

FILED
SUPREME COURT
STATE OF WASHINGTON
8/6/2018 4:06 PM
BY SUSAN L. CARLSON
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No. 95449-6

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Petitioners,

v.

PREMERA BLUE CROSS,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONERS

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I. INTRODUCTION

Despite acknowledging that scientific evidence supports petitioners' claim that proton beam therapy results in fewer side effects than traditional radiotherapy in treating prostate cancer, the Court of Appeals disregarded competent and admissible expert testimony to hold that a plaintiff cannot even raise a factual issue that a treatment is "medically necessary" and covered by a health insurance policy in the absence of "clinical evidence" conclusively proving the treatment's superiority. Because petitioner's health insurance policy with respondent Premera Blue Cross does not require such "clinical evidence" to establish medical necessity, the Court of Appeals not only invaded the province of the jury by deciding on summary judgment a factual issue as a matter of law, but violated elementary principles of Washington insurance law by impermissibly imposing upon insureds requirements not found in the plain language of a health insurance policy.

II. RESTATEMENT OF THE CASE

Petitioners John and Michelle Strauss briefly restate the facts in the light most favorable to them as the non-prevailing party on summary judgment. The facts are set forth more fully in their appellate briefs and petition for review. (App. Br. 3-15; Petition 2-7)

A. Premera denied Strauss coverage for proton beam therapy to treat his high-risk prostate cancer, finding the treatment not “medically necessary” in the absence of randomized clinical studies.

John Strauss was diagnosed with “high-risk,” “high-volume” prostate cancer in October 2008. (CP 69, 72, 1336-37) Because of his adverse cardiac history of arrhythmia and bypass surgery, Strauss was at “a higher operative risk” for surgical treatment and instead chose radiotherapy treatment. (CP 110, 897, 1334-37) Strauss successfully underwent proton beam therapy (“PBT”) treatment in February 2010 after his physician, Dr. David Bush, a Board-certified oncologist, recommended PBT due to reduced risk of side effects. (CP 133, 137, 895, 1392)

Proton beam therapy and traditional intensity modulated radiation (photon x-ray) therapy (“IMRT”) are the two primary types of radiotherapy to treat prostate cancer. (CP 88, 94, 691, 1125) Because IMRT results in “excess radiation to surrounding tissue,” it can cause significant side effects, including secondary cancer, damage to the rectum, bladder and bowel dysfunction, and sexual function issues from “radiation damage to the penile bulb.” (CP 1338) While more expensive, PBT is superior to IMRT because it results in fewer side effects. (CP 1125-26, 1338) PBT more precisely targets a “well-defined high dose” of radiation to a specific location, allowing the

volume of healthy tissue receiving radiation to be reduced by a factor of 2-3 compared to IMRT. (CP 1125)

Prior to receiving proton beam therapy, Strauss sought coverage for the treatment under his health insurance policy with respondent Premera Blue Cross (“Premera”). (CP 10, 241) Premera’s policy provided coverage for “medically necessary” treatments:

Those covered services and supplies that a physician, exercising prudent clinical judgment, would provide to a patient for the purpose of preventing, evaluating, diagnosing or treating an illness, injury, disease or its symptoms, and that are:

- In accordance with generally accepted standards of medical practice;
- Clinically appropriate, in terms of type, frequency, extent, site and duration, and considered effective for the patient’s illness, injury or disease; and
- Not primarily for the convenience of the patient, physician, or other health care provider, and not more costly than an alternative service or sequence of services 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.

(CP 212) Under the policy, “generally accepted standards of medical practice” are:

[S]tandards that are based on credible scientific evidence published in peer reviewed medical literature generally recognized by the relevant medical community, physician specialty society recommendations and the

views of physicians practicing in relevant clinical areas and any other relevant factors.

