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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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DANI FERGEN, individually and as Personal Representative of the
ESTATE OF PAUL J. FERGEN, and minors BRAYDEN FERGEN and
SYDNEY FERGEN, individually,

Plaintiffs/Petitioners,

vs.

JOHN D. SESTERO, M.D., individually and as an
employee/shareholder/agent of defendant SPOKANE INTERNAL
MEDICINE, P.S., a Washington corporation,

Defendants/Respondents.

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.

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BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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 ORIGINAL

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation under Washington law, and a supporting organization to Washington State Association for Justice (formerly Washington State Trial Lawyers Association). WSAJ Foundation has an interest in the rights of persons seeking redress under the civil justice system, including an interest in proper interpretation and application of the laws governing trial of medical negligence claims.

II. INTRODUCTION AND STATEMENT OF THE CASE

The Court's acceptance of review in these consolidated cases provides it the opportunity to revisit whether giving an "exercise of judgment" jury instruction is appropriate in medical negligence cases against health care providers. Fergen v. Sestero involves a medical negligence action by Dani Fergen, individually and as Personal Representative of the Estate of Paul J. Fergen and minors Brayden Fergen and Sydney Fergen (Fergen), against John D. Sestero, M.D. and Spokane Internal Medicine, P.S., the corporation for which he worked (Sestero). Appukuttan v. Overlake Med. Ctr. involves a medical negligence action by Anil Appukuttan (Appukuttan) against Overlake Hospital Medical Center, Puget Sound Physicians, PLLC, and physicians Alan Brown, Marcus Trione and Tina Neiders (Overlake/PSP).

For purposes of this brief, the following facts are relevant:

Re: *Fergen*

The underlying facts in Fergen are drawn from the Court of Appeals opinion, the briefing of the parties, and the trial court's jury instructions. See Fergen v. Sestero, 174 Wn.App. 393, 298 P.3d 782, *review granted*, 178 Wn.2d 1001 (2013); Fergen Br. at 2-11; Sestero Br. at 3-25; Fergen Reply Br. at 1; Fergen Pet. for Rev. at 5-10; Sestero Ans. to Pet. for Rev. at 1; Fergen Supp. Br. at 1-2; Fergen CP 3177-3199 (jury instructions).

Paul Fergen was seen by Sestero, an internist, regarding a lump on his right ankle causing minor discomfort. Sestero diagnosed the condition as a benign ganglion cyst and ordered an x-ray of the ankle to ensure no structural defects. The x-ray report was negative, but noted some soft tissue swelling and remarked that "if a soft tissue cyst is felt, an ultrasound might be of help." Fergen, 174 Wn.App. at 395 (quoting x-ray report). Sestero did not order an ultrasound, and encouraged Mr. Fergen to seek medical attention if the lump grew bigger or became more painful. Thirteen months later Mr. Fergen had a seizure, and was ultimately diagnosed with Ewing's sarcoma, a rare and aggressive cancer that originated in the lump on his ankle. The cancer metastasized throughout his body and Mr. Fergen died from this condition.

Fergen commenced this medical negligence action against Sestero, alleging negligent treatment regarding the lump on Mr. Fergen's ankle. At trial, Fergen presented expert testimony that Sestero breached the standard

of care in not pursuing an ultrasound or taking additional steps to confirm the lump was a benign ganglion cyst and that, had this been done, the cancer would have been detected and treated and Mr. Fergen would have had a significantly increased prospect of survival. See Fergen Br. at 4, 8-9. In defense, Sestero presented expert testimony that the standard of care did not require him to order an ultrasound, biopsy, or other test to rule out cancer, or to refer Mr. Fergen to a specialist. See Sestero Br. at 4, 7. These defense experts testified Sestero acted within the standard of care, given the history of the lump and the fact that soft tissue tumors on an ankle are exceedingly rare. See id. at 8, 15-17.

The jury was instructed regarding the applicable standard of care, see Instruction No. 6 (Fergen CP 3185), the nature and use of expert testimony, see Instruction No. 5 (Fergen CP 3184), and that a health care provider's liability is determined based upon what is known or reasonably should have been known at the time of the treatment or examination, see Instruction No. 17 (Fergen CP 3197).¹

The trial court also gave an instruction similar to, but not identical to, the Washington Pattern Jury Instruction (WPI) 105.08 regarding "exercise of judgment." 6 WASH. PRAC.: Washington Pattern Jury Instructions: Civil, WPI 105.08 (6th ed.). Fergen Instruction No. 18 provided:

A physician is not liable for selecting one of two or more alternative diagnoses if, in arriving at a diagnosis a

¹ Fergen Instruction Nos. 5, 6 and 17 are reproduced in the Appendix to this brief.

physician exercised reasonable care and skill within the standard of care the physician was obligated to follow.

Fergen, 174 Wn.App. at 396 (quoting Instruction No. 18, Fergen CP 3198).²

Fergen objected to this instruction, contending that Sestero did not make a conscious choice between alternative diagnoses and that, in any event, use of this type of instruction is improper and should be disapproved. See Fergen Br. at 6-8. In turn, Sestero argued the instruction was appropriate under applicable case law, and was required because he had made a clinical judgment in diagnosing a ganglion cyst, necessarily determining that "the likelihood of this being cancer is so far down the list that you don't go any further in terms of weighing that alternative." Sestero Br. at 23 (quoting Sestero counsel's remarks during colloquy regarding instructions).

The jury returned a defense verdict. Fergen appealed, and the Court of Appeals affirmed. See Fergen at 397-98. Fergen sought review by this Court, challenging whether Instruction No. 18 should have been given under the circumstances, and whether use of this type of instruction should be discontinued. This Court granted review.

Re: Appukuttan

The underlying facts in Appukuttan are drawn from the briefing of the parties and the trial court's jury instructions. See Appukuttan Br. at 4-

² Fergen Instruction No. 18 differs from WPI 105.08 by substituting "arriving at a diagnosis a physician" for "arriving at a judgment to make the particular diagnosis the physician," and "obligated" for "obliged." The current version of WPI 105.08, including its "Note on Use" and "Comment," is reproduced in the Appendix to this brief.

10; Overlake/PSP Br. at 3-7; Appukuttan Reply Br. at 1-3; Appukuttan CP 11-31 (jury instructions).

Appukuttan was seen at the Overlake Hospital Emergency Department on four occasions over three days for persistent pain in his left calf, following a soccer injury; on each of these occasions he was treated and released. Ultimately, Appukuttan was diagnosed with "compartment syndrome" of the left calf and a fasciotomy was performed. However, he ended up with a permanent foot drop.

