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STATE OF WASHINGTON
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No. 88819-1

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.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDING PARTIES

Respondents John D. Sestero, M.D., and Spokane Internal Medicine, P.S., ask the Court to deny Ms. Fergen's petition for review.

II. COUNTERSTATEMENT OF THE CASE

Respondents adopt the statement of facts set out in the Court of Appeals decision.

III. ARGUMENT WHY REVIEW SHOULD BE DENIED

Washington courts have long held that it is proper and within the trial court's discretion to give an "error of judgment" or, as it is now titled in WPI (Civ.) 105.08,¹ "exercise of judgment" instruction in cases where there is evidence that the defendant physician was confronted with a choice among competing therapeutic techniques or among medical diagnoses and, in arriving at a judgment, exercised reasonable care and skill within the standard of care he or she was obliged to follow. This was such a case, and thus the Court of Appeals decision affirming the trial court's giving of the "exercise of judgment" instruction in this case does not conflict with any decision of this Court or of the Court of Appeals so as to warrant review under RAP 13.4(b)(1) or (2). Nor does the Court of Appeals decision, which adheres to and applies well-established precedent, raise any issue of substantial public interest so as to warrant

¹ See 6 Wash. Prac.: Washington Pattern Jury Instructions: Civil 105.08, at 612-13 (6th ed. 2012)

review under RAP 13.4(b)(4). To the extent that Ms. Fergen seeks to have this Court overrule long-standing precedent concerning the “error of judgment,” now “exercise of judgment” instruction, she fails to make the requisite clear showing under the principle of *stare decisis* that such long-standing precedent is incorrect or harmful so as to justify abandoning it.

A. This Court Has Long-Recognized the Propriety and Utility of the “Error of Judgment” Instruction.

Since the mid-1970s, when this Court, in a *per curiam* opinion in *Miller v. Kennedy*, 85 Wn.2d 151, 152, 530 P.2d 334 (1975), found that it could “add nothing constructive to the well considered opinion” of, and therefore affirmed, approved, and adopted, the Court of Appeals’ decision in *Miller v. Kennedy*, 11 Wn. App. 272, 280, 522 P.2d 852 (1974), which had approved the “honest error of judgment” instruction, Washington courts, with refinements to the language of the instruction, have repeatedly recognized that the instruction can serve an important purpose and properly can be given as a supplement to a proper standard of care instruction in cases where the defendant physician was called upon to exercise professional judgment or, more specifically, was confronted with a choice among competing therapeutic techniques or among medical diagnoses. *See Miller v. Kennedy*, 91 Wn.2d 155, 160-61, 588 P.2d 734 (1978); *Watson v. Hockett*, 107 Wn.2d 158, 164-67, 727 P.2d 669 (1986);

Christensen v. Munsen, 123 Wn.2d 234, 248-49, 867 P.2d 626 (1994); *Vasquez v. Markin*, 46 Wn. App. 480, 487-89, 731 P.2d 510 (1986), *rev. denied*, 108 Wn.2d 1021 (1987); *Thomas v. Wilfac, Inc.*, 65 Wn. App. 255, 263-64, 828 P.2d 597, *rev. denied*, 119 Wn.2d 1020 (1992); *Gerard v. Sacred Heart Med. Ctr.*, 86 Wn. App. 387, 388-89, 937 P.2d 1104, *rev. denied*, 133 Wn.2d 1017 (1997); *Ezell v. Hutson*, 105 Wn. App. 485, 488-92, 20 P.3d 975, *rev. denied*, 144 Wn.2d 1011 (2001); *Housel v. James*, 141 Wn. App. 748, 760, 172 P.3d 712 (2007).

As the Court of Appeals in *Miller*, 11 Wn. App. at 280, and this Court in adopting the opinion of that court, in *Miller*, 85 Wn.2d at 152, reasoned in approving the use of the instruction:

The efforts of a physician may be unsuccessful or the exercise of one's judgment be in error without the physician being negligent so long as the doctor acted within the standard of care of his peers.... A doctor is liable only for misjudgment when he arrived at such judgment through a failure to act in accordance with the care and skill required in the circumstances. A mistake is not actionable unless it is shown to have occurred because the doctor did not perform within the standard of care of his practice. [Citations omitted.]

