

**FILED**

OCT 29 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 305236

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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

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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-Appellants,*

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.*

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REPLY BRIEF OF APPELLANTS

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## REPLY

As acknowledged in Dr. Sestero's response brief, the Fergen family's claim of negligence is that he diagnosed the lump on Paul Fergen's ankle as a benign ganglion cyst based upon nothing more than a brief history and visual and tactile inspection, without ordering the ultrasound suggested by the radiologist or taking any additional steps required by the standard of care to confirm (or disprove) that the lump was, in fact, a ganglion cyst. *See* Sestero Resp. Br., at 7-12 (quoting the Fergen family's expert witnesses). If Dr. Sestero had followed the standard of care, he would have discovered in short order that the lump on Mr. Fergen's ankle was a malignant tumor, and Mr. Fergen likely would have survived. Because Dr. Sestero did not take these steps, the malignancy was not discovered until much later, when Mr. Fergen's prospects for surviving turned out to be zero.

The Fergen family has never claimed that Dr. Sestero was negligent in failing to recognize immediately that the lump on Mr. Fergen's ankle as a rare form of cancer (Ewing's sarcoma). The rarity of the cancer would not have prevented the correct diagnosis, if Dr. Sestero had taken the steps necessary to confirm (or disprove) his erroneous diagnosis.

Dr. Sestero tries to reframe the issue on appeal as whether a trial court abuses its discretion in giving the error of judgment jury instruction, where the parties agree that the instruction correctly states the law. *See* Sestero Resp. Br., at 2. Nonetheless, the Court cannot avoid resolving the questions of what factual predicate is necessary for a defendant-health care provider to be entitled to the instruction—is it available only in cases where the provider exercises his or her judgment by selecting between competing alternate diagnoses, or, must it be given in every medical negligence case on grounds that the practice of medicine inherently involves the exercise of judgment?—and whether the necessary factual predicate is present in this record.

As an initial matter, however, it is necessary to address Dr. Sestero's discussion of the standard of review.

- I. **Dr. Sestero's discussion of the standard of review ignores the embedded factual question regarding the sufficiency of the evidence in the record, which is reviewed for substantial evidence; and the embedded legal question regarding what evidence is necessary to warrant the error of judgment instruction, which is reviewed de novo.**

Dr. Sestero urges that the standard of review is abuse of discretion. *See* Sestero Resp. Br., at 25-26. In discussing the standard of review he does not address the line of cases holding that it is prejudicial and reversible error to give a jury instruction that is not supported by

substantial evidence. See Fergen App. Br., at 12-13 (discussing the rule stated in *Albin v. National Bank of Commerce*, 60 Wn. 2d 745, 375 P.2d 487 (1962)).<sup>1</sup>

More importantly, Dr. Sestero glosses over the fact that the exercise of discretion must be based on substantial evidence and a correct view of the law. As explained in *Marriage of Littlefield*, 133 Wn. 2d 39, 46-47, 940 P.2d 1362 (1997):

A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.*

(Citations omitted; emphasis added.) Where a jury instruction accurately states the law and is supported by substantial evidence, giving that

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<sup>1</sup> Regarding the longstanding and well-attested nature of the rule, see *Schroeder v. Taylor*, 70 Wn. 2d 1, 4, 422 P.2d 21 (1966) (stating “[w]e have often said that it is error to give an instruction if there is no substantial evidence upon which it can be predicated”; citing *Albin*); *Reynolds v. Phare*, 58 Wn. 2d 904, 905, 365 P.2d 328 (1961) (stating “[w]e have consistently followed the rule that it is prejudicial error to submit to the jury by instructions a question unsupported by evidence in the record”; cited in *Albin*); *Leavitt v. De Young*, 43 Wn. 2d 701, 707-08, 263 P.2d 592 (1953) (stating “[t]his court has frequently held that where the trial court submits to the jury an issue concerning which there is no substantial evidence, the giving of such instruction is prejudicial error”); *Columbia Park Golf Course, Inc. v. City of Kennewick*, 160 Wn. App. 66, 90, 248 P.3d 1067 (2011) (stating “Washington cases consistently hold that it is prejudicial error to submit an issue to the jury when there is no substantial evidence concerning it”; citing *Albin*); *Bean v. Stephens*, 13 Wn. App. 364, 369, 534 P.2d 1047 (stating “[i]t is well established that it is prejudicial error to submit an issue to the jury where there is no substantial evidence concerning it” citing *Albin*), *rev. denied*, 86 Wn.2d 1003 (1975).