(CP 212)

Dr. Neil Kaneshiro, a pediatrician examining coverage requests part-time for Premera, reviewed Strauss' pre-authorization request and concluded that proton beam therapy was not "medically necessary" in the absence of "clinical outcomes" showing its superiority to other treatments. (CP 243, 1360-64, 1368) Dr. Kaneshiro has no expertise in the field and no "specific knowledge on what IMRT costs, what proton costs"; he did not read any peer-reviewed medical literature, consult with an oncologist, or speak with Strauss' treating physician Dr. Bush about Strauss' treatment options. (CP 1366, 1368-69)

Instead, Dr. Kaneshiro predicated his decision entirely on a statement in Premera's Corporate Medical Policy that proton beam therapy "*may* be considered not medically necessary in patients with clinically localized prostate cancer" because it is more expensive than IMRT. (CP 1004-05, emphasis added; CP 1366, 1368) While available online, the Corporate Medical Policy is not referenced anywhere in Premera's insurance policy or any subsequent endorsements to Strauss' policy, and includes a disclaimer that it is merely a "guide" and a "resource" for coverage determinations. (CP 169-239)

Strauss internally appealed Premera's denial of coverage three times, exhausting his administrative remedies with his insurer. (CP 244-45, 247-53, 280-81, 283, 1124-28) Although Premera now acknowledges that Strauss' evidence "offer[s] mixed conclusions" on proton beam therapy's benefits (Answer to Petition 14), in defending its denial of coverage Premera repeatedly claimed there was "no evidence in the recent peer-reviewed medical literature" of PBT's superiority. (CP 272-75, 277-78, 288-95) Strauss finally sought independent review from the Washington State Office of the Insurance Commissioner ("OIC"). (CP 290, 297) The organization handling the review for OIC upheld Premera's denial of coverage even after recognizing there was evidence of "positive data available . . . for this technology in prostate cancer." (CP 308-13)

B. The Court of Appeals affirmed the trial court's summary judgment dismissal of Strauss' claims in the absence of "clinical evidence" conclusively proving proton beam therapy's superiority.

Strauss sued Premera in August 2013 for breach of contract, insurance bad faith, and violation of the Consumer Protection Act. (CP 3-9) In opposing Premera's motion for summary judgment, Strauss agreed that proton beam therapy was "medically necessary" under the policy only if it "leads to fewer side effects" than IMRT (CP 19, 748), and submitted the declarations of treating physician Dr.

Bush, and Dr. George Laramore, a Board-Certified physician with over 30 years of experience in radiation oncology, asserting PBT's superior side effect profile. (CP 1122-28, 1331-54) Premera challenged neither experts' qualifications nor the methods and principles upon which they relied. The trial court nonetheless granted Premera's motion for summary judgment and dismissed all of Strauss' claims. (CP 1472-73)

The Court of Appeals affirmed the dismissal of Strauss' action as a matter of law "absent clinical evidence directly comparing PBT and IMRT," even though "the record establishes there are peer-reviewed medical studies that show the side effects of PBT may be superior to IMRT." *Strauss v. Premera Blue Cross*, 1 Wn. App. 2d 661, 683-84, ¶¶ 59-60, 408 P.3d 699 (2017). This Court granted Strauss' petition for review of Division One's published decision.

III. SUPPLEMENTAL ARGUMENT

A. The Court of Appeals rewrote the insurance policy to impose an additional requirement beyond those in the policy's plain language.

The Court of Appeals erroneously affirmed summary judgment on the ground there is no "clinical evidence" from randomized clinical trials directly comparing proton beam therapy to IMRT:

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.

Strauss, 1 Wn. App. 2d at 683-84, ¶ 59. But nothing in the Premera policy requires clinical evidence¹ from randomized trials to demonstrate medical necessity; the existence or absence of such evidence therefore cannot be the dispositive issue in determining coverage.

Courts “must” enforce an insurance policy “as written and may not modify it.” *Am. Nat’l Fire Ins. Co. v. B & L Trucking & Const. Co., Inc.*, 134 Wn.2d 413, 428, 951 P.2d 250 (1998). This Court interprets insurance policies in favor of the insured, liberally construing inclusionary clauses “to provide coverage for those who can be embraced within its terms.” *Hawaiian Ins. & Guar. Co., Ltd. v. Federated Am. Ins. Co.*, 13 Wn. App. 7, 20, 534 P.2d 48 (1975). The

¹ In fact, Strauss did produce clinical evidence of proton beam therapy’s superiority (*see, e.g.*, App. Br. 11 n.14, 13-14, 23; CP 1124-1244, 1246-1332, 1342-54), but he could not produce “clinical evidence directly comparing PBT and IMRT” because there are no such studies. The “clinical evidence” the Court of Appeals and Premera claim the policy requires is evidence from phase III randomized clinical trials. (*See Answer 11-14*) “Gold standard” phase III trials (*Answer 13*) are placebo-controlled, double blind randomized trials in which study participants randomly receive either a placebo or treatment, and neither the doctor nor the patient know which treatment the patient receives. Alice K. Marcee, *Expanded Access to Phase II Clinical Trials in Oncology: A Step Toward Increasing Scientific Validity and Compassion*, 63 Food & Drug L. J. 439, 453-54 (2008). These trials are “expensive, time consuming and often have difficulty enrolling the necessary number of research participants” due to ethical concerns in giving patients with life-threatening diseases a placebo “treatment.” Marcee, *Expanded Access*, 63 Food & Drug L. J. at 454, 456.