In a subsequent appeal in the same case, *Miller*, 91 Wn.2d at 160-61, this Court reiterated approval of the "error of judgment" instruction in cases where the physician was called upon to exercise professional judgment.

Some eight years later, in *Watson*, 107 Wn.2d at 164-67, this Court

again examined the instruction, made changes to its wording, and delineated the circumstances under which it properly could be given. This Court disagreed with the Court of Appeals' rejection of the "error of judgment" instruction approved in *Miller* as confusing, unnecessary, and an improper statement of the law that altered the standard of care as set forth in RCW 7.70.040, *see Watson v. Hockett*, 42 Wn. App. 549, 555-57, 712 P.2d 855 (1986), concluding instead that, when "given in connection with a proper standard of care instruction" and "used in the manner and form approved herein," the error of judgment instruction supplements 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 reasonable differ as to what constitutes proper treatment.

Watson, 107 Wn.2d at 166-67 (quoting J. Perdue, *Texas Medical Malpractice*, ch. 2, "Standard of Care", 22 Hous. L. Rev. 47, 60 (1985)).

Reaffirming that the "error of judgment" instruction is proper and reflects an accepted principle of law, this Court in *Watson*, 107 Wn.2d at 164-65, changed the wording of the instruction approved in *Miller* to delete the word "honest," thereby removing the basis for the concerns the Court of Appeals expressed in *Watson*, 42 Wn. App. at 555-57, and that courts in other jurisdictions had expressed in disapproving "honest,"

“good faith,” “mere,” or “bona fide” error of judgment instructions. This Court, indicated that the instruction is “to be given with caution” and circumscribed the circumstances in which the instruction properly may 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. [Footnote omitted.]

Watson, 107 Wn.2d at 165.

This Court again, another eight years later, affirmed the propriety of giving the “error of judgment” pattern jury instruction, WPI (Civ.) 105.08, in *Christensen*, 123 Wn.2d at 248-49. The pattern instruction at the time provided that:

A physician is not liable for an error of judgment if, in arriving at that judgment, the physician exercised reasonable care and skill, within the standard of care the physician was obliged to follow.

This Court held that the instruction accurately stated the law and was not a comment on the evidence, and reiterated the circumstances it had set forth in *Watson* for the proper use of the instruction. *Christensen*, 123 Wn.2d at 248-49.

Since *Christensen*, this Court has denied review of Court of Appeals' decisions affirming use of the pattern instruction in *Gerard v. Sacred Heart Med. Ctr.*, 86 Wn. App. 387, 388-89, 937 P.2d 1104, *rev. denied*, 133 Wn.2d 1017 (1997); and *Ezell v. Hutson*, 105 Wn. App. 485, 20 P.3d 975, *rev. denied*, 144 Wn.2d 2011 (2001).

Sometime after this Court's decision in *Christensen*, the Washington Pattern Instruction Committee modified WPI (Civ.) 105.08, eliminating use of the term "error" which courts in other jurisdictions had found controversial. As the Committee explained the change:

In *Christensen v. Munsen*, ... the Supreme Court approved the use of a similar instruction modified in accordance with *Watson* [*v. Hockett*, 107 Wn.2d 158]. 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.

Comment to WPI (Civ.) 105.08, 6 Wash. Prac.: Washington Pattern Jury Instructions: Civil 105.08, at 612-13 (6th ed. 2012) (emphases added). As modified, the pattern jury instruction, WPI (Civ.) 105.08, now the “exercise of judgment” instruction, does not use the controversial word “error” but retains *Watson*’s wise reminder that medicine is an inexact science where professional judgment may reasonably differ, by stating:

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.

That instruction, as it pertains to alternative diagnoses, is the instruction that was given in this case.