instruction is within “the range of acceptable choices.” However, where substantial evidence does not support a jury instruction, it is inherently an abuse of discretion to give the instruction, even if the instruction correctly states the applicable law. Under these circumstances, the exercise of discretion is “unsupported by the record” and “the facts do not meet the requirements of the correct standard.” In this way, and for these reasons, a trial court does not have discretion to give an instruction that is not supported by substantial evidence. Thus, the *Albin* line of cases properly focuses upon whether there is substantial evidence to support the instruction in question.<sup>2</sup>

The question of whether a jury instruction is supported by the record is reviewed for substantial evidence. *See, e.g., State v. Walker*, 136

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<sup>2</sup> The cases cited by Dr. Sestero are not to the contrary. *See* Sestero Resp. Br., at 25-26 (citing *Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 430, 40 P.3d 1206 (2002); *Thomas v. Wilfac, Inc.*, 65 Wn. App. 255, 264, 828 P.2d 597, *rev. denied*, 119 Wn. 2d 1020 (1992); and *Petersen v. State*, 100 Wn.2d 421, 440, 671 P.2d 230 (1983)). In *Micro Enhancement*, the court held that it was not an abuse of discretion to give a superseding cause instruction to the jury where there was substantial evidence of other causes besides the negligence of the defendants. *See* 110 Wn. App. at 418 (concluding “the court properly instructed the jury on superseding intervening cause in light of substantial evidence that other non-concurrent causes besides the negligence of Coopers proximately caused MEI’s damages”); *id.* at 431-33 (describing evidence of other causes). In *Thomas*, the court held that it was not an abuse of discretion to give an error of judgment instruction to the jury where there was substantial evidence that “the physician was confronted with a choice among competing therapeutic techniques or among medical diagnoses.” 65 Wn. App. at 264; *see also id.* at 258 (describing choice between competing medical diagnoses as pesticide poisoning, which the defendant-health care provider “ruled out,” and asthma, which he diagnosed). Finally, *Petersen* is not on-point, as the cited portion refers to the trial court’s discretion regarding the wording and number of instructions, rather than the need for substantial evidence to support a particular instruction. *See* 100 Wn.2d at 440 (stating “[t]he number and specific language of the instructions are matters left to the trial court’s discretion”).

Wn.2d 767, 777-79, 966 P.2d 883 (1998) (reviewing record for substantial evidence to support self-defense instruction). Accordingly, the Fergen family's brief-in-chief focuses primarily on the evidence in the record to support the error of judgment instruction in light of the substantial evidence standard of review.

However, it is apparent from Dr. Sestero's response brief that the parties do not share the same understanding of the factual predicate necessary to warrant the instruction. This issue (i.e., whether the facts "meet the requirements of the correct standard" within the meaning of *Littlefield*) should be reviewed de novo. See, e.g., *Walker*, 136 Wn.2d at 772-73 (reviewing factual predicate required for self-defense instruction de novo); *Tuttle v. Allstate Ins. Co.*, 134 Wn.App. 120, 138 P.3d 1107 (2006) (reviewing factual predicate required for emergency doctrine instruction de novo).

With a proper understanding of the standard of review, it is now possible to address the parties' divergent understandings of the factual predicate necessary to warrant the error of judgment instruction.

**II. If Dr. Sestero’s argument is correct, then the error of judgment instruction would be required in every medical negligence case, contrary to *Watson v. Hockett*, which admonishes courts to give the instruction with “caution” and limits it to cases involving “a choice among competing therapeutic techniques or among medical diagnoses.”**

Dr. Sestero acknowledges that the error of judgment instruction is limited to cases involving a choice among competing diagnoses. *See* Sestero Resp. Br., at 27 & 30-31. He argues that this requirement is satisfied in two ways.

