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No. 88819-1 (Consolidated with No. 89192-3)
SUPREME COURT OF THE STATE OF WASHINGTON

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

Appellants,

v.

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

Respondents.

ANIL APPUKUTTAN,

Appellant,

v.

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

Respondents.

RESPONDENTS' ANSWER TO BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE
FOUNDATION

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 ORIGINAL

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I. INTRODUCTION

Respondents in the consolidated cases of *Fergen v. Sestero*, No. 88819-1, and *Appukuttan v. Overlake Medical Center*, No. 89192-3, jointly provide this answer to the Brief of Amicus Curiae Washington State Association of Justice Foundation (WSAJF).

WSAJF does not dispute that this Court and the Washington Courts of Appeal have long held that the giving of an “error of judgment” instruction, or as now styled in WPI (Civ.) 105.08, an “exercise of judgment” instruction, is proper, provides useful watchwords, and is within the trial court’s discretion in medical malpractice cases where there is evidence that the defendant physician (1) was confronted with a choice among competing therapeutic techniques or among medical diagnoses, and (2) in arriving at the choice the physician made, the physician exercised reasonable care and skill within the standard of care the physician was obliged to follow. Nor does WSAJF contend that, under the parameters laid out in that long-standing Washington precedent, the trial courts in either *Fergen* or *Appukuttan* abused their discretion in giving the “exercise of judgment” instructions they gave or that the instructions given were incorrect statements of the law.

Rather, without showing that Washington’s long-standing precedent concerning the “error of judgment,” or now the “exercise of

judgment” instruction (as phrased to eliminate references to such words as “honest error” or “error of judgment”), is either incorrect or harmful,¹ WSAJF nonetheless asks this Court to overrule decades of case law and declare that the instruction is now somehow unnecessary, confusing, and unfair. There was and is nothing incorrect or harmful about what the Washington courts have held over all these decades concerning the propriety of the instruction, and thus WSAJF’s attempt to persuade this Court to reject *stare decisis* principles should be rejected.

II. ARGUMENT AND AUTHORITY

A. Nothing Has Changed to Suddenly Render the “Exercise of Judgment” Instruction Incorrect or Harmful When Given in Cases Like These Consolidated Cases.

Twenty-seven years ago, in *Watson v. Hockett*, 42 Wn. App. 549, 555-57, 712 P.2d 855 (1986), the Court of Appeals held that what was formerly known as the “error of judgment” instruction was confusing, unnecessary, and an improper statement of the law that altered the standard of care set forth in RCW 7.70.040. On review, this Court disagreed, decisively reversed, and held that, when “given in connection with a proper standard of care instruction” and when “used in the manner and form approved herein,” the error of judgment instruction supplements

¹ WSAJF, at least in passing, does acknowledge, *WSAJF Br. at 9* (citing *State v. Devin*, 158 Wn.2d 157, 168, 142 P.3d 599 (2006)), that the rule in Washington for “overruling precedent” is that the Court will not overrule precedent unless it concludes that the precedent is “incorrect and harmful.”

and clarifies the standard of care and serves an important purpose to:

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. [Italics in original.]

Watson v. Hockett, 107 Wn.2d 158, 166-67, 727 P.2d 669 (1986) (quoting J. Perdue, *Texas Medical Malpractice*, ch. 2, "Standard of Care", 22 HOUS. L. REV. 47, 60 (1985)).²

Times have not changed with respect to the inexactitude that characterizes the practice of medicine. Since 1986, medicine has seen advances, to be sure, and has become much more expensive for patients, but it remains an inexact science, where desired results cannot be guaranteed, and where professional judgment may reasonably differ as to what constitutes proper diagnosis and treatment. To this date, it remains true that neither a poor result, nor a choice among competing therapeutic

² This Court's long-standing approval of the propriety of the giving of an "error of judgment" instruction both predates and postdates *Watson*. See *Miller v. Kennedy*, 85 Wn.2d 151, 530 P.2d 334 (1975); *Miller v. Kennedy*, 91 Wn.2d 155, 588 P.2d 734 (1978); *Christensen v. Munsen*, 123 Wn.2d 234, 867 P.2d 626 (1994). This Court's decisions in the *Miller* cases, in *Watson*, and in *Christensen*, all post-date *Laudermilk v. Carpenter*, 78 Wn.2d 92, 100, 457 P.2d 1004 (1969), which WSAJF's claims, *WSAJF Br. at 12*, "should inform whether this Court continues to authorize use of exercise of judgment instructions." This Court's decisions concerning the "error of judgment" instructions in *Miller* cases *Watson*, and *Christensen* all reflect its determination that, in certain cases, a trial court may properly give an "exercise of judgment" instruction as an enunciation of one of the basic legal rules, or at least as an appropriate clarification of the basic legal rules, necessary for a jury to reach a verdict. Indeed, the "exercise of judgment" instructions given in *Fergen* and *Appukuttan* bear no resemblance whatsoever to the slanted, factually detailed, argumentative instructions that plaintiffs proffered and claimed on appeal that the trial court erred in failing to give in *Laudermilk*.

techniques or alternative diagnoses that later happens to prove to be ineffective or incorrect, in itself, establishes negligence. It is that latter principle that the “exercise of judgment” instruction embodies and serves as a useful reminder to prevent judge and jury from imposing on physicians a standard of infallibility whenever an exercise of judgment (within the standard of care the physician was obliged to follow) ultimately proves inefficacious or incorrect.