Ms. Fergen has never challenged or complained about the wording of the instruction that was given in this case. Her complaint has been that the instruction should not have been given in this case, or should never be given at all. Yet, as the Court of Appeals correctly concluded, *Fergen v. Sestero*, ___ Wn. App. ___, ___, 298 P.3d 782, 785 (2013), there was substantial evidence in this case that Dr. Sestero considered malignancy in deciding that Mr. Fergen's ankle lump was most likely a benign ganglion cyst, RP 609, that he was confronted with a choice among diagnoses, and that, in arriving at that diagnosis, he exercised reasonable care and skill within the standard of care he was obliged to follow, RP 1131, 1137-47, 1150-54, 1192-93, 1309-16, 1320, 1323-24, 1330, 1332-33, 1399-1406, 1412-13. This Court has held that, under such circumstances, even when the instruction used the word "error," the instruction properly may be given in connection with a proper standard of care instruction as it provides an important reminder that "medicine is an inexact science where the desired results cannot be guaranteed, and where professional judgment

may reasonably differ.” *Watson*, 107 Wn.2d 167; *Christensen*, 123 Wn.2d at 247-49.

B. Review is Not Warranted under RAP 13.4(b)(1) or (2) – the Court of Appeals Decision Is Not in Conflict with This Court’s Decision in *Watson v. Hockett* or Any Other Washington Decision.

Under *Watson*, the “error of judgment,” now the “exercise of judgment,” instruction properly may be given in connection with a proper standard of care instruction in cases “where the doctor is confronted with a choice among competing therapeutic techniques or among medical diagnoses” and “where there is evidence that in arriving at a judgment, ‘the physician ... exercised reasonable care and skill, within the standard of care he was obliged to follow.’” As noted above, the Court of Appeals correctly concluded there was substantial evidence presented in this case that Dr. Sestero was confronted with a choice among medical diagnoses and that, in arriving at his diagnosis of benign ganglion cyst, rather than some exceedingly rare malignancy, he exercised reasonable care and skill within the standard of care he was obliged to follow.

For the reasons explained in the Court of Appeals decision, this was a proper – even classic – case for use of an exercise of judgment instruction. By giving the instruction, the trial court wisely reminded the jury that medicine is not an exact science and focused the jury’s fact-finding on the essential requirement, imposed by RCW 7.70.040, that

plaintiff persuade it that Dr. Sestero *failed to exercise* the requisite degree of skill, care, and learning in arriving at the diagnosis of benign ganglion cyst, when, on November 14, 2008, he examined the nickel-sized, non-tender ankle lump that had been causing Paul Fergen minor discomfort for about one week, *see* RP 606, 609-10, 1214; *Brief of Respondent at 3*, rather than merely persuade it that the diagnosis turned out to be incorrect.

Had the trial court *not* given the exercise of judgment instruction, plaintiff's counsel would, misleadingly, have asked the jury to find malpractice simply because Dr. Sestero failed to diagnose Ewing's sarcoma, a cancer that is exceedingly rare, and rarer still as a soft-tissue lump on the ankle. RP 1312-13, 1323-34, 1402-03, 2061-65. As it was, plaintiff's counsel, in closing argument, urged the jury to focus on the outcome rather than the process:

You have to ask yourself, is it reasonable when it comes to the potential for cancer to say that feeling the cancer and looking at the lump is good enough, and if I think that cancer is so far down the list of possibilities, I don't have to do anything more than that. And if I'm going to be held accountable in a courtroom in front of people like you, I'm going to say I exercised my clinical judgment, and that was good enough no matter what the harm that flowed from that.

RP 1214. Plaintiff's counsel went on to argue:

But if the other potential is that this could be cancer, then you have an obligation to your patient to make sure it is a ganglion cyst and make sure it's not cancer.

RP 2153. And, as plaintiff's counsel argued in rebuttal closing:

It's not okay to stand before you and say clinical judgment is everything. Clinical judgment is certainly important. I would never say doctors can't use their clinical judgment. And there are plenty of times when they do it. But if you are arguing that, if the choices are cancer or something benign and you do nothing more than feel it and then say, "In my clinical judgment the cancer was so far down the list I can't be held responsible for that," well, I can't buy that."

