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SUPREME COURT
OF THE STATE OF WASHINGTON

No. 74600-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

Appellants,

v.

PREMERA BLUE CROSS,

Respondent.

**PREMERA BLUE CROSS'S RESPONSE TO
AMICUS BRIEF OF WASHINGTON STATE
ASSOCIATION FOR JUSTICE FOUNDATION**

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I. INTRODUCTION

As Premera explained in its supplemental brief, the trial court and the Court of Appeals both correctly held that there was no genuine dispute of material fact with respect to whether PBT results in fewer side effects than IMRT. The summary judgment evidence demonstrated that Strauss’s doctors, the three independent reviewers of his claim, and the medical community all unanimously reject Strauss’s contention that PBT causes fewer side effects. Premera also showed that Strauss’s treating physician and expert—his only summary judgment evidence—relied on conjecture and speculation, which is insufficient to survive summary judgment with respect to the dispositive issue in this case—whether PBT is medically necessary as defined by the Plan document, which is the parties’ contract.

The Plan provides that it covers only “medically necessary” treatments. The speculative expert testimony offered by Strauss does not meet his burden to satisfy his prima facie case under the relevant third-prong of the Plan’s definition of “medically necessary”— whether PBT was “not more costly than an alternative service” and “at least as likely to produce equivalent therapeutic or diagnostic results.” CP 274, CP 289. It is undisputed that PBT is significantly more costly, and that the therapeutic and diagnostic results of PBT and IMRT are equivalent, except that Strauss has argued that PBT was more likely to produce fewer adverse side effects.

In its amicus brief, the Washington State Association for Justice Foundation (the “Foundation”) largely ignores Premera’s arguments. After an irrelevant detour discussing the admissibility of expert testimony under

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), the Foundation contends that this case involves conflicting “medical experts’ opinions” that must be resolved by the jury.¹ In so arguing, however, the Foundation misconstrues the summary judgment record, particularly the substance and nature of the testimony of Strauss’s two witnesses. It also misunderstands the import of the cases it cites, which actually provide examples of the types of evidence that Strauss *could* have—but failed to—submit in opposition to summary judgment.

This Court should affirm.

II. ARGUMENT

A. The Foundation begins its brief with a lengthy discussion of *Frye* and Evidence Rules 702 and 703. *See* Amicus Br. 7–11. This analysis is completely irrelevant. Premera never moved to exclude the testimony of Dr. Laramore or Dr. Bush, and both the trial court and the Court of Appeals ruled based on the absence of a genuine issue of material fact, applying standard summary judgment principles. CP 1467; *Strauss v. Premera Blue Cross*, 1 Wn. App.2d 661, 683, 408 P.3d 699, 709–10 (2017). This case turns on whether Strauss created a genuine factual dispute, not the admissibility of testimony.

¹ The Foundation also suggests that Strauss’s bad faith and CPA claims should survive summary judgment even if his breach of contract claim was properly dismissed. Amicus Br. 5 n.1; *see also* Supp. Br. of Pet’rs 18–20 (arguing the same). But Strauss’s petition did not present as an issue for this Court’s review whether the bad faith and CPA claims were properly dismissed (*see* Petition 1), so those arguments fall outside the scope of this Court’s review. RAP Rule 13.7(b); *see Denaxas v. Sandstone Court of Bellevue, LLC*, 148 Wn. 2d 654, 671, 63 P.3d 125, 133 (2003) (an issue first raised in a supplemental brief is not within the scope of review).

B. With respect to the issue actually before the Court, the Foundation asserts one short argument—because the “expert opinion is conflicting,” the case should be sent to the jury. Amicus Br. 12–13. According to the Foundation, both Premera and Strauss “presented expert testimony supported by peer-reviewed medical studies.” *Id.* at 11. These assertions mischaracterize the evidence presented by the parties’ respective experts.

As Premera explained in its supplemental brief, the record does not contain conflicting expert opinions—only significant evidence that refutes Strauss’s claim. This includes the lack of *any* head-to-head comparisons of PBT and IMRT in clinical trials, the views of Strauss’s own doctors, and the uniform guidelines promulgated by the national medical organizations and the federal government. Premera Supp. Br. 13–15. By contrast, Strauss offered just his litigation expert witnesses’ speculation and conjecture—“theoretical” views based on “inferences” and “assumptions” drawn from existing studies—that PBT was more likely to produce fewer adverse side effects. *Id.* at 16–17.

