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NO. 69926-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I
(King County Superior Court Cause No. 10-2-28706-0 SEA)

ANIL APPUKUTTAN,

Plaintiff-Appellant,

vs.

OVERLAKE MEDICAL CENTER; PUGET SOUND PHYSICIANS,
PLLC; ALAN B. BROWN, M.D.; MARCUS TRIONE, M.D.; and
TINA NEIDERS, M.D.,

Defendants-Respondents.

BRIEF OF APPELLANT

John Budlong
Tara L. Eubanks
THE BUDLONG LAW FIRM
100 Second Avenue So., Suite 200
Edmonds, Washington 98020
(425) 673-1944

Attorneys for Plaintiff-Appellant

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I. INTRODUCTION

This is the first case to consider whether the judge-made standard of care for health care liability in the “exercise of judgment” instruction, WPI 105.08, is preempted by the 1975 Health Care Act, RCW 7.70, under Division One’s holding in *Branom v. State*, 94 Wn. App. 964, 969, 974 P.2d 335 (1999), which states that “whenever an injury occurs as a result of health care, the action for damages is governed *exclusively* by RCW 7.70.” (Emphasis supplied). The rule in *Branom* has been followed in *Beggs v. Dept. of Social & Health Services*, 171 Wn.2d 69, 79, 247 P.3d 421 (2011); *Berger v. Sonneland*, 144 Wn.2d 91, 106, 109, 26 P.3d 257 (2001); and *Hall v. Sacred Heart Med. Center*, 100 Wn. App. 53, 995 P.2d 621 (2000). To prevail in a health care liability action, RCW 7.70 only requires a plaintiff to “*establish one... proposition*”—that his “injury resulted from the failure of a health care provider to follow the accepted standard of care....expected of a reasonably prudent health care provider....” RCW 7.70.030 and .040.

Even if the “exercise of judgment” instruction is not statutorily preempted, it is inconsistent with and adds to RCW 7.70.040’s “necessary elements of proof.” A malpractice plaintiff has the burden of proving that a physician *is liable*. The “exercise of judgement” instruction, WPI 105.08, instructs, however, that “A physician *is not liable* for selecting one of two or

more alternative courses of treatment or diagnoses if....[the physician acted] within the standard of care...“*in arriving at the judgment....*” (Emphasis supplied) Under WPI 105.08, the plaintiff must prove that the physician’s subjective thought processes and choices “in arriving at that judgment” were below the standard of care in addition to proving that the physician failed to comply with RCW 7.70’s “reasonably prudent health care provider” standard of care and burden of proof in diagnosing, treating or referring the plaintiff for further care. The burden WPI 105.08 imposes on a plaintiff to disprove that “a physician is not liable” for exercising clinical judgment is *not* a “necessary element of proof” under RCW 7.70.040.

The “error/exercise of judgment” instruction was approved in the pre-Health Care Act case of *Miller v. Kennedy*, 91 Wn.2d 155, 588 P.2d 734 (1978) as a “supplementary” common law standard of care instruction. The *Miller* instruction was upheld in dictum “with caution” as to its use in *Watson v. Hockett*, 107 Wn.2d 158, 165, 727 P.2d 669 (1986) and in *Christensen v. Munsen*, 123 Wn.2d 234, 867 P.2d 626 (1994). WPI 105.08 is patterned on the *Watson* dictum. The trial court gave WPI 105.08 as Jury Instruction 10.

Neither Division One nor Division Two has approved the “error/exercise of judgment” instruction. Neither *Watson*, *Christensen* nor any of Division Three’s decisions that have since upheld the

instruction—*Vasquez v. Markin*, 46 Wn. App. 480, 731 P.2d 510 (1986); *Thomas v. Wilfac, Inc.*, 65 Wn. App. 255, 828 P.2d 597 (1992); *Gerard v. Sacred Heart Med. Ctr.*, 86 Wn. App. 387, 937 P.2d 1104 (1997); *Ezell v. Hutson*, 105 Wn. App. 485, 20 P.3d 975 (2001); *Housel v. James*, 141 Wn. App. 748, 172 P.2d 712 (2007); and *Fergen v. Sestero*, __ Wn. App. __, 298 P.3d 782 (2013)—have considered whether WPI 105.08’s “supplementary”, common law standard of care and burden of proof is an error of law because it is preempted by or inconsistent with RCW 7.70.

