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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 APPUKUTAN,

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.

REPLY BRIEF OF APPELLANT

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COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
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I. INTRODUCTION

Appellant Anil Appukuttan timely and adequately objected to Jury Instruction 10, the “exercise of judgment” instruction based on WPI 105.08, as a negative instruction that should not be given in general. Appukuttan’s appeal is not governed by stare decisis, which does not apply to legislative changes to common law burdens of proof. But if stare decisis does apply to the statement in *Watson v. Hockett*, 107 Wn.2d 158, 165, 167, 727 P.2d 669 (1986), that the “error of judgment” instruction may be given to “supplement” “the standard of care of a doctor”, then WPI 105.08 should be overruled as “incorrect and harmful”, *In re Rights to Use Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970), as well as preempted by or inconsistent with the burden of proof in RCW 7.70.030 and .040. *Watson*’s admonition to give the error of judgment instruction only “with caution”, 107 Wn.2d at 165, is incorrect and harmful because it provides insufficient guidance to trial courts in exercising their discretion to give or not give WPI 105.08, leading to unpredictable and inconsistent results.

II. ARGUMENT

A. Appukuttan’s Objections to Jury Instruction 10 Complied with CR 51(f).

CR 51 (f) provides:

(f) Objections to Instruction. ... The objector shall state distinctly the matter to which he objects and the grounds of his objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made.

Appukuttan twice objected to Instruction 10 before the trial court instructed the jury:

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.¹

Appukuttan's objection to Instruction 10 established the nature of the objection by advising the trial court of the legal point that the "a physician is not liable" instruction, WPI 105.08, should not be given in general: "it is not appropriate to treat that as... a presumption that this instruction should be given in general in any case involving clinical judgment." 11/29 RP 92. It also established the substance of that objection—"it is a negative instruction

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CP 23. Respondents incorrectly state that Appukuttan first objected to Instruction 10 as a "negative" instruction and a "comment on the evidence" in his new trial motion. *Respondents Brief*, p. 6. Both of those objections and his objection that "there is no presumption that this instruction should be given in general in any case involving clinical judgment" were made before the trial court instructed the jury. See 11/29/12 RP 89-92 and 12/3/12 RP 10.

in that it says the ‘physician is not liable for selecting...’, and also it is a comment on the evidence.” 12/3 RP 10.

“[A] negative instruction [is an instruction that] may have the tendency to confuse the jury as to the burden of proof.” *Dods v. Harrison*, 51 Wn.2d 446, 453, 319 P.2d 558 (1958), Hunter, J., concurring in Rosellini dissent. Appukuttan’s only burden was to establish the “necessary elements of proof” under RCW 7.70.040—*i.e.* that “(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.” Instruction 10 had a “tendency to confuse the jury as to the burden of proof”, *Dods, supra*, by requiring Appukuttan to disprove an additional, extrastatutory, negative proposition—that the defendants were “not liable” if they exercised “judgment” within the standard of care in selecting a diagnosis or treatment, even if they harmed him by negligently misdiagnosing, treating, or failing to refer him for necessary diagnosis and treatment.

Appukuttan was not required to inform the trial court specifically that Instruction 10 was statutorily preempted under *Branom v. State*, 94 Wn. App. 964, 974 P.2d 335 (1999). See *Trueax v. Ernst Home Center, Inc.*, 124 Wn.2d 334, 878 P.2d 1208 (1994); *Egede-Nissen v. Crystal Mountain, Inc.*,

93 Wn.2d 127, 135, 606 P.2d 1214 (1980) (specific legal authority not required to inform trial court adequately of nature and substance of objection to a jury instruction). *See also Greengo v. Public Employees Mut. Ins. Co.*, 135 Wn.2d 799, 813, 959 P.2d 657 (1998) (“We have repeatedly held that RAP 12.1(b) means exactly what it says: This court may raise issues *sua sponte* and may rest its decision thereon.”) The parties have fully briefed the burden of proof, standard of care, and statutory preemption issues that WPI 105.08 presents. Instruction 10 presents an issue of law and is reviewed *de novo*. *Griffin v. W. RS, Inc.*, 143 Wn.2d 81, 87, 18 P.3d 558 (2001).

Since Appukuttan contends Instruction 10 is an error of law, a factual appeal based on grounds of insufficient evidence that any of the defendants exercised “judgment” is unnecessary. It likely would be futile under Division Three’s broadly sweeping cases holding it is never an abuse of discretion to give the “a physician is not liable” instruction any time a defendant, or a hired medical opinion witness, testifies that the defendant considered any diagnostic or treatment choice within the differential diagnosis or even considered whether or not to apply patient restraints. *See Vasquez v. Markin*, 46 Wn. App. 480, 731 P.2d 510 (1986); *Gerard v. Sacred Heart Med. Ctr.*, 86 Wn. App. 387, 937 P.2d 1104 (1997); and *Fergen v. Sestero*, 174 Wn. App. 393, 298 P.3d 782 (2013), Supreme Court Case No. 88819-1.

