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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,
Petitioners,

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,
PLLC; ALAN B. BROWN, M.D.; MARCUS TIORNE, M.D.; and TINA
NEIDERS, M.D.,
Respondents.

**BRIEF OF AMICI CURIAE
WASHINGTON STATE MEDICAL ASSOCIATION AND
WASHINGTON STATE HOSPITAL ASSOCIATION**

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**I. IDENTITY AND INTEREST OF
*AMICI CURIAE***

The Washington State Medical Association (“WSMA”) and the Washington State Hospital Association (“WSHA”) (“Health Care Amici”), are state-wide non-profit organizations which represent the medical and osteopathic physicians and surgeons and physicians assistants, and the state’s 97 community hospitals and other health related organizations, as further described in the motion for permission to file this brief. The WSMA and WSHA have both appeared before this Court as *amici curiae*. Their more specific backgrounds and interests in this case are detailed in the motion for leave to file this brief that was filed on December 13, 2013.

Health Care Amici want to insure the Court understands that in many medical malpractice cases, particularly diagnosis and choice of treatment cases, the current pattern instruction on the physician’s exercise of judgment must be available to trial judges to properly instruct the jury as to the boundaries of a plaintiff’s claim against a physician and to state a material element of a physician’s potential defense to liability. That element is a long-standing part of Washington’s negligence law and an inherent part of the governing statute, RCW 7.70.030(1) and 7.70.040: If the physician acted within the standard of care, she was not *necessarily* negligent just because the diagnosis made was in error, or the particular course of treatment chosen was not the most efficacious or may have caused

the harm complained of. The instruction states the boundary of the physician's liability based on her defense, and is the backstop to allowing strict liability for a bad result, a concept that goes far beyond the statute or case law. The current text of the pattern instruction is:

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.

WPI 105.08, 6 WASH. PRAC. : WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 105.08, at 612 (6th Ed. 2012).

II. ISSUE OF CONCERN TO HEALTH CARE AMICI

Health Care Amici closely follow the law that affects them, patients, and the health care system. This includes the law defining physician liability for professional negligence that has been settled since adoption of Ch. 7.70 RCW in 1976, and by prior case law. The boundaries have always been whether the physician acted within the accepted standard of care. The tort system has always been a fault-based system, not a strict liability system based on "bad results." *Watson v. Hockett*, 107 Wn.2d 158, 161-62, 727 P.2d 669 (1986) ("a doctor will not normally be held liable under a fault based system simply because the patient suffered a bad result.") (unanimous decision).

Division III's decision in *Fergen v. Sestero*, 174 Wn. App. 393, 298 P.3d 782 (2013), accurately applied the settled law under the statute and cases to affirm the trial court's giving the jury the "exercise of judgment" instruction, WPI 105.08. The same is true in *Appukuttan v. Overlake Medical Center et al.*, where Judge Ramseyer similarly was correct in giving the instruction to the jury in that trial. Nevertheless, review was granted and the plaintiffs seek to have the instruction removed from availability to trial judges presiding over medical malpractice trials, or sharply curtailed in its use. Health Care Amici suggests the Court view the issue this way:

Should the trial court continue to have discretion to give the "exercise of judgment" instruction (set forth in WPI 105.08) where, under the facts of cases such as these before the Court, the instruction is necessary both to define for the jury the boundaries of a physician's liability, and to properly instruct the jury on a material element of the physician's potential defense, and where undue limitation or elimination of the instruction would expand liability beyond that stated in the governing statutes, RCW 7.70.030(1) and 7.70.040?

The basic principle embodied in the instruction – that a physician's exercise of her judgment made within the professional standard of care is not negligent and actionable, even if an incorrect or less efficacious diagnosis or treatment is chosen -- has been an integral and settled part of the law of professional negligence and an established defense where the circumstances warrant.¹ Neither

¹ See *Watson v. Hockett*, 107 Wn.2d 158, 161-62, 164-65, 727 P.2d 669 (1986) ("The 'error in judgment' principle is accepted in this state as *Miller [v. Kennedy]*, 91 Wn.2d 155, 588 P.2d 734 (1978)] makes clear.

plaintiff has challenged the substance of the rule, as neither excepted to the language of the instruction as an incorrect statement of the law. Rather, the plaintiffs argue that, despite the long-term acceptance of this basic principle, no instruction should be permitted which informs the jury of this settled law of a physician's defense. Their desired position is to ban the instruction, even though this would deny physicians a core element of a potential defense.