II. ASSIGNMENT OF ERROR

The Superior Court erred in giving Jury Instruction 10, the “exercise of judgment” instruction in WPI 105.08. CP 23.

III. ISSUES PRESENTED FOR REVIEW

1. Does RCW 7.70 provide the exclusive standard of care and burden of proof for health care liability actions such that the common law “exercise of judgment” jury instruction in WPI 105.08 is statutorily preempted?

2. If RCW 7.70 can be supplemented by common law jury instructions, is the “exercise of judgment” jury instruction an error of law because it is inconsistent with and adds to the “necessary elements of proof” of medical negligence in RCW 7.70.040?

IV. STATEMENT OF THE CASE

A. The Nature of this Case.

This is an appeal from a judgment in favor of the defendants in a medical negligence jury trial held before the Hon. Judith Ramseyer of the King County Superior Court in November-December 2012. Plaintiff Anil Appukuttan, a 25 year-old soccer player, sued Overlake Hospital Medical Center, Puget Sound Physicians, PLLC, Alan Brown, M.D., an orthopedic surgeon, Marcus Trione, M.D. and Tina Neiders, M.D. emergency physicians. Appukuttan alleged that the three physicians negligently failed to monitor and treat his compartment syndrome when he came into Overlake's Emergency Department four times in three days in August 2009, and as a result he developed a preventable, lifelong foot drop injury. CP 1-7. Appukuttan's claim against Overlake at trial was based solely on agency liability for defendants Brown, Trione and Neiders. CP 12. His claim against Puget Sound Physicians, PLLC at trial was based solely on respondeat superior liability for Trione and Neiders. CP 12.

B. The Trial Court Proceedings.

At midnight on August 23, 2009, Anil Appukuttan went to Overlake Hospital's Emergency Department because of increasing left calf pain after

being kicked in a soccer game earlier that evening . 11/20/12 RP 169. The attending emergency physician, Bradford Kilcline, M.D. gave Anil pain medication and sent him home with instructions to return if his pain worsened. 11/14 RP 105-06. In the early morning of August 24, Anil returned to Overlake's Emergency Department "in extreme pain." 11/20 RP 160. Dr. Kilcline could not "necessarily rule out lateral compartment syndrome" so he asked defendant Alan Brown, M.D. to examine Anil and rule it in or out. 11/20 RP 156.

Compartment syndrome develops when the swelling pressure inside a compartment in an extremity becomes elevated and squeezes off the blood and oxygen supply to the muscles and nerves. 11/14 RP 99-100. It is a medical emergency because once compartmental pressures rise to a level of about 30 mm Hg, irreversible muscle and nerve damage may occur within six hours. 11/14 RP 99-100, 121, 162-63. A patient at risk of compartment syndrome must be vigilantly monitored to determine if a fasciotomy—which is the only treatment for compartment syndrome—can be done to release the compartment pressures before permanent damage occurs. 11/14 RP 101, 103. The only two ways to treat suspected compartment syndrome are to "take the patient to the OR and open the compartments or you measure the

pressure and then decide what to do based on the pressure.” 11/14 RP 113. A physician can only measure compartment pressures with a pressure monitor, not by palpation. 11/14 RP 102. Neglected compartment syndrome leads to muscle necrosis and lifelong disabling neurologic injury like foot drop and also can cause renal failure. 11/14 RP 100, 117.

Dr. Brown examined Anil and found he had a “rather tense lateral compartment” and pain with dorsiflexion and plantarflexion, which are early warning signs of a developing compartment syndrome. 11/14 RP 111-12; 11/20 RP 161, 165. But Dr. Brown felt Anil had a hematoma rather than compartment syndrome, and let the hospital discharge Anil home without measuring his compartment pressures with the hospital’s Stryker monitor to determine if he needed a fasciotomy. 11/21 RP 21, 40.

