No. 98118-3

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

JAMES NEEDHAM, Respondent,

v.

SHERYL DREYER, and DAVITA EVERETT PHYSICIANS, INC. P.S. d/b/a The Everett Clinic, Petitioners.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY
#16-2-20189-31

ANSWER TO PETITION FOR REVIEW

BURI FUNSTON MUMFORD & FURLONG, PLLC

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INTRODUCTION

A doctor's inattention to her patient's abnormal vital signs and complaints of trouble breathing is never an acceptable exercise of professional judgment. The jury instruction at issue in the case – the exercise of medical judgment -- has been problematic throughout its history. WPI 105.08 ("to be used with caution"); *Fergen v. Sestero*, 182 Wn.2d 794, 808, 346 P.3d 708 (2015) ("scattered case law"). As the Court of Appeals correctly concluded, the improper use of the instruction here requires a new trial.

Appellant James Needham lost both his legs to frostbite after his treating physician, Dr. Sheryl Dreyer, failed to diagnose an emergent infection during a routine clinic visit. At his jury trial for medical malpractice, Mr. Needham presented testimony from multiple doctors that Dr. Dreyer breached the standard of care by failing to address abnormal vital signs and to investigate his complaints of breathing problems. Over Plaintiff's objection, the trial judge allowed the medical judgment instruction even though this was a routine clinic visit. Like so many cases before his, this instruction was tantamount to a directed verdict. The jury absolved Dr. Dreyer of liability.

Mr. Needham appealed, and the Court of Appeals reversed.

> Because Dr. Dreyer did not select one of two or more alternative courses of treatment and did not arrive at a judgment to follow a particular course of treatment or make a particular diagnosis with regard to Needham's breathing symptoms, the trial court erred by giving the exercise of judgment instruction. The trial court further erred by admitting evidence of Needham's alcohol use on the day of his collapse because the probative value of that evidence was substantially outweighed by the risk of unfair prejudice. Finally, because these errors were not harmless, we reverse the jury verdict and remand for a new trial.

Needham v. Dreyer, __ Wn. App. 2d __, 454 P.3d 136, 139 (2019). Dr. Dreyer and the Everett Clinic now seek this Court's review. Because the Court of Appeals reversed for good reason, Mr. Needham respectfully requests this Court to deny Defendants' petition for review.

I. Restatement Of Issues Presented.

Dr. Dreyer and the Clinic's petition presents three issues:

A. The medical judgment jury instruction "should only be given when the doctor chooses between reasonable, medically acceptable options; it should not be given simply if a physician is practicing medicine at the time." *Fergen v. Sestero*, 182 Wn.2d 794, 808, 346 P.3d 708 (2015). The Court of Appeals reversed the trial court because "the record contains no evidence that Dr. Dreyer *made* any of the choices that she claims she *had*." *Needham v. Dreyer*, __ Wn. App. 2d __, 454 P.3d 136, 144 (2019). Did the trial court give the instruction in error?

B. Under ER 403, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." The Court of Appeals reversed the trial court's admission of evidence that Mr. Needham drank alcohol, citing "the highly prejudicial nature of the evidence and the inability to discern its probative value." *Needham*, 454 P.3d at 147. Did trial court abuse its discretion by admitting the evidence?

C. "A prejudicial error...affects or presumptively affects the results of a case and is prejudicial to a substantial right." *Blaney v. Int'l Ass'n of Machinists And Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 211, 87 P.3d 757 (2004). The Court of Appeals concluded the faulty jury instruction and prejudicial alcohol evidence materially affected the outcome at trial. Was the cumulative error prejudicial?

II. Statement of Facts.

Under RAP 10.3, a Statement of the Case should be "a fair statement of the facts and procedure relevant to the issues presented for review, without argument." Defendants' petition violates this rule by repeatedly attacking Division I in the guise of factual statements. (Petition at 5 n.2) ("Contrary to Division I's statement") (Petition at 8 n.3) ("Division I rejected Dr. Dreyer's argument on appeal"); (Petition at 11) ("Division I adopts several of Mr. Needham's self-serving characterizations of the evidence"); (Petition at 12) ("Division I ignored the facts and arguments

considered by the trial court before and during trial"). Mr. Needham respectfully requests the Court to give no weight to these improper attacks.

