 74600-6

No. 95449-6

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.

FILED
Oct 07, 2016
Court of Appeals
Division I
State of Washington

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE MONICA J. BENTON

REPLY BRIEF OF APPELLANTS

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I. ARGUMENT

A. This Court views the evidence and all reasonable inferences in the light most favorable to Mr. Strauss.

Because the trial court dismissed his claim on summary judgment, this Court views the evidence and all inferences in the light most favorable to Mr. Strauss. *Barber v. Bankers Life & Cas. Co.*, 81 Wn.2d 140, 142, 500 P.2d 88 (1972); *Keck v. Collins*, 184 Wn.2d 358, 370, ¶27, 357 P.3d 1080 (2015). "Where different, competing inferences may be drawn from the evidence, the issue *must* be resolved by the trier of fact." *Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 320, ¶22, 111 P.3d 866 (2005), *rev. denied*, 156 Wn.2d 1008 (2006) (emphasis added); *Duckworth v. Langland*, 95 Wn. App. 1, 8, 988 P.2d 967 (1998) (courts "do not weigh the parties' credibility" on summary judgment); *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, ¶12, 192 P.3d 886 (2008) (summary judgment inappropriate where "reasonable minds could differ on the facts controlling the outcome of the litigation").

Premera confuses Mr. Strauss' burden on summary judgment with his burden at trial, mistakenly arguing that proton beam therapy "is 'medically necessary' only if Strauss can carry his burden of proving that PBT leads to fewer side-effects." (Resp. Br. 20) On summary judgment, however, Mr. Strauss need only raise a material

issue of fact, not establish, as Premera erroneously contends, "that PBT is superior to IMRT as a matter of law." (Resp. Br. 24) Rather, it is *Premera's* burden to prove, as a matter of law, that *no* reasonable mind could find that PBT is medically necessary under the policy. Because Premera failed to meet this burden, Mr. Strauss is entitled to present his claims to the jury.

B. Whether proton beam therapy was "medically necessary" under the policy is a disputed fact.

Expert evidence based on credible scientific data demonstrated that proton beam therapy is "medically necessary" under the plain language of Premera's policy. Premera relies on the "third-prong" of the "medically necessary" definition in the policy – whether proton beam therapy was "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" (CP 212) – and agrees that whether PBT is "medically necessary" thus turns on whether it has a superior side effect profile to IMRT. (RP 14) (Resp. Br. 20) Premera's lengthy discussion on the weight and credibility of that evidence (Resp. Br. 21-30) only highlights that reasonable minds can and do reach different conclusions regarding PBT's efficacy. The trial court erred in granting Premera's motion for summary judgment when it

improperly resolved a factual issue by requiring randomized clinical trials as a prerequisite to medical necessity.

1. Expert testimony and medical literature establish that proton beam therapy is medically necessary based on its superior side effect profile.

Proton beam therapy is "medically necessary" as defined by the plain language of the policy. "The court examines the terms of an insurance contract to determine whether under the plain meaning of the contract there is coverage." *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 576, 964 P.2d 1173 (1998). "If terms are defined in a policy, then the term should be interpreted in accordance with that policy definition." *Kitsap County*, 136 Wn.2d at 576.

Premera's argument that Mr. Strauss cannot raise an issue of fact regarding medical necessity "premised almost entirely on the opinion of two doctors" (Resp. Br. 28) is without merit. In *Keck*, our Supreme Court held that an expert doctor's testimony alone raises a genuine issue of material fact where that testimony "could sustain a verdict for the nonmoving party" in her medical malpractice claim. 184 Wn.2d at 374, ¶41. *See also Bowers v. Marzano*, 170 Wn. App. 498, 505, ¶18, 290 P.3d 134 (2012) ("affidavit expressing an expert's opinion may be sufficient to create a genuine issue of fact and thus preclude summary judgment"); *Lamon v. McDonnell Douglas Corp.*,

91 Wn.2d 345, 352, 588 P.2d 1346 (1979) ("affidavit containing expert opinion on an ultimate issue of fact was sufficient to create a genuine issue of fact which would preclude summary judgment"); *Coggle v. Snow*, 56 Wn. App. 499, 510-11, 784 P.2d 554 (1990) (expert doctor's declaration sufficient to raise issue of fact on informed consent and negligence claims). This Court "indulge[s] a certain degree of leniency in reviewing the affidavits of the nonmoving party." *Coggle*, 56 Wn. App. at 511.