Twelve hours later at 8 p.m. on August 24, Anil returned to Overlake for the third time. 11/20 RP 169. He was seen by emergency physician Dr. Trione who called Dr. Brown at home for a follow up consultation. 11/20 RP 181-82. Dr. Brown was no longer on call and decided not to come in to re-evaluate Anil or measure his compartment pressures. 11/20 RP 181, 188-89. Dr. Trione did not ask the orthopedic surgeon who was on call to evaluate Anil after Dr. Brown decided not to come in. 11/15 RP 74.

On August 26, Anil returned to Overlake for the fourth time and reported increased pain in his left leg, swelling, redness and decreased sensation to Dr. Neiders. 11/27 RP 182. Dr. Neiders' August 26 records do not reference Anil's three previous visits to the ER with Drs. Kilcline, Brown or Trione for suspected compartment syndrome. 11/27 RP 189, 191-93, 206. Instead, Dr. Neiders diagnosed cellulitis, which is an inflammation of the skin, discharged Anil home without medical monitoring, and referred him to an infectious disease specialist, Dr. Hashisaki. 11/27 RP 196, 220. Dr. Neiders' August 26 record does not say she considered compartment syndrome, and she did not include it in her differential diagnosis. 11/27 RP 197, 207.

On August 27, Dr. Hashisaki ruled out cellulitis and emergently sent Anil back to Overlake for the fifth time. 11/27 RP 199. There the on-call orthopedic surgeon Dr. Clayton Brandes diagnosed compartment syndrome and performed an emergency fasciotomy, but it was too late to save Anil from permanent foot drop. 11/20 RP 190, 201; 11/27 RP 186, 199.

On August 29, Dr. Neiders found out that Anil had been diagnosed with compartment syndrome and had a fasciotomy. RP 188. Then she changed her medical record to say that she had read Dr. Kilcline's and Dr.

Trione's records and had considered compartment syndrome when she saw Anil on August 26. 11/27 RP 186-87. Dr. Neiders did not read Dr. Brown's orthopedic consultation report. 11/27 RP 193.

In the trial, Appukuttan presented medical expert testimony from trauma surgeon John Mayberry, M.D. that defendant Brown violated the standard of care by not ruling in or ruling out extremity compartment syndrome the first time he saw Anil on the morning of August 24, 11/14 RP 146; by not either measuring Anil's compartment pressures or taking him to the operating room for a fasciotomy, 11/14 RP 113-14; and by not coming into the hospital to re-assess Anil after Dr. Trione called him at home on the evening of August 24 to report that Anil had returned to the hospital for the third time. 11/14 RP 147.

Anil Appukuttan presented medical expert testimony from emergency physician Marc Suffis, M.D. that defendants Trione and Neiders violated the standard of care by not ensuring that Dr. Brown or another specialist examined Anil on his third and fourth return visits to the emergency department to rule compartment syndrome in or out and perform a timely fasciotomy. 9/15 RP 74.

During the trial, Dr. Brown testified he exercised his clinical or medical “judgment” in his examination, history and evaluation of Anil, 11/20 RP 170; and in deciding not to use the Stryker pressure monitor to measure Anil’s compartmental pressures, 11/20 RP 153-55. Dr. Neiders testified she exercised her clinical judgment in deciding the amount of pain medication to give to Anil. 11/28 RP 37-38.

At the conclusion of the trial, over Appukuttan’s exceptions, 11/29 RP 89-93; 12/3 RP 10, the trial court gave Jury Instruction 10, the “exercise of judgment” instruction in WPI 105.08:

INSTRUCTION NO. 10

A physician is not liable for selecting one of two or more alternative courses of treatment or diagnoses, if, in arriving at the judgment to follow the particular course of treatment or make the particular diagnosis, the physician exercised reasonable care and skill within the standard of care the physician was obliged to follow.

CP 23.