Appukuttan commenced this medical negligence action against Overlake/PSP, alleging that negligent treatment during the course of the four emergency room visits caused his foot drop. He contended that the Overlake/PSP physicians "negligently failed to monitor and treat his compartment syndrome when he came to Overlake's Emergency Department four times in three days...." Appukuttan Br. at 4.

At trial, Appukuttan presented expert testimony that Overlake/PSP physicians violated the standard of care in failing to take adequate steps to rule in or out compartment syndrome and provide timely treatment for this condition. See id. at 8. In defense, Overlake/PSP presented evidence that their physicians exercised proper clinical judgment and complied with the standard of care. See Instruction No. 1 (Appukuttan CP 12) (summarizing claims); Overlake/PSP Br. at 13-14. Overlake/PSP presented testimony by one of the defendant physicians, Dr. Brown, that he exercised proper clinical judgment in deciding not to use a certain medical device (Stryker

pressure monitor) to measure Appukuttan's compartmental pressures during the course of his emergency room treatment. See Appukuttan Br. at 9.

The jury was instructed on the applicable standard of care for Overlake/PSP health care providers, see Instruction No. 9 (Appukuttan CP 22), and on the nature and use of expert testimony, see Instruction No. 5 (Appukuttan CP 18). Over Appukuttan's objection, the trial court also gave Instruction No. 10, the "exercise of judgment" instruction, based upon WPI 105.08. This instruction provided:

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.

Appukuttan Br. at 9 (quoting Instruction No. 10, Appukuttan CP 23).³

The jury returned a defense verdict, and Appukuttan appealed to the Court of Appeals, challenging whether the trial court erred in giving the exercise of judgment instruction.⁴ Upon completion of the briefing, Appukuttan successfully moved to transfer the appeal to this Court, where it was consolidated with Fergen.

³ Appukuttan Instruction Nos. 5, 9 and 10 are reproduced in the Appendix to this brief.

⁴ Overlake/PSP contends that Appukuttan did not preserve for review his general challenges to the continued use of the exercise of judgment instruction; Appukuttan disagrees. See Overlake/PSP Br. at 1, 9-12; Appukuttan Reply Br. at 1-4. For purposes of this amicus curiae brief, it is assumed Appukuttan properly preserved his general challenges to the exercise of judgment instruction.

III. ISSUE PRESENTED

Whether use of "exercise of judgment" instructions such as WPI 105.08 should be discontinued as unnecessary, confusing and unfair, and cases upholding this type of instruction should be disapproved?

See Fergen Pet. for Rev. at 4; Appukuttan Br. at 1, 3, 18.

IV. SUMMARY OF ARGUMENT

Exercise of judgment instructions such as WPI 105.08 are unnecessary, confusing and unfair. Use of this type of instruction should be discontinued, and any precedent holding to the contrary should be disapproved. Under the doctrine of stare decisis, the flaws in the analysis supporting use of this type of instruction are of such magnitude as to render any holdings authorizing such use "incorrect and harmful."

Exercise of judgment instructions are unnecessary because, under Laudermilk v. Carpenter, 78 Wn.2d 92, 100-01, 457 P.2d 1004 (1969), the jury instructions on the standard of care are all that should be given to a jury in order for it to determine whether a physician's acts or omissions were negligent.

Exercise of judgment instructions are confusing because they obscure proper focus on the objective standard of care, creating an unnecessary risk that the jury will misapply the law. They are also confusing because they are framed in the negative ("A physician is not liable...").

Use of exercise of judgment instructions is unfair because the criteria for determining when the instruction should be given, announced

in Watson v. Hockett, 107 Wn.2d 158, 165, 727 P.2d 669 (1986), which limits use to situations where the physician must choose between alternative treatments or diagnoses, is wholly inconsistent with this Court's recognition in Miller v. Kennedy, 91 Wn.2d 155, 160, 588 P.2d 734 (1978), that a physician's exercise of judgment is an inherent part of the practice of medicine. This inconsistency renders the Watson formulation unworkable for trial courts. A jury instruction that Watson warns should be used "with caution" is arguably applicable to almost any medical negligence case. As a consequence, use of the exercise of judgment instruction is fundamentally unfair because of the likelihood of trial courts inconsistently applying Watson. This inconsistency cannot be remedied on appeal under the governing abuse of discretion standard of review.

A physician's exercise of professional or clinical judgment, as it relates to compliance with the standard of care, is properly addressed in the examination of expert witnesses and the argument of counsel.

V. ARGUMENT

Introduction

The briefing of the parties in these consolidated cases discusses in depth the history and evolution of what is now referred to as the "exercise of judgment" instruction, and it is not repeated here. See Fergen Supp. Br. at 1-14; Sestero Br. at 27-34; Appukuttan Br. at 11-18; Overlake/PSP Br. at 13-21; see also RAP 10.3(e) (requiring amicus briefs to avoid

repetition).⁵ Fergen argues that this Court's cases addressing use of this type of instruction are not precedential. See Fergen Supp. Br. at 1-14. While this argument may have merit, this brief assumes that these cases are stare decisis and that the Court will not abolish use of exercise of judgment instructions unless it concludes the rule established is "incorrect and harmful." See State v. Devin, 158 Wn.2d 157, 168, 142 P.3d 599 (2006) (articulating and applying Washington rule for overruling precedent).

The argument that follows addresses the question of the continued use of exercise of judgment instructions based upon the text of WPI 105.08. See Appendix.

Briefly, under this Court's jurisprudence, trial courts are currently advised to use this type of instruction "with caution" to supplement and clarify the standard of care. See Watson, 107 Wn.2d at 165, 166-67. The instruction's use "will ordinarily be limited to situations where the doctor is confronted with a choice among competing therapeutic techniques or among medical diagnoses." Id. at 165 (footnote omitted). Trial court determinations regarding use of the instruction are reviewed on appeal for

⁵ The "exercise of judgment" instruction phraseology is used here, although in the past this type of instruction has been referred to by different names, most recently "error in judgment" instruction. This Court has addressed this type of instruction in four opinions, the last of which was issued in 1994. See Dinner v. Thorp, 54 Wn.2d 90, 97, 338 P.2d 137 (1959) ("honest mistake or an [error] in judgment"); Miller v. Kennedy, 91 Wn.2d 155, 160 n.4, 588 P.2d 734 (1978) ("honest error in judgment"); Watson v. Hockett, 107 Wn.2d 158, 164, 727 P.2d 669 (1986) ("honest error of judgment"); and Christensen v. Munsen, 123 Wn.2d 234, 248, 867 P.2d 626 (1994) ("error of judgment"); cf. Samuelson v. Freeman, 75 Wn.2d 894, 454 P.2d 406 (1969) (concluding series of jury instructions regarding medical negligence, including "errors in judgment" instruction and "honest judgment" instruction, overemphasized the limitations on the physician's liability, requiring new trial).

abuse of discretion. See Fergen v. Sestero, 174 Wn.App. at 396 & n.3; see also Christensen, 123 Wn.2d at 247, 249.

