed to send pre-suit notice before expiration of the statute of limitations and repose periods. He contends that the THCLA's statutes of limitations and repose ran before Patient sought to certify a class. Dentist argues that adding new plaintiffs well after expiration of the statute of limitations and statute of repose periods would be futile without the new plaintiffs having satisfied the pre-suit notice condition

precedent for bringing a health care liability action.

Dentist asserts that nothing about the language and structure of the provisions of the THCLA authorizes, or even contemplates, combining three years' worth of individual patient interactions between a healthcare provider and 8,000 patients into a single healthcare liability class action. Dentist contends that the THCLA permits healthcare liability actions only by an individual "claimant" or a "plaintiff." Tenn. Code Ann. § 29-26-115(a). The THCLA requires that "[a]ny person, or that person's authorized agent" give pre-suit notice. Tenn. Code Ann. § 29-26-121(a)(1). Also, it requires that pre-suit notice include the name "of the patient whose treatment is at issue." Tenn. Code Ann. § 29-26-121(a)(2)(A). Under the THCLA, "if the notice is not sent by the patient," then the notice must identify "the claimant authorizing the notice and the relationship of the patient." Tenn. Code Ann. § 29-26-121(a)(2)(B). Dentist contends that the trial court "exempted" and improperly excused approximately 8,000 class members from the THCLA's pre-suit notice requirement.

According to Patient, Dentist's arguments go to how the case should be resolved on the merits, not to whether the requirements for class treatment were satisfied at the certification stage. Patient asserts that Dentist is addressing the ultimate viability of the claims themselves, contending that individualized issues will defeat liability, that defenses under the THCLA will ultimately bar recovery, or that unnamed class members may later fail to establish required statutory elements. Patient argues the THCLA governs substantive liability and pre-suit requirements for healthcare claims; it does not displace Rule 23 or eliminate class actions as a procedural mechanism. She claims nothing in the THCLA expressly or implicitly prohibits healthcare liability claims from proceeding as class actions. Patient argues that had the General Assembly intended to categorically bar class actions in healthcare liability cases, it easily could have done so. The absence of any language barring class actions, according to Patient, is dispositive. Patient maintains that any individualized statutory defenses are properly addressed later in the case, not on an appeal as of right from a certification ruling.

As to the issue of notice, Patient asserts Dentist was on notice, not only of the alleged conduct, but of the representative nature and scope of the claims from the very beginning. She argues that the THCLA does not require duplicative notice from every individual within a certified class. Patient contends that the class definition she identified leaves no ambiguity as to who the potential claimants are, the time period at issue, or the nature of the alleged exposure.

Dentist responds that "even though the health care provider has knowledge of the claim," the Patient has not complied with the THCLA's pre-suit notice provision when the potential class members do not give written pre-suit notice. *Runions*, 549 S.W.3d at 87. He maintains that "class members are not parties before class certification." *Speerly v. GMC LLC*, 143 F. 4th 306, 315 (6th Cir. 2025) (en

banc). The Tennessee Supreme Court has not adopted class action tolling. *Tigg v. Pirelli Tire Corp.*, 232 S.W.3d 28, 33 and 35 (Tenn. 2007); Rule 23.03(1) imposes a burden on a plaintiff to seek class certification as “promptly as practical.” *Id.* at 35-36. Thus, when a plaintiff fails to provide proper notice, she has “failed to protect” the other potential class members’ claims. *Id.* at 35. Dentist contends that the delay in seeking class certification in this case resulted in the proposed class members’ claims becoming time barred by the THCLA’s one-year statute of limitations and its three-year statute of repose.

Our Supreme Court, in *Walker*, has held a statute does not permit class actions where it uses singular terms such as “person” or “individual” throughout. *Id.*, 249 S.W.3d at 309-310. The *Walker* Court, involving Tennessee Consumer Protections Act (“TCPA”) claims, held “class actions are . . . prohibited because they are not actions brought ‘individually.’” *Id.* at 310. The legislation at issue in *Walker* stated “[a]ny person . . . may bring an action individually to recover actual damages.” *Id.* at 309. The court pointed out that “the TCPA uses the singular terms ‘individual’ and ‘person’ throughout.” *Id.* at 309. In this case, we acknowledge that the THCLA does not contain the phrase “may bring an action individually.” But it uses the singular “Claimant,” “claimant’s,” “the claimant,” “person,” “person’s” and “the patient” throughout. Further, the THCLA requires a singular “person” give written pre-suit notice identifying the singular “patient whose treatment is at issue” as a precondition to filing a healthcare liability action.