The Court of Appeal's decision provides a neutral statement of the relevant facts. *Needham*, 454 P.3d at 139-141. On December 28, 2012, James Needham went to a routine clinical visit with his primary care doctor, Sheryl Dreyer, M.D., who is an employee of the Everett Clinic. (5 VRP 736) Mr. Needham's appointment was the last of the day on Friday before the New Year's holiday.

Mr. Needham is HIV positive. Dr. Dreyer had been his primary care doctor since 2011, when he moved to Washington from Oregon. (3 VRP 427) He saw her frequently for general primary care and management of his HIV medication. (3 VRP 37). Three months before the final December clinic visit, on September 25, 2012, Mr. Needham saw Dr. Dreyer for a regular office visit. On September 28, 2012, Needham's roommate, Jackie Black, called the Clinic to express concerns regarding Needham's health; Needham was coughing and exhibiting loss of balance, drowsiness, and disorientation. Dr. Dreyer recommended that Black take Needham to an emergency room (ER) for an evaluation. *Needham*, 454 P.3d at 139.

On September 30, 2012, Mr. Needham was hospitalized with pneumonia in the lower lobe of his right lung. (2 VRP 209) Dr. Dreyer saw

him again on October 12, 2012 and suggested he may need a chest x-ray to confirm that the pneumonia had cleared. (3 VRP 218).

On October 23, 2012 Mr. Needham was hospitalized at Providence Health Center with a clostridium dificile infection (c-diff). (3 VRP 219 and 224-25) As part of his course of treatment, he received a chest x-ray and an abdominal CT scan. (3 VRP 221) His chest X-ray was negative but the abdominal CT showed that the lower tip of the right lung was abnormal. (3 VRP 221).

On December 28, 2012 Mr. Needham came to Dr. Dreyer's clinic for a routine clinical appointment, including regular bloodwork. (Def. Ex. 101 at 262; CP ___)*. The medical assistant who checked Mr. Needham into the clinic noted that he reported complaints of back pain, foot pain and **difficulty breathing**. (Def. Ex. 101at 254).

His pulse oximeter reading was below normal at 93%. *Id.* His blood pressure was 80/50, the lowest ever recorded for him. *Id.* and (Def. Ex. 101 at 287-288). His pulse was at a tachycardic level of 106, the highest ever measured for him. *Id.* The electronic medical record system used by the clinic created a red flag in the electronic chart to alert Dr. Dreyer that Mr. Needham's blood pressure was two standard deviations from normal.

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* The Clerk did not assign clerk's paper numbers to the trial exhibit. All references will be to the page number of the exhibit.

Id.; (5 VRP 854:19-855:6) A graph in Mr. Needham's medical records displays how abnormal plaintiff's vital signs were on December 28, 2012. *Id.*

Although Dr. Dreyer's medical assistant noted in the electronic chart Mr. Needham "says he can't breathe very good", Dr. Dreyer did not ask him why he told the medical assistant that he was having breathing problems. (Def. Ex. 101 at 254); (3 VRP 256-257) Dr. Dreyer testified that she did not recall discussing the symptoms reported to the medical assistant at any time during the meeting with Mr. Needham. (2 VRP 384) Dr. Dreyer did not perform a chest examination. (2 VRP 382:14-15)

Instead, Dr. Dreyer spent time talking to Mr. Needham about recent events in his life, including the passing of his dog and his roommate. (3 VRP 450) She did a cursory exam of his back and told him that he was just depressed. *Id.* Dr. Dreyer's note indicates that he should pursue a future gastroentrology consultation and follow up in 1-2 months. (Def. Ex. 101 at 259). She then sent Mr. Needham home and left for the weekend.

A few hours after Mr. Needham was discharged, the laboratory paged the on-call doctor at the Everett Clinic with the news that Mr. Needham's lab results showed a white blood cell count of roughly 29,700. (Def. Ex. 101 at 262-263). This indicates an emergent infectious process. (3 VRP Vol. 272) The clinic then made several unsuccessful attempts to

contact Mr. Needham to tell him that he needed to be seen again. *Id.* However, the clinic failed to reach him. *Id.*

Three days after Mr. Needham left the clinic, on New Year's Day, 2013, emergency responders found him unconscious in his cabin in Concrete, Washington. When Mr. Needham was transported by ambulance to the Sedro Woolley emergency room, he was found to have a serious case of pneumonia in the lower lobe of his right lung, and severe frostbite. (5 VRP 861) The frostbite eventually required Mr. Needham to have both legs amputated slightly below the knee. (5 VRP 848)

Mr. Needham sued Dr. Dreyer and the Everett Clinic for breaching the standard of care by sending him home from the clinic when his vital signs and reported trouble breathing indicated that he was seriously ill, and in need of further evaluation.

