

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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ALINA BOYDEN and  
SHANNON ANDREWS,

Plaintiffs,

Case No. 17-cv-264

v.

STATE OF WISCONSIN DEPARTMENT  
OF EMPLOYEE TRUST FUNDS, et al.,

Defendants.

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**PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION  
IN *LIMINE* TO EXCLUDE EXPERT TESTIMONY OFFERED BY DR. BUDGE**

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Plaintiffs, Alina Boyden and Shannon Andrews (collectively "Plaintiffs"), through their undersigned counsel, respectfully submit the following brief in opposition to Defendants' Motion *in Limine* (Dkt. # 178) seeking to exclude certain testimony of Plaintiffs' expert, Stephanie Budge, Ph.D.

**ARGUMENT**

Federal Rule of Evidence 702 and the factors set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), protect the jury from being swayed by unreliable theories in areas beyond the jury's experience or understanding. When analyzing the reliability of an expert witness, courts should consider the *Daubert* factors. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141-42 (1997); *Deputy v. Lehman Bros., Inc.*, 345 F.3d 494, 505 (7th Cir. 2003) (noting that the *Daubert* factors are "neither definitive nor exhaustive, but rather flexible to account for the various

types of potentially appropriate expert testimony”). However, the most important test is whether the expert opinion will help the jury understand an issue outside a layperson’s general knowledge. *See* FED. R. EVID. 702(a); *see also United States v. Curry*, 977 F.2d 1042, 1051-52 (7th Cir. 1992).

Defendants ask this Court to preclude Dr. Budge from testifying about “the costs to insurance plans of covering transition-related care for transgender individuals.” (Dkt # 178 at 4). Defendants argue that Dr. Budge is unqualified to testify on this issue because she is not a health care actuary<sup>1</sup> nor an expert in the field of health insurance practices. (*Id.* at 6-7). They also argue that Dr. Budge’s opinions with respect to the cost-effectiveness of insurance coverage for medical treatments for gender dysphoria should be excluded because they are based on “studies that are not used in the actuarial sciences for benefit pricing purposes.” (*Id.* at 8-9). Defendants fail to present any reasonable basis upon which to exclude Dr. Budge’s testimony.

**A. Dr. Budge’s Expertise as a Psychologist Who Treats Gender Dysphoria Qualifies Her to Testify on the Costs of Denying Coverage for Transition-Related Care.**

Defendants assert that Dr. Budge’s opinions about the cost-effectiveness of medical treatment for gender dysphoria should be excluded because she “lacks any specialized knowledge, skill, experience or education in the area of insurance coverage and assessing the cost-effectiveness of exclusion provisions for insurance

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<sup>1</sup> Defendants suggest that their insurance expert, David Williams, is an actuary. (Dkt. # 178 at 8) (“Both the Plaintiffs and the State Defendants have submitted reports from health insurance actuarial experts . . .”). Mr. Williams, however, is *not* an actuary. (Williams Dep. (Dkt. # 111 at 24:14-19 (not an actuary); 20:6-8, 23:10-13 (no courses in actuarial science))).

places.” (Dkt. # 178 at 6). However, Defendants misrepresent the scope of Dr. Budge’s opinion.

Dr. Budge does not purport to be an expert “in the area of insurance coverage.” Rather, Dr. Budge opines that excluding coverage for medical treatments of gender dysphoria may result in additional long-term costs, and that such costs have the potential to outweigh the short-term savings associated with denying coverage for these treatments. (Dkt. # 158, Budge Dep. at p. 112:12-13). In forming her opinion, Dr. Budge draws on her training, research, and clinical experience treating gender dysphoria, which is expressly permitted by Fed. R. Evid. 703: “an expert may base an opinion on facts or data in the case that the expert has . . . personally observed.” Throughout her decade-long career as a mental health professional specializing in gender dysphoria, Dr. Budge has seen that denying coverage for transition-related care often causes other conditions to appear or become exacerbated. *Id.* In particular, Dr. Budge explains that untreated gender dysphoria can lead to suicide, depression, anxiety, drug abuse, and other problems. *Id.* As a licensed psychologist with years of experience treating gender dysphoria, Dr. Budge is highly qualified to testify on the medically necessary treatments associated with these collateral conditions. Dr. Budge has testified that denying coverage of treatment for gender dysphoria often results in severe ongoing distress for many patients, including suicide attempts that can result in expensive emergency room visits and hospitalizations. (*Id.* at 113:8-21). It does not take an actuary or health insurance expert to know that additional treatments come with additional costs. Accordingly, Dr. Budge is wholly qualified to

testify about the sequelae of denying medically necessary treatment, as well as potential associated costs.

