

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
9/10/2018 4:42 PM  
BY SUSAN L. CARLSON  
CLERK

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
9/20/2018  
BY SUSAN L. CARLSON  
CLERK

No. 95449-6

---

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

JOHN STRAUSS and MICHELLE STRAUSS,  
husband and wife, and their marital community,

Petitioners,

vs.

PREMERA BLUE CROSS,

Respondent.

---

BRIEF OF AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

---

Daniel E. Huntington  
WSBA No. 8277  
422 W. Riverside, Suite 1300  
Spokane, WA 99201  
(509) 455-4201

Valerie D. McOmie  
WSBA No. 33240  
4549 NW Aspen St.  
Camas, WA 98607  
(360) 852-3332

On Behalf of  
Washington State Association  
for Justice Foundation

## TABLE OF CONTENTS

	<b>Page</b>
I. IDENTITY AND INTEREST OF AMICUS CURIAE	1
II. INTRODUCTION AND STATEMENT OF THE CASE	1
III. ISSUE PRESENTED	5
IV. SUMMARY OF ARGUMENT	5
V. ARGUMENT	6
A. Overview Of The Applicable Rules Governing Summary Judgment.	6
B. Proximate Cause Expert Medical Testimony Does Not Require Supporting Statistical Studies For Admissibility.	7
C. Conflicting Medical Expert Opinions Regarding Causation Create A Genuine Issue Of Material Fact That Precludes Summary Judgment And Requires Resolution By The Trier Of Fact.	11
VI. CONCLUSION	14

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Alpine Indus., Inc. v Gohl</i> , 30 Wn. App. 750, 637 P.2d 998 (1981), <i>review denied</i> , 97 Wn.2d 1013 (1982).....	12
<i>Anderson v. Akzo Nobel Coatings, Inc.</i> , 172 Wn.2d 593, 260 P.3d 857 (2011).....	passim
<i>Baxter v. MBA Grp. Ins. Tr. Health &amp; Welfare Plan</i> , 958 F. Supp. 2d 1223 (W.D. Wash. 2013).....	12
<i>Bruns v. PACCAR, Inc.</i> , 77 Wn. App. 201, 890 P.2d 469, <i>review denied</i> , 126 Wn.2d 1025 (1995).....	10
<i>Columbia Riverkeeper v. Port of Vancouver USA</i> , 188 Wn.2d 421, 395 P.3d 1031 (2017).....	6
<i>Coventry Assocs. v. Am. States Ins. Co.</i> , 136 Wn.2d 269, 961 P.2d 933 (1998).....	5
<i>Daubert v. Merrell Dow Pharm., Inc.</i> , 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).....	8
<i>Eriks v. Denver</i> , 118 Wn.2d 451, 824 P.2d 1207 (1992).....	7
<i>Ferebee v. Chevron Chem. Co.</i> , 736 F.2d 1529 (D.C. Cir.).....	13
<i>Frye v. United States</i> , 293 F. 1013 (D.C. Cir. 1923).....	8, 9, 11
<i>Harrison v. Whitt</i> , 40 Wn. App. 175, 698 P.2d 87, <i>review denied</i> , 104 Wn.2d 1009 (1985).....	12