B. Stare Decisis Does Not Apply to Legislative Changes to Common Law Burdens of Proof or Standards of Care.

“Stare decisis is a doctrine developed by courts to accomplish the requisite element of stability in court-made law...” *In re Rights to Use Waters of Stranger Creek*, 77 Wn.2d 649, 466 P.2d 508 (1970). It does not apply to legislative changes to the common law of torts:

[T]he legislature is not bound by decisional law or by the doctrine of stare decisis. It may change that law as, for example, the legislature did when it abolished the theretofore existing right of action for gross negligence in host-guest automobile cases (Laws of 1933, ch. 18, p. 145; *Shea v. Olson*, 185 Wash. 143, 53 P.2d 615, 111 A.L.R. 998 (1936)); and when it later reinstated the right of action for gross negligence by the nonpaying guest against his host (Laws of 1957, ch. 132, p. 484), and then when it repealed the host-guest automobile statute by Laws of 1974, 1st Ex.Sess., ch. 3, p. 2.

Brewer v. Copeland, 86 Wn.2d 58, 62, 542 P.2d 445 (1975). In *State v. Devin*, 158 Wn.2d 157, 168, 142 P.2d 599 (2006), the Supreme Court confirmed that statutory changes trump stare decisis:

In debating whether this court should overturn [*State v. Furth*, 82 Wash. 665, 667, 144 P. 907 (1914)], the parties in this case have focused on the doctrine of stare decisis, which requires certain conditions to be met before a rule is abandoned. RCW 7.69.030. At least arguably, that statute trumps the *Furth* abatement rule....

Within constitutional limits,² the Legislature has authority to change common law standards of care and burdens of proof in health care and other tort actions. *See Harris v. Robert C. Groth, M.D., Inc., P.S.*, 99 Wn.2d 438, 447, 451, 663 P.2d 113 (1983) (“The 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 and we must implement that choice”; *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 38, 204 P.3d 885 (2009) (in statutory causes of action, courts will not impose additional burdens of proof that exceed the statute’s requirements); *Branom v. State*, 94 Wn. App. 964, 969, 974 P.2d 335 (1999) (preempting any common law duty to obtain parents’ informed consent for a child’s medical treatment) and *Hall v. Sacred Heart Medical Center*, 100 Wn. App. 53, 995 P.2d 621 (2000) (preempting any common law liability claim based on “abandonment-neglect” of a patient).

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See e.g. Putman v. Wenatchee Valley Medical Center, P.S., 166 Wn.2d 974, 216 P.3d 374 (2009) (Legislature may not enact statutes that unduly burden a medical malpractice plaintiff’s constitutional right of access to courts or that irreconcilably conflict with procedural court rules and therefore violate the separation of powers); and *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 771 P.2d 711 (1989) (Legislature may not enact statutes that infringe on parties’ inviolate right under Wa. Const. Art. 1, Section 21 to have a jury determine damages in a civil action.)

In *Watson v. Hockett*, 107 Wn.2d 158, 165, 727 P.2d 669 (1986), the Supreme Court ruled that the “change in the standard of care, as enunciated in *Harris*, [did not] affect the instructions we had approved in *Miller [v. Kennedy*, 91 Wn.2d 155, 588 P.2d 734 (1978) for] “the standard of care of a doctor.” *Watson* considered whether the “exercise of judgment” instruction may be used as a “supplemental” instruction to the standard of care, 107 Wn.2d at 167, not whether WPI 105.08’s burden to disprove that “a physician is not liable” for selecting alternative diagnoses or treatments within the differential diagnosis exceeds “necessary elements of proof” in RCW 7.70.040. Similarly, *Christensen v. Munsen*, 123 Wn.2d 234, 249, 867 P.2d 626 (1994), held the error of judgment instruction was not a comment on the evidence because it “accurately stated the law as set forth by this court in *Watson...*”, for the standard of care of a doctor, without addressing RCW 7.70.040’s “necessary elements of proof.” Neither *Gerard v. Sacred Heart Medical Center*, 86 Wn. App. 387, 937 P.2d 1104 (1997) nor *Ezell v. Hutson*, 105 Wn. App. 485, 489-90, 20 P.3d 975 (2001), tested WPI 105.08 for inconsistency with RCW 7.70.040’s “necessary elements of proof” or *Branom* preemption.

C. **If Stare Decisis Applies, The “A Physician Is Not Liable” Instruction Should Be Abandoned as Incorrect and Harmful.**

If stare decisis applies to any extent, the “exercise of judgment” rule in WPI 105.08 should be abandoned as “incorrect and harmful”, *Stranger Creek*, 77 Wn.2d at 653, because it undermines “the evenhanded, predictable, and consistent development of legal principles,... reliance on judicial decisions, and... the actual and perceived integrity of the judicial process”, *Keene v. Edie*, 131 Wn.2d 822, 831, 935 P.2d 588 (1997) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. (1991)), by needlessly injecting unpredictability, inconsistency, and one-sidedness into medical negligence trials. It does this by leaving to the trial court’s discretion, rather than to any settled rule of law, the decision to give or not give WPI 105.08.