Although this Court has struggled with this type of instruction for over 50 years, and has refined and seemingly narrowed its use, it remains controversial and requires reexamination. Any such reexamination should be conducted against the backdrop of the substantive law governing medical negligence claims and with an eye toward the guiding principles regarding how juries are to be instructed on the law.

A. Overview Of Ch. 7.70 RCW, And The Standard Of Care Governing Health Care Providers.

In Washington, medical negligence claims against health care providers are governed by Ch. 7.70 RCW. See RCW 7.70.010-.020; see also RCW 4.24.290; Berger v. Sonneland, 144 Wn.2d 91, 109, 26 P.3d 257 (2001). Under RCW 7.70.030, health care providers are liable for negligence, failure to obtain informed consent, or breach of a promise that a particular injury would not occur. RCW 7.70.040 sets forth the proof requirements for establishing medical negligence. In order to show breach of the standard of care, a plaintiff must prove that:

[t]he 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. ...

RCW 7.70.040(1).⁶

⁶ The current versions of RCW 4.24.290 and RCW 7.70.010-.040 are reproduced in the Appendix to this brief.

Ordinarily, the standard of care required of health care providers in the particular circumstances must be established by expert testimony. See Harris v. Groth, 99 Wn.2d 438, 451, 663 P.2d 113 (1983). However, the degree of care actually practiced by members of the profession is not conclusive on the issue. See id.

Washington Pattern Jury Instructions are frequently used to apprise juries regarding the applicable standard of care under RCW 7.70.040. See WPI 105.01 (regarding standard of care for general health care providers); see also WPI 105.02 (regarding standard of care for specialists).⁷ At the same time, consistent with the teachings in Harris, jurors in medical negligence cases are usually given the pattern instruction on the role expert testimony plays in determining what the standard of care is and whether it has been violated. See WPI 2.10.⁸ These pattern instructions on standard of care and use of expert testimony are the core instructions educating jurors on how to resolve medical negligence claims against physicians. In reexamining whether these instructions alone are sufficient to apprise the jury of its responsibility, the Court should also have in mind the guiding principles regarding how juries are to be instructed on the governing law.

⁷ The current versions of WPI 105.01 and 105.02, including each pattern instruction's "Note on Use" and "Comment," are reproduced in the Appendix to this brief. The juries in Fergen and Appukuttan were each instructed on the standard of care based upon WPI 105.02. See Fergen Instruction No. 6 (CP 3185); Appukuttan Instruction No. 9 (CP 22).

⁸ The current version of WPI 2.10, including its "Note on Use" and "Comment," is reproduced in the Appendix to this brief. The juries in both Fergen and Appukuttan were given an instruction based on WPI 2.10. See Fergen Instruction No. 5 (CP 3184), and Appukuttan Instruction No. 5 (CP 18).

B. Overview Of Guiding Principles Regarding Instructing Juries On Substantive Law, And The Washington Policy Of Limiting Instructions To The Basic And Essential Instructions Minimally Necessary For A Jury To Reach A Verdict.

It is often said that jury instructions are sufficient if they allow counsel to argue their theory of the case, do not mislead the jury and properly inform it of the applicable law. See Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). However, there is an overarching principle that should inform whether this Court continues to authorize use of exercise of judgment instructions. See Fergen Supp. Br. at 16. In Laudermilk v. Carpenter, 78 Wn.2d 92, 457 P.2d 1004 (1969), this Court held:

It has, for some years, been the policy of our Washington system of jurisprudence, in regard to the instruction of juries, to avoid instructions which emphasize certain aspects of the case and which might subject the trial judge to the charge of commenting on the evidence, and also, to avoid slanted instructions, formula instructions, or *any instruction other than those which enunciate the basic and essential elements of the legal rules necessary for a jury to reach a verdict.*

78 Wn.2d at 100 (emphasis added).

The guiding principle highlighted above should be a starting point in examining the propriety of any instruction regarding matters of substantive law. It requires deciding what a jury needs to be told in order to properly do its work. This guiding principle is distinct from the common, post hoc inquiry regarding whether a trial court's instructions grossly overemphasized one party's theory of the case, thereby denying the other party a fair trial. See e.g. Samuelson v. Freeman, 75 Wn.2d at 896-

97. The theory underlying this principle is that if instructions on the governing substantive rules are confined to what is essential, there is little risk the jury will misconceive the law or its duty. See Laudermilk, 78 Wn.2d at 100. As Laudermilk explains, when this principle is followed it is then the responsibility of counsel for the parties to argue to the jury "the refinements of these rules within the factual framework of [the] case." 78 Wn.2d at 100.

Laudermilk requires this Court to ask whether the use of exercise of judgment instructions, even under the seemingly limited circumstances outlined in Watson, is more than what is minimally necessary to properly educate a jury regarding the medical negligence standard of care. If so, it should be avoided.

As noted above, instructions also must not mislead the jury, and must properly state the law. This Court has determined that an instruction that is confusing is misleading. See Keller, 146 Wn.2d at 251, 253 (determining part of former WPI 140.01 was confusing, misleading and legally erroneous, requiring a new trial). The Court has also recognized that an instruction is prejudicial to a party if it "tend[s] to confuse the members of the jury as to their responsibility in the case." Dods v. Harrison, 51 Wn.2d 446, 451, 319 P.2d 558 (1957) (holding that, under conflicting evidence regarding whether plaintiff or defendant caused the motor vehicle accident, an instruction directing jury to return a verdict for the defendant if it was unable to determine which party was responsible

was confusing and prejudicial). An instruction is also confusing if it "creates an unnecessary risk of misapplication." Gjerde v. Fritzsche, 55 Wn.App. 387, 391-92, 777 P.2d 1042 (1989) (noting that instructions phrased in the negative carry an unnecessary risk of confusion and misapplication, but concluding the instruction in question did not confuse the jury in this instance and was not erroneous).

With this background regarding the substantive law governing medical negligence claims and the guiding principles for instructing juries, the question is whether the Court's precedent authorizing use of exercise of judgment instructions is incorrect and harmful.

C. The WPI 105.08 Exercise Of Judgment Instruction Is Unnecessary, Confusing And Unfair, And Its Use Should Be Discontinued; Precedent Supporting Use Of This Instruction Should Be Found "Incorrect And Harmful" Under The Doctrine Of Stare Decisis, And Disapproved.