First, he equates the judgments involved in arriving at his diagnosis of the lump on Mr. Fergen’s ankle with the judgments involved in making a choice among competing diagnoses. *See, e.g.*, RP 2112:24-2113:4 (jury instruction conference, describing failure to perform imaging or other definitive testing of the lump as “the judgment call”); RP 2203:6-17 (closing argument, describing history and visual and tactile inspection of the lump as “the judgments that Dr. Sestero did”); RP 2204:20-23 (closing argument, describing failure to order suggested ultrasound as “judgment”); RP 2042:8-18 & 2044:17-24 (Dr. Sestero, testifying that “clinical judgment” “involves everything” and that “clinical judgment plays everything in our coming up with a plan”); Sestero Resp. Br., at 40 (quoting defense expert testimony describing “putting together the

history,” “seeing with your eyes” and “feeling with your hands” as “clinical judgment”).

Second, Dr. Sestero defines diagnosis in terms of “distinguishing one disease from another.” Sestero Resp. Br., at 34 (quoting medical dictionary). With this definition in mind, he reasons that the selection of one diagnosis necessarily entails the rejection of all other possible diagnoses. *See, e.g.*, Sestero Resp. Br., at 39 (referring to “the medical judgment that is involved in making any diagnosis”); *id.* at 39 (referring a second time to “the judgment a physician exercises when making any diagnosis”). Thus, Dr. Sestero concludes that his diagnosis of the lump on Mr. Fergen’s ankle as benign ganglion cyst, ipso facto, involved a choice not to diagnose it as cancer or anything else.

In short, Dr. Sestero attempts to turn every step along the way toward making a diagnosis, and the diagnosis itself, into a choice among competing diagnoses, thereby justifying the error of judgment instruction in every medical negligence case. This is contrary to the limitations on the use of the error of judgment instruction delineated in *Watson* and renders them meaningless. It undermines the rationale for the error of judgment rule, and has pernicious effects on the trial of a medical negligence case.

**A. Dr. Sestero’s approach is contrary to the limitations on the error of judgment rule stated in *Watson* and renders them meaningless.**

The error of judgment instruction is not supposed to be given in every medical negligence case. It merely supplements the standard of care instructions, and it is to be given with caution. *See Watson*, 107 Wn.2d at 165-66; *Christensen*, 123 Wn.2d at 249; *see also* WPI 105.08 (Note on Use). The Washington Supreme Court has placed two specific limitations on the circumstances where the instruction may properly be given:

In the first place, as its terms make clear, it applies only where there is evidence that in arriving at a judgment, “the physician or surgeon exercised reasonable care and skill, within the standard of care he [or she] was obliged to follow.” *Secondly, its application will ordinarily be limited to situations where the doctor is confronted with a choice among competing therapeutic techniques or among medical diagnoses.*

*Watson*, at 165 (quoting jury instruction; emphasis added); *accord Christensen*, 123 Wn.2d at 249. The second limitation is at issue here.<sup>3</sup>

In the context of a claim based upon erroneous diagnosis, the requisite “choice ... among medical diagnoses” involves ruling in or ruling out more than one diagnosis. For example, in *Thomas v. Wilfac*,

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<sup>3</sup> The first limitation is not at issue because there is no dispute that Dr. Sestero produced evidence that he complied with the standard of care, even though the Fergen family produced countervailing evidence that he violated the standard of care. These limitations appear to represent a departure from prior case law. *See Miller v. Kennedy*, 91 Wn. 2d 155, 160, 588 P.2d 734 (1978) (approving prior version of error of judgment instruction on grounds that “[t]he exercise of professional judgment is an inherent part of the care and skill involved in the practice of medicine”); *see also* Fergen App. Br., at 18 n.10 (discussing *Miller*).