Watson’s warning that the “a physician is not liable” instruction should only be given “*with caution*” is a potent and refractory source of unpredictability in Washington’s medical liability law because it provides insufficient guidance to trial courts in the exercise of their discretion, leading to unpredictable and inconsistent results. 107 Wn.2d at 165 (emphasis supplied). *Watson’s* admonition leaves it to the discretion of the trial judge to give or not to give WPI 105.08 whenever a defendant or any opinion witness testifies that “judgment” was exercised in arriving at “a choice among

competing therapeutic techniques or among medical diagnoses.” *Id.* Such “judgment” evidence can be elicited in almost every case because “[t]he exercise of professional judgment is an inherent part of the care and skill involved in the practice of medicine.” *Miller v. Kennedy*, 91 Wn.2d 155, 160, 588 P.2d 734 (1978). In *Fergen v. Sestero*, 174 Wn. App. 393, 298 P.3d 782 (2013), Division Three held a medical opinion witness may supply the requisite “judgment” evidence, even when the defendant does not:

Defendant’s “expert witnesses testified that, in his diagnostic process, Dr. Sestero exercised reasonable care and skill within the standard of care because he examined the lump, considered its history, ordered an x-ray of the ankle to ensure no structural defects, referred Mr. Fergen to an orthopedic specialist, and instructed him to follow-up as necessary.... Therefore...the trial court did not abuse its discretion by instructing the jury on a physician’s exercise of judgment.”

Instead of promoting “consistent development of legal principles, ... [and] reliance on judicial decisions”, *Keene v. Edie*, 131 Wn.2d at 831, WPI 105.08 requires malpractice litigants to guess and gamble, any time an exercise of judgment is claimed, on whether or not WPI 105.08 will be given. Since trial judges have discretion to give or not give WPI 105.08 whenever there is “judgment” evidence, *Miller* and *Fergen*, *supra*, jury instructions and trial outcomes can and do vary according to the predilections of different judges, or even different preferences of the same judges in different cases. When trial judges are given discretion to choose one rule of law over

another—*i.e.* whether health care liability should be based only on RCW 7.70's "necessary elements of proof" and "reasonably prudent" standard of care, or should also require disproof that "a physician is not liable" for exercising "judgment" in selecting among alternative diagnoses or treatments—it invites arbitrariness, which results in inconsistent application of legal principles and inevitably calls into question the "actual and perceived integrity of the judicial process", *Keene, supra* at 831. Since WPI 105.08 is always or almost always associated with defense verdicts, a trial court's exercise of discretion to give WPI 105.08 is tantamount to directing a defense verdict.

If the "a physician is not liable" instruction in WPI 105.08 correctly "supplement[s]" the reasonable prudence standard of care in RCW 7.70, *Watson, supra* at 166, then why should it only be given "with caution", *id.* at 165, and "only be given in connection with a proper standard of care instruction", never as a stand-alone instruction? *Id.* at 166-67. And why should it be given at the discretion of one trial judge, but refused at the discretion of another, even if both trial judges heard identical evidence that both defendants exercised "judgment"...in selecting one of two or more alternative courses of treatment or diagnoses", WPI 105.08, especially when the instruction is always or almost always outcome determinative?

WPI 105.08 also is not “evenhanded”, *Keene, supra* at 831, because the fact that no one knows if it will be given *until the end of the trial* creates a significant economic disadvantage for malpractice plaintiffs vis-a-vis medical malpractice insurers. Once an insured physician is sued, a malpractice insurer cannot lawfully avoid its contractual obligation to pay defense costs, which are unaffected by whether or not WPI 105.08 is given. This lets the malpractice insurer plan for the worst—having to defend under RCW 7.70's burden of proof and standard of care—but hope for the best—that WPI 105.08 will be given and result in a defense verdict or hung jury that will foreclose indemnification.

In contrast, a patient harmed by medical malpractice initially has a choice either to become “ultimately liable” for tens or hundreds of thousands of dollars in litigation costs necessary to prosecute a malpractice case, or to forgo a lawsuit.³ The injured patient can hope for the best—that the jury will be instructed only as to RCW 7.70's burden of proof and standard of care, but

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RPC 1.8(e) provides:

(1) a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses....

cannot plan against the worst—that WPI 105.08 will be given at the end of the trial after all the money is spent and result in a defense verdict or hung jury, making the patient “ultimately liable” for huge litigation costs uncovered by a verdict and judgment. If the injured patient knew before commencing the lawsuit that WPI 105.08 would be given, he or she could avoid this predicament by forgoing or abandoning a futile malpractice lawsuit. On the other hand, if injured patients and malpractice insurers knew in advance that WPI 105.08 would *not* be given, they could evaluate medical negligence cases according to the standard of care and burden of proof in RCW 7.70 and try or settle them accordingly.