Dr. David Bush and Dr. George Laramore, two highly-qualified, Board Certified radiation oncologists, testified that based on credible scientific evidence and medical literature, proton beam therapy has a superior side effect profile to IMRT. (CP 1124-26, 1335) Premera contends that PBT is not superior to IMRT because Dr. Laramore agreed with a National Comprehensive Cancer Network statement that there is currently "no clear evidence" supporting PBT's superior "treatment efficacy or long-term toxicity" in light of an "ongoing prospective randomized trial." (CP 827, 368) (Resp. Br. 24-25) But Dr. Laramore, an "impressive" expert even in Premera's eyes (RP 32), considered *all* of the available evidence, not just that from a single, ongoing clinical trial, and nevertheless concluded that "the <u>overall</u> therapeutic results" of proton beam

therapy and IMRT "are not equivalent but would be better with proton radiotherapy." (CP 700) (underline in original)

A second expert, Dr. Bush, likewise submitted a letter to Premera detailing PBT's benefits as a medically necessary treatment under the policy. (CP 1124-26, 241) Dr. Bush listed the 22 credible scientific sources he relied upon in coming to his conclusions, including studies and data obtained from various trials involving PBT that were published in reputable, peer reviewed journals. (CP 1127-28) Similarly, Dr. Laramore "relied upon credible scientific evidence" in coming to his conclusions, including 27 "studies published in peer review medical literature that is generally accepted by the oncology medical community." (CP 1336, 1352-54) Just like the expert testimony in *Keck*, both Dr. Laramore's and Dr. Bush's testimony could sustain a jury verdict in Mr. Strauss' favor.

This expert evidence is sufficient to create a genuine issue of material fact even though Dr. Bush and Dr. Laramore were not, as Premera claims, "financially disinterested providers." (Resp. Br. 26) Premera's argument that Dr. Bush's expert opinion as a clinical oncologist is somehow diminished or biased because he treated Mr. Strauss at Loma Linda Medical Center merely goes to the weight and credibility of Dr. Bush's evidence, as does its assertion that Dr.

Laramore was a "paid expert." (Resp. Br. 28) Such credibility determinations and competing inferences from the evidence "must be resolved by the trier of fact." *Versuslaw*, 127 Wn. App. at 320, ¶22. Mr. Strauss was entitled to present this evidence to the jury.

2. The trial court improperly resolved a factual issue when it went beyond the plain language of the policy and required randomized clinical trials as a condition for medical necessity.

Premera's reliance on the absence of randomized clinical trials between proton beam therapy and IMRT does not support its argument that Mr. Strauss produced *no* evidence of PBT's superiority. (Resp. Br. 21, 23) The trial court erred by going beyond the plain language of the policy to impose the additional requirement of clinical trials, ignoring credible expert evidence of a genuine factual dispute and impermissibly deciding as a matter of law an issue that should have gone to the jury. *Busenius v. Horan*, 53 Wn. App. 662, 666, 769 P.2d 869 (1989) (court does "not . . . resolve any existing factual issues" on summary judgment).

a. Premera's policy does not require that medical necessity be established by randomized clinical trials.

The policy does not require evidence from randomized clinical trials for a treatment to be medically necessary. Yet Premera repeatedly contends that without such trials, "[t]here is *no* evidence

that PBT results in fewer side-effects than IMRT."[1] (Resp. Br. 7, 14, 21, 23, 26) (emphasis added) This assertion flies in the face of the multitude of expert evidence that PBT does, in fact, lead to fewer side effects than IMRT. Indeed, Premera spends the length of its brief arguing the *superiority* of its own evidence over Mr. Strauss', contending that "randomized trials are the 'gold standard' for an evidence-based comparison of different treatment methods." (Resp. Br. 22) Neither the existence nor absence of "clinical evidence that PBT is superior" is dispositive of coverage (Resp. Br. 23), because the plain language of the policy does not require conclusive "clinical evidence" for a treatment to be medically necessary. (CP 212) Premera's attempt at conflating the existence of *any* evidence with that of randomized clinical trials is an ill-disguised attempt to have this Court weigh the evidence and resolve a clear factual dispute.

Premera relies on *Baxter v. MBA Group Ins. Trust Health and Welfare Plan*, 958 F. Supp. 2d 1223 (W.D. Wash. 2013), to argue that randomized clinical trials are required as a matter of law to prove proton beam therapy's superior side effect profile. (Resp. Br. 27-28)

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[1] Contrary to Premera's claims, none of Mr. Strauss' experts or physicians stated that there was "no" evidence of proton beam therapy's superiority. (Resp. Br. 14) They merely acknowledged that no randomized trials have been completed yet and cited to other credible evidence demonstrating PBT's superior side effect profile. (CP 260, 657, 787, 653, 680)

Baxter is inapposite and does not stand for such a sweeping proposition. In *Baxter*, *both* parties moved for summary judgment, thereby conceding that there were no material issues of fact and PBT's efficacy could be determined as a matter of law. *See Tiger Oil Corp. v. Dep't of Licensing, State of Wash.*, 88 Wn. App. 925, 930, 946 P.2d 1235 (1997). Accordingly, the insured had to prove PBT's superiority *as a matter of law*. Under such circumstances, the district court could find that the insured failed to satisfy this burden in the absence of randomized clinical trials.