Over the plaintiff's objection, the trial court gave the medical judgment instruction, WPI 105.08, at defendants' request. (Court's Instruction to Jury; CP 102). The jury returned a verdict that Dr. Dreyer did not breach the standard of care. (Special Verdict Form; CP 85-87). Mr. Needham appealed, and on December 23, 2019, the Court of Appeals Division I reversed and remanded for a new trial.

> [W]e cannot ignore that giving the exercise of judgment instruction nearly always results in a defense verdict, and courts should use the instruction with caution. See Fergen,

> 182 Wash.2d at 818, 346 P.3d 708 (Stephens, J., dissenting). Indeed, the four Justice dissent in Fergen noted that "[i]n every case to have considered an error of judgment instruction, this court has recognized this type of instruction serves to emphasize the defendant's theory of the case." Fergen, 182 Wash.2d at 818, 346 P.3d 708. Here, the jury instruction affected the final outcome of the case when it emphasized Dr. Dreyer's theory that Needham's drinking alcohol on December 31 caused his collapse. Given that the testimony was prejudicial to Needham's clams, it cannot be said that his substantial rights were unaffected. Thus, where, as here, the instruction was improper, the error can hardly be said to be harmless.

Needham, 454 P.3d at 147.

Dr. Dreyer and the Everett Clinic now petition this Court for Review.

ARGUMENT

III. The Court of Appeals Properly Applied This Court's Ruling in *Fergen v. Sestero.*

To justify review, Defendants allege that the Court of Appeal's decision conflicts with *Fergen v. Sestro,* 182 Wn.2d 794, 346 P.3d 708 (2015), *Colley v. PeaceHealth,* 177 Wn. App. 717, 312 P.3d 989 (2013), and the harmless error doctrine. (Petition at 12). None of these arguments are persuasive, and none require further review by this Court.

A. Dr. Dreyer Was Simply Practicing Medicine At The Time.

The medical judgment instruction "should not be given simply if a physician is practicing medicine at the time." *Fergen*, 182 Wn.2d at 808.

The medical judgment rule protects health care providers from liability for making a reasonable choice in diagnosis and treatment when *more than one alternative is within the standard of care*. In other words, a health care provider's reasonable choice, on its own, should not create liability because medical treatment inherently requires making choices between alternatives.

Given the technical nature of medicine, practitioners can always assert in hindsight that every action or inaction with a patient involved a choice. For this reason, malpractice in routine medical encounters (which still involve choices) falls outside the medical judgment rule, because the negligence claim is not for the *choice* itself, but for the practitioner's failure to meet the standard of care.

In this case, Mr. Needham came to the Everett clinic for what Dr. Dreyer characterized as a routine office visit. (2 Vol. 383) He did not come seeking a diagnosis or with a pressing complaint. Instead, he had a regularly scheduled visit to make sure his medications were on track and to complete routine lab work. *Id.* When he presented at the clinic he was asked about what was bothering him. He reported pain in his back and feet, and that he couldn't breathe very good. (Def. Ex. 101 at 254) He was not consulting Dr. Dreyer for her opinion about what alternatives were available to him to treat these reported symptoms, but rather was simply reporting symptoms and relying on his doctor to know what to do.

What could be more emblematic of "merely practicing medicine at the time?" As the Court of Appeals recognized, Dr. Dreyer did not choose among diagnoses or treatments during Mr. Needham's routine office visit.

> According to Needham's testimony and the medical record from his visit to the Clinic on December 28, 2012, Dr. Dreyer did not discuss Needham's breathing problem with him, and Dr. Dreyer testified that she did not perform a chest examination during the visit. Dr. Dreyer testified that she did not do so because Needham did not tell her he was having breathing problems. Specifically, the medical record indicates that the examination and treatment plan only addressed HIV, diarrhea, back pain, and Needham's mental health.