In *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.* 559 U.S. 393, 130 S. Ct. 1431, 176 L.Ed.2d 311 (2010), the United States Supreme Court examined the interplay between a New York statute that prohibited class actions in suits seeking penalties or statutory minimum damages and Rule 23 of the Federal Rules of Civil Procedure, which allows for the maintenance of class actions in federal court. In a separate concurrence in *Shady Grove*, Justice Stevens observed that whether a state law displaces a federal procedural rule “turns on whether the state law actually is part of a State’s framework of substantive rights or remedies,” *id.* at 1449, which requires a careful interpretation of the provisions at issue, *id.* at 1450. He concluded that a state procedural rule “may in some instances become so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy.” *Id.* “Such laws, for example, may be seemingly procedural rules that make it significantly more difficult to bring or to prove a claim, thus serving to limit the scope of that claim.” *Id.* Justice Stevens held that a procedural rule “cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right.” *Id.* at 1452, 1456. Under the rule announced in *Marks v. United States*, 430 U.S. 188, 97 S. Ct. 990, 51 L.Ed 2d 260 (1977), Justice Stevens was “the crucial fifth vote in *Shady Grove*” and his opinion was the controlling one.

In *Bearden v. Honeywell Int'l, Inc.*, 2010 WL 3239285, at *8-10 (M.D. Tenn. Aug. 16, 2010), a federal district court considered whether *Shady Grove* required it to allow plaintiffs to bring class actions under Tennessee's Consumer Protection Act (TCPA), which has been interpreted to preclude class actions. The court concluded that because the TCPA's restriction on class actions "is a part of Tennessee's framework of substantive rights and remedies, Rule 23 does not apply." *Id.* at *10 (footnote omitted). Noting *Shady Grove*'s fractured majority and the 4-1-4 split in the opinions, the *Bearden* Court reasoned:

Under the rule announced in *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *United States v. Cundiff*, 555 F.3d 200, 208 (6th Cir. 2009) (quoting *Marks*, 430 U.S. at 193 [97 S.Ct. 990]).... Here, that means that Justice Stevens' concurrence is the controlling opinion.

Bearden, 2010 WL 3239285 at *10.

Applying Justice Stevens's approach to the matter before us, we find that the THCLA notice provisions are so intertwined and interwoven with the statute's rights and remedies that it functions as a substantive rule. The notice provisions give shape to the substantive rights and remedies in healthcare liability actions in this state; these notice provisions are the means by which the General Assembly has chosen to define the rights and obligations of the parties in the area of healthcare liability law. The THCLA's statutory requirement of "timely, written pre-suit notice is mandatory and may be satisfied only by strict compliance." *Rolling Hills Hosp. LLC*, 600 S.W.3d at 331. Because the notice provisions are substantive components of the state law, a class action is unavailable in this case.

In our view, the trial court's class certification order allowing a class of 8000 patients without proof of each class member's strict compliance with THCLA's mandatory pre-suit notice provision has created a class action exemption not found in the text of the THCLA. *See Runions*, 549 S.W.3d at 87; Tenn. Code Ann. § 26-29-121(b) (trial court has no discretion to "excuse compliance" with the mandatory pre-suit notice provision without "extraordinary cause shown"). The trial court did not independently look beyond Patient's pleadings to require proof that class members had timely complied with the pre-suit notice requirement. The court is mindful of the high bar set by Justice Stevens for finding that a rule seemingly procedural is in fact substantive. *Shady Grove*, 130 S. Ct. at 1457. We find that a class action would alter Tennessee substantive law in this case.

Even if we disregard the THCLA issue, we must find certification of a class improper. We address here each Rule 23 requirement.

