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 AMICUS

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INTRODUCTION

Amici Washington State Medical Association, Washington Hospital Association, and American Medical Association urge this Court to accept review to promote using the medical judgment instruction in most medical malpractice cases. Why? Because giving the instruction almost always results in a defense verdict. *Fergen v. Sestro*, 182 Wn.2d 794, 823, 346 P.3d 708 (2015) (Stephens, J., dissenting). Additionally, Amici want a broad reading of *Colley v. PeaceHealth*, 177 Wn. App. 717, 312 P.3d 989 (2013), that permits defense experts to speculate on the causes of a plaintiff's injury. Amici and the defense bar fear the loss of these two weapons that give them substantial advantages at trial.

The Court of Appeals properly recognized and enforced this Court's limits in *Fergen,* that trial courts should only give the medical judgment instruction with caution and not in the case of a routine office visit. The Court of Appeals also correctly held that all expert medical testimony – whether from the plaintiff or defense – must be made on a more probable than not basis. No further review is necessary to reinforce these points.

Respondent James Needham respectfully requests this Court to deny the Petition for Review and remand this case for a fair trial.

I. Amici Would Eliminate Any Limits On Using The Instruction.

The Brief of Amici underscores the need for clear limits on using the medical judgment instruction. First, as Amici argue, every interaction with a patient involves choices, and in their view, the medical judgment instruction was appropriate here and in most if not all cases. Second, the instruction helps doctors win malpractice cases. Without it, their liability exposure will increase. Third, Amici believe that once the trial court gives the instruction, "it is not for a reviewing court to elevate its view of certain portions of the record over that of the jury's." (Amici Brief at 8).

This Court has repeatedly warned that the medical judgment instruction should not be given in every trial for medical malpractice.

> [T]his instruction is not appropriate in every medical malpractice action, only those based in negligence where the doctor faced a diagnostic or treatment choice that called on his or her judgment. It may be given to supplement a general instruction on the proper standard of care only when there is evidence that the physician complied with that standard of care and skill required by the circumstances. While the exercise of professional judgment is an inherent part of the care and skill involved in the practice of medicine, this instruction is limited to situations where the doctor uses judgment to choose between alternative treatments or diagnoses.

Fergen v. Sestero, 182 Wn.2d 794, 804–05, 346 P.3d 708 (2015) (citations and quotations omitted); *Watson v. Hockett*, 107 Wn.2d 158, 165, 727 P.2d

669 (1986) ("error in judgment instruction is, however, to be given with caution").

In Amici's view, the instruction is appropriate whenever a medical practitioner makes choices in treating a patient.

> [W]hile the Decision asserts Dr. Dreyer did not make a choice between diagnoses or treatments, her trial counsel asked that defense experts specifically about such contentions made by plaintiff experts...
>
> Their opinions and Dr. Dreyer's lengthy testimony regarding her physical exam of Mr. Needham...ignored in the Decision, show that Dr. Dreyer was confronted with choices and made choices.

(Amici Brief at 5 n.3) (record citations omitted). Dr. Dreyer met with Mr. Needham for a short clinical appointment at the end of the day before a long weekend. (Def. Ex. 101 at 262; CP __).

If this routine examination qualifies for the medical judgment instruction, there are no effective limits to its use. It is hard to imagine any encounter between doctor and patient that does involve Amici's "choices". Contrary to Amici's assertions, the Court of Appeals correctly enforced this Court's limit on the wholesale use of a problematic jury instruction. *Fergen*, 182 Wn.2d at 808 ("should not be given simply if a physician is practicing medicine at the time"). Amici's argument provides no reason for further review.

II. The Instruction Uniquely Privileges Medical Professionals.

Next, Amici fault the Court of Appeals for reducing "health care defendants' ability to defend against negligence claims." (Amici Brief at 5). Without the medical judgment instruction, Amici fear their members' liability exposure will increase. Put bluntly, the instruction helps medical practitioners win jury trials.

No other profession receives this special treatment. Architects, lawyers, accountants, and the general public must defend their actions in court based on reasonable care. And the essential elements of malpractice are identical for all professionals. However, only doctors are allowed supplemental instructions on the exercise of their judgment.

> The exercise of judgment instruction is a relic of a discredited theory of liability, one that sought to hold a doctor to a lesser duty than any other person. It is a refinement of the "error in judgment" instruction, which required a jury to consider whether a health care provider exercised judgment in "good faith." *Dinner v. Thorp,* 54 Wash.2d 90, 97–98, 338 P.2d 137 (1959).

Fergen, 182 Wn.2d at 813–14 (Stephens, J., dissenting).

Amici's assertions rely on this privilege, accusing the Court of Appeals of not understanding the intricacies of medicine.

> The appellate court also disregarded much of the medical evidence presented by Dr. Dreyer and her medical experts which had been accepted by the jury. This usurped the jury's role and *got the medicine wrong*.

(Amici Brief at 1) (emphasis added). Somehow, Amici argue, the jury can correctly evaluate medical testimony with the instruction, but an appellate court on review cannot. The opposite is true.