Through their legal and malpractice insurer sources, respondents’ attorneys have unequaled knowledge of outcomes of medical malpractice trials during the last 30 years in which the “a physician is not liable” instruction has been given. But they have not cited a single plaintiff’s verdict in any such trial because WPI 105.08 always or almost always is associated with defense verdicts. It is no wonder respondents sagely advise that “plaintiffs’ lawyers should be more selective in taking cases or deciding which cases to take to trial.” *Respondents’ Brief*, p. 30. If plaintiff lawyers knew the “a physician is not liable” instruction would be given, they would be foolish to take any medical negligence cases at all.

Medical defendants will not suffer unfair prejudice from being held to “the same standard of care as is imposed upon other members of society”, *Harris*, 99 Wn.2d at 447, if they lose the “a physician is not liable” stalking horse instruction, because they already enjoy the advantage of many other jury instructions—burden of proof, WPI 21.01; standard of care, WPI 105.01 and 105.02; proximate causation, WPI 15.01; super-majority verdict, WPI 1.11; and “no guarantee/poor result”, WPI 105.07—that stack the legal deck in favor of defense verdicts and hung juries. *See Appendix*.

In *Mohr v. Grantham*, 172 Wn.2d 844, 262 P.3d 490 (2011), the Supreme Court trenchantly noted that in addition to having to explain and overcome the “notoriously elusive” concept of proximate causation, *id.* at 850-51, “in order to prevail in a medical malpractice claim, a plaintiff still also bears the exacting burden to prove that a health care provider breached the standard of care.” *Id.* at 851, fn. 4. *Mohr* reasons that 30 years of “history assures us that *Herskovits* [*v. Group Health Cooperative of Puget Sound*, 99 Wn.2d 609, 664 P.2d 474 (1983)] did not upend the world of torts in Washington, as demonstrated by the few cases relying on *Herskovits* that have been heard by Washington appellate courts.” *Id.* at 857. Likewise, there is no reason to fear that abandoning the “a physician is not liable” instruction will upend the world of medical malpractice, since a “defendant

physician [who] missed a diagnosis or provided a treatment which failed”, *Respondents’ Brief*, p. 20, has burden of proof, standard of care, proximate cause, super-majority verdict, and “no guarantee/poor result” instructions to guard against improvident liability.

Uniformity and predictability could be served by giving WPI 105.08 in every medical negligence case where there is evidence the defendant exercised “judgment.” Or they could be served by abandoning WPI 105.08 and letting juries decide medical negligence cases according to RCW 7.70’s burden of proof and standard of care. But they cannot be served by giving trial judges discretion to decide which rule of law should apply case by case, especially when exercising discretion to give the instruction always or almost always is associated with a defense verdict.

As a policy matter, WPI 105.08 should be abandoned rather than applied uniformly because the Legislature has provided for health care liability actions in RCW 7.70, and Washington voters rejected de facto medical malpractice immunity by defeating Initiative 330 in 2005.⁴ To apply

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Initiative 330 sought to “change healthcare liability laws by: limiting recovery for noneconomic damages; limiting attorney fees; requiring advance notice of lawsuits; shortening time for filing cases; expanding evidence of payment from other sources and eliminating subrogation for those sources; authorizing mandatory arbitration without trial; authorizing periodic payments of future damages and terminating those payments under certain circumstances;

WPI 105.08 uniformly would vanquish the “underlying principles of deterring negligence and compensating for injury”, *Mohr*, 172 Wn.2d at 856, which the Legislature, the voters, and the Supreme Court respectively have enacted, preserved and upheld.

D. The Defect in WPI 105.08 Is in Its Message, Not in Its Adjectives, Nouns or Use.

The repeated judicial modifications and limitations to the “error/exercise of judgment” instruction over the last half century since *Dinner v. Thorp*, 54 W.2d 90, 98, 338 P.2d 137 (1959) show it has become unstable precedent. Our Supreme Court has eliminated its defining adjectives “good faith”, “honest”, “mere”, “bona fide” and said it can only be given “with caution” and not as a stand-alone instruction because otherwise it is considered “misleading”, “argumentative”, “slanted” and irrational. See *Dinner and Watson v. Hockett*, 107 Wn.2d 158, 163, 165, 727 P.2d 669 (1986) (“terms such as ‘honest mistake’ and ‘bona fide error’ ... not only defy rational definition but also tend to muddle the jury’s understanding of the burden imposed upon a plaintiff in a malpractice action.”) The current

eliminating liability for other persons or entities in some cases; and limiting damage recovery from multiple healthcare providers.” *Coppernoll v. Reed*, 155 Wn.2d 290, 293-94, 119 P.3d 318 (2005).

version of WPI 105.08 substitutes the word “exercise” for “error.” But the defect in WPI 105.08 is not in its defining adjectives, or in its nouns “exercise” or “error”, or in its cautious or incautious use; its defect is in its message—“A physician is not liable”—which has “muddle[d] the jury’s understanding of the burden imposed upon a plaintiff in a malpractice action” for the last 50 years.