Court of Appeals' requirement of randomized clinical trials "directly comparing" proton beam therapy and IMRT to establish the "medical necessity" of treatment rewrites the insurance policy to impose an additional requirement not contained in the language of the policy.

Other courts have similarly rejected attempts to deny coverage based on standards not expressly stated in the policy. For instance, in *Wilson v. Office of Civilian Health & Med. Programs of the Uniformed Servs.*, 65 F.3d 361, 365-66 (4th Cir. 1995), CHAMPUS, a military health benefits program, denied coverage of a high-dose chemotherapy treatment as "experimental or investigational," relying on an "unwritten agency policy mandating Phase III trials before a treatment is provided." The Fourth Circuit affirmed the district court's determination that the treatment was covered because "nothing in the Code of Federal Regulations or the CHAMPUS policy manual indicates that published, Phase III clinical trial results are required before a benefit can be provided." 65 F.3d at 365. CHAMPUS thus impermissibly "imposed a requirement beyond those in the applicable regulations by creating an informal, but nonetheless binding, prerequisite that a treatment pass Phase III trials." 65 F.3d at 366.

Similarly, in *Pirozzi v. Blue Cross-Blue Shield of Virginia*, 741 F. Supp. 586, 588 (E.D. Vir. 1990), Blue Cross denied coverage of high-dose chemotherapy treatment for breast cancer under an experimental treatment exclusionary clause. As in this case, the insured provided expert testimony from two Board-certified oncologists that the treatment was not experimental, while Blue Cross “relie[d] heavily on the absence of phase III studies” relating to the treatment’s efficacy. 741 F. Supp. at 591-93. The district court held the insured’s expert testimony sufficient to require coverage, noting that “nothing in the Plan requires that a treatment be the subject of completed phase III studies to escape the experimental treatment exclusion. Nor did Blue Cross offer any persuasive reason to read such a stringent requirement into the plan.” 741 F. Supp. at 593.

Like *Pirozzi* and *Wilson*, the policy’s plain language here does not require phase III clinical trials, nor any “clinical evidence directly comparing” treatments. Nor is there “any persuasive reason” to read such a “stringent requirement” into the policy. Unlike traditional contracts, insurance policies “are not purely private affairs” and must be interpreted in light of public policy considerations. *Oregon Auto. Ins. Co. v. Salzberg*, 85 Wn.2d 372, 376-77, 535 P.2d 816 (1975).

Scientists and medical experts have not only questioned the presumed superiority of placebo-controlled, double blind randomized trials as the “gold standard”; the ethical concern such trials raise is one of the most “persistently controversial issue[s]” in clinical research. Ezekiel J. Emanuel et al., *What Makes Clinical Research Ethical?*, 283 *J. Am. Med. Assoc.* 2701, 2708 (2000); see Jason Grossman and Fiona J. Mackenzie, *The Randomized Controlled Trial: gold standard, or merely standard?*, 48 *Perspectives in Biology & Med.* 516, 516-34 (2005). These concerns are particularly prominent in oncological clinical trials “because of the seriousness of the disease”: “if a standard therapy is available for the type of cancer being studied, then giving a subgroup of patients a placebo . . . is unethical because of the known outcome of not treating the disease – death.” Alice K. Marcee, *Expanded Access to Phase II Clinical Trials in Oncology: A Step Toward Increasing Scientific Validity and Compassion*, 63 *Food & Drug L. J.* 439, 453-54 (2008); Sharona Hoffman, *The Use of Placebos in Clinical Trials: Responsible Research or Unethical Practice?*, 33 *Conn. L. Rev.* 449, 458-59 (2001). The Court of Appeals’ imposition of such a requirement violates public policy as well as the contractual principles governing interpretation of insurance policies.

B. The Court of Appeals wrongly required Strauss as the nonmoving party to prove his case for coverage as a matter of law on summary judgment.