Here, only Premera moved for summary judgment, while Mr. Strauss argued that a factual issue existed for the jury to decide. Thus, unlike the insured in *Baxter*, Mr. Strauss does *not* have to establish proton beam therapy's superiority as a matter of law, but rather that reasonable minds could differ on whether PBT leads to fewer side effects than IMRT given the available scientific evidence.

Premera is impermissibly asking this Court to decide on summary judgment that its evidence is superior to Mr. Strauss'. This is a credibility determination and an issue of fact that is exclusively within the purview of the jury.

b. Proton beam therapy's superiority is based on credible scientific evidence.

Even if randomized clinical trials *are* considered the "gold standard," such trials are not the *only* standard or test for comparing treatments. Premera incorrectly asserts that "[i]t is undisputed that the alleged superiority of PBT is theoretical." (Resp. Br. 21) The absence of randomized clinical trials on PBT's side effects compared to IMRT's does not make PBT's superiority "theoretical." (Resp. Br. 21)

Dr. Laramore's conclusions are based on "actual data" from reputable studies that "concluded that there was . . . consistently . . . a reduced risk of second malignancy induction with proton radiotherapy compared with either IMRT or 3D conformal therapy." (CP 657) Dr. Laramore's opinions and conclusions are not inadmissible "theory" (RP 32) simply because he drew reasonable inferences as an expert in his field based on this "actual data." *See, e.g.*, *Advanced Health Care, Inc. v. Guscott*, 173 Wn. App. 857, 873, ¶31, 295 P.3d 816 (2013) (specific conclusions drawn from scientific data do not have to be generally accepted in the scientific community; "*concerns about the possibility of error or mistakes made in the case at hand can be argued to the factfinder*") (emphasis in original) (quoted source omitted).

Indeed, Premera does not argue that Dr. Laramore or Dr. Bush's testimony would be inadmissible at trial, only that "to say that Dr. Bush's and Dr. Laramore's opinion might qualify as a scientifically valid theory under Frye is far different from saying that PBT's supposed superiority is a generally accepted fact." (Resp. Br. 29-30) But the policy does not require that PBT's *superiority* be a generally accepted fact; it simply requires that PBT as a *treatment* be "[i]n 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." (CP 212) (emphasis added) Mr. Strauss presented expert evidence that PBT is a generally accepted treatment for prostate cancer *and* that its side effect profile is superior to IMRT, satisfying the policy's definition of "medically necessary."

C. The trial court erred in dismissing the bad faith and CPA claims because Premera breached its common law and statutory duty of good faith by erroneously denying Mr. Strauss' claim and conducting an inadequate investigation.

Whether an insurer acted in bad faith is a question of fact for the jury. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 484, 78 P.3d 1274 (2003). In order to affirm a grant of summary judgment on a bad

faith or Consumer Protection Act claim, *"there must be no disputed facts pertaining to the reasonableness of the insurer's action in light of all the facts and circumstances of the case."* *Smith*, 150 Wn.2d at 486 (emphasis added) (internal quotations omitted); *Safeco Ins. Co. of America v. JMG Restaurants, Inc.*, 37 Wn. App. 1, 14-15, 680 P.2d 409 (1984).

1. Premera acted unreasonably by misapplying its definition of medical necessity and denying coverage based on the lack of randomized clinical trials.

A jury could find that Premera acted in bad faith in denying coverage for proton beam therapy because its superior side effect profile was not based on randomized clinical trials, after Mr. Strauss demonstrated that PBT was "medically necessary" under the terms of the policy. (CP 243) "[C]ourts liberally construe insurance policies to provide coverage wherever possible." *Bordeaux, Inc. v. American Safety Ins. Co.*, 145 Wn. App. 687, 694, ¶14, 186 P.3d 1188 (2008), *rev. denied*, 165 Wn.2d 1035 (2009); *Starr v. Aetna Life Ins. Co.*, 41 Wash. 199, 203, 83 P. 113 (1905) ("insurance policies are to be construed in favor of the insured, and most strongly against insurance companies"). Premera ignored this principle by basing its determination entirely upon the lack of randomized controlled

studies, even though the plain language of the policy did not require such studies for a treatment to be "medically necessary."