The exercise of judgment instruction is unnecessary, confusing and unfair, and its use should be discontinued. These flaws are each of such magnitude as to render any precedent supporting use of the instruction incorrect and harmful.

1. The Instruction Is Unnecessary.

In Ezell v. Hutson, 105 Wn.App. 485, 492, 20 P.3d 975, *review denied*, 144 Wn.2d 1011 (2001), the Court of Appeals rejected a challenge to a prior version of WPI 105.08 ("error in judgment" instruction), concluding "we are constrained to follow the principles established under

stare decisis." However, in following this Court's precedent the Court of Appeals added:

If the Supreme Court chooses to revisit the line of cases that bind us, it seems fair to add that we see no independent reasons for giving a separate "error of judgment" instruction.

105 Wn.App. at 491. This is the first time since Ezell's remarks that the Court has revisited what is now referred to as the exercise of judgment instruction. It should conclude that its prior decisions upholding use of this type of instruction in certain situations to supplement or clarify the standard of care are incorrect and harmful. See Christensen, 123 Wn.2d at 249 (indicating instruction supplements the standard of care); Watson, 107 Wn.2d at 166 (indicating instruction supplements and clarifies standard of care).

As noted in Laudermilk, *supra*, Washington policy regarding jury instructions includes a directive to avoid giving instructions "other than those which enunciate the basic and essential elements of the legal rules necessary for a jury to reach a verdict." 78 Wn.2d at 100. A jury instructed on the standard of care set forth in RCW 7.70.040, coupled with an explanation on the role of expert testimony, has all that it needs. The standard of care is simple and straightforward, requiring the jury to take into account the "skill, care, and learning" of the health care provider in determining whether he or she was negligent. See WPI 105.01 & .02. This standard covers the full spectrum of medical practice that may be subject to scrutiny, including all aspects of diagnosis or treatment. The

reference in RCW 7.70.040 to "skill, care, and learning" requires the jury to consider all factors in assessing the physician's conduct or decision-making that is at issue. See WPI 105.01 & .02. Fundamentally, this involves assessing the physician's professional or clinical judgment. Indeed, this Court stated in Miller, "[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 (emphasis added).⁹

Adding an exercise of judgment instruction does not clarify the standard of care inquiry at all. It is an augmentation and, as discussed infra, one that comes with a significant risk. The non-essential nature of the exercise of judgment instruction is evident in the remarks of defense counsel in Fergen, made during the course of argument over instructions in the trial court:

And under these circumstances, and particularly the way the plaintiffs have tried the case, I can argue as an error in judgment that he was within the standard of care, and they can argue that he was outside of the standard of care for the judgment he made. And, in fact, that's the way they've tried the case. That's what the instruction says. He still has to comply with the standard of care. And their proof is that the judgments he made were wrong; they were outside the standard.

⁹ This statement is echoed by defense expert testimony in Fergen that:

There is literally not an interaction that goes on in the office on a daily basis that doesn't involve some degree of physician judgment, some choice of saying, "I'm going to think about these things. I'm not going to think about these because they're so unlikely."

Sestero Br. at 40 (quoting testimony of Dr. Leo).

Fergen Br. at 9 (quoting record); see also Sestero Br. at 22-24. The references to "judgment" in the above passage are surplusage – the outcome simply turns on whether the standard of care was violated.

This Court's exercise of judgment jurisprudence is incorrect in overlooking the guiding principle that non-essential instructions regarding substantive law must be avoided. See Laudermilk at 100.¹⁰ The Court's prior cases do not hold the exercise of judgment instruction is *essential* to a jury's understanding of the standard of care. The instruction is cast as supplemental, or a reminder. See Watson, 107 Wn.2d at 167; Christensen, 123 Wn.2d at 249. Also, the mere fact that use of the instruction is left to the discretion of the trial court also belies the *need* for the instruction.

Overlake/PSP casts the instruction as serving an "important purpose," relying on a passage from Watson, explaining the reasons for using this type of instruction. Overlake/PSP Ans. to Pet. for Rev. at 4.

This passage provides:

The purpose served by these instructions, used in the manner and form approved herein, is best described by using the words of one commentator who, in discussing similar supplemental or clarifying instructions, stated that

these doctrines provide 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.

¹⁰ A similar guiding principle is noted by the Oregon Supreme Court in Rogers v. Meridian Park Hosp., 772 P.2d 929, 931 (Or. 1989) (explaining "[j]ury instructions should reduce the relevant law to terms readily grasped by the jury without doing violence to the applicable legal rule"), in the course of striking down a medical negligence instruction containing an error in judgment component.

Watson at 167 (footnote omitted; emphasis added by Court) (quoting J. Purdue, Texas Medical Malpractice, Ch. 2, "Standard of Care," 22 Hous.L.Rev. [1, at] 47, 60 (1985)).

This quoted passage does not support using WPI 105.08. Nor does it speak in terms of the necessity for using an exercise of judgment instruction. Moreover, as Fergen notes, the passage does not justify the use of such instructions. See Fergen Supp. Br. at 12-13. Neither of the two rationales stated in the passage relate to use of WPI 105.08.¹¹ The first rationale, that physicians cannot guarantee results, relates to the concept expressed in WPI 105.07, the "no guarantee/poor result" instruction, not WPI 105.08.¹² The second rationale, that the instruction serves as a reminder that professional judgment may *reasonably* differ as to what constitutes proper treatment, is a matter for the trial court in performing its gatekeeping function, and not for the jury at all. The stated concern may surface when a physician is sued for choosing among two or more *reasonable* alternative treatments, each of which is within the standard of care. In this instance, liability may be resolved by summary judgment or directed verdict if there is no justiciable issue regarding

¹¹ Not only does the quoted passage from the J. Purdue article not support use of WPI 105.08, it and the surrounding text is not about use of the Texas "error in judgment" rule in jury instructions. See 22 Houston L. Rev. at 54-63. Moreover, that "rule" appears to be nothing more than a shorthand way of saying a physician is not liable for choosing between two or more reasonable alternative treatments, and will not be responsible for an unfavorable result absent evidence of negligence and violation of the standard of care. See id. at 57. The J. Purdue article's subsequent discussion of jury instructions does not mention the "error in judgment" rule. See id. at 467-87.

¹² WPI 105.07, including its "Note on Use" and "Comment," is reproduced in the Appendix to this brief. This pattern instruction was not given in either Fergen or Appukuttan.

breach of the applicable standard of care. A health care provider is not liable, as a matter of law, for a poor result if his or her choice of treatment was unquestionably within the standard of care.