In closing argument, defense counsel for Drs. Trione and Neiders argued that Jury Instruction 10 was “a really important instruction.” 12/3 RP 108. Dr. Trione relied on Jury Instruction 10 to argue he was not liable because he exercised clinical judgment in performing Anil’s physical examination, 12/3 RP 142; in assessing Anil’s condition and in discussing it

with defendant Brown on the telephone, 12/3 RP 126; in not asking Dr. Brown to come back to the emergency room on the evening of August 24 to re-examine Anil for compartment syndrome, 12/3 RP 75; and in relying on Dr. Brown to decide whether or not to measure Anil's compartment pressures. 12/3 RP 92.

Dr. Brown relied on Jury Instruction 10 to argue he was not liable because he exercised clinical judgment in believing Anil had a hematoma instead of compartment syndrome, 12/3 RP 108-09; in deciding not to measure Anil's compartment pressures with the Stryker monitor, 12/3 RP 88; in deciding to stay at home instead of coming back to the hospital to re-assess Anil on the evening of August 24, 12/3 RP 74, 91-92; and in denying Dr. Mayberry's charge that Dr. Brown "blew off" Anil's care when he did not return to the hospital. 12/3 RP 90-91.

After the trial, the Court entered judgment on the defense verdict, CP 32-34. Appukuttan moved for a new trial under CR 59(a)(1), (8) and (9) on grounds that the "exercise of judgment" instruction is an error of law that caused a procedural irregularity and denied substantial justice. CP 36-52. The trial court denied the motion for a new trial. CP 137-38; 1/10/13 RP 29-36. Appukuttan timely appealed. CP 139-42.

V. ARGUMENT

A. The Common Law “Exercise of Judgment” Jury Instruction in WPI 105.08 Is Pre-empted by or Inconsistent with the Standard of Care and Burden of Proof for Health Care Liability under the 1975 Health Care Act, RCW 7.70.

In 1975, the Washington Legislature enacted Laws of 1975, 2d Ex. Sess., ch. 56, § 9, codified at RCW 7.70, to modify the substantive and procedural aspects of common law health care liability actions:

7.70.010. Declaration of modification of actions for damages based upon injuries resulting from health care.

The state of Washington, exercising its police and sovereign power, hereby modifies as set forth in this chapter and in RCW 4.16.350, as now or hereafter amended, certain substantive and procedural aspects of all civil actions and causes of action, whether based on tort, contract, or otherwise, for damages for injury occurring as a result of health care which is provided after June 25, 1976.

The 1975 Health Care Act decrees that the only “necessary elements of proof” for establishing health care liability are: “(1) the health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider...” and (2) “such failure was a proximate cause of the injury complained of”:

7.70.030. Propositions required to be established--Burden of proof

No award shall be made in any action or arbitration for damages for injury occurring as the result of health care which is provided after June 25, 1976, unless *the plaintiff establishes one* or more of the following *propositions*:

(1) That injury resulted from the failure of a health care provider to follow the accepted standard of care....

7.70.040. Necessary elements of proof that injury resulted from failure to follow accepted standard of care

The following shall be *necessary elements of proof* that injury resulted from the failure of the health care provider to follow the accepted standard of care:

(1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances;

(2) Such failure was a proximate cause of the injury complained of.

(Emphasis supplied)

In Washington, the “error/exercise of judgment” jury instruction originated in *Dinner v. Thorp*, 54 W.2d 90, 97-98, 338 P.2d 137 (1959):

A physician is not liable for damages consequent upon an honest mistake or an error in judgment in making a diagnosis or in determining upon a course of procedure where there is reasonable doubt as to the nature of the physical conditions involved. If a physician brings to his patient care, skill, and knowledge he is not liable to the patient for damages resulting from his honest mistakes or a bona fide error of judgment. The law requires a physician to base any professional decision he may make on skill and careful study and

consideration of the case, but when the decision depends upon an exercise of judgment the law requires only that the judgment be made in good faith.

The Supreme Court in *Dinner* held this instruction was “misleading” error because it “indicates to the jury that the exercise of judgment in good faith alone absolves the [physician] from liability, irrespective of his exercise of such skill and learning...” *Id.*

In *Miller v. Kennedy*, 91 Wn.2d 155, 588 P.2d 734 (1978), the Supreme Court approved the following “error of judgment” jury instruction:

“A physician or surgeon is not liable for an honest error of judgment if, in arriving at that judgment, the physician or surgeon exercised reasonable care and skill, within the standard of care he was obliged to follow.”