<i>Intalco Aluminum Corp. v. Dep't of Labor &amp; Indus.</i> , 66 Wn. App. 644, 833 P.2d 390 (1992), review denied, 120 Wn.2d 1031 (1993).....	10, 11, 13
<i>Jacobsen v. State</i> , 89 Wn.2d 104, 569 P.2d 1152 (1977).....	6
<i>Johnston-Forbes v. Matsunaga</i> , 181 Wn.2d 346, 333 P.3d 388 (2014).....	7
<i>Keck v. Collins</i> , 184 Wn.2d 358, 357 P.3d 1080 (2015).....	6
<i>Lamon v. McDonnell Douglas Corp.</i> , 91 Wn.2d 345, 588 P.2d 1346 (1979).....	7
<i>Meadows v. Grant's Auto Brokers, Inc.</i> , 71 Wn.2d 874, 431 P.2d 216 (1967).....	6
<i>Reese v. Stroh</i> , 74 Wn. App. 550, 874 P.2d 200 (1994), aff'd on other grounds, 128 Wn.2d 300, 907 P.2d 282 (1995).....	13
<i>Reese v. Stroh</i> , 128 Wn.2d 300, 907 P.2d 282 (1995).....	8, 9, 10, 13
<i>Seattle Police Officers Guild v. City of Seattle</i> , 151 Wn.2d 823, 92 P.3d 243 (2004).....	6
<i>SentinelC3, Inc. v. Hunt</i> , 181 Wn.2d 127, 331 P.3d 40 (2014).....	7
<i>Strauss v. Premera Blue Cross</i> , 1 Wn. App. 2d 661, 408 P.3d 699 (2017), review granted, 190 Wn.2d 1025 (2018).....	passim
<i>Street v. Weyerhaeuser Co.</i> , 189 Wn.2d 187, 399 P.3d 1156 (2017).....	7, 8
<i>Ulmer v. Ford Motor Co.</i> , 75 Wn.2d 522, 452 P.2d 729 (1969).....	12
<i>Volk v. DeMeerleer</i> , 187 Wn.2d 241, 386 P.3d 254 (2016).....	7, 9

**Rules**

ER 702 .....8, 9, 10, 11

ER 703 .....8, 9, 10, 11

## **I. IDENTITY AND INTEREST OF AMICUS CURIAE**

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking redress under the civil justice system, including an interest in the proper application of the rules governing summary judgment and a litigant's right to trial on a disputed material issue of fact created by conflicting expert testimony.

## **II. INTRODUCTION AND STATEMENT OF THE CASE**

John and Michelle Strauss (Strauss) bring this action against Premera, arising out of a denial of coverage for medical services under a health insurance policy. The facts are drawn from the Court of Appeals' opinion and the briefing of the parties. *See Strauss v. Premera Blue Cross*, 1 Wn. App. 2d 661, 408 P.3d 699 (2017), *review granted*, 190 Wn.2d 1025 (2018); Strauss Pet. for Rev. at 2-7; Premera Ans. to Pet. for Rev. at 3-8; Strauss Supp. Br. at 2-6; Premera Supp. Br. at 3-10.

Strauss had a medical insurance policy with Premera that covered "medically necessary" treatment, including radiation. The policy defines "medically necessary" as medical services that "a physician, exercising prudent clinical judgment, would provide to a patient" to treat a disease, and that are in accordance with "generally accepted standards of medical practice," "clinically appropriate," "and not more costly than an alternative

service ... at least as likely to produce equivalent therapeutic or diagnostic results as to the diagnosis or treatment of that patient's illness, injury or disease." *Strauss*, 1 Wn. App. 2d at 664 (quoting Premera policy).

59-year-old John Strauss was diagnosed with intermediate-risk prostate cancer. Initially, Strauss discussed the treatment options of surgery and radiation treatment with a Seattle urologist and a radiation oncologist. Strauss discussed the differences between proton beam therapy (PBT) and intensity-modulated radiation therapy (IMRT) with the radiation oncologist, who advised Strauss that there was a lack of clear, long-term evidence showing an improved side effect profile for patients who undergo PBT versus IMRT.

Subsequently, Strauss consulted Loma Linda University Medical Center radiation oncologist Dr. David Bush, who recommended PBT. Dr. Bush requested preauthorization from Premera for PBT for Strauss. Premera denied authorization, stating that PBT "may be considered not medically necessary" because the clinical outcomes with PBT have not been shown to be superior to other approaches including IMRT, yet PBT is generally more costly. *Strauss*, 1 Wn. App. 2d at 669.

In accordance with Premera's policy procedures, Strauss proceeded through three levels of appeal which were reviewed by three different independent radiation oncologists. The reviewers all concluded that PBT was not "medically necessary" under the terms of Premera's policy. The reviewers stated there were other standard treatment options available to

Strauss including surgery and IMRT, and that there is an abundance of medical data and experience to support those treatment options with known efficacy, toxicity and quality of life, while in contrast clinical evidence to support PBT is limited in terms of efficacy, toxicity and effects on quality of life, and clinical trials regarding PBT are ongoing.