Premera intentionally conflates what Strauss must prove at trial with his burden on summary judgment. Premera premises its argument on a non-binding district court decision under ERISA, *Baxter v. MBA Group Ins. Trust Health & Welfare Plan*, 958 F. Supp. 2d 1223 (W.D. Wash. 2013). Neither *Baxter* nor any relevant authority supports Premera's argument that the rules governing summary judgment do not apply in this case.

In *Baxter*, the plaintiff sought coverage for proton beam therapy to treat prostate cancer under an ERISA policy. Like here, "medical necessity" turned on whether proton beam therapy had a superior side effect profile than IMRT. The district court in *Baxter* held that, in the absence of randomized clinical trials, it could not determine as a matter of law that PBT was superior to IMRT.

Misinterpreting *Baxter*, Premera contends that *only* evidence of randomized clinical trials is sufficient to raise a factual issue on proton beam therapy's medical necessity. But unlike here, *both* parties moved for summary judgment in *Baxter*, 958 F. Supp.2d at 1226, and the district court determined medical necessity under the policy by evaluating for itself competing medical studies.

ERISA plan participants such as the plaintiff in *Baxter* do not have a right to jury trial. *Thomas v. Oregon Fruit Products Co.*, 228 F.3d 991, 996-97 (9th Cir. 2000); *see also Mustoe v. Xiaoye Ma*, 193 Wn. App. 161, 164, ¶ 5, 371 P.3d 544 (2016) (“By filing cross motions for summary judgment, the parties concede there were no material issues of fact.”). In contrast, Strauss, who has a right to a jury trial on his coverage claim, did not move for summary judgment, but relied on expert testimony to argue that he was entitled to a trial at which the jury would determine whether proton beam therapy *more likely than not* results in superior or fewer side effects than IMRT. *See Sedwick v. Gwinn*, 73 Wn. App. 879, 885, 873 P.2d 528 (1994) (court applies on summary judgment the substantive evidentiary burden at trial); *Anderson v. Liberty Lobby*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (in a “run-of-the-mill civil case,” court inquires on summary judgment whether jury could find for plaintiff by a preponderance of the evidence).

Strauss does not have the burden on summary judgment to “show that PBT is superior to IMRT *as a matter of law*,” as Premera argues. (Answer 14, emphasis added) The Court of Appeals impermissibly weighed the parties’ competing evidence, in the light

most favorable to Premera, the moving party, adopting the erroneous burdens of proof that Premera continues to espouse in this Court.

Despite recognizing that “contract interpretation and application” of the policy’s plain language *should* be the dispositive issue on summary judgment, Premera disregards as “nonsensical” these elementary principles of insurance contract interpretation. (Answer 12-13) Applying the correct standard on summary judgment raises a triable issue of fact for the jury; it does not result in “*any* admissible scientific opinion *automatically*” satisfying the policy’s definition of medical necessity. (Answer 13, emphasis added) Strauss satisfied his burden to “make a showing sufficient to establish the existence” of proton beam therapy’s superior side effect profile. *Wuth v. Lab. Corp. of Am.*, 189 Wn. App. 660, 685, ¶ 49, 349 P.3d 841 (2015) (quoted source omitted), *rev. denied*, 185 Wn.2d 1007 (2016). (CP 1124-28, 1331-39, 1342-54)

C. The Court of Appeals wrongly disregarded admissible expert testimony establishing the “essential element” of Strauss’ claim.

An expert’s affidavit on an “essential element” of the plaintiff’s claim is sufficient to create a triable issue of fact. *Wuth*, 189 Wn. App. at 685, ¶ 49; *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346 (1979). Division One erred in disregarding the very

expert evidence that established proton beam therapy's superiority. *Strauss*, 1 Wn. App. 2d at 683, ¶ 59 ("the record establishes there are peer-reviewed medical studies that show the side effects of PBT may be superior to IMRT"). (Answer 11-12: acknowledging "the scientific evidence offered by both sides")

Dr. Laramore, by Premera's own admission an "impressive" Board-certified radiation oncologist (RP 32), concluded that "the overall therapeutic results" of proton beam therapy and IMRT "are not equivalent but would be better with proton radiotherapy." (CP 700, underline in original) Dr. Bush, also a Board-certified expert in radiation oncology, likewise testified that PBT is preferable to IMRT because it "improve[s] the safety profile of the treatment" by allowing "more of the radiation [to] end up where it needs to go, the prostate itself, and less radiation goes to the nontreatment areas." (CP 895) Both experts based their opinions on credible scientific evidence, including peer-reviewed studies and data from clinical trials involving PBT. (CP 1124-28, 1130-1244, 1246-1332, 1336, 1342-54) This admissible expert testimony created a genuine factual issue on the "essential element" of Strauss' breach of contract claim. It is neither conclusory nor "theoretical" simply because no *randomized* clinical trials of PBT and IMRT exist. (See Answer 12-14)