Rogers v. Meridian Park Hosp., 307 Or. 612, 772 P.2d 929, 933 (1989) provides no support for respondents’ proposition that “[t]he source of the problem is the use of the word ‘error’ rather than the word ‘exercise.’” *Respondents’ Brief*, p. 19. The Oregon Supreme Court in *Rogers* rejected the “exercise of judgment” instruction altogether, holding:

... the court should not instruct the jury in such terms; such instructions not only confuse, but they are also incorrect because they suggest that substandard conduct is permissible if it is garbed as an “exercise of judgment.”

Id. at 620.

The WPI Committee did not conduct any juror polls or focus groups to give any credence to respondents’ contention that the source of the problem with WPI 105.08 is “the controversial word ‘error.’” *Respondents’ Brief*, p. 19. To the contrary, the uniform defense verdicts associated with WPI 105.08 in its present “exercise of judgment” rendition confirm its defect

has not been fixed by substituting the word “exercise” for “error”, but rather inheres in its message, “A physician is not liable....”

Further, nothing in WPI 105.08 *requires* a jury to link the “a physician is not liable” instruction to RCW 7.70's reasonable prudence standard of care. WPI 105.08 leaves a jury free to conclude that if “a physician is not liable” for exercising judgment within the standard of care in “selecting one of two or more alternative courses of treatment or diagnoses”, the physician also is not liable for harm caused by negligent misdiagnosis, negligent treatment, negligent failure to refer, or other negligent acts or omissions.

E. WPI 105.08's “Watchwords” Are More Harmful than Useful.

Respondents mistakenly credit WPI 105.08 with “useful watchwords to remind judge and jury that medicine is an inexact science where the desired results cannot be guaranteed, and where professional judgment may reasonably differ as to what constitutes proper treatment.” *Watson*, 107 Wn.2d at 167, *quoting from* J. Perdue, *Texas Medical Malpractice, Ch. 2, “Standard of Care”*, 22 Hous.L.Rev. 47, 60 (1985). *See Respondents’ Brief*, pp. 16, 19. WPI 105.08 doesn’t say medicine is an inexact science, or that a physician cannot guarantee a desired result, or that doctors may have reasonable differences over what constitutes proper treatment. Instead, it

invites the jury to find that “a physician is not liable” for exercising “judgment” within the standard of care in selecting any diagnosis or treatment, no matter if the physician’s other acts or omissions negligently harmed the patient. The “no guarantee/poor result” instruction, WPI 105.07, speaks to the inability to guarantee a desired result: “A poor medical result is not, by itself, evidence of negligence.” *See Appendix*. The “standard of care” instructions, WPI 105.01 and 105.02, acknowledge that doctors may have reasonable differences as to what constitutes proper treatment:

The degree of care actually practiced by members of the medical profession is evidence of what is reasonably prudent. However, this evidence alone is not conclusive on the issue and should be considered by you along with any other evidence bearing on the question.

Appendix.

Unlike WPI 105.01 and 105.07, WPI 105.08 does not speak to the purposes respondents credit it with promoting. WPI 105.08 just “suggest[s] that substandard conduct is permissible if it is garbed as an ‘exercise of judgment’”, *Rogers v. Meridian Park Hosp.*, 307 Or. 612, 772 P.2d 929, 933 (1989), which makes it useless as well as incorrect and harmful.

III. CONCLUSION

For these reasons, 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 15th day of August, 2013.

THE BUDLONG LAW FIRM

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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 Appellant's Reply Brief and Appendix was filed with the court and delivered via e-mail and legal messenger to the following persons -

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DATED this 15th day of August, 2013.

Debra M. Watt

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NO. 69926-1

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.

APPENDIX

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COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

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WPI 1.11

GENERAL INSTRUCTIONS

WPI 1.11

CONCLUDING INSTRUCTION—FOR
SPECIAL VERDICT FORM

Upon retiring to the jury room for your deliberations, first select a presiding juror. The presiding juror shall see that your discussion is sensible and orderly, that you fully and fairly discuss the issues submitted to you, and that each of you has an opportunity to be heard and to participate in the deliberations on each question before the jury.

You will be given [the exhibits admitted in evidence and] these instructions. You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. However, do not assume that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If you need to ask the court a question that you have been unable to answer among yourselves after reviewing the evidence and instructions, write the question simply and clearly. The presiding juror should sign and date the question and give it to the

INTRODUCTORY AND GENERAL

WPI 1.11

bailiff. The court will confer with counsel to determine what answer, if any, can be given.