Ultimately, Strauss paid to undergo PBT at Loma Linda with Dr. Bush, and had a successful outcome. Strauss thereafter filed suit against Premera alleging breach of contract, bad faith and violation of the Consumer Protection Act.

Premera moved for summary judgment dismissal of the lawsuit, arguing that Strauss could not meet his burden to show that PBT was “medically necessary” under the policy. Premera conceded that PBT and IMRT result in equivalent therapeutic outcomes, but asserted there was no dispute that PBT is more costly than IMRT. Premera emphasized that there were no studies that directly compare PBT and IMRT. Premera submitted a number of exhibits, including declarations from qualified medical experts who stated that IMRT is the standard treatment, that PBT was a reasonable treatment choice for Strauss, that PBT and IMRT have the same cancer control rate, that available data is insufficient to make definitive statements about how PBT compares to IMRT with respect to side effects, and that because there have been no randomized trials to directly compare PBT with IMRT it cannot be said that PBT is superior or “medically necessary” under the terms of Premera’s policy.

Strauss submitted exhibits in opposition to summary judgment, including statements from qualified medical experts which did not dispute that PBT was the more expensive treatment, and stated that PBT and IMRT are equivalent in treating prostate cancer, but also stated that PBT is superior “in terms of the side effect profile.” *Strauss*, 1 Wash. App. 2d at 675. One of Strauss’s experts conceded there were no direct randomized trials comparing PBT and IMRT, but stated that he could infer the advantages and disadvantages from medical studies, cited the medical studies supporting his conclusion that PBT was superior with respect to side effects, and concluded PBT met the Premera policy requirements for being “medically necessary” for Strauss. Strauss argued there were genuine issues of material fact as to whether PBT was medically necessary under the policy language, which precluded granting summary judgment.

The trial court granted Premera’s motion and dismissed the lawsuit. Strauss appealed. The Court of Appeals found there was no dispute that PBT was “clinically appropriate” and complied with “generally accepted standards of medical practice.” *Strauss*, 1 Wn. App. 2d at 683 n.18.

However, the court affirmed summary judgment dismissal, holding:

Because the record establishes there are peer-reviewed medical studies that show the side effects of PBT may be superior to IMRT and other peer-reviewed medical studies that show the side effects of IMRT may be superior to PBT, reasonable minds could only conclude that absent clinical evidence directly comparing PBT and IMRT, the treatments are equivalent and Strauss cannot show PBT was medically necessary.

*Id.* at 683-84.<sup>1</sup>

Strauss petitioned for review of two issues: 1) whether summary judgment should have been denied due to the conflicting expert testimony; and 2) whether the Court of Appeals imposed an additional requirement beyond the plain language of the insurance policy by requiring randomized clinical trials in order for an insured to show that a particular treatment was medically necessary. This Court granted review on June 7, 2018.

### **III. ISSUE PRESENTED**

In determining whether a particular medical treatment is superior to another and therefore should be covered by a health insurance policy, is a policy holder entitled to resolution by a fact finder of conflicting expert testimony based on credible scientific evidence and peer-reviewed medical literature?

### **IV. SUMMARY OF ARGUMENT**

The Court of Appeals assumed the role of the trier of fact by balancing evidence presented by conflicting expert opinions in affirming the trial court's summary judgment dismissal of Strauss's claims. When there is a conflict in medical experts' opinions regarding medical causation, the resolution of the differing opinions should be determined by the trier of fact. The lack of statistical studies in support of a medical expert's causation opinion does not make the expert opinion inadmissible, and the weight to be given the absence of supporting statistical studies may be considered by the

---

<sup>1</sup> The Court of Appeals dismissed Strauss's claims for breach of contract, bad faith and violation of the CPA. *Strauss*, 1 Wn. App. 2d 684. The court's opinion focuses solely on the breach of contract claim, and does not include any analysis of the bases for dismissal of the bad faith and CPA claims. Bad faith and CPA claims may be actionable whether or not denial of coverage is ultimately determined to be correct. *See Coventry Assocs. v. Am. States Ins. Co.*, 136 Wn.2d 269, 279-81, 961 P.2d 933 (1998).

trier of fact along with other factors affecting expert credibility. Conflicting competent expert medical opinions regarding causation create a genuine issue of material fact which should not be resolved on summary judgment.