Health Care Amici are submitting this brief to make sure the Court is fully aware that the rule of law embodied in the instruction is both long settled and an inherent part of the statute; and that, as currently constituted, the instruction no longer includes terms which previously generated judicial criticism or caution.

Most importantly, Health Care Amici want to make sure the Court knows the instruction needs to remain available for use by trial judges as a core aspect of trial practice, in many cases to properly instruct a jury on a physician's defense to a negligence claim for the professional choice made of her diagnosis or treatment modality. Prohibiting the instruction would misstate the law in such cases by being materially incomplete and would, in effect, deny the physician her defense. It would remove a necessary "tool" from trial judges' "toolbox" of potential instructions and deny them the ability to correctly instruct juries on physicians' defenses in appropriate cases.

Health Care Amici respectfully submit this brief to help the Court understand that the plaintiffs' proposal would be a dramatic

change to settled law that is not warranted and is bad policy. The instruction is necessary in certain cases to inform a jury of the boundaries of liability under medical negligence law and of an essential element to a physician's defense. It informs the jury of the settled parameters of liability for the art of practicing medicine in cases involving the exercise of judgment when choosing between potential diagnoses or treatments: the physician has a recognized defense if she followed the standard of care but, when exercising her professional judgment, chose an incorrect or less efficacious diagnosis or treatment plan from among the available options.

III. LEGAL DISCUSSION

A. **Instructing the Jury: The Jury Must Be Instructed on Both the Parameters of Liability and Also on the Defenses That May Apply.**

The purpose of jury instructions is to provide the applicable law on the elements of *both* claims *and* defenses to the twelve citizens who will decide the case. As Professor Tegland explains:

The instructions . . . are intended to inform the jury of the law as it relates to the case being tried. The jury is informed of applicable statutory law, ordinances, and the established principles of common law as they have been expressed in court decisions. Typically included are the elements of the plaintiff's cause of action, the burden of proof, **potentially applicable defenses**, the manner in which damages are to be determined, and other factual issues in the case.

5 K. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE § CR 51.1 (6th ed. 2013) (emphasis added); 14A K. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE §31:1(2nd ed. 2009) pp. 291-92 (same). Professor Tegland notes the pattern instructions in Washington are widely used (even if not formally “approved” by this Court other than in cases that come before it), and that the “committee of volunteer judges, practitioners, and academics” that continually updates them has, “[f]or the most part, . . . maintained a balance between the plaintiff’s bar and the defense bar, and has maintained an objective drafting style.” *Id.*, §31:2, p. 293. This is evident in the history of WPI 105.8 as recounted by the parties, and its current iteration, which has eliminated terms that had caused critical comments.

Both parties are *entitled* to have the jury instructed on their parts of the case for which there is evidence; that includes instructions on the parameters of liability, *and* instructions on the *potential defenses* to the asserted liability for the case before them, based on the admitted evidence. *Id.* As Professor Tegland explains:

The parties are *entitled* to have their respective theories of the case presented to the jury in the instructions, *including* multiple claims and inconsistent *defenses*, provided there is evidence in the record to support them. . .

14A K. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE §31:12 (2nd ed. 2009), p. 314 (emphasis added). This basic principle applies in both civil and criminal cases.²

The failure to instruct on an applicable defense, or on a necessary element of a defense, is both an incorrect statement of the law and prevents the defendant from arguing her defense, and thus is error as a matter of law. *Travis v. Washington Horse Breeders Ass'n, Inc.*, 111 Wn.2d 396, 408-09, 759 P.2d 418 (1988). *Accord*, cases in footnote 2, *supra*.