B. The “Exercise of Judgment” Instruction Is Not Unnecessary, Confusing or Unfair.

As the amicus brief filed by the Washington State Medical Association and Washington State Hospital Association explains, the exercise of judgment instruction is both appropriate and necessary to aid the jury in understanding the boundaries of professional medical negligence liability. Juries are much more easily misled and/or confused when the instruction applies but is not given than when the instruction applies and is given.

Medical malpractice is never alleged in a vacuum. In every case, there has been an adverse result: a diagnosis has been missed or a treatment has failed; a patient has died, lost a limb or organ, become disabled or scarred, or has remained sick. Health care providers are not infallible, do not claim to be infallible, and should not be sued, found

deficient, and held liable for “failing” to be infallible. Much as the plaintiff’s bar might like it to be, the proof of medical negligence is not in the pudding of a disappointing result or an exercise of judgment that ultimately proves incorrect. If there is negligence because one alternative diagnosis or one competing therapeutic technique chosen over another proved ineffective or incorrect, it is not merely because the choice proved ineffective or incorrect; it is because medical *judgment* was exercised in some way that did not conform to the standard of care governing the exercise of judgment in arriving at the choice of the particular diagnosis or therapeutic technique. A jury must be so instructed in such a case, and the juries in both the *Fergen* and *Appukuttan* cases properly were.

The pattern instruction, WPI (Civ.) 105.08, expresses sound and well-settled principles. Contrary to WSAJF’s arguments, it is not an unnecessary instruction. As *Watson* held, 107 Wn.2d at 158, it serves an important purpose and “provides useful watchwords.” Nor is the instruction confusing.³ As *Watson* held, it supplements and clarifies the

³ WSAJF erroneously claims, *WSAJF Br. at 14*, that *Gjerde v. Fritzsche*, 55 Wn. App. 387, 391-92, 777 P.2d 1072 (1989), *rev. denied*, 113 Wn.2d 1038 (1990), stands for the proposition that “instructions phrased in the negative carry an unnecessary risk of confusion and misapplication.” *Gjerde* does not stand for such an expansive proposition. It held only that, while an “after-acquired knowledge” instruction was a correct statement of the law under prior case law and there was no confusion and no error in giving it in that case, “the use of the negative in the phrase ‘not to be judged in the light of any after-acquired knowledge in relation to the case’ creates an unnecessary risk of misapplication” as to *causation*. It does not suggest that any use of a negative such as “not” in an instruction carries an unnecessary risk of jury confusion or misapplication.

standard of care set out in RCW 7.70.040.⁴ An instruction carefully drafted and edited by the Washington Pattern Jury Instruction Committee and approved by the Supreme Court in light of *Watson* and the Court's other decisions can hardly be unfair, and the fact that juries sometimes render defense verdicts in cases where the instruction is given hardly proves that it *is* unfair. Indeed, there is nothing unfair about an instruction that reminds the jury that, before a physician can be held liable for his or her exercise of judgment in choosing among competing therapeutic options or among medical diagnoses, the jury must find that, in arriving at the choice made, the physician violated the standard of care he or she was obliged to follow.

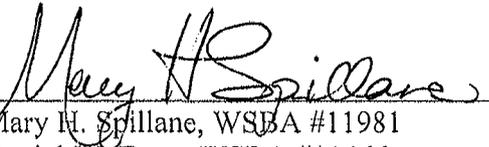
III. CONCLUSION

There is nothing incorrect or harmful about Washington's jurisprudence concerning the propriety of the "exercise of judgment" instruction. *Stare decisis* should be respected and this Court should reject WSAJF's invitation to overturn that long-standing jurisprudence.

⁴ Nowhere does WSAJF even attempt to explain how an instruction that this Court can properly give to clarify the law is nonetheless simultaneously confusing.

RESPECTFULLY SUBMITTED December 30, 2013.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 30th day of December, 2013, I caused a true and correct copy of the foregoing document, "Respondents' Answer to Brief of Amicus Curiae Washington State Association for Justice Foundation," to be delivered in the manner indicated below to the following counsel of record:

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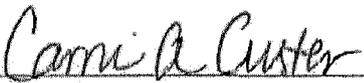
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Dear Clerk of Court,

Attached for filing in .pdf format is Respondents' Answer to Brief of Amicus Curiae Washington State Association for Justice Foundation in *Fergen v. Sestero / Appukuttan v. OHMC, et al.*, Supreme Court Cause No. 88819-1 (Consolidated with No. 89192-3). The attorney filing this answer is Mary Spillane, WSBA No. 11981, (206) 628-6656, e-mail: mspillane@williamskastner.com.

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