NUMEROSITY

Patient asserts the class is “so numerous that joinder of all members is impracticable.” Tenn. R. Civ. P. 23.01(1). According to Patient, in addition to the size of the proposed class, factors such as the ease of identifying class members, the geographic dispersion of class members, and judicial economy may indicate that joinder of all class members is impracticable. *Mays v. Tenn. Valley Auth.*, 274 F.R.D. 614, 621 (E.D. Tenn. 2011). At the hearing, the trial court related as follows: “[W]ith the number of potential plaintiffs, it would be far superior for a class action to proceed as opposed to 8,000 potential plaintiffs.”

In contrast, Dentist contends that only Patient fulfilled the THCLA’s conditions precedent to asserting a viable healthcare liability action. He observes that Patient has failed to identify any additional proposed class members in five years and, therefore, has failed to meet the numerosity requirement under Rule 23.01 because the class is speculative.

In *McBarnette v. Feldman*, 153 Misc. 2d 627, 582 N.Y.S. 2d 900 (Sup. Ct. Suffolk Cnty. NY 1992) the estate of a dentist who died from HIV faced a class action brought by patients. The trial court observed that it “is confronted with questions involving dental procedure, causality, proximate cause, injury, if any, which tend to suggest class action is not the superior method *Id.* at 637, 582 N.Y.S.2d at 907. The *McBarnette* court observed as to numerosity as follows:

[T]here has been no showing that other patients of Dr. Feldman share in plaintiff’s concerns or phobia for possible risk of transmission of the HIV virus which causes AIDS. Most medical authorities consider the risk of transmission to be remote. Be that as it may, it is clear that the membership in the proposed class is affected and determinative of how many visits a patient may have made, what dental procedure was performed, how intrusive the procedure was, what infection control procedures were practiced, etc. Clearly, a patient of defendant who may have been seen for only a check up or x-rays does not run the same risk as the patient who had a root canal or tooth extraction. In the absence of any proof or attempt to document the existence of a prospective class, to ascertain how and which persons would comprise the class sought to be represented or to show whether indeed any of the patients of Dr. Feldman have been injured by him is indicative of plaintiff’s failure to factually demonstrate that the purported class exists. *Scott v. Prudential Ins. Co.*, 80 A.D. 2d 746,

437 N.Y.S.2d 180 (4th Dept. 1981).

Id. at 638, 582 N.Y.S.2d at 908. We find this case persuasive. For example, a class that includes patients who only received consultations is too broad. Upon our review of the record before us, we do not find that the trial court properly conducted a rigorous analysis to establish numerosity pursuant to Rule 23.01(1).

COMMONALITY

Tennessee Rule of Civil Procedure 23.01(2) requires that there exist “questions of law or fact common to the class.” Commonality requires that each class member suffer the same injury. *Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338, 349-50, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011). The “claims must depend upon a common contention,” *id.* at 350, 131 S. Ct. 2541, and what matters is the capacity to generate common answers, not merely the raising of common questions. *Id.*

Patient argues the central questions in this case concern Dentist’s course of conduct, regulatory compliance, and the creation of a common risk of exposure to serious infectious diseases; she contends that these questions do not depend on individualized dental procedures but rather negligent and intentional infliction of emotional distress claims based on a shared traumatic event: the disclosure that patients may have been exposed to HIV, Hepatitis B, and Hepatitis C due to improper sterilization practices. As the record reflects, the disclosure occurred at roughly the same time for the class: through Dentist’s December 2019 notification letter and contemporaneous media coverage reporting the sterilization failures. Patient claims that whether receiving a letter informing patients of possible exposure to life-altering diseases would foreseeably cause serious emotional distress is a question that is common to every class member.

Patient relates that in addition to the common questions of law and fact that the trial court found in its order certifying the class, the following questions are common to every class member and are capable of class-wide resolution:

1. Whether Dentist failed to properly sterilize dental instruments during the period from September 2016 through September 2019, thereby exposing patients to communicable diseases;
2. Whether patients were notified, whether through Dentist’s December 2019 letter and or the contemporaneous media coverage, that they may have been exposed to HIV, Hepatitis B, and Hepatitis C;
3. Whether the communication of that risk would foreseeably cause serious emotional distress to a reasonable patient, a question central

to both the negligent and intentional infliction of emotional distress claims;

4. Whether the emotional distress alleged by the class arose at the same relative point in time, namely when patients learned of their potential exposure and were instructed to undergo medical testing.