It is this full explanation of the applicable law via instructions that allows each party to argue their case to the jury fully and fairly and gives the jury the right legal tools to decide the case. And it is the trial court's discretion that determines what is the proper combination of instructions in the unique circumstances of the case

² See, e.g., *Travis v. Washington Horse Breeders Ass'n, Inc.*, 111 Wn.2d 396, 408-09, 759 P.2d 418 (1988) (*reversing* for failure to give instruction on reasonableness defense to CPA claim); *Parrot-Horjes v. Rice*, 168 Wn. App. 438, 276 P.2d 376, *rev. den.*, 176 Wn.2d 1008 (2012) (defendant entitled to self-defense instruction at trial of wrongful death action, affirming trial court's use of the instruction and the defense verdict); *Henderson v. Pennwalt Corp.*, 41 Wn. App. 547, 551-52, 704 P.2d 1256 (1985) (jury *verdict reversed* for trial court's failure to give employer's requested instruction embodying its defense that the discriminatory actions of its supervisor were not authorized or known by higher management in gender discrimination case: "Each party is entitled, when the evidence warrants it, to have his theory of the case submitted to the jury under appropriate and properly requested instructions.") *Accord*, *Torno v. Hayek*, 133 Wn. App. 244, 252-53, 136 P.3d 536 (2006) (defense entitled to instruction under its case theory and instruction affirmed because it was supported by substantial evidence, rejecting challenge by plaintiff, affirming judgment the plaintiff appealed as too low).

Criminal cases are consistent. See, e.g., *State v. Mora*, 110 Wn. App. 850, 855-56, 43 P.3d 38, *rev. den.*, 147 Wn.2d 1021 (2002) (defendant entitled to instruction on defense to theft of good faith belief in ownership where supported by "some legal or factual basis for the belief" and "[t]he matter is then for the jury to decide.").

before that judge, so long as they provide an accurate statement of the law and accord with the other caveats, such as not injecting favoritism or confusion into the jury process. See 14A K. TEGLAND, *supra*, §§31:9 – 31:12, pp. 309-12.

It thus makes no sense to peremptorily remove from the trial judge's "tool box" of instructions one of the tools she would use in crafting the necessary instructions to a jury in a case which needs just that particular tool. Why deny to the judge or the jury the precise tool they need to get the job done right?

It is precisely because the trial judge must exercise her discretion based on the unique facts of the case and the applicable law as to both the claims and defenses that the Court should be wary of the plaintiffs' request here to remove or limit any of the "tools" in the trial judge's box of potential instructions for medical malpractice cases, and thus peremptorily limit the trial judge's exercise of discretion.

Indeed, under the circumstances such as in the two cases at issue here, refusal of an instruction on the exercise of judgment that embodies the core concept noted *supra* would be an abuse of discretion because it would not inform the jury of a well-established boundary to liability, nor of a critical element of the physician's defense and, thus, would deny her that defense. It would permit an erroneous argument that borders on, if it does not turn into, a *res ipsa loquitur* or strict liability argument: that because the physician

when exercising her professional judgment chose a wrong or a less efficacious diagnosis from all those available, or chose a wrong or less efficacious treatment from the available options that were consistent with the standard of care, she is necessarily negligent, even though she met the standard of care. This mischief cannot be allowed because it changes the applicable law and violates the fundamental right of defendant physicians to be held accountable under negligence law for fault-based liability as established by the Legislature in Ch. 7.70 RCW, not simply from “the mere fact that an injury was therapy produced or that there was an unfavorable or ‘bad’ result from the therapy. *Watson*, 107 Wn.2d at 162.

B. The “Exercise of Judgment” Instruction in Washington, WPI 105.08, Correctly States the Long-Settled Law of a Physician’s Potential Defense Even Where There Has Been an Injury Or a “Bad Result” From the Choice in Diagnosis Or Therapeutic Techniques.

1. The Roots of the “Exercise of Judgment” Instruction, Formerly Called “Error of Judgment”.

The parties have described the history of what is now properly known as the “exercise of judgment” instruction embodied in WPI 105.08.³ The central points on what is the present state of the law and how we got there are few but important:

- “The [exercise of] judgment principle is accepted in this state as *Miller [v. Kennedy]*, 91 Wn.2d 155, 588 P.2d 734

³ Like the parties, Health Care Amici use “exercise of judgment” to also describe the earlier versions of the instruction even though they contained the word “error” in order to maintain the focus on the core legal principle at issue of the physician’s exercise of judgment within the standard of care as part of the art of practicing medicine.