Conceding that Strauss' expert evidence "might qualify as a scientifically valid theory under *Frye*" (Resp. Br. 29-30; Answer 13; RP 32), Premera waived any objection by failing to challenge "as novel any of the *underlying scientific methods or principles*" on which Strauss' experts relied. *Advanced Health Care, Inc. v. Guscott*, 173 Wn. App. 857, 873-74, ¶ 32, 295 P.3d 816 (2013) (emphasis in original) (error to subject party's expert testimony to *Frye* test where party seeking exclusion did not challenge as "novel" the underlying scientific methods); *State v. Newbern*, 95 Wn. App. 277, 288-89, 975 P.2d 1041 (refusing to consider *Frye* challenge on appeal where party "objected only to the diagrams as substantive evidence, claiming they were not reliable," and "did not invoke *Frye* or otherwise argue that the evidence was not accepted within the scientific community"), *rev. denied*, 138 Wn.2d 1018 (1999). Regardless, the scientific data and peer-reviewed literature from reputable medical and scientific journals upon which Drs. Bush and Laramore relied are not "novel." (CP 1127-28, 1336, 1352-54; see App. Br. 19-21, 25-27; Reply 4-6, 9-10) Claims that Strauss' expert evidence "suffer[s]" from a "defect" because it is "based on models, dosimetric studies (studies that compare treatment plans) and cross-study comparisons" (Answer 12) goes to the *weight* of Strauss' evidence, not its admissibility.

In *Reese v. Stroh*, 128 Wn.2d 300, 302-03, 907 P.2d 282 (1995), for instance, the plaintiff sued his doctor for failing to treat his emphysema with Prolastin, a protein replacement therapy. The trial court directed a verdict for the defendant after finding plaintiff's expert causation opinion inadmissible where "there have been no statistically significant studies proving the efficacy of Prolastin therapy." 128 Wn.2d at 307. This Court reversed, rejecting the defendant's argument that the "lack of statistical support [was] fatal" to the expert opinion, and holding instead that courts must trust the jury's ability to "evaluate the foundation for [the expert's] opinion" accordingly. 128 Wn.2d at 309 (jury is "perfectly capable of determining what weight to give this kind of expert testimony") (quoted source omitted).

To survive summary judgment, Strauss did not have to establish that experts "generally accept" that proton beam therapy results in fewer side effects than IMRT, much less produce "gold standard" phase III clinical evidence conclusively proving PBT's superior side effect profile. (Answer 12-13) Neither *Frye* nor Premera's insurance policy requires "that the specific conclusions drawn from the scientific data" be "generally accepted in the scientific community" or that "every deduction drawn from generally accepted

theories . . . be generally accepted.” *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 611, ¶ 22, 260 P.3d 857 (2011). In addition, “considerable evidence” exists that “Phase III clinical trials are not the critical aspect in determining whether a therapy has become ‘generally accepted’ within the medical community.” *Wilson*, 65 F.3d at 365. Nor does Dr. Bush’s deposition statement that data exists “to support both sides” (Answer 14) render his expert opinion conclusory or theoretical; it merely raises a factual issue for the jury at trial – not for a court to decide as a matter of law on summary judgment. *Anderson*, 477 U.S. at 255 (credibility determinations “are jury functions, not those of a judge”).

As Division One recognized, and as Premera’s policy actually requires (CP 212), “[t]here is no dispute” that Strauss satisfied the policy’s requirement that proton beam therapy be a clinically appropriate and “generally accepted” treatment for prostate cancer. *Strauss*, 1 Wn. App. 2d at 683, ¶ 57 n.18. The Court of Appeals erred in then concluding that the “testimony of Dr. Laramore and Dr. Bush and the peer-reviewed medical studies they rely on do not create a material issue of fact” because the “undisputed record establishes there were no published clinical studies directly comparing PBT and IMRT.” *Strauss*, 1 Wn. App. 2d at 683, ¶ 58.