In your question, do not indicate how your deliberations are proceeding. Do not state how the jurors have voted on any particular question, issue, or claim, nor in any other way express your opinions about the case.

In order to answer any question, [ten] [five] jurors must agree upon the answer. It is not necessary that the jurors who agree on the answer be the same jurors who agreed on the answer to any other question, so long as [ten] [five] jurors agree to each answer.

When you have finished answering the questions according to the directions on the verdict form, the presiding juror must sign the form, whether or not the presiding juror agrees with the verdict. The presiding juror will then tell the bailiff that the jury has reached a verdict, and the bailiff will bring you back into court where your verdict will be announced.

NOTE ON USE

Use this instruction whenever a special verdict form is to be used.

Jurors may also be provided with suggested deliberation procedures, see WPI 6.18. If this is done, the two instructions must be kept distinct and should be read to the jurors at different times. See the Note on Use and Comment to WPI 6.18.

If jurors are not allowed to take notes (see WPI 1.01.04), the instruction will need to be modified.

COMMENT

Under RCW 4.44.380, ten jurors must agree before there is a verdict of a jury of twelve. For special verdicts, it is not necessary that the same ten jurors agree on all the interrogatories, so long as each interrogatory answer is agreed to by some combination of ten jurors, CR 49(1) (as amended by the Supreme Court in June, 2001). With the amendment to CR 49 in 2001, the Supreme Court has resolved a long-standing tension in Washington's case law between the "any ten jurors" standard and the "same ten jurors" standard. The Supreme Court's adoption of the "any ten jurors" standard is now reflected in the pattern instruction.

CHAPTER 15

PROXIMATE CAUSE

Analysis of Instructions

Instruction Number	
15.01	Proximate Cause—Definition.
15.01.01	Proximate Cause—Definition—Alternative.
15.02	Proximate Cause—Substantial Factor Test.
15.03	[Reserved.]
15.04	Negligence of Defendant Concurring With Other Causes.
15.05	Negligence—Intervening Cause.

WPI 15.01

PROXIMATE CAUSE—DEFINITION

The term "proximate cause" means a cause which in a direct sequence [unbroken by any new independent cause,] produces the [injury] [event] complained of and without which such [injury] [event] would not have happened.

[There may be more than one proximate cause of an [injury] [event].]

NOTE ON USE

This instruction is the standard definition of proximate cause. For an alternative wording of this instruction, see WPI 15.01.01, Proximate Cause—Definition—Alternative.

Use WPI 15.02, Proximate Cause—Substantial Factor Test, instead of WPI 15.01 or WPI 15.01.01 when the substantial factor test of proximate causation applies.

Use bracketed material as applicable.

The last sentence in brackets should be given only when there is evidence of a concurring cause. In the event the last sentence is used, consideration should be given to WPI 15.04, Negligence of Defendant Concurring with Other Causes.

COMMENT

Elements of Proximate Cause. Proximate cause under Washington law recognizes two elements: cause in fact and legal causation. See

WPI 21.01

MEANING OF BURDEN OF PROOF—
PREPONDERANCE OF THE
EVIDENCE

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case [bearing on the question], that the proposition on which that party has the burden of proof is more probably true than not true.

NOTE ON USE

This instruction should be given in every case in which the burden of proof is preponderance of the evidence. This is true even though the only issue in the case is the amount of damages. The bracketed material should be used if limited purpose testimony has been introduced or if any propositions require a certain type of evidence for proof, as in malpractice cases. See WPI 1.06 (Evidence for Limited Purpose).

For a fraud case, or for any case in which the burden of proof is by clear, cogent and convincing evidence, see WPI 160.02, Fraud—Burden of Proof, or WPI 160.03, Fraud—Burden of Proof—Combined with Preponderance of Evidence.

COMMENT

The "more probably true than not true" definition set forth in this instruction is generally accepted. See *Dependency of H.W.*, 92 Wn.App. 420, 961 P.2d 963 (1998); *In re Sego*, 82 Wn.2d 736, 739 n. 2, 513 P.2d 831, 833 n. 2 (1973).

[Current as of May 2002.]

CHAPTER 105
HEALTH CARE

Analysis of Instructions

Instruction Number	
105.01	Negligence—General Health Care Provider.
105.02	Negligence—Health Care Provider—Specialist.
105.02.01	Negligence—Hospital.
105.02.02	Hospital Responsibility—Corporate Negligence.
105.02.03	Negligence—Hospital—Apparent Agency.
105.03	Burden of Proof—Negligence—Health Care Provider.
105.04	Informed Consent—Health Care Provider.
105.05	Burden of Proof—Informed Consent—Health Care Provider.
105.06	Theories of Recovery.
105.07	No Guarantee/Poor Result.
105.08	Exercise of Judgment.
105.09	Loss of a Chance of Survival (No instruction is set forth).