Needham, 454 P.3d at 143. Dr. Dreyer was not exercising medical judgment for Mr. Needham's breathing problems necessary to trigger protection from liability. "Dr. Dreyer did not address Needham's breathing symptoms at all, and it follows that she did not exercise her medical judgment to address Needham's symptoms." *Needham*, 454 P.3d at 143.

The Court of Appeals carefully applied this Court's guidance in *Fergen*, refusing to approve the medical judgment instruction in case where Dr. Dreyer was simply practicing medicine during a routine office visit.

B. Dr. Dreyer Did Not Choose Between Reasonable, Medically Acceptable Alternatives

Next, the medical judgment rule applies only when the doctor chooses between reasonable, medically acceptable options. "The defendant had a choice of therapeutic techniques within the proper standard of care

and used his judgment to choose which course of treatment to take." *Fergen*, 182 Wn.2d at 807. In other words, each of the physician's options or choices must be within the standard of care. Here, Dr. Dreyer failed to notice and act on Mr. Needham's abnormal vital signs, and she failed to ask why he reported to the medical assistant that he was having trouble breathing. Overlooking abnormal vital signs is not a reasonable treatment alternative.

> Choices may exist in every medical situation, but an active choice must be made in order to receive the exercise of benefit instruction. In short, we are not persuaded by Dr. Dreyer and the Clinic's assertion that the exercise of judgment instruction was proper simply because Dr. Dreyer may have *had* a choice when there is no evidence that she *made* a choice.

Needham, 454 P.3d at 144 .

In their petition, Defendants attack the Court of Appeals for three reasons. First they criticize the court for "rel[ying] on its own re-examination of the facts in *Fergen*, as well as dicta within one other case, to reach an opposite result." (Petition at 13). The Court of Appeals examined the *Fergen* decision closely and used helpful instruction from Division III in *Housel v. James*, 141 Wn. App. 748, 760, 172 P.3d 712 (2007). This is what an appellate court should do when reviewing a jury instruction that "is to be used with caution." WPI 105.08 (Note On Use). The pattern instruction further advises: "this instruction may be used only

when the doctor is confronted with a choice among competing therapeutic techniques or among medical diagnoses." WPI 105.08 (Note On Use) The Court of Appeals did not err by carefully examining the appellate record, caselaw, and relevant treatises before reaching its decision.

Second, Defendants fault the court for not setting the "low bar" in *Fergen* even lower to affirm the trial court's decision. (Petition at 14); *Fergen*, 182 Wn.2d at 807 ("we consistently see a low bar that must be satisfied"). If Defendants are correct that Dr. Dreyer made a choice among competing therapeutic techniques or among medical diagnoses in this case, then this controversial instruction is appropriate in every case. No routine office visit or medical examination would be outside the shelter of the medical judgment rule. The Court of Appeals correctly enforced the boundaries to the rule, namely, that Dr. Dreyer must at least show she made a choice. Her proof -- that a choice existed -- would immunize practitioners in every medical interaction in every context.

Third, Defendants criticize the Court of Appeals for not providing enough deference to the trial court. (Petition at 15). The Court of Appeals reviewed the trial court's decision to give the medical judgment instruction for an abuse of discretion. *Needham*, 454 P.3d at 141 (2019) ("review a trial court's decision to provide a jury instruction for abuse of discretion").

> A court should give the instruction only when the physician presents sufficient evidence that they made a choice between two or more alternative, "reasonable [and] medically acceptable" treatment plans or diagnoses. Fergen, 182 Wash.2d at 808, 346 P.3d 708. The court should not give the instruction "simply if a physician is practicing medicine at the time." Fergen, 182 Wash.2d at 808, 346 P.3d 708.

Needham, 454 P.3d at 142. The Court found an abuse of discretion based on Defendants' failure to qualify for the controversial, supplemental instruction.

> Dr. Dreyer presented no evidence that she even discussed Needham's *present* breathing difficulties with him. Rather, the record indicates that Dr. Dreyer simply did not acknowledge Needham's reported chest symptoms despite being able to learn of them by reviewing his medical chart. It does not show that she reached the stage of medical treatment where she was exercising her judgment to choose between diagnoses and treatments.

Needham, 454 P.3d at 144. This is not a matter of credibility or weight; the record has no evidence that Dr. Dreyer made a diagnostic choice during the December office visit. No reasonable judge would give the instruction under these circumstances.