(1978)] makes clear, and probably in a majority of other jurisdictions as well.” *Watson v. Hockett*, 107 Wn.2d 158, 164-65, 727 P.2d 669 (1986). *See also id.*, 107 Wn.2d at 161-62 and cases cited therein.

- This Court unanimously held in 1978: “The exercise of professional judgment is an inherent part of the care and skill involved in the practice of medicine.” *Miller v. Kennedy*, 91 Wn.2d at 160.
- The exercise of judgment principle has expressly and unanimously been held to be embodied in the statute, since the change in the standard of care made by the statute did *not* affect the “error in judgment” instruction approved in *Miller v. Kennedy*: “The instructions approved in *Miller* . . . are unaffected by [*Harris v. Groth*, 99 Wn.2d 438, 663 P.2d 113 (1993)].” *Watson, supra*, 107 Wn.2d at 166-67.
- This Court *unanimously* held that the exercise of judgment instruction, in conjunction with the “no guarantee” and “bad result” instructions (now contained in WPI 105.07), are *all* important instructions to be given in combination in certain cases to inform both the judge and jury because they:
 - **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.**

Watson v. Hockett, 107 Wn.2d at 167 (emphasis added) (citations omitted).

- The current instruction in WPI 105.08 has removed terms that have been criticized in the past (“honest”; “error”), eliminating the basis for concerns raised in earlier court decisions.

The plaintiffs here seek to eliminate a defense that necessarily resides in the structure of the statute and the nature of medical malpractice claims, which are premised on standard of care, not results. As Professor Tegland noted, *supra*, the pattern instructions generally have reflected a good balance between the plaintiff and defense bars. This is especially so with the exercise of judgment instruction which has been modified over the years to eliminate perceived problems with certain terms.

But the concern that Health Care Amici have, and why they submit this brief to the Court, is that if the plaintiffs' position is accepted in these cases, it would upset that balance in the overall instructions available to trial judges. It would upset that careful balance in the instructions which has been in place since at least this Court approved the older instruction twice in the 1970's in the *Miller v. Kennedy* decisions, then re-affirmed that principle in 1986 in *Watson v. Hockett*, and in 1994 in *Christensen v. Munsen*, 123 Wn.2d 234, 867 P.2d 626 (1994). Moreover, it would materially change the statute that controls claims based on injuries due to health care by allowing for arguments that the misdiagnosis or less efficacious course of treatment establishes the physician's liability. In short, the analysis would move to simply demonstrating the "bad result" because it necessarily meant the physician was negligent, contrary to the statute.

2. The Exercise of Judgment Instruction Should Continue to Be Available to Trial Judges and Juries for Those Cases Which Involve Choices in Diagnoses and Courses of Treatment So the Physicians Can Assert Their Potential Legal Defense Where Justified By the Evidence.

This case presents an opportunity for the Court to approve the changes made to the pattern instruction, which have only made it more acceptable than it was in the many times the appellate courts, including this Court, have affirmed the basic principle it embodies. And rightly so, since that principle, which states an essential element to a defense to a negligence claim, is inherent in the statute. This Court should approve the new, improved WPI that has excised any problematic terms (“honest”; “error”) and now simply states, accurately, the basis for the physician’s defense to a claim of negligence in a case involving choosing diagnoses or courses of treatment, particularly when given in conjunction with WPI 105.01 and 105.07, as noted in *Watson*.

First, the exercise of judgment instruction meshes well with WPIC 105.01 and 105.07 on standard of care and “no guarantee/poor result.” This is the judge’s tool box. These instructions set the boundaries for cases that involve the exercise of professional judgment in choosing diagnoses or courses of treatment. Both judge and jury need to have all tools available so there is not a skewed result. WPIC 105.08 gives an example of the boundary of physician liability, what is NOT negligent, in terms the jury can understand so

that it can be properly applied. It is an example that is needed to insure the jury does not bypass or mis-apply the standard of care. How does one explain the standard of care to a jury about the exercise of judgment? It is not the same to simply have it in closing argument; it needs to come from the judge because it is, in fact, part of the law, the legal rules that the jury needs to be consciously applying.