The instruction has the potential to change an objective standard to a subjective one: the judgment of the physician. That blurring of the objective standard likely skewed the jury's assessment of Dr. Dreyer's duty to Mr. Needham. As the Court of Appeals recognized,

> giving the exercise of judgment instruction nearly always results in a defense verdict, and courts should use the instruction with caution. *See Fergen*, 182 Wn.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 Wn.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.

Needham v. Dreyer, 11 Wn. App. 2d 479, 499, 454 P.3d 136 (2019).

Washington law does not entitle doctors to a special jury instruction on demand. Only in a limited subset of cases – those truly involving a choice between defined alternative treatments within the standard of care – should a trial court even consider supplementing the standard of care instruction. Here, the trial court erred by giving the instruction in a case

without these essential prerequisites. Amici's criticism of the Court of Appeal's decision relies on privilege, not law.

III. Flawed Instructions Require Reversal.

Amici devote a substantial portion of their brief to the basic statement that juries decide the facts after the trial judge gives the law. (Amici Brief at 5-8). This presumes that the jury receives proper instructions from the judge. But when the trial court gives an erroneous instruction, appellate courts must review the record carefully to decide whether error tainted the jury's verdict.

> When a jury instruction erroneously states the law and prejudices a party, we must reverse. Prejudice is presumed if the instruction contains a clear misstatement of the law; prejudice must be demonstrated if the instruction is merely misleading.

Hendrickson v. Moses Lake Sch. Dist., 192 Wn.2d 269, 281, 428 P.3d 1197 (2018).

The Court of Appeals scrutinized the trial record for three reasons. First, it had to decide whether the testimony at trial supported giving the medical judgment instruction. It did not. *Needham*, 11 Wn. App. 2d at 491 ("the record contains no evidence that Dr. Dreyer *made* any of the choices that she claims she *had*"). Second, as described below, it had to evaluate whether Dr. Dreyer's experts speculated that alcohol contributed to Mr. Needham's injuries. They did. *Needham*, 11 Wn. App. 2d at 496 ("Dr.

Dreyer's experts relied on speculation as to the as to the amount of alcohol consumed prior to the collapse").

Finally, the Court had to determine whether these cumulative errors prejudiced Mr. Needham at trial, tainting the jury's verdict. They did.

> [T]he nature of alcohol-related testimony is highly prejudicial to the case as a whole... the testimony from Dr. Dreyer's experts suggested that Needham was intoxicated at the time of his collapse. Thus, the trial's outcome was materially affected.

Needham, 11 Wn. App. 2d at 498-99. A jury verdict depends on the trial court's evidentiary rulings and jury instructions. When the trial court makes cumulative errors that undermine the verdict, appellate courts must scrutinize the record, vacate the verdict, and remand for retrial. Amici's assertion that this "usurps the role of the jury" misses the point of appellate review. (Amici Brief at 5).

IV. Medical Experts May Not Speculate.

Amici's last argument is that the trial court appropriately admitted expert testimony that alcohol might have played a role in Mr. Needham's collapse. "[A] patient is responsible for his own actions or inactions and how they may have affected or led to his injury." (Amici Brief at 10). According to Amici, the Court of Appeals' decision in *Colley v. PeaceHealth,* 177 Wn. App. 717, 312 P.3d 989 (2013) allowed defendant's

experts to testify about alcohol use without having to prove what actually caused Mr. Needham's injuries. (Amici Brief at 9).

The Court of Appeals appropriately distinguished *Colley* from the facts in Mr. Needham's case.

> *Colley* is distinguishable because the experts in *Colley* relied on confirmed diagnoses, an extensive past medical history, and an admitted *history* of alcoholism. Here, 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, 11 Wn. App. 2d at 495. Like all other witnesses, experts in medical malpractice cases may not speculate to the jury on what might be alternative causes of an injury. Yet the trial court allowed exactly that with the possibility that alcohol might have had some role in Mr. Needham's collapse. Because this was highly prejudicial, the Court of Appeals correctly reversed the jury's verdict.

CONCLUSION

Amici Washington State Medical Association, Washington State Hospital Association, and American Medical Association are frank about their support for the medical judgment jury instruction. It favors their members and shields them from liability. The Court of Appeals correctly decided James Needham's appeal not on privilege, but on principle. Every

litigant deserves a fair trial free of misleading jury instructions and improper speculative testimony.

Mr. Needham respectfully requests this Court to deny further review and remand for a fair trial.

DATED this 15th day of April, 2020.

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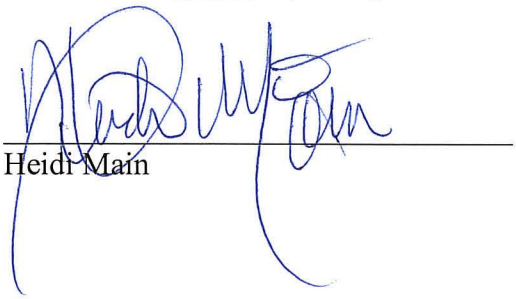

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