Choosing to focus on one suspected disease and missing a developing infection from another disease is not a reasonable medical choice. A physician is required to be vigilant about all possible infections. Mr. Needham's claim is not that she should have focused on C. difficile rather than pneumonia -- or vice versa. It is that she failed to notice

important signs of infection from *both* of these diseases. This is not a diagnostic choice; it is malpractice.

C. The Medical Judgment Instruction Unfairly Benefits Physicians Over Other Professionals.

Professional negligence has the same elements for all professions: duty, breach, causation and damages. Despite being codified in RCW Ch. 7.70, the elements of a medical malpractice claim are effectively the same as a common law negligence claim involving other professionals. But physicians are the only professionals who enjoy a special, exclusive, jury instruction that emphasizes to the jury that medical treatment and diagnosis involves choices and judgment calls.

There is no legal judgment instruction to use in malpractice cases involving attorneys. There is no financial judgment instruction to use in cases involving accountants. There is no engineering judgment instruction to use in cases involving engineers. The use of the medical judgment instruction emphasizes that physicians enjoy special status and are held to a different standard than other professionals.

The instruction exists to remind the juries that the practice of medicine requires choices. *Fergen*, 182 Wn.2d at 808. Is not the same true for other professions? Why do juries only need to be reminded that

professionals exercise judgment and make choices in the medical context and not in other contexts?

As the dissent in *Fergen* points out, the medical judgment is a relic of a bygone era where doctors always knew best and could only be held accountable when they acted in bad faith. It is time to abolish this antiquated and slanted instruction entirely. At minimum, trial courts must follow this Court's guidance and use the instruction cautiously for a limited set of circumstances. The Court of Appeals appropriately reversed the trial court for not recognizing these boundaries.

IV. *Colley* Does Not Entitle Experts To Speculate.

Next, the Court of Appeals concluded that the trial court abused its discretion by admitting speculative expert testimony.

> Dr. Dreyer's experts relied solely on Needham's statement that he drank on the day of his collapse. The evidence does not show that Needham was inebriated when he collapsed or what his blood alcohol content (BAC) level was. Instead, the testimony was based on speculation, which was not supported by a factual basis in the record.

Needham, 454 P.3d at 145. At trial, Defendants persuaded the trial court that *Colley v. Peacehealth*, 177 Wn. App. 717, 312 P.3d 989 (2013), entitled their experts to testify on the possible effect alcohol may have had on Mr. Needham's condition.

The Court of Appeals identified a critical distinction with *Colley*: "the experts in *Colley* relied on confirmed diagnoses, an extensive past medical history, and an admitted *history* of alcoholism." *Needham,* 454 P.3d at 145. Since none of that existed here, Defendants' experts, by their own admission, were "speculating as to the affect that alcohol could have had on Needham at the time of the collapse or whether it did." *Needham*, 454 P.3d at 146. The Court of Appeals appropriately concluded this was an abuse of discretion. *Volk v. DeMeerleer*, 187 Wn.2d 241, 277, 386 P.3d 254 (2016) ("when an expert fails to ground his or her opinions on facts in the record, courts have consistently found that the testimony is overly speculative and inadmissible").

A. Defense And Plaintiff Experts Must Meet The Same Evidentiary Standard.

Opinion testimony can only be admitted if it is helpful to the trier of fact. In order to be helpful, it must be relevant. Testimony that is speculative is not relevant. To be relevant, opinion testimony must be stated on a more probable than not basis.

> Expert medical testimony must meet the standard of reasonable medical certainty or reasonable medical probability. *See, e.g., Ritzschke v. Dep't of Labor & Indus.,* 76 Wn.2d 29, 30, 454 P.2d 850 (1969); *O'Donoghue v. Riggs,* 73 Wn.2d 814, 822–23, 440 P.2d 823 (1968); *see also Restatement (third) of Torts: Liability of Physical and Emotional Harm* § 28 cmt. c(5); *Black's Law Dictionary* 1380 (9th ed. 2009) (noting that "reasonable medical probability" and "reasonable medical certainty" are used interchangeably).

Anderson v. Akzo Nobel Coatings, Inc., 172 Wn.2d 593, 606–07, 260 P.3d 857 (2011).