*Inc.*, 65 Wn. App. 255, 258-59, 828 P.2d 597, *rev. denied*, 119 Wn.2d 1020 (1992), a patient alleged that her health care providers were negligent in erroneously diagnosing her with asthma and in failing to diagnose her with pesticide poisoning. On appeal of a verdict in favor of the health care providers, the patient argued that the superior court erred in giving the error of judgment instruction to the jury. *See id.*, 65 Wn. App. at 263-64. The Court of Appeals affirmed the superior court under circumstances where the diagnosing physician specifically “ruled out pesticide poisoning and diagnosed asthma.” *Id.* at 258.<sup>4</sup>

In this case, Dr. Sestero did not make the requisite choice among competing diagnoses. The process of arriving at a diagnosis does not necessarily involve ruling out competing diagnoses, no matter how much “judgment” is involved in making the diagnosis in question. Similarly, the fact that one diagnosis tautologically implies a rejection of all other possible diagnoses does not mean that the health care provider in question actually ruled out competing diagnoses. *See Sestero Resp. Br.*, at 39 (relying on Dr. Sestero’s acknowledgment that cancer was a “possibility”

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<sup>4</sup> Counsel overlooked this aspect of *Thomas* in the Fergen family’s brief-in-chief. *See Fergen App. Br.*, at 22 n.12. The other Washington cases involve “a choice among competing therapeutic techniques” rather than “a choice ... among medical diagnoses,” using the categories described in *Watson*. *See Fergen App. Br.*, at 21-22 (discussing these cases).

as the sole record support for its argument that he chose from competing diagnoses in Mr. Fergen's case).

As the record reveals, Dr. Sestero denied having a memory of his visit with Mr. Fergen, other than what is contained in his medical record. *See* RP 2050:5-6 ("Right. I stated that I don't remember anything outside of what was documented in the note"); RP 2051:14 ("It's all in the note"). The medical record does not contain any indication that he ruled out or entertained diagnoses of the lump on Mr. Fergen's ankle, other than a benign ganglion cyst. *See* Ex. P-1A<sup>5</sup>; RP 2043:4-21. In describing the "clinical judgment" that he exercised in diagnosing Mr. Fergen, Dr. Sestero does not indicate that he considered any competing diagnoses. *See* RP 2042:8-18 & 2044:17-24. He did not tell the Fergen family about any competing diagnoses. *See* RP 610:6-611:1. He did nothing to rule out cancer or any other competing diagnoses. *See* RP 2069:10-16. Under these circumstances, there was no choice among competing diagnoses, and the error of judgment instruction should not have been given.

**B. Dr. Sestero's approach undermines the rationale for the limitations on the error of judgment rule, and has pernicious effects on a medical negligence trial.**

The rationale for limiting the error of judgment instruction to cases involving a choice between competing diagnoses is evident from the New

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<sup>5</sup> Ex. P-1A is included in the Appendix to the Fergen family's brief-in-chief.

York case law on which *Watson* relies as support for the limitation. *See* 107 Wn.2d at 165 n.22 (citing *Spadaccini v. Dolan*, 407 N.Y.S.2d 840 (N.Y. App. Div. 1978)). Giving the error of judgment instruction in the absence of a choice between competing diagnoses “would transform it from a protection against second-guessing of genuine exercises of professional judgment in treatment or diagnosis into a cloak for professional misfeasance.” *Nestorowich v. Ricotta*, 97 N.Y.2d 393, 399 (N.Y. 2002) (stating rationale for the rule of *Spadaccini*); *see also Ezell v. Hutson*, 105 Wn. App. 485, 491, 20 P.3d 975 (indicating previous version of error of judgment instruction unduly emphasizes limits of a defendant-health care provider’s liability and risks juror confusion), *rev. denied*, 144 Wn.2d 1011 (2001).

If, as Dr. Sestero claims, the process of arriving at a singular diagnosis is deemed to be equivalent to a choice between competing diagnoses, then the error of judgment instruction invites the jury to return a defense verdict based upon a mere difference of opinion among the expert witnesses regarding the nature or breach of the standard of care, without resolving the factual disputes presented by the conflicting expert testimony. In other words, the jury will be inclined to relegate the standard of care to a matter of judgment, and infer the absence of negligence from

nothing more than the existence of a conflict in the standard of care testimony.