In *Fergen*, Judge Brown in Division III acknowledged the correctness of the law underlying the instruction and that there was sufficient evidence for it to have been given by the trial judge and was correctly given in that case. *Fergen*, 174 Wn. App at 397-98. But it may not have to be given in every case.

There are many different standards of care for medical care and treatment and not all of them need the exercise of judgment instruction. For instance, a claim based on a botched repair of a broken leg or doing a hip replacement might be premised on the surgeon's skill in working with bones and the materials currently used. The claim that argues the repair was botched because the surgeon's skills on this particular job were not up to the standard of care would be held negligent based on the proof related to how the surgery was done, not on the decision of which surgical procedure to do. Similarly, a botched appendectomy or tonsillectomy or delivery that focuses on the inadequate skills of the surgeon or obstetrician in how they did the procedure would not in most cases have the

exercise of judgment instruction because, as the instruction is currently limited by case law (as indicated in the Comment to WPI 105.08), the claim at issue would not involve making the *choice* between alternative courses of treatment, but how the chosen course of treatment was carried out. On the other hand, if while conducting a surgery the surgeon is confronted with a choice between competing courses (take the entire organ, or just a portion once the extent of the cancer is seen and how far it extends into the organ in question), the fact of making *that choice* would be just the sort of evidence that would support giving the instruction where the choice made gave rise to the basis for the patient's complaint.

The *Fergen* case here is a good example of when it is not error to give the instruction, but where the failure to have given it might well have been an abuse of discretion. In that case Dr. Sestero examined Mr. Fergen's ankle and, based on his palpation, experience, and judgment, dismissed cancer as a likely diagnosis and concluded it was a common "benign ganglion cyst," ordering an x-ray. 174 Wn. App. at 395. While it later turned out Dr. Sestero had not diagnosed one of the most difficult kinds of cancer to detect and diagnose, Ewing's sarcoma, his defense was that his approach to the patient and the problem in dismissing cancer and making his diagnosis of a ganglion cyst was presented were within the standard of care. He therefore was entitled to the defense embodied in the exercise of judgment instruction, which if followed insures the jury

will not find liability simply because the diagnosis in question was later determined to be incorrect.

Plaintiff's counsel's approach in *Fergen* was that, where there is "any possibility" that cancer might be a possible diagnosis, any and all tests must be employed, as demonstrated by the quotations from closing argument in Dr. Sestero's briefs: Answer to Petition for Review, pp.9-12; Response Brief, pp. 36-37. But especially under the statute, this is really an argument over what the standard of care *should be* if there is a possibility of cancer. It seeks to rule out any exercise of judgment in diagnosing a condition. Plaintiff's counsel aggressively argued the standard of care *should be* a comprehensive testing protocol any and every time there is the remotest *possibility* a symptom might indicate cancer, even though that potential diagnosis is immediately discarded because none of the normal indicators are present. *Id.* He really was arguing for *res ipsa loquitur* liability where a physician fails to diagnose a cancer early. See *Miller v. Kennedy*, 11 Wn. App. 272, 277-78, 522 P.2d 852 (1974), *adopted and aff'd*, 85 Wn.2d 151, 530 P.2d 334 (1975).

The *Appukuttan* plaintiff's argument is slightly different. It appears to state that the exercise of judgment instruction sets a standard that would preempt parts of the statute. That is not accurate, as the history of the issue noted *supra* shows. Rather, the instruction clarifies what is already stated in Ch. 7.70 RCW, as *Watson v. Hockett* unanimously held: A physician must act within

the standard of care in order to overcome the plaintiff's element of proof in RCW 7.70.030(1). The exercise of judgment instruction simply states that if the physician made a decision regarding a diagnosis or a treatment from one or more choices – all of which are within the standard of care (and therefore overcoming the burden of RCW 7.70.030(1)) – then the physician is not liable for negligence under the statute. However, if the physician exercised his or her judgment and made a decision that was *not* within the standard of care, then the jury instruction would not protect the physician solely because he or she exercised their professional judgment.