D. Strauss should be allowed to pursue his bad faith and Consumer Protection Act claims based on Premera's inadequate investigation and denial of coverage.

Whether an insurer acted in bad faith is a factual question for the jury. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 484, 78 P.3d 1274 (2003). Summary judgment on a bad faith or Consumer Protection Act (“CPA”) claim is appropriate *only* if there are “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 (internal quotation marks and quoted source omitted); *Safeco Ins. Co. of Am. v. JMG Rest., Inc.*, 37 Wn. App. 1, 14-15, 680 P.2d 409 (1984). Even where an insurer’s ultimate coverage decision on a first party claim is correct, an insurer has a duty of good faith and fair dealing to “conduct a reasonable investigation before denying coverage.” *Coventry v. Am. States Ins. Co.*, 136 Wn.2d 269, 279, 281, 961 P.2d 933 (1998) (quoted source omitted); *see St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 134, ¶ 26, 196 P.3d 664 (2008).

Former WAC 284-43-410² required initial claim reviews to be performed by someone “who [is] properly qualified, trained, [and] supervised.” The coverage determination must also “[i]nclude

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. The relevant portions of the regulation are unchanged.

consideration of the treating provider’s clinical judgment and recommendations” and “the extent to which the service is likely to produce incremental health benefits for the enrollee.” WAC 284-43-5440(2)(h). A jury could find that it was unreasonable to assign Dr. Kaneshiro, a pediatrician not qualified in radiation or oncology, to make a claim determination for prostate cancer treatment. By choosing not to speak to Dr. Bush and instead basing his decision only on the higher cost of proton beam therapy under Premera’s Corporate Medical Policy (a document that was not part of Strauss’ health insurance policy and that serves merely as a “guide” for claim determinations), a jury could find that Dr. Kaneshiro and Premera disregarded Strauss’ “treating provider’s clinical judgment” and ignored the treatment’s “incremental health benefits.”

A jury could also find that Premera acted in bad faith by disregarding its definition of “medical necessity” to deny coverage based on the lack of randomized clinical trials, despite the policy not requiring this specific type of “clinical evidence” to establish coverage. Under WAC 243-43-5440(2)(d), an insurer must clearly “[i]dentify the information needed in the decision-making process.” Premera concedes that “the lack of randomized trials” was “a key reason” for finding proton beam therapy not medically necessary (Resp. Br. 32)

even though nothing in the policy language requires such evidence. If Premera wanted randomized clinical trials to be a prerequisite for medical necessity, it was required by law to draft policy language including that “key” requirement, and to obtain the Insurance Commissioner’s approval. Instead, Premera violated WAC 284-43-5440(2)(d) and its duty of good faith by failing to properly identify in its policy that randomized clinical evidence is “needed in the decision-making process” to establish medical necessity.

E. This Court should award Strauss his attorney fees.

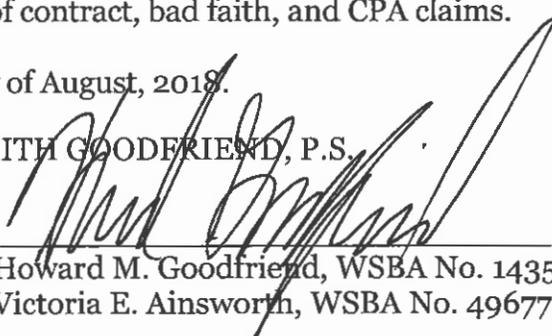
This Court should award Strauss his attorney fees at trial and on appeal because Premera forced him to “assume the burden of legal action, to obtain the full benefit of his insurance contract.” *Olympic Steamship Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 53, 811 P.2d 673 (1991); RAP 18.1(a).

IV. CONCLUSION

This Court should reverse the Court of Appeals and remand for trial on Strauss’ breach of contract, bad faith, and CPA claims.

Dated this 6th day of August, 2018.

SMITH GOODFRIEND, P.S.

By: 

Howard M. Goodfriend, WSBA No. 14355
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Attorneys for Petitioners

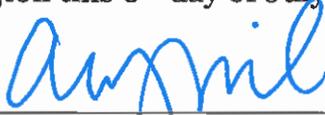
DECLARATION OF SERVICE

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

That on July 6, 2018, I arranged for service of the foregoing Supplemental Brief of Petitioners, to the Court and to the parties to this action as follows:

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Andrienne E. Pilapil

SMITH GOODFRIEND, PS

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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

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