Id. at 160 fn. 4.

In *Miller*, the Court of Appeals had upheld the “honest error of judgment” jury instruction as part of the pre-Health Care Act, common law, “physician-peer” standard of care: “The efforts of a physician may be unsuccessful or the exercise of one’s judgment be in error without the physician being negligent so long as the doctor acted within the standard of care *of his peers.*” 11 Wn. App. at 280 (emphasis supplied). On further review, the Supreme Court in *Miller* held the “error of judgment” instruction was properly given as a “supplementary instruction” to the standard of care

instruction because the defendant physician “was called upon to exercise his professional judgment in performing the delicate surgery of a kidney biopsy.” 91 Wn.2d at 159, 160. To establish liability under *Miller’s* jury instructions, a plaintiff had to prove two propositions: (1) the plaintiff was injured by the physician’s failure to follow the applicable standard of care *and* (2) the physician did not make an “honest error of judgment” in choosing whether or how to treat the plaintiff’s condition.

In *Harris v. Robert C. Groth, M.D., Inc., P.S.*, 99 Wn.2d 438, 447, 451, 663 P.2d 113 (1983), the Supreme Court said “[t]he Legislature [in enacting RCW 7.70] has chosen to impose upon health care providers the same standard of care as is imposed upon other members of society—[i.e. a “reasonably prudent practitioner” standard]—and we must implement that choice.” In *Watson v. Hockett*, 42 Wn. App. 549, 556, 712 P.2d 855 (1986), the Court of Appeals concluded that *Harris* had impliedly overruled *Miller’s* “error of judgment” instruction as being inconsistent with RCW 7.70. It held that instruction was now “an improper statement of the law” and “there was no error in refusing to submit it to the jury.” *Id.* at 557.

The Supreme Court in *Watson* affirmed that it was not prejudicial error to refuse the “error of judgment” instruction, 107 Wn.2d at 169, but

stated in dictum that “[t]he change in the standard of care, as enunciated in *Harris*” from “the standard ‘expected by the medical profession’ to that ‘expected by society’” did not affect the “error in judgment” instruction or the “no guarantee/poor result” jury instruction.¹ *Id.* at 166-67. It said these common law instructions:

supplement the standard of care; while they may clarify it, they do not change it. Thus, these instructions can only be given in connection with a proper standard of care instruction.

Id. at 166-67. *Watson’s* dictum did not consider whether RCW 7.70 exclusively governed health care liability actions and thus preempted *Miller’s* “supplementary” “error of judgment” standard of care and the extrastatutory burden of proving that the defendant’s subjective choices and judgments as well as his or her exercise of care and treatment were negligent. Nor did *Watson* consider whether the “exercise of judgment” instruction is inconsistent with and adds to RCW 7.70.040’s “necessary elements of proof.”

In *Christensen v. Munsen*, 123 Wn.2d 234, 249, 867 P.2d 626 (1994), the Supreme Court upheld an “error of judgment” instruction based on a former version of WPI 105.08 because it “accurately stated the law as set

¹ The “no guarantee/poor result” instruction, WPI 105.07, is not at issue on this appeal because it was not given and because, unlike the “exercise of judgment” instruction, it does not impose a “supplementary”, extrastatutory burden of proof to establish a physician’s liability.

forth by this court in *Watson...*”, again without considering the preemptive effect of RCW 7.70's decree that the only “necessary elements of proof” for health care liability are “that injury resulted from the failure of the health care provider to follow the accepted standard of care.”

Five years after *Christensen*, Division One in *Branom v. State*, 94 Wn. App. 964, 969, 974 P.2d 335 (1999) held that health care injury actions are “governed exclusively by RCW 7.70”:

This section sweeps broadly. It clearly states that RCW 7.70 modifies procedural and substantive aspects of all civil actions for damages for injury occurring as a result of health care. ... Reading RCW 7.70.010 and .030 together, we conclude that whenever an injury occurs as a result of health care, the action for damages for that injury is governed exclusively by RCW 7.70.