The medical decision made on the diagnosis or course of treatment must be within the standard of care to avoid liability. The instruction states a material element of the physician's potential defense that the decision does not need to be the correct one so long as that particular choice was within the standard of care. In that way the instruction supports, but does not supplant, what is stated in RCW 7.70.030(1). More importantly, where supported by evidence as in both cases before the Court, the instruction instructs the jury on an element of the physician's defense, which the physician is entitled to have included in the instructions. *See* Section III, *supra*.

IV. CONCLUSION

The plaintiffs in both cases had their days in court and were able to fully and fairly present their cases. The trial judges ruled that in both cases there was evidence the physicians were confronted with

choices in making their diagnoses and exercised their judgment within the standard of care. The juries simply agreed with the defendant physicians in both cases that they acted within the standard of care in exercising their judgment and were not liable under the statute.

The rules of liability for all physicians should not be changed after the fact just to permit two plaintiffs to recover when the juries who heard their cases determined after careful consideration that they should not. The Court should not modify or change long-settled law, core principles of medical malpractice liability and defense, to achieve that result. As noted *supra*, doing that in these cases would effectively amend the statute to increase potential liability in the class of cases for which the instruction has been approved and used for decades beyond what the statute provides. But since the Legislature pre-empted this field and has not seen fit to so expand liability under the statute, the Court may not modify the statute in its stead.

Plaintiffs cannot properly ask this Court to eliminate or drastically limit the use of the instruction without trenching on the statute and changing it, which the courts cannot do since the legislature has spoken. Health Care Amici thus ask the Court to confirm use of the exercise of judgment instruction under the current neutral language of WPI 105.08 which correctly states the settled limit on liability and a critical element to a physician's defense in proper cases. It is a necessary "tool in the toolbox" of trial judges who must preside over trials and make certain the jury has the

correct statement of the law and defenses which apply in the
circumstances of that trial.

Respectfully submitted this 16th day of December, 2013.

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Subject: Filing Attachments to Email on behalf of Amici WSMA/WSHA No. 88819-1 (consolidated with 89192-3)

Court Clerk:

Documents to be filed:

1. Washington State Medical Assn. & Washington State Hospital Assn. Brief as *Amici Curiae* with attached Certificate of Service

Case Name: ***Fergen v. Sestero (No. 88819-1)***
consolidated with *Appukuttan v. Overlake Medical Ctr.* No. 89192-3
Case No.: **No. 88819-1**
Filer(s): Gregory M. Miller, WSBA No. 14459, phone 206-622-8020 ext. 163, miller@carneylaw.com

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No. 88819-1
(Consolidated with 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,

Petitioners,

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, PLLC;
ALAN B. BROWN, M.D.; MARCUS
TIORNE, M.D.; and TINA NEIDERS,
M.D.,

Respondents.

CERTIFICATE OF
SERVICE

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STATE OF WASHINGTON
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I certify under penalty under the laws of the State of Washington
that on the 16th day of December, 2013, I caused a true and correct copy of
*WASHINGTON STATE MEDICAL ASSOCIATION AND WASHINGTON STATE
HOSPITAL ASSOCIATION BRIEF AS AMICI CURIAE* to be delivered as follows:

 ORIGINAL

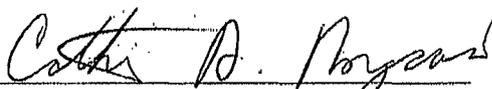
<p>Mark D. Kamitomo Markam Group Inc., P.S. 421 W Riverside Ave., Ste. 1060 Spokane, WA 99201-0406 P: 509-747-0902 F: 509-747-1993 Email: mark@markamgrp.com</p> <p><i>Counsel for Petitioner Fergen-88819-1</i></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input checked="" type="checkbox"/> email <input type="checkbox"/> Other
<p>George M. Ahrend Ahrend Albrecht PLLC 16 Basin St. SW Ephrata, WA 98823-1865 P: 509-764-9000 F: 509-464-6290 Email: gahrend@trialappeallaw.com</p> <p><i>Counsel for Petitioner Fergen-88819-1</i></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input checked="" type="checkbox"/> email <input type="checkbox"/> Other
<p>Mary H. Spillane Daniel W. Ferm Williams, Kastner & Gibbs Two Union Square 601 Union Street, Ste. 4100 Seattle, WA 98101-2380 P: 206-628-6600 F: 206-628-6611 Email: mspillane@williamskastner.com Email: dferm@williamskastner.com</p> <p><i>Counsel for Sestero, Spokane Internal Medicine PS-88819-1; Overlake Medical Ctr, Puget Snd Physicians, Drs. Brown, Trione, Neiders-89192-3</i></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input checked="" type="checkbox"/> email <input type="checkbox"/> Other
<p>James B. King Evans, Craven & Lackie, PS 818 W Riverside Ave., Ste. 250 Spokane, WA 99201-0994 P: 509-455-5200 F: 509-455-3632 Email: jking@ecl-law.com</p> <p><i>Co-Counsel for Sestero, Spokane Internal Medicine PS-88819-1</i></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input checked="" type="checkbox"/> email <input type="checkbox"/> Other

<p>John Budlong Tara L. Eubanks Law Offices of John Budlong 100 Second Ave. So, Ste 200 Edmonds, WA 98020-3551 P: 425-673-1944 F 425-673-1884 Email: john@budlonglawfirm.com Email: tara@budlonglawfirm.com</p> <p><i>Counsel for Plt/Appellant Anil Appukuttan 89192-3</i></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input checked="" type="checkbox"/> email <input type="checkbox"/> Other</p>
<p>Christopher H. Anderson Karen Griffith Fain Anderson Vanderhoef, PLLC 701 Fifth Ave., Ste. 4650 Seattle, WA 98104 P: 206-749-2380 F: 206-749-0194 Email: chris@favfirm.com Email: Karen@favfirm.com</p> <p><i>Counsel for Respondent Overlake-89192-3</i></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input checked="" type="checkbox"/> email <input type="checkbox"/> Other</p>
<p>John C. Graffe Johnson Graffe Keay Moniz & Wick 925 Fourth Ave., Ste. 2300 Seattle, WA 98104-1145 P: 206-223-4770 F: 206-386-7344 Email: johng@jgkmw.com</p> <p>Philip deMaine Johnson Graffe Keay Moniz & Wick 2115 N 30th St., Ste. 101 Tacoma, WA 98403-3396 P: 253-572-5323 Email: phild@jgkmw.com</p> <p><i>Counsel for Respondent Brown-89192-3</i></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input checked="" type="checkbox"/> email <input type="checkbox"/> Other</p> <p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input checked="" type="checkbox"/> email <input type="checkbox"/> Other</p>

<p>Lee M. Barns Mary K. McIntyre McIntyre & Barns PLLC 2505 Third Ave., Ste. 202 Seattle, WA 98121-1480 P: 206-682-8285 F: 206-682-8636 Email: leeb@mcblegal.com Email: marym@mcblegal.com</p> <p><i>Counsel for Respondent Puget Sound Physicians, Drs. Brown, Trione & Neiders -- 89192-3</i></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input checked="" type="checkbox"/> email <input type="checkbox"/> Other
<p>Bryan P. Harnetiaux 517 E. 17th Ave. Spokane, WA 99203 P: 509-624-3890 F: n/a Email: amicuswsajf@wsajf.org</p> <p><i>Counsel for WSAJF Amicus</i></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input checked="" type="checkbox"/> email <input type="checkbox"/> Other
<p>David P. Gardner Winston & Cashatt 601 W. Riverside, Ste. 1900 Spokane, WA 99201-0695 P: 509-838-6131 F: 509-838-1416 Email: dp@winstoncashatt.com</p> <p><i>Counsel for WSAJF Amicus</i></p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input checked="" type="checkbox"/> email <input type="checkbox"/> Other

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DATED this 16th day of December, 2013.


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Subject: RE: Filing Attachments to Email on behalf of Amici WSMA/WSHA No. 88819-1 (consolidated with 89192-3)

Rec'd 12/16/2013

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