This is entirely different from the situation where the jury hears competing expert testimony regarding the proper standard of care. Resolution of this issue is fully covered by the standard of care and expert testimony instructions. See e.g. Fergen Instructions No. 6 (CP 3185) (standard of care) & No. 5 (CP 3184) (expert testimony); Appukuttan Instructions No. 9 (CP 22) (standard of care) & No. 5 (CP 19) (expert testimony).

This Court's precedent supporting the exercise of judgment instruction is incorrect. It is also harmful because it serves as a basis for a pattern instruction that is given considerable weight by trial courts. See WPI 0.10 (introduction to WPIs, noting pattern instructions are not authoritative but "are often treated as 'persuasive'").

The absence of an exercise of judgment instruction will not adversely impact trial of the case itself. Medical experts for each party will likely discuss the role of professional or clinical judgment as it relates to their opinions regarding compliance with the standard of care. See Harris, 99 Wn.2d at 449 n.6 (suggesting expert testimony may involve "significant judgment factors"); cf. Rogers, 772 P.2d at 933 (indicating that in the absence of the disapproved error of judgment instruction witnesses may continue to use terms such as "exercise of judgment"). The

views of these experts will no doubt be subjected to rigorous cross-examination. Further, counsel for both sides will be able to argue to the jury regarding whether any professional or clinical judgments at issue complied with the standard of care. See Laudermilk, 78 Wn.2d at 100-01 (describing counsels' responsibility to argue to the jury the refinements of the legal rules within the framework of the case). This is the adversarial process at work; this is how it should be.

2. The Instruction Is Confusing.

Not only is the exercise of judgment instruction unnecessary, it is also confusing in that it obscures focus on RCW 7.70.040's objective standard of care and carries a significant risk of prejudice. While the health care providers argue that exercise of judgment instructions are compatible with the customary instructions on standard of care, and correctly note that juries are presumed to follow a court's instructions, it is not that simple when an instruction carries a serious risk of misapplication.

WPI 105.08 has the tendency to confuse juries. The interface between this instruction and pattern instructions on the standard of care and use of expert testimony is complex and subtle. The unacceptable risk is that, because of the exercise of judgment instruction, the jury will focus on the professional or clinical judgment of the defendant physician and determine that no liability should be imposed so long as that judgment is supported by *some* expert testimony that the conduct at issue complied with the standard of care. Consequently, a defense verdict may result

without the jury resolving the underlying dispute among the experts on what the standard of care is and whether it was violated. See Fergen Supp. Br. at 17-18.

This is not an idle or unsubstantiated concern. Under WPI 105.01 and WPI 105.02, juries are told to consider the skill, care and learning of the physician to resolve the standard of care issue. WPI 105.08 introduces the undefined term "judgment." With this instruction, the physician's defense may be re-cast in terms of the role of professional or clinical judgment in treatment and diagnosis. See e.g. Fergen Supp. Br. at 18 n.15 (providing excerpts from defense testimony and argument of counsel focusing on the role of judgment). The risk is that the jury will be misled into thinking that professional or clinical judgment is a free-standing consideration in its inquiry, which it is not. This misguided notion may find support in the jury's mind when it considers WPI 105.08 in conjunction with the last paragraph of WPI 105.01 or WPI 105.02, regarding the standard of care. The last paragraph of these instructions, premised on the teachings of Harris, 99 Wn.2d at 451, provides:

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.

WPI 105.01 & .02 (identical text). Considering this language in conjunction with WPI 105.08, a jury may conclude that various judgments

made by physicians during the course of diagnosis or treatment should not be second-guessed when supported by some expert testimony.

The risk of confusion and misapplication of the exercise of judgment instruction is further compounded because the instruction is framed in the negative. See WPI 105.08 (providing "A physician is not liable..."). See Gjerde, supra, 55 Wn.App. at 391-92.

The exercise of judgment instruction is confusing and thus misleading, if not legally erroneous. Precedent supporting this instruction should be deemed incorrect and harmful because it undermines the statutory requirements for proof of medical negligence set forth in RCW 7.70.040.¹³

3. The Instruction Is Unfair.

In Watson, 107 Wn.2d at 165, the Court restricted the circumstances under which an exercise of judgment-type instruction may be given, stating that it is ordinarily limited to situations where the physician is confronted with a choice among alternative treatments or diagnoses. Trial court determinations whether this criteria is met are reviewed for abuse of discretion. See Fergen, 174 Wn.App. at 396 & n.3; Christensen, 123 Wn.2d at 248-49; see also Seattle Western v. Mowat Co., 110 Wn.2d 1, 9, 750 P.2d 245 (1988) (construction malpractice case).

The Watson formulation provides insufficient guidance for the trial court to determine when the exercise of judgment instruction should be

¹³ Appukuttan basically argues for the same result, urging under a preemption analysis that the exercise of judgment instruction places an additional burden of proof on plaintiffs beyond the proof requirements set forth in RCW 7.70.040. See Appukuttan Br. at 11-18.

given. Equally important, Watson is inconsistent with this Court's previous recognition in Miller 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. Therefore, Watson and Miller are irreconcilable. Miller's recognition makes sense. In Fergen, Sestero argues that "[p]laintiffs ignore what the jury heard concerning the medical judgment that is involved in making *any* diagnosis." Sestero Br. at 39 (emphasis added). One defense expert testified in Fergen that:

Your judgment is always a key piece of everything we do in gaining a sense in evaluating a patient of what it is that they actually have. There is literally not an interaction that goes on in the office on a daily basis that does not involve some degree of physician judgment, some choice of saying, "I'm going to think about these things. I'm not going to think about these because they're so unlikely."

Id. at 40 (quoting testimony of Dr. Leo).

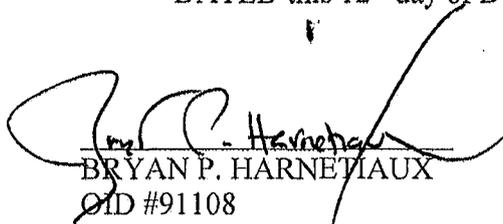
At the very least, the tension between Miller and Watson leaves trial courts without clear guidance, rendering inconsistent application of the Watson formulation likely. This is fundamentally unfair. Also, because of Miller, the threshold for use of the instruction "with caution" does not really exist, rendering the Watson formulation unworkable. Watson at 165. This problem is compounded because appellate review for abuse of discretion offers little opportunity for meaningful clarification on appropriate use of the instruction.

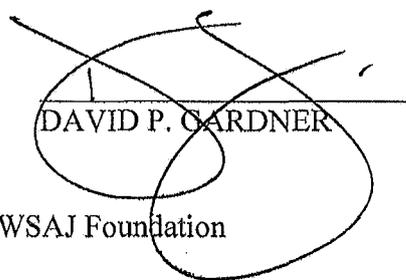
The Court should conclude the Watson formulation is incorrect and harmful because it cannot be fairly and predictably applied.¹⁴

VI. CONCLUSION

For all of the reasons discussed in this brief, the Court should overrule existing precedent supporting use of exercise of judgment instructions in medical negligence cases. WPI 105.08 and similar instructions should not be given.