Patient asserts that each of these questions can be answered “yes” or “no” once, and the answer applies uniformly to the class.

Dentist argues that the individualized nature of healthcare provided to 8,000 patients at two different office locations over a three-year span does not lend itself to common questions that predominate over questions specific to each patient’s particular treatment. *See Warren v. Scott*, 845 S.W.2d 780 (Tenn. Ct. App. 1992). In *Warren*, the trial court denied class certification on the grounds that the class would require additional and different evidence from the individual class members, including evidence related to statute of limitations that was relevant to each member’s claim. *Id.* at 783. This court recognized that resolution of the questions regarding the statute of limitations was “fact-sensitive” and thus precluded a finding that there was a common issue of fact which supported class certification. *Id.* Dentist notes that many courts now refuse to certify classes comprising alleged injuries dispersed over years due to the “individual issues of exposure, causation, and/or damages” *Adventure House LLC*, 617 S.W.3d at 562. Dentist further argues that emotional distress may vary in degree among class members. *See Bain v. Wells*, 936 S.W.2d 618, 619 (Tenn. 1997) (holding that in order to prove an intentional infliction of emotional distress or negligent infliction of emotional distress in an exposure case, the plaintiff must prove actual exposure to the pathogen). *See Adventure House LLC*, 617 S.W.3d at 561-62 (the existence of identified multiple variables precludes the conclusion that the proposed common questions “will elicit common answers leading to classwide relief.”).

In *McBarnette*, the trial court observed as follows:

Here, in the case of the actions of Dr. Feldman putting at risk the health of his patients, each is an individual matter dealing with issues of how regular a patient each was, the number of visits, dental procedures performed and other “risk behavior” factors which would not or may not be common to each of them. Causality and proximate cause would require individual investigation and proof as to the risk factors practiced with each individual patient and the dental procedures performed over what period of time and thus do not easily lend themselves to issues of commonality or predominance to warrant class certification. . . .

Id. at 638, 582 N.Y.S.2d at 908. A proposed class member whose claim is based on a consultation only, with no treatment, is different from a patient who received treatment. Patient has not shown that a class action will generate common answers “apt to drive the resolution of the litigation.” *Adventure House LLC*, 617 S.W.3d at 563 (citing *Dukes*, 564 U.S. at 350, 131 S. Ct. 2541).

TYPICALITY

Rule 23.01(3) requires that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” Tenn. R. Civ. P. 23.01(3). A claim is typical if it: (1) arises from the same event, practice, or course of conduct that gives rise to the claims of other class members, and (2) is based on the same legal theory as their claims. *Craft v. Vanderbilt Univ.*, 174 F.R.D. 396, 404 (M.D. Tenn. 1996).

Patient asserts that the trial court made specific findings that her claims are typical of the class: the named Patient’s claims arise from the same conduct (Dentist’s failure to properly sterilize instruments), during the same period (September 15, 2016 to September 15, 2019), and under the same legal theories as the claims of the class (received uniform notification of potential exposure to serious communicable diseases that resulted in the experience of extreme emotional distress). Patient asserts that her interests align with those of the class, and no unique defenses or circumstances undermine her ability to represent class members.

Dentist claims that individualized questions abound and an independent rigorous analysis by the trial court would have revealed them. Dentist argues that if the crux of this healthcare liability action is potential exposure to infectious disease at the time of dental treatment, the individualized inquiries necessary for each class member to establish potential exposure during the day or days they were treated during that three-year span defy “typicality.” Were any infectious patients seen on the day of each class member’s particular treatment? Were any patients seen before the particular class member, or was the class member the first patient of the day? What type of treatment did each class member receive? Did any patients actually become infected? Were any members of the class ever diagnosed with an infectious disease during that three-year span? Dentist maintains these claims are not “typical” of Patient’s claim because she was never infected and never diagnosed with an infectious disease. *Bain*, 936 S.W.2d at 619.