Branom holds that RCW 7.70 preempts common law claims for negligent infliction of emotional distress (because they are not “authorized” by RCW 7.70.030), *id.* at 975, and any common law duty to obtain parents’ informed consent for a child’s medical treatment (because RCW 7.70.050(1)(d) “expressly requires that the person suffering injury be the patient.”) *Id.* at 974. *Branom*’s “govern[s] exclusively” rule preempts WPI 105.08’s “unauthorized” burden of making a plaintiff prove that a defendant physician failed to exercise subjective judgment within the standard of care

in “selecting one of two or more alternative courses of treatment or diagnoses”, just as it preempts unauthorized, common law duties of care. *See Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 38, 204 P.3d 885 (2009) (Courts will not impose additional elements of proof beyond those required by the governing statute).

Hall v. Sacred Heart Medical Center, 100 Wn. App. 53, 995 P.2d 621 (2000), applied *Branom’s* “govern[s] exclusively” rule in holding that a proposed common law “abandonment-neglect” instruction could not supplement RCW 7.70’s “reasonably prudent provider” standard of care:

Reading [RCW 7.70.010 and .030] together, the *Branom* court determined that whenever an injury occurs as a result of health care, the action for damages is governed exclusively by RCW 7.70. *Branom*, 94 Wash. App. at 969, 974 P.2d 335.

The Halls’ proposed instruction is not a correct statement of the law. ... The trial court properly refused to give the Halls’ instruction regarding abandonment/neglect.

Id. at 62-63.

Citing RCW 7.70.010, .030 and *Branom*, the Supreme Court in *Berger v. Sonneland*, 144 Wn.2d 91, 26 P.3d 257 (2001), ruled that “[c]auses of action for injuries occurring as a result of health care are governed by RCW chapter 7.70” and that “[w]hen injury results from health care, any legal action is governed by RCW chapter 7.70.” *Id.* at 106, 109.

In *Beggs v. Dept. of Social & Health Services*, 171 Wn.2d 69, 79, 247 P.3d 421 (2011), the Supreme Court, citing *Branom*, ruled that RCW 7.70 provides the exclusive damages remedy in health care injury actions:

Chapter 7.70 RCW provides the exclusive remedy for damages for injuries resulting from health care. *Branom v. State*, 94 Wash. App. 964, 969, 974 P.2d 335 (1999). It also determines whether an injury is actionable. *Id.*; see RCW 7.70.030.

Under *Branom* and its progeny, RCW 7.70's command that a plaintiff need only "establish one... proposition"—*i.e.* that the "injury resulted from the failure of a health care provider to follow the accepted 'reasonably prudent health care provider' standard of care"—preempts WPI 105.08's additional burden of proving that the defendant's subjective choices among different diagnoses and treatments "in arriving at that judgment" also were below the standard of care. Even if RCW 7.70 does not strictly preempt common law standards of care and burdens of proof, the "exercise of judgment" instruction is an error of law because it is inconsistent with and adds to RCW 7.70.040's "necessary elements of proof." Consequently, the trial court erred in giving Jury Instruction 10, which imposed on plaintiff Appuktan an unauthorized, common law standard of care and an unnecessary, extrastatutory burden of proof.

B. The “Exercise of Judgment” Instruction Imposes an Impossible or Improper Burden of Proof.

In reviewing the “error of judgment” instruction more than fifty years ago, the Supreme Court in *Dinner v. Thorp*, 54 W.2d 90, 98, 338 P.2d 137 (1959) ruled it was “misleading” error to instruct a jury that “when the [physician’s] decision depends upon an exercise of judgment the law requires only that the judgment be made in good faith.” The Court explained that such an instruction erroneously “indicates to the jury that the exercise of judgment in good faith alone absolves the [physician] from liability, irrespective of his exercise of such skill and learning...” *Id.* But WPI 105.08 does exactly what *Dinner* prohibits: it instructs the jury that “*A physician is not liable... [if] the physician exercised reasonable care and skill within the standard of care... in arriving at the judgment to follow the particular course of treatment or make the particular diagnosis....*”, irrespective of whether he or she exercised reasonable care, skill and learning in diagnosing, treating, following or referring the patient.