**B. Dr. Budge Cites to Reliable Studies Regarding the Costs of Denying Coverage for Transition-Related Care, Which is Permitted by Fed. R. Evid. 703.**

Defendants assert that Dr. Budge is unqualified to opine on the costs of denying coverage for transition-related care because she bases her opinion, in part, on academic studies. However, Fed. R. Evid. 703 permits experts to base their opinion on the work of other experts in the field, provided the underlying facts or data are reliable. *See Gopalratnam v. Hewlett-Packard Co.*, 877 F.3d 711, 789 (7th Cir. 2017); *see also Dura Auto. Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d 609, 613 (7th Cir. 2002) (“[I]t is common in technical fields for an expert to base an opinion in part on what a different expert believes on the basis of expert knowledge not possessed by the first expert. . . .”).

Defendants argue that the studies cited by Dr. Budge in her expert report are unreliable because they “are not used in the actuarial sciences for benefit pricing purposes.” (Dkt. # 178 at 8). However, Defendants misstate the field of expertise at issue. Dr. Budge is not opining on the separate actuarial question of how gender dysphoria treatment benefits are, or should be, *priced* by an insurer. Rather, Dr. Budge testifies on the broader question of whether excluding coverage for such treatments has long-term costs that could exceed the cost of providing the medically necessary care, which is well within the scope of her expertise. Thus, it is irrelevant that insurance companies do not rely on academic studies, such as those cited by Dr.

Budge, when evaluating the costs associated with certain treatments; Dr. Budge does not opine on how insurance companies evaluate costs.

The question at hand is whether Dr. Budge is permitted to opine on costs associated with denying coverage for transition-related care. As discussed *supra*, based on her clinical training and experience, Dr. Budge is highly qualified to testify about the existence of collateral conditions, as well as about the general costs associated with them. Furthermore, under Fed. R. Evid. 703, Dr. Budge is entitled to supplement her personal knowledge with facts and data produced by other experts in the field. She is not required to perform her own original research, as Defendants assert. (Dkt. # 178, p. 7) (“There is no indication that Dr. Budge undertook any investigation or economic analysis independently to determine what the costs of treatment would be for any of the health issues that she theorizes could result with the Exclusion.”).

As an expert in public health (Budge Dep. at 112:8-10) and as a social scientist, Dr. Budge has the capacity to evaluate the literature on the costs and benefits of various policy choices. (*See* Budge Dep. at 114:12-16). Defendants selectively quote from Dr. Budge’s deposition testimony to suggest that she simply parroted, without any critical assessment, the conclusion of a study that estimated the annual cost of treating depression, anxiety, drug abuse and other conditions resulting from a lack of coverage for medical treatments for gender dysphoria. (Dkt. # 178 at 7, 10). However, Defendants questioned Dr. Budge about a study *without providing a copy for her reference*. Dr. Budge declined to recite from memory minute details contained

in the referenced study, but nowhere did she indicate she did not understand the studies she cited. (Dkt. # 158. at 113:19-116:1). (“Without that article in front of me I can’t answer that question fully.”). Even without being given the opportunity to review the study about which she was being questioned, Dr. Budge provided a detailed explanation about how her clinical experience with patients who had financial barriers to obtaining care, along with her own research, informed her opinions about the costs of not providing coverage for necessary gender-confirming treatments. *Id.* Her opinions thus are not, as Defendants allege, the sort of unfounded *ipse dixit* that courts reject under F.R.E. 702. (Dkt. # 178 at 9).

Regardless of whether U.S. insurance companies take into account the long-term costs of treating depression, suicidality and other consequences of failure to provide coverage in their pricing of gender dysphoria benefits (Dkt. # 178 at 8-9 (citing Williams report)), these costs do exist, should be considered by the jury, and are extremely relevant in determining whether cost considerations justified the State’s exclusion. Indeed, while noting that the sorts of longer-term costs and benefits reflected in the articles upon which Dr. Budge relied were not useful for normal insurance pricing practices (Williams Dep. (Dkt. # 111) 184:12 - 187:25)), Defendants’ expert conceded that such longer-term considerations are useful for deciding whether the benefit “is a value to the patient . . . and whoever’s paying for the service” by improving “quality of life.” (*Id.* at 187:1-22).

**CONCLUSION**

Even if Dr. Budge is not permitted to testify about cost effectiveness (though she is qualified to do so), she should not be precluded from testifying about the consequences of not receiving necessary medical treatments for gender dysphoria. Defendants provide no reasonable basis to support exclusion of such testimony. There is no dispute that Dr. Budge – a licensed and practicing psychologist who specializes in treating gender dysphoria – is qualified to testify about gender dysphoria, its treatment, and the consequences of failure to provide medically necessary treatments. Therefore, Plaintiffs respectfully request that this Court deny Defendants’ motion to exclude the identified testimony of Dr. Budge.

Dated this 14th day of September, 2018.

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