In *McBarnette*, the trial court found that the plaintiff had

[f]ailed to show that her claims are typical of the class she seeks to represent. At this time, she claims to have tested negative for HIV and claims to suffer fear, anxiety and distress as a result of the discovery

that *they (she and the proposed class) are at risk of infection* with HIV. However, there is nothing in her papers to suggest that her claim is anything other than her individual fear of the risk of HIV infection and AIDS. Plaintiff's fear or phobia of the risk of transmission of the AIDS virus from Dr. Feldman to her during her dental treatment is actually unique to her and may not be shared by other patients of Dr. Feldman. This may be due to the fact that other patients of Dr. Feldman may have been aware of his HIV status as reported, the dental procedure was minor or unintrusive or Dr. Feldman, in individualized cases, may have practiced safe, effective infection control techniques which minimized the impact of a risk of transmission.

For whatever reason and there are a myriad of reasons to choose from, plaintiff has failed to satisfy her burden of establishing that her complaints and fears about AIDS and the risks of transmission are typical and shared by a whole class of other patients of Dr. Feldman to warrant class certification.

Id. at 639, 582 N.Y.S.2d 908 (citations omitted) (emphasis in original).

Dentist further notes that Patient was the only member of the proposed class who had satisfied the condition precedent to assert a healthcare liability action because no other member of the class had given Dentist the mandatory written pre-suit notice. Accordingly, Dentist contends that Patient's claim was not typical of the proposed class and her legal and factual position is markedly different from that of the class. We must agree. The typicality element has not been met to certify this class action.

ADEQUATE REPRESENTATION

Rule 23.01(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Tenn. R. Civ. P. 23.01(4). We find the evidence of record supports the determination that Patient's lengthy delay in moving for class certification did not protect the class members' claims. Thus, Patient has not satisfied her burden to establish adequacy of representation requirements of Rule 23.01.

PREDOMINANCE

Rule 23.02(3) requires a showing that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members" and a class action must be "superior to other available methods for fairly and efficiently adjudicating the controversy." Tenn. R. Civ. P. 23.02. The

underlying inquiry is one that “tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623, 117 S. Ct. 2231, 138 L.Ed. 2d 689 (1997). In *Walker*, the Court held: “[t]he existence of separate issues of law and fact, particularly regarding damages, does not necessarily negate class action certification, so long as common legal and factual issues, including the nature of the claim and of the relief sought, predominate.” *Walker*, 249 S.W.3d at 308.

The predominance requirement is “more demanding” than the commonality requirement. *Amchem Prods.*, 521 U.S. at 624, 117 S. Ct. 2231. Although the existence of individual issues does not foreclose certifications, “common issues should predominate over, and be unencumbered by, any individual claims or issues involved in the action.” *Government Employees Inc. Co. v. Bloodworth*, M2003-02986-COA-R10-CV, 2007 WL 1966022, at *14 (Tenn. Ct. App., June 29, 2007).

According to the class certification order, the trial court found “common questions of law and fact predominate over individual issues.” Dentist contends neither the order nor the transcript reflects an independent, rigorous element oriented analysis by the trial court in its consideration of the predominance question.

In *McBarnette*, the court held on the predominance issue:

For the reasons as previously outlined above, with regard to the complex and myriad factual bases upon which liability is claimed with its inherent difficulties and individualized approaches to issues of causality, proximate cause, injury and damages, plaintiff has failed to prove or convince this court that class certification . . . is the superior method in dealing with her claim as representative of a class described as former patients of Dr. Feldman

Id. at 640, 582 N.Y.S.2d at 909.

Based on the record before us, we find that the class certification order does not set forth a sufficient explanation of the trial court’s analysis. It repeats the Rule 23 requirements and states it found them satisfied. However, we cannot conclude that the trial court has conducted the type of analysis necessary to comply with the Rule 23 requirements. Consequently, we must vacate the trial court’s order certifying this action as a class action. The order is insufficient and must be reversed. A trial court that premises its analysis on an erroneous understanding of the governing law acts outside its discretion. *Bloodworth*, 2007 WL 1966022, at *5 (citing *Amchem Prod., Inc.*, 521 U.S. 591, 625).

V. CONCLUSION

The trial court's order certifying the class is vacated. This case is remanded. Costs of this appeal are assessed to the appellee, Kalyn Doxley.

s/John W. McClarty
JOHN W. McCLARTY, JUDGE