Premera concedes that "the lack of randomized trials [wa]s a key reason" for finding that proton beam therapy was not medically necessary (Resp. Br. 32), arguing that, in the absence of randomized clinical trials, there is "no" evidence proving that PBT is not "at least as likely to produce equivalent . . . results" as a cheaper treatment. (Resp. Br. 21-28) (CP 212) Premera breached its duty of good faith by imposing additional requirements not included in its policy and putting its own pecuniary interests above those of its insureds.

2. A jury could find that Premera acted in bad faith by not providing coverage when proton beam therapy was conceivably "medically necessary" under the policy.

Even if Premera's coverage decision was ultimately correct, a jury could nevertheless find that it conducted its investigation in bad faith by assigning a pediatrician, with no expertise in radiology or oncology, to review Mr. Strauss' claim. Even where an insurer's ultimate coverage decision is correct, the duty of good faith and fair dealing requires the insurer to "conduct a reasonable investigation before denying coverage." *Coventry Associates v. American States Ins. Co.*, 136 Wn.2d 269, 279, 281, 961 P.2d 933 (1998) (quoted

source omitted); *see St. Paul Fire and Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 134, ¶26, 196 P.3d 664 (2008).

Premera claims that "referring Strauss's initial claim to a specialist would conflict with Washington law" because "there is no requirement that an initial determination be made by a health care provider, much less an expert in the field," under former WAC 284-43-410.[2] (Resp. Br. 34-35) Premera contends that because former WAC 284-43-620[3] required an expert review at the appeal and independent review levels, "[i]t would be unreasonable to expect Premera to have experts decide every initial claim." (Resp. Br. 35) (emphasis in original)

It is neither "unreasonable" nor "contrary to Washington law" (Resp. Br. 34) to assign a specialist to review an initial claim determination merely because they are required at the appeals level. Former WAC 284-43-410 required initial claim reviews to be done by someone "who [is] properly qualified, trained, [and] supervised."

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[2] Former WAC 284-43-410 was in effect at the time of Mr. Strauss' claim determination. It was recodified as WAC 284-43-2000 in December 2015. WSR 16-01-081.

[3] WAC 284-43-620 was recodified as WAC 284-43-4040 in December 2015. WSR 16-01-081.

Premera fails to explain how a pediatrician is "properly qualified" to consider the efficacy of different prostate cancer treatments.

A jury could find that it was unreasonable, and therefore a breach of the duty of good faith, to assign a pediatrician to make a claim determination for prostate cancer treatment when that pediatrician was not "properly qualified" or "trained" in radiation oncology. This is especially true in light of the fact that Dr. Kaneshiro based his decision *entirely* on Premera's "Corporate Medical Policy," which was intended to be merely a "guide" for, and not dispositive of, a claim determination. (CP 216) Premera had a duty of good faith to apply the terms of its policy in determining coverage, construing any ambiguities in language in favor of Mr. Strauss as its insured.

A jury could find that Premera acted in bad faith by misapplying the plain language of its policy and denying Mr. Strauss' claim without reasonably investigating it. This Court should reverse the summary judgment and remand for trial on Mr. Strauss' bad faith and Consumer Protection Act claims.

D. Mr. Strauss is entitled to his attorney fees.

Mr. Strauss is entitled to his attorney fees because he was forced to bring suit to "obtain the full benefit of his insurance contract." *Olympic Steamship Co., Inc. v. Centennial Ins. Co.*, 117

Wn.2d 37, 53, 811 P.2d 673 (1991). He is also entitled to attorney fees under the Consumer Protection Act if he prevails in the trial court on remand. RCW 19.86.090. This Court should award fees or direct the trial court to do so upon entry of a final judgment.

II. CONCLUSION

This Court should reverse and remand for a trial of Mr. Strauss' claims for breach of contract, insurance bad faith, and violation of the Consumer Protection Act.

Dated this 7th day of October, 2016.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on October 7, 2016, I arranged for service of the foregoing Reply Brief of Appellants, to the court and to the parties to this action as follows:

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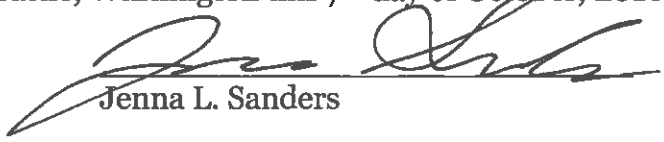

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