WPI 105.01

**NEGLIGENCE—GENERAL HEALTH
CARE PROVIDER**

A (fill in type of health care provider) owes to the patient a duty to comply with the standard of care for one of the profession or class to which he or she belongs.

A (type of health care provider) has a duty to exercise the degree of skill, care, and learning expected of a reasonably prudent (health care provider) in the State of Washington acting in the same or similar circumstances at the time of the care or treatment in question.

Failure to exercise such skill, care, and learning constitutes a breach of the standard of care and is negligence.

The degree of care actually practiced by members of the medical profession is evidence of what is reasonably prudent. However, this evidence alone is not conclusive on the issue and

WPI 105.01

STANDARDS OF CONDUCT

should be considered by you along with any other evidence bearing on the question.

NOTE ON USE

Use this instruction for a claim of negligence involving any member of the healing arts such as doctor, surgeon, dentist, chiropractor, psychologist, or nurse by filling in the blank with the appropriate word. See RCW 4.24.290 and RCW 7.70.020. This instruction is to be used when the health care provider is not a specialist. For a specialist, use WPI 105.02. If the jury must decide whether the health care provider held himself or herself out as a specialist, use both instructions.

Do not use this instruction for an incorporated hospital. Use WPI 105.02.01 instead.

Do not use WPI 10.01, Negligence—Adult—Definition. The ordinary definition of negligence should not be used in a malpractice case.

Use WPI 105.03, Burden of Proof—Negligence—Health Care Provider, with this instruction.

COMMENT

RCW 4.24.290 and RCW 7.70.040(1).

RCW 7.70.040(1) provides that the plaintiff in an action for professional negligence must show that the defendant health care provider "failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances." RCW 4.24.290 varies from RCW 7.70.040(1). RCW 4.24.290 provides in part that "[t]he plaintiff in order to prevail shall be required to prove by a preponderance of the evidence that the defendants failed to exercise that degree of skill, care, and learning possessed at that time by other persons in the same profession, and that as a proximate result of such failure the plaintiff suffered damages." The committee elected to incorporate the language of RCW 7.70.040(1) into this instruction in view of the court's opinion in *Harris v. Groth*, 99 Wn.2d 438, 663 P.2d 113 (1983).

In *Harris v. Groth*, *supra*, the court held that the standard of care established under RCW 7.70.040 and RCW 4.24.290 is that of a "reasonably prudent practitioner" and not that of the "average practitioner." The court reasoned that the statutory phrase "expected of a reasonably prudent health care provider" referred to the expectations of society and not those of the medical community. The court in *Harris v. Groth*, 99 Wn.2d at 451, summarized its holding as follows:

WPI 105.02

NEGLIGENCE—HEALTH CARE
PROVIDER—SPECIALIST

A health care professional owes to the patient a duty to comply with the standard of care for one of the profession or class to which he or she belongs.

A (fill in type of health care provider) who [holds himself or herself out as a specialist in (fill in type of specialist)] [assumes the care or treatment of a condition that is ordinarily treated by a (fill in type of specialist)] has a duty to exercise the degree of skill, care and learning expected of a reasonably prudent (fill in type of specialist) in the State of Washington acting in the same or similar circumstances at the time of the care or treatment in question. Failure to exercise such skill, care, and learning constitutes a breach of the standard of care and is negligence.

The degree of care actually practiced by members of the medical profession is evidence of what is reasonably prudent. However, this evidence alone is not conclusive on the issue and should be considered by you along with any other evidence bearing on the question.

NOTE ON USE

Use this instruction for a claim of negligence involving any healing art, such as that practiced by a physician, surgeon, dentist, chiropractor, or other profession, by filling the blanks with the appropriate words. This instruction is to be used if the practitioner is a specialist, claimed to be a specialist, or provided care or treatment within the exclusive province of a specialist. If the practitioner is not a specialist, use WPI 105.01. If the jury must decide whether or not the practitioner holds himself or herself out as a specialist, then use both instructions.

Use bracketed material as applicable. If more than one specialty is involved, fill in the blanks and use bracketed material to designate the appropriate specialty or specialties.

Do not use WPI 10.01, Negligence—Adult—Definition. The ordinary definition of negligence should not be used in a malpractice case.

WPI 105.07

NO GUARANTEE/POOR RESULT

[A _____ (fill in type of health care provider) does not guarantee the results of his or her care and treatment.]

[A poor medical result is not, by itself, evidence of negligence.]

NOTE ON USE

Use one or both sentences of this instruction, when appropriate, to supplement either WPI 105.01, Negligence—General Health Care Provider, or WPI 105.02, Negligence—Health Care Provider—Specialist. See the Comment below.