## V. ARGUMENT

### A. Overview Of The Applicable Rules Governing Summary Judgment.

The Supreme Court reviews summary judgments de novo. *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 421, 432, 395 P.3d 1031 (2017). The Court construes evidence and inferences from the evidence in favor of the nonmoving party. *Columbia Riverkeeper*, 188 Wn.2d at 432.

The purpose of summary judgment is to avoid an unnecessary trial when there is no genuine issue of material fact; however, “a trial is absolutely necessary if there is a genuine issue as to any material fact.” *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977). A “material fact” exists when the outcome of the litigation depends on its resolution. *See Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823, 830, 92 P.3d 243 (2004). The summary judgment procedure was not designed to deprive a litigant of a trial on disputed issues of fact. *See Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 879, 431 P.2d 216 (1967). The “purpose of summary judgment is not to cut litigants off from their right of trial by jury” if they have competent, qualified evidence which they will offer at trial. *Keck v. Collins*, 184 Wn.2d 358, 369, 357 P.3d 1080 (2015).

Summary judgment may be granted only if “reasonable [minds] could reach but one conclusion” on the basis of the facts submitted.

*SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 140, 331 P.3d 40 (2014) (citation omitted). In general, an expert opinion on an ultimate issue of fact is sufficient to create a genuine issue of fact which precludes summary judgment. *See Eriks v. Denver*, 118 Wn.2d 451, 457, 824 P.2d 1207 (1992); *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346 (1979).

**B. Proximate Cause Expert Medical Testimony Does Not Require Supporting Statistical Studies For Admissibility.**

In *Strauss*, although the Court of Appeals did not state that the Plaintiffs' expert medical testimony was inadmissible, its explanation for discounting that testimony due to the lack of supporting randomized clinical trials suggests that it found the basis for those expert opinions either was not generally accepted within the relevant scientific community or was unhelpful because it was unreliable.

Expert testimony is admissible provided the expert is qualified and his or her testimony will be helpful to the trier of fact. *Volk v. DeMeerleer*, 187 Wn.2d 241, 277, 386 P.3d 254 (2016). “[A] reasoned evaluation of the facts is often impossible without the proper application of scientific, technical, or specialized knowledge.” *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 354, 333 P.3d 388 (2014) (brackets added). Expert medical testimony is required on those matters “strictly involving medical science.” *Street v. Weyerhaeuser Co.*, 189 Wn.2d 187, 198, 399 P.3d 1156 (2017) (citations omitted). The question is whether the particular fact sought to be proved is such as is “observable by [a layperson’s] senses and describable

without medical training.” *Street*, 189 Wn.2d at 198 (citation omitted). Matters involving medical science requiring expert testimony include the nature of the harm which may result and the probability of its occurrence, because only a medical expert is capable of judging what risks exist and the likelihood of occurrence. *Id.*<sup>2</sup>

Evidence rules provide protection against unreliable or untested scientific evidence. Scientific evidence must satisfy the *Frye*<sup>3</sup> requirement that the theory and technique or methodology relied upon are generally accepted in the relevant scientific community; scientific evidence that satisfies *Frye* must meet the reliability standards of ER 702 and 703<sup>4</sup>; expert medical testimony must meet the standard of reasonable medical certainty/reasonable medical probability; and finally, expert medical testimony that satisfies all of the above criteria is tested by the adversarial process, including cross-examination and opposing expert testimony, and is ultimately weighed by the jury. *See Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 607–08, 260 P.3d 857 (2011).

---

<sup>2</sup> In *Strauss*, on summary judgment the Court of Appeals applied principles of insurance contract law to determine whether Strauss could meet an insured's initial burden of proving coverage under the policy. 1 Wn. App. 2d at 681-82. Ultimately, the coverage determination turns on medical expert causation opinions, *i.e.*, whether PBT more probably than not causes fewer side effects than IMRT.