Further, if, as Dr. Sestero claims, making a singular diagnosis is tantamount to a rejection of all other diagnoses, then the error of judgment instruction allows him to reframe the issue of negligence in terms other than the standard of care. Thus, in this case, he was able to frame the issue of negligence as a choice between diagnosing a benign ganglion cyst, which is relatively common, and Ewing's sarcoma, which is relatively rare, sidestepping the question of whether he would have discovered the cancer if he had followed the standard of care in diagnosing the cyst. *See* Sestero Resp. Br., at 1 (incorrectly characterizing the Fergen family's negligence claim as "Dr. Sestero underestimated the possibility of and did not rule out malignancy and thus arrived at his diagnoses negligently"); *id.* at 3 (stating "Dr. Sestero considered malignancy an exceedingly unlikely possibility in his differential diagnosis, and thus did not mention that remote possibility to Mr. Fergen"); *id.* at 4 (stating "the applicable standard of care did not require Dr. Sestero to order an ultrasound, biopsy or other test to rule out cancer"); *id.* at 17 (same); *id.* at 17 (quoting defense expert testimony that "the standard of care does not require a physician to 'hunt for exceedingly rare conditions'").

Dr. Sestero does not address the concerns underlying the limitation of the error of judgment rule to cases involving a choice among competing diagnoses. The concerns that he does raise are unrelated to the error of judgment rule and appear to be overblown. Initially, Dr. Sestero argues that the error of judgment instruction is necessary to focus the jury's attention on the diagnoses at the time it was made, and to prevent the jury from evaluating it with the benefit of hindsight, i.e., "Monday morning quarterbacking." Sestero Resp. Br., at 36-37 & 41. This concern has nothing to do with the error of judgment instruction, and it was addressed by two separate instructions given to the jury. One entire instruction was specifically directed to the issue of hindsight and focused the jury's attention on "what is known about the case at the time of treatment or examination" and the "facts then in existence." CP 3197 (jury instr. #17). In addition, the standard of care instruction incorporated language focusing the jury's attention on "the time of the care or treatment in question." CP 3185 (jury instr. #6). The error of judgment instruction does not address this concern.

Further, Dr. Sestero argues that the error of judgment instruction is necessary to focus the jury's attention on the standard of care rather than the erroneous diagnosis. *See* Sestero Resp. Br., at 36 & 41. The standard of care instruction addressed this concern. *See* CP 3185. Additional

instructions were available to Dr. Sestero as well, which are specifically tailored to address this issue. *See Watson*, 107 Wn.2d at 166-167 (discussing “no guarantee,” “bad result” and “error in judgment” instructions); *see also* WPI 105.07 (no guarantee/poor result instruction). The error of judgment instruction does not address this concern, especially where there was no choice between competing diagnoses. Thus, the concerns raised by Dr. Sestero do not support the instruction in this case.

**III. Dr. Sestero’s argument about the need to prove that a “physician arrived at his or her diagnosis in a way that complied with the standard of care” is not disputed and beside the point; it does not justify the error of judgment instruction.**

Dr. Sestero argues that the Fergen family is obligated to prove he arrived at the diagnoses of the lump on Mr. Fergen’s ankle in a way that violated the standard of care, not merely that the diagnosis was incorrect. *See Sestero Resp. Br.*, at 34-37. There is no dispute regarding this point. The jury was properly instructed regarding the standard of care. *See* CP 3185. The Fergen family acknowledges the obligation to prove that Dr. Sestero violated the standard of care, and the family produced such evidence at trial. *See, e.g.*, RP 410:18-414:12 & 889:12-890:24. At any rate, this argument is beside the point because the need to prove a violation of the standard of care does not automatically entitle a

defendant-health care provider to an error of judgment instruction, in the absence of a choice among competing diagnoses, as noted above.