This a breach of contract case, and the Court must apply this evidence to the contractual provision at issue here, which the Association ignores. The Plan provides that it covers only “medically necessary” treatments, which the Plan defines, in relevant part, as “not more costly than an alternative service” and “at least as likely to produce equivalent therapeutic or diagnostic results.” CP 274, CP 289.

It is undisputed that PBT is significantly more expensive than IMRT. Therefore, Strauss must show that PBT is likely to produce fewer adverse side effects than IMRT. The “theoretical” views of Strauss’s experts based on “inferences” and “assumptions” drawn from existing studies fail to meet his prima facie case that PBT is likely to produce fewer adverse side effects than IMRT. Though the Foundation baldly asserts that Strauss submitted “expert testimony” at summary judgment, Amicus Br. 11, it never actually discusses those opinions and how they suffice to create a genuine factual dispute. Likewise, though the Foundation contends that the opinions of Strauss’s expert Dr. Laramore were “supported by peer-reviewed medical studies,” *id.*, its brief avoids discussing those studies for a reason—none of them directly compared the side effects of PBT and IMRT. That is why he conceded that his opinion that PBT results in fewer side effects was only “theoretical” and based on “assumptions” and “inferences.”

It is correct, as the Foundation contends, that head-to-head clinical trials are not *required* as a basis for medical opinion testimony. A doctor, for example, could opine based on his own observation of the side effects experienced by patients treated with PBT and IMRT. But Strauss’s expert offered no such testimony. Instead, as Premera has explained, he relied on precisely the “speculation, conjecture, or mere possibility” that this Court has rejected as sufficient to overcome a summary judgment motion. *Reese v. Stroh*, 128 Wn. 2d 300, 310, 907 P.2d 282, 287 (1995).

The cases discussed by the Foundation, setting aside the fact that they address admissibility not summary judgment, demonstrate the weakness of Strauss's evidence. The Court of Appeals in *Intalco Aluminum Corp. v. Dep't of Labor & Indus.*, 66 Wn. App. 644, 833 P.2d 390 (1992), allowed the treating physicians to testify as to the cause of an illness, in the absence of published studies, because they "studied the claimants over a period of 2 years, conducting numerous neurological tests during that time." *Id.* at 655, 833 P.2d at 396. This Court in *Reese* allowed an expert to testify that the defendant doctor should have treated the plaintiff with a particular drug, in the absence of statistical studies, because his opinion was based on "the information and studies supporting the FDA's approval of [the drug], his own clinical experiences, and information regarding the Plaintiff's medical condition." 128 Wn. 2d at 304, 907 P.2d at 284. And this Court in *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn. 2d 593, 260 P.3d 857 (2011), permitted causation opinion testimony based on the expert's own analysis of the scientific evidence. *Id.* at 603–04, 260 P.3d at 862. By contrast, neither Strauss's expert Dr. Laramore nor his PBT doctor Dr. Bush based their opinions on their own direct clinical observation of the supposedly differing side effects of the two radiation treatments.

Finally, the Foundation's effort (Amicus Br. 12 n.5) to distinguish *Baxter v. MBA Group Ins. Trust Health & Welfare Plan*, 958 F. Supp. 2d 1223 (W.D. Wash. 2013), fails. It contends that the medical studies in the record in *Baxter* differ from those in this case. That is wrong. As Premera explained in its supplemental brief (pp. 18–19), both cases involve the same

experts and medical evidence proffered by the plaintiff-patient. Nor was the procedural posture meaningfully different in *Baxter*; the *Baxter* court applied the same summary judgment standard even though both parties moved for summary judgment in that case, while only Premera did so here. The question both in *Baxter* and here is whether the facts were in dispute, and like the courts below, the federal court in *Baxter* held that there was no genuine issue of fact.

Strauss has failed to offer evidence sufficient to satisfy his prima facie case that PBT is medically necessary because it was “not more costly than an alternative service” and “at least as likely to produce equivalent therapeutic or diagnostic results.” CP 274, CP 289.

III. CONCLUSION

This Court should affirm the judgment of the Court of Appeals, Division 1.

DATED: October 2, 2018

Respectfully submitted,

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I hereby certify under penalty of perjury of the laws of the State of Washington that on the 2nd day of October, 2018, I caused to be served a copy of the foregoing on the following person(s) in the manner indicated below at the following address(es):

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Premera Blue Cross's Response to Amicus Brief of Washington State Association for Justice Foundation

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