All that is required to invoke WPI 105.08’s “[a] physician is not liable” instruction is medical testimony by the defendant or a medical expert witness that “in arriving at the judgment”, the defendant considered “choices” or exercised “judgment” within the differential diagnosis standard of care, no

matter how negligent the chosen diagnosis or treatment actually was. *See*

Housel v. James, 141 Wn. App. 748, 760, 172 P.3d 712 (2007):

[T]he [“exercise of judgment”] instruction...should be limited to situations where the doctor is faced with a choice of treatments).

...the record discloses that Dr. James was presented with at least three treatment choices: additional testing, watchful waiting, or surgical repair of the hernia. There is sufficient evidence that in electing to proceed with surgical repair of the hernia, he exercised reasonable care and skill within the standard he was obliged to follow.

And *Gerard v. Sacred Heart Medical Center*, 86 Wn. App. 387, 390,

937 P.2d 1104 (1997):

Based on her experience and training, Dr. Bruya said that the decision to restrain a patient is a nursing judgment. We are not persuaded by Mr. Gerard's assertion that the decision to restrain a patient is merely a matter of custodial security. The court did not err in giving the error-of-judgment instruction.

And *Vasquez v. Markin*, 46 Wn. App. 480, 489, 731 P.2d 510 (1986):

Dr. Markin presented evidence of reasonable care, and was confronted with the situation where he had to make a choice. Finally, a proper standard of care instruction was given. Thus, it was not error to give [the “error of judgment”] instruction.

And *Fergen v. Sestero*, ___ Wn. App. ___, 298 P.3d 782, 785 (2013):

[Defendant's] expert witnesses testified he faced a choice between at least two differential medical diagnoses because Mr. Fergen's lump was necessarily either benign, which was very likely, or malignant, which was very unlikely.

To overcome the “exercise of judgment” instruction, a plaintiff must prove the physician never really made any choice or exercised any judgment, but instead is acting in bad faith or lying in claiming that he did. To impose on a plaintiff this unseemly, extrastatutory burden of proof is improper under *Dinner* and contrary to the reasonably prudent provider standard of care. WPI 105.08 also is inconsistent with RCW 7.70 because it absolves a physician from liability for exercising “judgment” in selecting among alternative diagnoses or treatments, even if the physician’s injury-causing misdiagnosis, treatment or failure to follow or refer was below the standard of care. This extrastatutory burden of proof either is impossible to meet because the exercise of professional judgment pervades the practice of medicine, *Miller, supra*, or is improper and “misleading” under *Dinner*, or is error because it is preempted by or inconsistent with RCW 7.70.030 and .040.

The Supreme Court in *Watson* said the “error of judgment” instruction “applies only where there is evidence that in arriving at a judgment, ‘the physician or surgeon exercised reasonable care and skill, within the standard of care...’ and that it “will ordinarily be limited to situations where the doctor is confronted with a choice among competing therapeutic techniques or among medical diagnoses.” 107 Wn.2d at 165. But *Watson*’s first limitation

is no limitation at all because the defendant physician would have lost on summary judgment or a directed verdict if she could not offer testimony that she complied with the standard of care.

Watson's second limitation is hardly a limitation either, since almost every medical malpractice case involves judgments and choices among diagnoses or treatments that are within the differential diagnosis. The Supreme Court in *Miller* recognized this in stating that “[t]he exercise of professional judgment is an inherent part of the care and skill involved in the practice of medicine.” 91 Wn.2d at 160. Under Division Three’s decisions, so long as a defendant physician or an expert witness testifies in trial that the physician made any choice or exercised any clinical “judgment” within the differential diagnosis standard of care, it is not error to instruct the jury under WPI 105.08 that the “physician is not liable.”