**IV. Dr. Sestero urges the Court to apply the wrong prejudice analysis because prejudice is presumed when a jury instruction is not supported by substantial evidence; in any event, the record demonstrates actual prejudice to the Fergen family.**

Dr. Sestero argues that the Fergen family has the burden of establishing prejudice. *See* Sestero Resp. Br., at 26. In making this argument he again fails to address the *Albin* line of cases regarding the prejudice that is presumed from a jury instruction that is not supported by substantial evidence. A jury instruction that is not supported by substantial evidence constitutes an implicit and misleading comment on the evidence, signaling to the jury that the court must think there is evidence on the issue. It thereby encourages the jury to speculate on an issue not supported by the evidence *See* Fergen App. Br., at 13-14.

The cases cited by Dr. Sestero do not undercut the presumption of prejudice based on a jury instruction that is unsupported by substantial evidence. *See* Sestero Resp. Br., at 26 & n.13 (citing *Brown v. Spokane Cy. Fire Prot. Dist.*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983); *Caruso v. Local Union No. 690*, 107 Wn.2d 524, 530, 730 P.2d 1299, *cert. denied*, 484 U.S. 815 (1987); *Griffin v. West RS, Inc.*, 143 Wn.2d 81, 91, 18 P.3d

558 (2001); *Miller v. Yates*, 67 Wn. App. 120, 125, 834 P.2d 36 (1992); *Keller v. City of Spokane*, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002)).

None of the cases cited by Dr. Sestero is on-point. The cited passage from *Brown* involves the burden to establish that *evidentiary* errors are prejudicial. *See* 100 Wn.2d at 196. While *Brown* also involves an allegation of instructional error, that portion of the decision does not involve any discussion of prejudice. *See id.* at 197.

The remaining cases appear to involve legally correct but misleading jury instructions, rather than jury instructions that are not supported by substantial evidence. *See Keller*, 146 Wn.2d at 249 (stating “[e]ven if an instruction is misleading, it will not be reversed unless prejudice is shown”); *Griffin*, 143 Wn.2d at 91 (stating “[e]ven if the instruction were misleading, Griffin still bears the burden to establish consequential prejudice”); *Caruso*, 107 Wn.2d at 529-30 (involving “misleading” instruction).<sup>6</sup> They do not involve jury instructions unsupported by substantial evidence.

With respect to merely misleading instructions, Dr. Sestero does not elaborate upon the nature of the showing of prejudice that is required to warrant reversal. *See Sestero Resp. Br.*, at 26. The burden of showing prejudice is satisfied where the misleading jury instruction “was actively

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<sup>6</sup> The nature of the instructional error is not apparent from the text of the decision in *Miller*, 67 Wn. App. at 125.

urged upon the jury during closing argument.” *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 876, 281 P.3d 29 (2012). “No greater showing of prejudice from a misleading jury instruction is possible without impermissibly impeaching a jury’s verdict.” *Id.*, 174 Wn.2d at 876-77. Assuming for the sake of argument that the prejudice analysis applicable to a misleading jury instruction also applies here, in the context of a jury instruction that is unsupported by substantial evidence, the Fergen family has satisfied its burden of proving prejudice because Dr. Sestero actively urged the error of judgment instruction upon the jury during closing argument. *See* RP 2203:1-17 & 2204:20-23; *see also* Fergen App. Br., at 10-11 (quoting same).

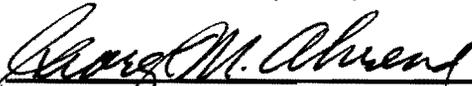
### CONCLUSION

Based on the argument and authorities in their brief-in-chief and the foregoing reply brief, the Fergen family asks the Court to reverse the judgment of the superior court and remand this case for new trial with proper instructions.

Submitted this 26th day of October, 2012.

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**CERTIFICATE OF SERVICE**

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

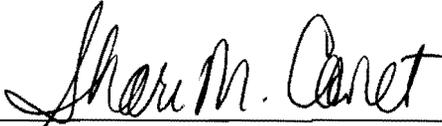
On October 26, 2012, I served the document to which this is annexed as follows:

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Signed on October 26, 2012 at Ephrata, Washington.

  
\_\_\_\_\_  
Shari M. Canet, Paralegal