RP 2218.

Dr. Sestero was entitled to the protection that WPI 105.08 provides against focusing solely on the fatal incorrectness of diagnosis, rather than on compliance with the applicable standard of care in reaching the diagnosis. The standard of liability for medical malpractice in Washington is process-based, not outcome-based. RCW 7.70.040 allows recovery for malpractice only upon proof that the defendant "*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 [emphasis added]." *See also* WPI (Civ.) 105.01 and 105.02. A plaintiff claiming medical negligence is not entitled to prevail simply because a physician reached an incorrect diagnosis even though he exercised the skill, care and learning expected of a reasonably prudent physician in arriving at the diagnosis. The "exercise of judgment"

instruction serves a vital function by making that clear. The Court of Appeals' affirmance of the trial court's giving of it in this case is not in conflict with *Watson* or any other Washington appellate decision.

C. The Court of Appeals Decision Does Not Involve an Issue of Substantial Public Interest that Should Be Determined by This Court So As to Warrant Review under RAP 13.4(b)(4).

No RAP 13.4(b) criteria are met by Ms. Fergen's argument, *Petition at 17*, that use of the "exercise of judgment" instruction in a case like this creates "uncertainty" because the Court of Appeals declined to add a new gloss on the pattern "exercise of judgment" instruction and limit its use to cases where the defendant physician "*consciously* selected between competing alternative diagnoses or treatments." Neither her argument nor the Court of Appeals' declination to embrace it creates an issue of substantial public interest that should be determined by this Court. Indeed, the "exercise of judgment" instruction set forth in WPI (Civ.) 105.08 and given in this case, speaks of "selecting" among one of two or more medical diagnoses clearly implying the making of a choice, and the court long ago approved the instruction's use, even when it contained the phrase "error of judgment," in cases where the evidence shows that the defendant physician was "confronted with a choice among competing therapeutic techniques or among medical diagnoses." *Christensen*, 105 Wn.2d at 249. To limit use of the instruction to cases involving evidence

of “conscious choice,” as petitioner seems to propose, would make for meaningless redundancy.

In any event, the Court of Appeals has not injected “uncertainty” into Washington medical malpractice law by approving use of the “exercise of judgment” pattern instruction in a case devoid of evidence that the defendant physician made a *conscious* choice between or among competing medical diagnoses because, as the Court of Appeals concluded, in this case there was evidence that Dr. Sestero made a conscious choice:

Here, Dr. Sestero testified he considered malignancy in deciding Mr. Fergen’s lump was most likely a benign ganglion cyst. His expert witnesses testified he faced a choice between at least two differential medical diagnoses because Mr. Fergen’s lump was necessarily either benign, which was very likely, or malignant, which was very unlikely. And, his expert witnesses testified that, in his diagnostic process, Dr. Sestero exercised reasonable care and skill within the standard of care because he examined the lump, considered its history, ordered an x-ray of the ankle to ensure no structural defects, referred Mr. Fergen to an orthopedic specialist, and instructed him to follow-up as necessary. This evidence rises above speculation and conjecture, and is a sufficient quantum to persuade a fair-minded person that Dr. Sestero’s mere failure to produce a good medical result was not medical negligence. Therefore, substantial evidence supports his case theory and the trial court did not abuse its discretion by instructing the jury on a physician’s exercise of judgment.

Fergen, ___ Wn. App. at ___, 298 P.3d at 785 (emphasis added). Ms.

Fergen’s argument that the Court of Appeals decision creates

“uncertainty” not only is lacking in merit but also fails to make the case for review pursuant to either RAP 13.4(b)(1) or RAP 13.4(b)(4).