In their petition, Defendants assert a different standard for defense experts under *Colley*.

> [T]he trial court properly admitted testimony of defense experts that was not offered to establish a superseding cause, but to show that the plaintiff lacked proof of his causation theory by identifying other explanations for the claimed injury and opining that it was not possible to infer with certainty that those other explanations could not be ruled out. 177 Wn. App. at 729, 732. The trial court was not required to exclude the evidence as irrelevant or speculative because "[t]he defendant does not have the burden to prove causation or lack of causation." *Id.* at 728-29.

(Petition at 17). According to Defendants, since they do not have the burden of proof, their medical experts can testify on *possible* alternative causes for injury.

The Court of Appeals wisely rejected this attack on the fundamental standards of relevance and admissibility.

> The defense can rely on evidence in the record to show that the plaintiff lacked proof of causation when there are other known potential causes of plaintiff's injury. *Colley*, 177 Wash. App. at 729, 312 P.3d 989. In short, in *Colley*, we held that the defense may attack the premise of the plaintiff's causation theory, if the defense presents evidence of causation that is relevant and probative. Specifically, the evidence must first be admissible, and expert testimony must be based on facts in the record, or risk being overly speculative and inadmissible.

Needham, 454 P.3d at 145.

An expert can rule out a cause on a more probable than not basis, but may not speculate on what the cause might have been. In other words, a defense expert may testify, "I do not know what the cause was, but I can give an opinion on a more probable than not basis that it was not *x.*" But an expert may not testify that, "I cannot state this on a more probable than not basis, but in my opinion it could have been *x, y or z.*"

B. The Trial Court Admitted Speculative And Prejudicial Evidence.

By admitting evidence of Mr. Needham's alcohol consumption, and then allowing Defendants' experts to speculate on its possible contribution to his injuries, the trial court caused unfairly prejudiced Mr. Needham in the eyes of the jury.

> We are quite concerned about the prejudicial impact of this testimony. We are aware that it is certainly possible that the jury rejected Kramer's liability claims because it thought poorly of him.

Kramer v. J.I. Case Mfg. Co., 62 Wn. App. 544, 559–60, 815 P.2d 798 (1991). As the Court of Appeals concluded,

> The evidence's probative value is difficult—if not impossible—to discern. On the other hand, the evidence likely had a significant prejudicial effect, which cast Needham as a heavy drinker, referenced alcohol within Needham's medical records, and provided the jury with a more understandable or relatable cause of collapse, i.e. over-consumption of alcohol. Because of the highly prejudicial

> nature of the evidence and the inability to discern its probative value, we conclude that the trial court abused its discretion by admitting it.

Needham, 454 P.3d at 146–47.

V. The Cumulative Errors Materially Affected Mr. Needham's Trial.

Finally, Defendants argue that the trial court's errors did not materially affect the jurors' deliberations and verdict. "[E]ven if there was error, Division I's conclusion that the error was not harmless is contrary the well-established presumption that a jury followed the court's instructions." (Petition at 19). Defendants underestimate the effect of the trial court's errors.

The Court of Appeals applied the correct standard for reversable error and found that the error below required a new trial. *Needham*, 454 P.3d at 147 ("outcome of the trial...materially affected"). Defendants' repeated, unsupported, allegations of "binge drinking", coupled with the powerful medical judgment instruction, led directly to the jury's verdict for Dr. Dreyer. "The jury instruction affected the final outcome of the case when it emphasized Dr. Dreyer's theory that Needham's drinking alcohol on December 31 caused his collapse." *Needham*, 454 P.3d at 147. The cumulative errors deprived Mr. Needham of a fair trial.

CONCLUSION

Fair trials do not simply happen. They are the product of a trial court giving appropriate jury instructions and guarding against bias and speculation. In this case, the trial court erred by using an instruction that emphasized the medical defense theory of the case, and then allowing the defense medical experts to offer speculative and prejudicial opinions weighted with the prestige of their qualifications. An HIV-positive man without wealth, power or prestige had no chance of a fair trial with these legal errors favoring the defense. The Court of Appeals correctly invalidated the outcome of this unfair process and remanded for a new trial free of the advantages the trial court accorded to the defendant physician. Respondent James Needham respectfully requests the Court to deny Defendants' petition for review and remand his case for a new trial.

DATED this 20 day of February, 2020.

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