<sup>3</sup> *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). In civil cases, the Washington Supreme Court has neither expressly adopted the "general acceptance" test from *Frye* nor expressly rejected the "reliability" test from *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). *See Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 602, 260 P.3d 857 (2011).

<sup>4</sup> Qualified expert testimony is admissible under ER 702 if it would be helpful to the trier of fact in understanding matters outside the competence of ordinary lay persons. *Anderson*, 172 Wn.2d at 600. ER 703 concerns the factual basis for an expert opinion and permits an opinion based on the expert's first-hand knowledge or on information generally relied upon in the field of expertise. *Reese v. Stroh*, 128 Wn.2d 300, 309, 907 P.2d 282 (1995).

Speculative expert statements will not preclude summary judgment. *Volk*, 187 Wn.2d at 277. Whether expert testimony is too speculative to be admissible depends upon the expert's basis for forming the opinion, not on the expert's conclusions. *See id.* Expert testimony is inadmissible as speculative when the expert fails to ground his or her opinions on facts in the record. *See id.*

Here, there is no argument that Strauss's experts were not qualified. Their testimony is not speculative, as it was grounded in particular facts concerning Strauss's diagnosis and PBT treatment. *See Strauss*, 1 Wn. App. 2d at 674. Their expert medical opinions were discounted solely because they were not supported by randomized clinical trials.

This Court has held the absence of "a statistically significant basis" for an expert's medical causation opinion neither implicates *Frye* nor renders the proffered testimony inadmissible as unreliable under ER 702 or 703. *See Anderson*, 172 Wn. 2d at 610; *Reese v. Stroh*, 128 Wn.2d 300, 305, 307, 309, 907 P.2d 282 (1995). In *Anderson*, the plaintiffs' medical expert opined that a mother's exposure to organic solvents in the workplace was the probable cause of damage to her unborn child, but acknowledged there was insufficient research and described the state of scientific knowledge on the issue as "evolving." *See Anderson*, 172 Wn.2d at 603-05. The trial court struck the expert and granted summary judgment dismissal because, without that testimony, the plaintiffs could not prove causation. *See id.* at 599. On review, this Court acknowledged that it appeared the relevant scientific

community had not yet seriously researched whether exposure to the solvents could cause the birth defects at issue in the case. *See id.* at 605. However, the Court reversed summary judgment, finding the lack of statistical support did not render the expert's causation opinion inadmissible and stating that "[m]any expert medical opinions are pure opinions and are based on experience and training rather than scientific data." *Id.* at 610 (brackets added).

In *Reese*, the trial court directed a verdict on the basis that the plaintiff could not prove proximate cause, after striking the plaintiff's medical expert because he did not have a statistically significant basis for his opinion that a particular drug would have been effective in treating the plaintiff's lung disease. *See Reese*, 128 Wn.2d at 305. This Court affirmed the court of appeals' reversal, holding that there is no requirement under ER 702, ER 703 or Washington case law that proximate cause expert medical testimony be based on statistically significant studies. *See id.* at 309; *see also Bruns v. PACCAR, Inc.*, 77 Wn. App. 201, 216, 890 P.2d 469, *review denied*, 126 Wn.2d 1025 (1995) (explaining that "[w]hile studies would strengthen an expert's testimony on causation, the competence of expert testimony does not depend on the existence of such studies" (brackets added)).

In *Intalco Aluminum Corp. v. Dep't of Labor & Indus.*, 66 Wn. App. 644, 833 P.2d 390 (1992), *review denied*, 120 Wn.2d 1031 (1993), the court of appeals rejected the employer's argument that medical evidence was purely speculative and insufficient as a matter of law because no studies of

neurological disease and aluminum workers existed to substantiate the medical experts' opinions that exposure to aluminum was the proximate cause of the workers' disease. The court held that the absence of studies does not compel the conclusion that the workers failed to make a showing of proximate cause. *Intalco*, 66 Wn. App. at 660 (noting that “[i]f this court were to accept Intalco’s argument, the first victims of any newly recognized occupational disease would always go uncompensated” (brackets added)).