DATED this 12th day of December, 2013.


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On Behalf of WSAJ Foundation

¹⁴ See Appukuttan Reply Br. at 11 (arguing that WPI 105.08 is not "evenhanded" because the determination of whether the exercise of judgment instruction will be given does not occur until the end of trial).

Appendix

4.24.290. Action for damages based on professional negligence of hospitals or members of healing arts--Standard of proof--Evidence--Exception

In any civil action for damages based on professional negligence against a hospital which is licensed by the state of Washington or against the personnel of any such hospital, or against a member of the healing arts including, but not limited to, an East Asian medicine practitioner licensed under chapter 18.06 RCW, a physician licensed under chapter 18.71 RCW, an osteopathic physician licensed under chapter 18.57 RCW, a chiropractor licensed under chapter 18.25 RCW, a dentist licensed under chapter 18.32 RCW, a podiatric physician and surgeon licensed under chapter 18.22 RCW, or a nurse licensed under chapter 18.79 RCW, the plaintiff in order to prevail shall be required to prove by a preponderance of the evidence that the defendant or 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, but in no event shall the provisions of this section apply to an action based on the failure to obtain the informed consent of a patient.

[2010 c 286 § 12, eff. June 10, 2010; 1995 c 323 § 2; 1994 sp.s. c 9 § 702; 1985 c 326 § 26; 1983 c 149 § 1; 1975 1st ex.s. c 35 § 1.]

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.

[1975-'76 2nd ex.s. c 56 § 6.]

7.70.020. Definitions

As used in this chapter "health care provider" means either:

(1) A person licensed by this state to provide health care or related services including, but not limited to, an East Asian medicine practitioner, a physician, osteopathic physician, dentist, nurse, optometrist, podiatric physician and surgeon, chiropractor, physical therapist, psychologist, pharmacist, optician, physician assistant, midwife, osteopathic physician's assistant, nurse practitioner, or physician's trained mobile intensive care

paramedic, including, in the event such person is deceased, his or her estate or personal representative;

(2) An employee or agent of a person described in part (1) above, acting in the course and scope of his employment, including, in the event such employee or agent is deceased, his or her estate or personal representative;

or

(3) An entity, whether or not incorporated, facility, or institution employing one or more persons described in part (1) above, including, but not limited to, a hospital, clinic, health maintenance organization, or nursing home; or an officer, director, employee, or agent thereof acting in the course and scope of his or her employment, including in the event such officer, director, employee, or agent is deceased, his or her estate or personal representative.

[2010 c 286 § 13, eff. June 10, 2010; 1995 c 323 § 3; 1985 c 326 § 27; 1981 c 53 § 1; 1975-'76 2nd ex.s. c 56 § 7.]

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;

(2) That a health care provider promised the patient or his or her representative that the injury suffered would not occur;

(3) That injury resulted from health care to which the patient or his or her representative did not consent.

Unless otherwise provided in this chapter, the plaintiff shall have the burden of proving each fact essential to an award by a preponderance of the evidence.

[2011 c 336 § 250, eff. July 22, 2011; 1975-'76 2nd ex.s. c 56 § 8.]

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.

[2011 c 336 § 251, eff. July 22, 2011; 1983 c 149 § 2; 1975-'76 2nd ex.s. c 56 § 9.]

WPI 2.10 Expert Testimony

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

NOTE ON USE

The committee recommends that this instruction be given only upon request. Because expert testimony is so common in modern jury trials, there is no good reason why it should be treated any differently from other testimony.

COMMENT

The court in *Gerberg v. Crosby*, 52 Wn.2d 792, 329 P.2d 184 (1958), held that the court need not give a special instruction on expert testimony on its own initiative. In dictum, however, the court indicated that such an instruction should be given if requested:

In the case at bar the jury was instructed generally that they were the sole and exclusive judges of the credibility of the several witnesses and the weight to be attached to the testimony of each. It perhaps would have been wise to have specifically called the jury's attention to the fact that this instruction also applied to expert witnesses.

Gerberg v. Crosby, 52 Wn.2d at 800. See also *Talley v. Fournier*, 3 Wn.App. 808, 479 P.2d 96 (1970) (reaffirming that such an instruction should be given).

The determination as to whether an expert witness possesses the necessary qualifications to testify upon a proper subject is within the sound discretion of the trial court. *Rice v. Johnson*, 62 Wn.2d 591, 384 P.2d 383 (1963); *Saldivar v. Momah*, 145 Wn.App. 365, 397, 186 P.3d 1117 (2008) (discretion is to be exercised according to specified criteria).

A qualified expert is competent to express an opinion on a proper subject even though the expert thereby expresses an opinion on the ultimate fact to be found by the trier of fact. ER 704; *Gerberg v. Crosby*, supra.

It is for the jury to determine what weight should be given expert-opinion testimony. *Gerberg v. Crosby*, supra; *Sigurdson v. City of Seattle*, 48 Wn.2d 155, 292 P.2d 214 (1956); *Kohfeld v. United Pacific Ins. Co.*, 85 Wn.App. 34, 42-43, 931 P.2d 911 (1997).

For a more complete discussion of these issues, see Tegland, 5B Washington Practice: Evidence Law and Practice §§ 702.1 et seq. (5th ed.).

[Current as of June 2009.]

WPI 105.01 Negligence—General Health Care Provider

A _____ 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 _____ has a duty to exercise the degree of skill, care, and learning expected of a reasonably prudent _____ 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 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).

Standard of care. 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. Robert C. Groth, M.D., Inc., P.S.*, 99 Wn.2d 438, 663 P.2d 113 (1983).

In *Harris*, 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* summarized its holding as follows:

The standard of care against which a health care provider's conduct is to be measured is that of a reasonably prudent practitioner possessing the degree of skill, care and learning possessed by other members of the same profession in the State of Washington. The degree of care actually practiced by members of the profession is only some evidence of what is reasonably prudent—it is not dispositive.

Harris v. Robert C. Groth, M.D., Inc., P.S., 99 Wn.2d at 451.

In *Brown v. Dahl*, 41 Wn.App. 565, 705 P.2d 781 (1985), the court held that the trial court's insertion of the terms "average," "reasonable," and "ordinary" into a standard of care instruction was erroneous because these terms allowed the jury to apply a lower standard than the "reasonable prudence" standard. *Brown* also holds that the instructions given by the trial court on the standard of care overemphasized the defendant's case and deprived the plaintiff of a fair trial.