Watson also says the “error/exercise of judgment” instruction is only “to be given with caution”, 107 Wn.2d at 165, but there really is no such thing. Once the jury is instructed that “a physician is not liable” for making a choice or exercising judgment, the genie is out of the bottle, the impossible or improper burden is cast on the plaintiff, and all “caution” goes to the winds. The “exercise of judgment” instruction lets the jury find that although

the physician injured the plaintiff by failing to exercise reasonable care, skill and learning, the physician still “is not liable” because he or she subjectively considered choices that were within the differential diagnosis standard of care “in arriving at the judgment.” Indeed, under WPI 105.08 the jury is free to find that the physician exercised judgment and therefore “is not liable” without even considering if the plaintiff was injured by the physician’s failure to follow the exclusive, accepted, “reasonably prudent health care provider” standard of care in RCW 7.70.

The reported decisions confirm that giving the “physician is not liable” instruction, WPI 105.08, is tantamount to directing a defense verdict because it always is associated with a defense verdict. *See Dinner v. Thorp; Miller v. Kennedy; Christensen v. Munsen; Vasquez v. Markin; Thomas v. Wilfac; Inc., Gerard v. Sacred Heart Med. Ctr.; Ezell v. Hutson; Housel v. James; supra, Costello v. Deaconess Medical Center*, 109 Wn. App. 1069, Not Reported in P.3d, 2002 WL 15964 (2002); *Oakes v. Providence Health System*, Thurston Cy. Superior Court Case No. 03-2-00896-3 (2005) reported in DeWolf, *Civil Jury Instruction Handbook* (2008-2009), pp. 85, 92; and *Fergen v. Sestero, supra*.

Physicians are much more likely to prevail in civil trials than ordinary defendants judged by a standard of reasonable care, even when the “exercise of judgment” instruction is not given. Yet no court would consider instructing a jury that an ordinary defendant “is not liable” for exercising “judgment” when “confronted with the situation where [it] had to make a choice” to run a red light, or sell defective products, or pollute, or violate building codes. *Vasquez*, 46 Wn. App. at 489. In the 1975 Health Care Act, the Legislature enacted a reasonably prudent standard of care. *Harris* says we must implement that policy choice, which according to *Branom* “sweeps broadly” and “govern[s] exclusively” health care liability actions. 94 Wn. App. at 969. Accordingly, the “exercise of judgment” jury instruction in WPI 105.08 should be overruled and abandoned because it is preempted by or inconsistent with the exclusive, legislative standard of care and burden of proof in RCW 7.70.

VI. CONCLUSION

Since RCW 7.70.030 and .040 provide the exclusive standard of care and burden of proof for establishing health care liability, appellant Anil Appukuttan respectfully asks this Court to reverse the judgment dismissing his claims against the defendants and remand for a new trial.

RESPECTFULLY OFFERED this 20th day of May, 2013.

THE BUDLONG LAW FIRM

By: 

JOHN BUDLONG, WSBA #12594
Attorneys for Appellant

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the date indicated below, a true and correct copy of the attached Brief of Appellant was filed with the court and delivered via e-mail and legal messenger to the following persons -

Mary H. Spillane
WILLIAMS, KASTNER & GIBBS
Two Union Square
601 Union Street, Suite 4100
Seattle, Washington 98101
*Attorneys for Defendants Overlake, Brown, Puget
Sound Physicians, Trione & Neiders*

Christopher H. Anderson
Karen Griffith
FAIN ANDERSON VANDERHOEF, PLLC
701 Fifth Avenue, Suite 4650
Seattle, Washington 98104
Attorneys for Defendant Overlake

John C. Graffe
Philip deMaine
JOHNSON GRAFFE KEAY MONIZ & WICK
925 Fourth Avenue, Suite 2300
Seattle, Washington 98104
Attorneys for Defendant Brown

Lee Barns
Mary K. McIntyre
MCINTYRE & BARNES PLLC
2200 6th Avenue, Suite 925
Seattle, Washington 98121-1829
*Attorneys for Defendants Puget Sound Physicians,
Trione & Neiders*

DATED this 20th day of May, 2013.

Debra M. Watt

DEBRA M. WATT