In rejecting any requirement for statistical studies to qualify a proximate cause medical expert opinion under *Frye* or ER 702 or 703, this Court has noted the “difference between the quest for truth in the courtroom and in the laboratory,” and that “[g]enerally the degree of certainty required for general acceptance in the scientific community is much higher than the concept of probability used in civil courts.” *Anderson*, 172 Wn.2d at 607-08 (brackets added; citations omitted). “To require the exacting level of scientific certainty to support opinions on causation would, in effect, change the standard for opinion testimony in civil cases.” *Id.* at 608.

**C. Conflicting Medical Expert Opinions Regarding Causation Create A Genuine Issue Of Material Fact That Precludes Summary Judgment And Requires Resolution By The Trier Of Fact.**

In *Strauss*, the appellate court acknowledged that the Plaintiff presented expert testimony supported by peer-reviewed medical studies that show the side effects of PBT may be superior to IMRT, and the defendant presented expert testimony supported by peer-reviewed medical studies that show the side effects of IMRT may be superior to PBT. *Strauss*, 1 Wn. App.

2d at 683-84. The resolution of these differing expert opinions should not be determined on summary judgment; they should be left to the trier of fact.<sup>5</sup> Where expert opinion evidence is conflicting, it is error to determine as a matter of law a material issue of fact disputed in the expert testimony. *See Ulmer v. Ford Motor Co.*, 75 Wn.2d 522, 533, 452 P.2d 729 (1969).

“The trier of fact confronted with conflicting expert testimony may accept the testimony of one expert and reject the testimony of another.” *Alpine Indus., Inc. v Gohl*, 30 Wn. App. 750, 754-55, 637 P.2d 998 (1981), *review denied*, 97 Wn.2d 1013 (1982). Where expert opinion evidence is conflicting, the trier of fact may believe some witnesses and disbelieve others, as well as draw any fairly deducible reasonable inferences from the evidence; questions of expert credibility are for the trier of fact. *Harrison v. Whitt*, 40 Wn. App. 175, 178-79, 698 P.2d 87, *review denied*, 104 Wn.2d 1009 (1985).

The absence of randomized clinical trials to support Strauss’s experts’ medical opinions regarding the superiority of PBT does not warrant the Court of Appeals’ finding that “reasonable minds could only conclude”

---

<sup>5</sup> The Court of Appeals cited *Baxter v. MBA Grp. Ins. Tr. Health & Welfare Plan*, 958 F. Supp. 2d 1223 (W.D. Wash. 2013), in support of its decision to grant summary judgment. *Strauss*, 1 Wn. App. 2d at 684. In *Baxter*, the federal district court concluded that the record before it demonstrated that PBT and IMRT provide equivalent treatment in terms of cancer control and side effects, and that no study cited by either party provides "statistically significant evidence" that one therapy is superior to the other. 958 F. Supp. 2d at 1237-38. In contrast, here the Court of Appeals found that the record before it presented conflicting expert opinions, including peer-reviewed medical studies that show the side effects of PBT may be superior to IMRT, and other peer-reviewed medical studies that show the side effects of IMRT may be superior to PBT. *Strauss*, 1 Wn. App. 2d at 683. In addition, Washington law does not require "statistically significant evidence" to support proximate cause medical expert opinions. *See* discussion in §V. B. above.

that Strauss cannot meet the burden of proving PBT was medically necessary. The credibility of the conflicting expert opinions, and the weight to be given the lack of supporting randomized clinical trials, should be left for determination by the trier of fact. As this Court stated in *Reese v. Stroh*:

We agree with the court of appeals that [the medical expert's] proposed testimony, based on the information known to the medical profession at the time of Plaintiff's treatment, 'is the type of information jurors and their physicians rely on in their everyday lives to make decisions about health care. There is nothing mystical about it, and jurors are perfectly capable of determining what weight to give this kind of expert testimony.'... Furthermore, the jury can evaluate... the lack of substantial statistical support concerning the therapy's efficacy.

128 Wn.2d at 309 (quoting *Reese v. Stroh*, 74 Wn. App. 550, 565, 874 P.2d 200 (1994), *aff'd on other grounds*, 128 Wn.2d 300, 907 P.2d 282 (1995) (brackets added)).