Ms. Fergen’s assertion, *Petition at 18*, that *Watson* should be overruled and the “exercise of judgment” instruction abandoned also does not present an issue of substantial public interest that should be decided by this Court under RAP 13.4(b)(4). This Court has already, and repeatedly since 1975, reviewed the principle of law embodied in the “error of judgment,” now “exercise of judgment,” instruction, and has approved the giving of such an instruction in connection with a proper standard of care instruction in cases, like this one, where the physician was confronted with a choice among medical diagnoses and where there is evidence that, in arriving at his diagnosis, the physician exercised reasonable care and skill within the standard of care he was obliged to follow. This Court has articulated how such an instruction can be helpful and provide “useful watchwords” to remind jurors that “medicine is an inexact science where the desired results cannot be guaranteed, and where professional judgment may reasonably differ.” *Watson*, 107 Wn. 2d at 167. Nothing has changed since *Watson* to render those principles obsolete, to make the “watchwords” any less useful, or to render medicine an exact science or doctors guarantors of the correctness of their diagnoses.

Ms. Fergen has not shown that the “exercise of judgment” instruction or anything this Court said in *Watson* is incorrect or harmful so as to warrant wholesale abandonment of the instruction or overruling of *Watson* or any of the multiple other decisions that have approved the giving of it. As this Court explained in *City of Federal Way v. Koenig*, 167 Wn.2d 341, 346-47, 217 P.3d 1172 (2009):

The principle of stare decisis “requires a clear showing that an established rule is incorrect and harmful before it is abandoned.”... This respect for precedent “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”... [Citations omitted.]

And, as this Court explained in *Lunsford v. Saberhagen Holdings*, 166 Wn.2d 264, 278, 208 P.3d 1092 (2009):

In Washington, stare decisis protects reliance interests by requiring “a clear showing that an established rule is incorrect and harmful before it is abandoned.”... The substantive restraints placed on courts to “not only heed the relevant judicial past in arriving at a decision, but also to arrive at it within as straight and narrow a path as possible,” ordinarily produces changes in the law “with a minimum of shock to those who act in reliance upon judicial decisions.”... The constraints of stare decisis prevent the law from becoming “subject to incautious action or the whims of current holders of judicial office.”... Although stare decisis limits judicial discretion, it also protects the interests of litigants by providing clear standards for determining their rights and the merits of their claims. Therefore, overruling prior precedent should not be taken lightly.... [Citations omitted; footnote omitted.]

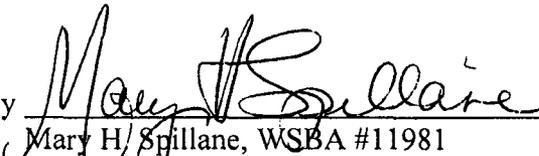
Because this Court has already addressed the propriety and utility of the instruction, first in *Miller*, again in *Watson*, and again in *Christensen*, and because Ms. Fergen has not shown that the instruction or anything this Court said in *Watson* is incorrect or harmful, her assertion that the instruction should now be abandoned and *Watson* overruled does not present an issue of substantial public that this Court needs to decide, so as to warrant review under RAP 13.4(b)(4).

IV. CONCLUSION

For the foregoing reasons, the petition for review should be denied.

RESPECTFULLY SUBMITTED this 10th day of June, 2013.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 10th day of June, 2013, I caused a true and correct copy of the foregoing document, "Answer to Petition for Review," to be delivered in the manner indicated below to the following counsel of record:

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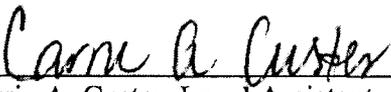
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DATED this 10th day of June, 2013, at Seattle, Washington.



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Subject: Fergen v. Sestero / Case #88819-1

Dear Clerk,

Attached for filing in .pdf format is the Answer to Petition for Review in *Fergen v. Sestero*, Supreme Court Cause No. 88819-1. The attorneys filing this brief are Mary Spillane, WSBA No. 11981, (206) 628-6656, e-mail: mspillane@williamskastner.com and Dan Ferm, WSBA No. 11466, (206) 233-2908, e-mail: dferm@williamskastner.com.

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