The court in *Harris* suggested that the instruction on health care provider negligence should omit reference to the standard of practice for the profession prevailing at the time of the care or treatment in question. 99 Wn.2d at 448 n.5. However, in *Miller v. Peterson*, 42 Wn.App. 822, 714 P.2d 695 (1986), the court did not find any prejudicial error under the facts of that case resulting from the giving of an instruction which included the "standard of practice" language. Consistent with the court's suggestion in footnote 5 in *Harris*, the committee has included no reference to "standard of practice" in the instruction.

The committee has, however, included a reference to the "standard of care." In practice the term "standard of care" is frequently used by lawyers, judges, and expert witnesses during a medical negligence jury trial and is referred to in many appellate decisions as well. See, e.g., *Van Hook v. Anderson*, 64 Wn.App. 353, 358, 824 P.2d 509 (1992). Thus, to comply with actual practice, the committee has included language to convey to the jury that the duty of a health care provider is to comply with the "standard of care."

The court in *Adair v. Weinberg*, 79 Wn.App. 197, 205, 901 P.2d 340 (1995), cited the last paragraph of this instruction with approval, noting that such an instruction could have cured any confusion engendered by opposing counsel's misleading arguments about whether society, or doctors alone, define the standard of care. The first sentence of the last paragraph of the instruction was inserted by the committee to caution the jury not to confuse the standard of care with the prevailing standard of practice. See *Harris v. Groth*, supra, and *Watson v. Hockett*, 107 Wn.2d 158, 727 P.2d 669 (1986).

Mode of proof. The purpose of the second sentence of the last paragraph of the instruction is to inform the jury that expert testimony is not the exclusive means of determining the degree of care owed. Inclusion of this provision in a jury instruction was approved in *Richards v. Overlake Hosp. Medical Center*, 59 Wn.App. 266, 277, 796 P.2d 737 (1990).

The court in *Richards*, however, cautioned that "although the standard of care is not restricted to what is actually practiced, it must be determined by reference to expert testimony as to what is reasonably prudent." 59 Wn.App. at 277. Thus, the *Richards* court found no error in the trial court's refusal to instruct the jury that "[i]t is society and the patients to whom physicians are responsible, not solely their fellow practitioners." *Richards v. Overlake Hosp. Medical Center*, 59 Wn.App. 266, 277, 796 P.2d 737 (1990). The *Richards* court explained that such an instruction was not correct, as "the law does not permit a jury to base a standard of care on what it believes to be a prudent expectation of society or patients." *Richards v. Overlake Hosp. Medical Center*, 59 Wn.App. 266, 277, 796 P.2d 737 (1990). See also *Adair v. Weinberg*, 79

Wn.App. at 202-04 (reference to the phrase "expected by society" in a jury instruction on, or argument about, the standard of care in a medical negligence case is improper).

Absent exceptional circumstances, expert testimony is necessary to establish the standard of care, and to prove whether a particular practice is reasonably prudent under the applicable standard of care. E.g., *McLaughlin v. Cooke*, 112 Wn.2d 829, 836, 774 P.2d 1171 (1989). As a general rule, expert testimony on the issue of proximate cause is also necessary in medical negligence cases and must be based upon a reasonable degree of medical certainty. *McLaughlin v. Cooke*, 112 Wn.2d 829, 836, 774 P.2d 1171 (1989). The requisite expert testimony on standard of care and causation may be provided by nonphysicians if they are found qualified by the trial court. *Harris v. Groth*, supra; *Douglas v. Bussabarger*, 73 Wn.2d 476, 438 P.2d 829 (1968).

For additional cases discussing the competency and qualifications of an expert to testify on standard of care or causation in medical negligence cases, see, e.g., *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989); *McKee v. American Home Products, Corp.*, 113 Wn.2d 701, 782 P.2d 1045 (1989); *White v. Kent Medical Center, Inc., P.S.*, 61 Wn.App. 163, 810 P.2d 4 (1991).

The requirement that there be expert testimony to establish the standard of care in a particular situation is a guideline for the court as to whether the plaintiff has established a case for consideration by a jury. Ordinarily, the jury need not be instructed as to the existence of the evidentiary requirement. However, the giving of such an instruction was held not to be error in a case in which trial events caused the court to fear the jury might "go off on a tangent" and "make their own" standard of care." *Housel v. James*, 141 Wn.App. 748, 758-60, 172 P. 3d 712 (2007).

One exception to the general rule requiring expert testimony in medical malpractice cases is the situation where a physician inadvertently leaves a foreign object or substance in the patient. The court in *Bauer v. White*, 95 Wn.App. 663, 976 P.2d 664 (1999), held as a matter of law that it is not reasonably prudent for a physician to unintentionally leave a foreign substance in a surgical patient and therefore the plaintiff in such a case does not need expert testimony to establish the physician's negligence.

Whether the standard of care was breached is a separate question from whether that breach proximately caused the plaintiff's damages. The question of proximate cause may still go to the jury even though negligence has been established as a matter of law. See *Keogan v. Holy Family Hospital*, 95 Wn.2d 306, 622 P.2d 1246 (1980); *Byerly v. Madsen*, 41 Wn.App. 495, 704 P.2d 1236 (1985).

In *Ketchum v. Overlake Hosp. Medical Center*, 60 Wn.App. 406, 804 P.2d 1283 (1991), the court held that it was reversible error to give an instruction stating that "the testimony of other health care providers that they would have followed a different course of treatment, or disagreement between health care providers as to what the treatment should have been, is not enough to establish negligence." The court found that although the general principle of law underlying the instruction may be appropriate in analyzing a prima facie case of negligence, the instruction was incomplete and misleading once the issue of negligence was submitted to the jury and came close to commenting on the evidence.

The first paragraph of this instruction assumes that it is a patient who is claiming injury as a result of a health care provider's failure to follow the applicable standard of care. In the typical case, defining the duty as "owe[d] to the patient" is seen as accurate and helpful. In *Eelbode v. Chec Medical Centers, Inc.*, 97 Wn.App. 462, 984 P.2d 436 (1999), however, the court held that

a physician-patient relationship is not always required to establish liability for a breach of the standard of care. Thus, in the case of a cognizable claim by a non-patient, it may be necessary to modify the first paragraph to delete the reference to "the patient."