COMMENT

The giving of a supplemental “no guarantee/poor result” instruction in a medical malpractice case is within the trial court’s discretion. *Christensen v. Munsen*, 123 Wn.2d 234, 248, 867 P.2d 626, 634 (1994). Also see, *Estate of Lapping v. Group Health Cooperative of Puget Sound*, 77 Wn.App. 612, 626–27, 892 P.2d 1116 (1995). The use of such an instruction was earlier discussed and approved in the cases of *Miller v. Kennedy*, 91 Wn.2d 155, 588 P.2d 734 (1978), and *Watson v. Hockett*, 107 Wn.2d 158, 727 P.2d 669 (1986).

In *Watson, supra*, the court suggested the circumstances in which discretion should be exercised in favor of use of the instruction: “Such an instruction is particularly appropriate where the jury has heard evidence or argument from which it might reach an improper conclusion that doctors guarantee good results, or can be found negligent merely because of a bad result.” *Watson v. Hockett*, 107 Wn.2d at 164.

In *Watson, supra*, where the central issue was the credibility of the parties, the decision not to give an instruction of this type did not constitute “prejudicial error.” *Watson v. Hockett*, 107 Wn.2d at 167. In *Christensen, supra*, the court noted that “the evidence supported giving the instruction, since the main issue at trial was whether plaintiff’s blindness was the result of defendant’s treatment or her underlying eye disease.” *Christensen v. Munsen*, 123 Wn.2d at 248.

In an analogous case involving architectural malpractice, the determination of whether to give a supplemental instruction of this type has been held to be discretionary with the trial judge. See *Seattle Western Industries v. David A. Mowat Co.*, 110 Wn.2d 1, 9, 750 P.2d 245, 251 (1988) (trial court did not abuse its discretion by refusing to give a

WPI 105.08

EXERCISE OF JUDGMENT

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

NOTE ON USE

This instruction may be used only when the doctor is confronted with a choice among competing therapeutic techniques or among medical diagnoses. The current form of the instruction is intended to respond to the Supreme Court's statement that the instruction is to be used with caution; see the Comment below. Use this instruction to supplement either WPI 105.01, Negligence—General Health Care Provider, or WPI 105.02, Negligence—Health Care Provider—Specialist. The court should give WPI 105.07 (first bracketed language) with this instruction.

COMMENT

Reformulation of Former "Error of Judgment" Instruction. The committee has reformulated this instruction, which has become known as the "error of judgment" instruction. In holding that the giving of such an instruction in certain limited circumstances was not erroneous, appellate courts have repeatedly urged caution in their use.

In *Watson v. Hockett*, 107 Wn.2d 158, 727 P.2d 669 (1986), the court held that it is appropriate to give an "error of judgment" instruction to supplement a "proper" standard of care instruction in some instances. The instruction at issue in *Watson* stated: "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." 107 Wn.2d at 164. In approving the use of the instruction in the case before it, the court emphasized that an "error of judgment" instruction is to be given "with caution," that it should not contain the word "honest," and that its use should "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.

In *Christensen v. Munsen*, 123 Wn.2d 234, 249, 867 P.2d 626 (1994), the Supreme Court approved the use of a similar instruction modified in

accordance with *Watson v. Hackett*, supra. See also *Ezell v. Hutson*, 105 Wn.App. 485, 20 P.3d 975 (following *Watson* but questioning the need for the instruction), rev. denied 144 Wn.2d 1011, 31 P.3d 1185 (2001). The same cautions for its use were repeated by the court.

Nevertheless, there has been considerable criticism of this type of instruction (in Washington and elsewhere), which has focused on the use of the term "error." The Supreme Court of Oregon, in expressing its disapproval of the use of the word, made the following observation:

To state that a doctor is not liable for bad results caused by an error of judgment makes it appear that some types of negligence are not culpable. It is confusing to say that a doctor who has acted with reasonable care has nevertheless committed an error of judgment because untoward results occur. In fact, bad results notwithstanding, if the doctor did not breach the standard of care, he or she by definition has committed no error of judgment. The source of the problem is the use of the word "error." Error is commonly defined as "an act or condition of often ignorant or imprudent deviation from a code of behavior." Webster's Third New International Dictionary 772 (unabridged 1971). These sentences could lead the jury to believe that a judgment resulting from an "ignorant or imprudent deviation from a code of behavior" is not a breach of the standard of care.

Rogers v. Meridian Park Hospital, 307 Or. 612, 620, 772 P.2d 929, 933 (1989). See also *Hirahara v. Tanaka*, 87 Haw. 460, 959 P.2d 830 (1998) (adopting the *Rogers* court's analysis).

Sharing these concerns, while also recognizing the wisdom of the *Watson* court's conclusion that it can sometimes be helpful to remind jurors that "medicine is an inexact science where the desired results cannot be guaranteed, and where professional judgment may reasonably differ" (107 Wn.2d at 167), the committee offers this rewritten instruction.

Application. The "error of judgment" instruction has been applied not only to physicians, but also to nurses. See *Gerard v. Sacred Heart Med. Ctr.*, 86 Wn.App. 387, 937 P.2d 1104 (1997).

[Current as of May 2002.]