In *Intalco Aluminum*, the court noted that the employer presented its own expert medical testimony to challenge the theories on which the workers' attending physicians based their proximate cause conclusion. 66 Wn. App. at 662. Despite the absence of statistical studies substantiating the claimants' experts' opinions, the court concluded that "this was 'a classic battle of the experts, a battle in which the jury must decide the victor.'" *Id.* (quoting *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1535 (D.C. Cir.), *cert. denied*, 469 U.S. 1062, 105 S.Ct. 545, 83 L.Ed.2d 432 (1984)).

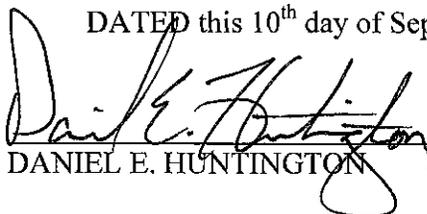
Here, in granting Premera summary judgment, the trial court, and the Court of Appeals, usurped the role of the jury and weighed conflicting expert testimony that reached different conclusions regarding medical causation.

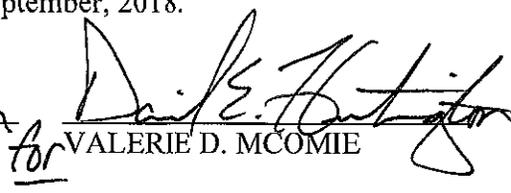
That conflicting expert testimony should be presented at trial to a jury, which can determine the credibility of the expert witnesses and weigh the significance of the lack of supporting randomized clinical trials.

## VI. CONCLUSION

The Court should adopt the analysis advanced in this brief in the course of resolving the issues on review, and reverse the summary judgment dismissal of the Plaintiffs' claims.

DATED this 10<sup>th</sup> day of September, 2018.

  
DANIEL E. HUNTINGTON

  
for VALERIE D. MCOMIE

On Behalf of WSAJ Foundation

## CERTIFICATE OF SERVICE

I hereby certify that on the 10<sup>th</sup> day of September, 2018, I electronically filed the foregoing document with the Clerk of the Court using the Washington State Appellate Courts Portal which will send notification of such filing to all counsel of record herein.

Howard M. Goodfriend  
[howard@washingtonappeals.com](mailto:howard@washingtonappeals.com)

Victoria E. Ainsworth  
[tori@washingtonappeals.com](mailto:tori@washingtonappeals.com)

Patrick A. Trudell  
[patrick@ktblaw.com](mailto:patrick@ktblaw.com)

Gwendolyn Payton  
[gpayton@kilpatricktownsend.com](mailto:gpayton@kilpatricktownsend.com)

John R. Neeleman  
[jneleman@kilpatricktownsend.com](mailto:jneleman@kilpatricktownsend.com)

/s Valerie D. McOmie  
Valerie D. McOmie, WSBA # 33240  
WSAJ Foundation

September 10, 2018 - 4:42 PM

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 95449-6  
**Appellate Court Case Title:** John Strauss and Michelle Strauss v. Premera Blue Cross  
**Superior Court Case Number:** 13-2-28143-1

**The following documents have been uploaded:**

- 954496\_Briefs\_20180910164101SC421253\_6726.pdf  
This File Contains:  
Briefs - Amicus Curiae  
*The Original File Name was Strauss Amicus Brief Final.pdf*
- 954496\_Motion\_20180910164101SC421253\_3141.pdf  
This File Contains:  
Motion 1 - Amicus Curiae Brief  
*The Original File Name was Strauss Motion for Leave to File Amicus Brief - Final.pdf*

**A copy of the uploaded files will be sent to:**

- GPayton@kilpatricktownsend.com
- andrienne@washingtonappeals.com
- danhuntington@richter-wimberley.com
- howard@washingtonappeals.com
- irountree@kilpatricktownsend.com
- jneeleman@kilpatricktownsend.com
- patrick@ktbllaw.com
- tori@washingtonappeals.com

**Comments:**

---

Sender Name: Valerie McOmie - Email: valeriemcomie@gmail.com

Address:

4549 NW ASPEN ST  
CAMAS, WA, 98607-8302  
Phone: 360-852-3332

**Note: The Filing Id is 20180910164101SC421253**