Consumer Protection Act. In *Quimby v. Fine*, 45 Wn.App. 175, 724 P.2d 403 (1986), the court held that the Consumer Protection Act does not apply to medical negligence actions, but that the Act may apply to a lack of informed consent claim if the claim is based upon the entrepreneurial aspects of a medical practice. See also, *Burnet v. Spokane Ambulance*, 54 Wn.App. 162, 166-67, 772 P.2d 1027 (1989); *Thomas v. Wilfac, Inc.*, 65 Wn.App. 255, 265, 828 P.2d 597 (1992). In *Ambach v. French*, 141 Wn.App. 782, 173 P.3d 941 (2007), review granted at 164 Wn.2d 1007, 195 P.3d 87 (2008), the Court of Appeals held that the "injury to business or property" prong of a CPA claim against a doctor could be satisfied by "allegations of economic loss due to the increased cost of surgery over the cost of more conservative treatment." 141 Wn.App at 790.

[Current as of June 2009.]

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 _____ who [holds himself or herself out as a specialist in _____] [assumes the care or treatment of a condition that is ordinarily treated by a _____] has a duty to exercise the degree of skill, care, and learning expected of a reasonably prudent _____ 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.

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

COMMENT

A specialist is held to the standard of care possessed by other members of that specialty. It is error not to give an instruction that so indicates. *Dinner v. Thorp*, 54 Wn.2d 90, 338 P.2d 137 (1959); *Atkins v. Clein*, 3 Wn.2d 168, 100 P.2d 1 (1940).

See the Comment to WPI 105.01, Negligence—General Health Care Provider.

The standard of care required of professional practitioners must be established by the testimony of experts who practice in the same field. See *McKee v. American Home Products, Corp.*, 113 Wn.2d 701, 782 P.2d 1045 (1989) (the standard of care of a pharmacist practicing in Washington was not established by an affidavit of an Arizona physician); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989) (pharmacist not competent to testify on the physician's standard of care for treatment using medication).

In *Richards v. Overlake Hosp. Medical Center*, 59 Wn.App. 266, 796 P.2d 737 (1990), the court stated that an instruction stating that a family practitioner who holds himself out "as qualified to provide pediatric care ... has a duty to possess and exercise the degree of skill, care and learning of a reasonably prudent family practitioner in the State of Washington" was a "flat" misstatement of the law and error, though harmless under the facts of the case. The court said that the instruction deprived the jury of the determination whether the doctor should be held to the standard of care of a reasonably prudent family physician or to the standard of a reasonably

prudent pediatrician, because the instruction as given assumed that regardless of the conclusion of the jury, the doctor was to be judged by the standard of care of a family practitioner.

The witness need not have the same precise practice as the defendant "so long as the criterion by which the witness measures defendant's treatment is that of defendant's own school of medicine." *White v. Kent Medical Center, Inc., P.S.*, 61 Wn.App. 163, 173, 810 P. 2d 4 (1991). When the evidence establishes that there is a national standard of care, an out-of-state practitioner may testify to its application in a Washington case. *Elber v. Larson*, 142 Wn.App. 243, 173 P.3d 990 (2007).

[Current as of June 2009.]

WPI 105.07 No Guarantee/Poor Result

[A _____ 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). See also *Estate of Lapping v. Group Health Co-op. 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*, 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*, 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.” 107 Wn.2d at 167. In *Christensen*, 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, Inc. 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 supplemental “no guarantee/poor result” instruction because the instructions given permitted the defendant to argue its case, were not misleading, and properly informed the jury of the applicable law).

Although the reported cases discuss this instruction as a unit, there are actually two distinct propositions stated. The two sentences are separately bracketed because the Supreme Court has noted that the “no guarantee” portion of this instruction would clearly be inappropriate “in a case tried on a theory that the doctor had promised a particular result.” *Watson v. Hockett*, 107 Wn.2d at 164.

If it is determined that a “no guarantee/poor result” instruction is appropriate, the court in *Watson* suggested that the instruction be stated in the following language:

A doctor does not guarantee a good medical result. A poor medical result is not, in itself, evidence of any wrongdoing by the doctor.

107 Wn.2d at 164. The committee has made two small changes in this wording with the intention

of clarifying, not changing, the meaning: "in itself" has been changed to "by itself" and "wrongdoing" has been changed to "negligence."

[Current as of June 2009.]

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.

The instruction does not apply to informed consent claims, only to claims alleging violation of the standard of care under RCW 7.70.040.

COMMENT

Reformulation of former “error of judgment” instruction. The committee previously reformulated this instruction, which had 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 its 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*. See also *Ezell v. Hutson*, 105 Wn.App. 485, 20 P.3d 975 (following *Watson* but questioning the need for the instruction). 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 Hosp., 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 published this rewritten instruction in the fifth edition. Its language has since been approved by the Court of Appeals. *Housel v. James*, 141 Wn.App. 748, 760, 172 P.3d 712 (2007).

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

[Current as of June 2009.]

Extract,
Fergen v. Sestero Jury
Instructions

JURY INSTRUCTION NO. 5

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

INSTRUCTION NO. 6

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 physician who holds himself out as a specialist in internal medicine has a duty to exercise the degree of skill, care and learning expected of a reasonably prudent internal medicine physician 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 profession of internal medicine 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.

INSTRUCTION NO. 17

The question of whether or not an internal medicine physician exercised the proper degree of care, skill and learning is to be determined by reference to what is known about the case at the time of treatment or examination, and must be determined based on the pertinent facts then in existence of which he knew, or, in the exercise of reasonable care, should have known.

Extract,
Appukuttan v. Overlake
Med. Ctr.
Jury Instructions

INSTRUCTION NO. 5

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You also may consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

INSTRUCTION NO. 9

The defendant physicians owe 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 physician who holds out himself or herself as a specialist and assumes the care or treatment of a condition that is ordinarily treated by a specialist has a duty to exercise the degree of skill, care, and learning expected of a reasonably prudent specialist acting in the same or similar circumstances at the time of the care or treatment in question.

Dr. Brown has a duty to exercise the degree of skill, care, and learning expected of a reasonably prudent orthopedic surgeon 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.

Dr. Trione and Dr. Neiders have a duty to exercise the degree of skill, care, and learning expected of a reasonably prudent emergency medicine physician 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.

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.

OFFICE RECEPTIONIST, CLERK

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Subject: Fergen v. Sestero, et al. - Appukuttan v. Overlake Med. Center, et al. #88819-1
Attachments: Fergen Appukuttan Motion.pdf; Fergen Appukuttan Brief.pdf

Dear Mr. Carpenter,

Attached is the proposed BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION. Also attached is the MOTION OF WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION TO SUBMIT OVER-LENGTH AMICUS CURIAE BRIEF.

These documents are being served on counsel per prior arrangement, in conjunction with this transmission. (Although Mary Spillane is counsel for respondents in both cases, she is only being sent one email transmission.)

Respectfully submitted

Bryan Harnetiaux, WSBA #5169
On behalf of WSAJ Amicus Foundation
OID #91108