

FILED

JUN 27 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 305236

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

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.

BRIEF OF APPELLANTS

Mark D. Kamitomo
MARKAM GROUP, INC., P.S.
421 W. Riverside Ave., Ste. 1060
Spokane, WA 99201-0406
(509) 747-0902

George M. Ahrend
AHREND ALBRECHT PLLC
100 E. Broadway Ave.
Moses Lake, WA 98837
(509) 764-9000

Attorneys for Plaintiffs-Appellants

FILED

JUN 27 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 305236

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

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.

BRIEF OF APPELLANTS

Mark D. Kamitomo
MARKAM GROUP, INC., P.S.
421 W. Riverside Ave., Ste. 1060
Spokane, WA 99201-0406
(509) 747-0902

George M. Ahrend
AHREND ALBRECHT PLLC
100 E. Broadway Ave.
Moses Lake, WA 98837
(509) 764-9000

Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
INTRODUCTION	1
ASSIGNMENTS OF ERROR.....	1
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	1
STATEMENT OF THE CASE.....	2
I. Background facts.	2
II. Error in judgment instruction.....	6
ARGUMENT	11
I. The superior court erred by giving the error of judgment instruction to the jury.	11
A. Giving a jury instruction that is not supported by substantial evidence is prejudicial error, requiring reversal and remand...	12
B. The error of judgment rule is only applicable, and an error of judgment instruction should only be given to the jury, when the defendant-health care provider in question considers two or more alternative diagnoses or treatments.....	14
C. There is a lack of substantial evidence that Dr. Sestero considered two or more alternative diagnoses of the cancerous lump on Mr. Fergen’s ankle; instead, he considered a singular diagnosis of a benign ganglion cyst.	19
D. The error of judgment instruction misled and confused the jury, exacerbating the prejudice that normally occurs when a jury instruction is not supported by substantial evidence.....	22
CONCLUSION.....	25
CERTIFICATE OF SERVICE	26

APPENDIX

TABLE OF AUTHORITIES

Cases

<i>Albin v. National Bank of Commerce</i> , 60 Wn. 2d 745, 375 P.2d 487 (1962)	12-14, 23
<i>Anderson v. House of Good Samaritan Hosp.</i> , 44 A.D.3d 135, 840 N.Y.S.2d 508 (N.Y. App. Div. 2007)	18
<i>Bean v. Stephens</i> , 13 Wn. App. 364, 534 P.2d 1047, <i>rev. denied</i> , 86 Wn. 2d 1003 (1975).....	13
<i>Blodgett v. Olympic Savings & Loan Ass'n</i> , 32 Wn. App. 116, 646 P.2d 139 (1982).....	13-14
<i>Board of Regents of Univ. of Wash. v. Frederick & Nelson</i> , 90 Wn. 2d 82, 579 P.2d 346 (1978).....	19
<i>Christensen v. Munsen</i> , 123 Wn. 2d 234, 867 P.2d 626 (1994).....	15, 22, 23
<i>Columbia Park Golf Course, Inc. v. City of Kennewick</i> , 160 Wn. App. 66, 248 P.3d 1067 (2011).....	13
<i>Ezell v. Hutson</i> , 105 Wn. App. 485, 20 P.3d 975, <i>rev. denied</i> , 144 Wn. 2d 1011 (2001).....	8, 15, 22-24
<i>Gerard v. Sacred Heart Med. Ctr.</i> , 86 Wn. App. 387, 937 P.2d 1104, <i>rev. denied</i> , 133 Wn. 2d 1017 (1997).....	15, 22
<i>Glenn v. Brown</i> , 28 Wn. App. 86, 622 P.2d 1279 (1980), <i>rev. denied</i> , 95 Wn. 2d 1018 (1981).....	14, 19
<i>Hammel v. Rife</i> , 37 Wn. App. 577, 682 P.2d 949, <i>rev. denied</i> , 102 Wn. 2d 1007 (1984).....	14

<i>Hardee v. Department of Soc. & Health Servs.</i> , 172 Wn. 2d 1, 256 P.3d 339 (2011).....	24
<i>Haynes v. Moore</i> , 14 Wn. App. 668, 545 P.2d 28 (1975).....	14
<i>Housel v. James</i> , 141 Wn. App. 748, 172 P.3d 712 (2007).....	15, 22
<i>Ketchum v. Overlake Hosp. Med. Ctr.</i> , 60 Wn. App. 406, 804 P.2d 1283, <i>rev. denied</i> , 117 Wn. 2d 1004 (1991).....	21
<i>Klink v. G.D. Searle & Co.</i> , 26 Wn. App. 951, 614 P.2d 701 (1980).....	13, 19-21
<i>Manzanares v. Playhouse Corp.</i> , 25 Wn. App. 905, 611 P.2d 797 (1980).....	14
<i>Matsyuk v. State Farm Fire & Cas. Co.</i> , 173 Wn. 2d 643, 272 P.3d 802 (2012).....	18
<i>McCleary v. State</i> , 173 Wn. 2d 477, 269 P.3d 227 (2012).....	19
<i>Miller v. Kennedy</i> , 91 Wn. 2d 155, 588 P.2d 734 (1978).....	14-15, 18
<i>Miller v. Kennedy</i> , 11 Wn. App. 272, 522 P.2d 852 (1974), <i>aff'd</i> , 85 Wn. 2d 151, 530 P.2d 334 (1975).....	18
<i>Nestorowich v. Ricotta</i> , 97 N.Y.2d 393, 767 N.E.2d 125 (N.Y. 2002).....	17-18, 24
<i>Roberson v. Perez</i> , 156 Wn. 2d 33, 123 P.3d 844 (2005).....	16
<i>Spadaccini v. Dolan</i> , 63 A.D.2d 110, 407 N.Y.S.2d 840 (N.Y. App. Div. 1978)	17-18

<i>State v. O'Connell</i> , 83 Wn.2d 797, 523 P.2d 872 (1974).....	13
<i>Thomas v. Wilfac, Inc.</i> , 65 Wn. App. 255, 828 P.2d 597, <i>rev. denied</i> , 119 Wn. 2d 1020 (1992).....	15, 22
<i>Vasquez v. Markin</i> , 46 Wn. App. 480, 731 P.2d 510 (1986), <i>rev. denied</i> , 108 Wn. 2d 1021 (1987).....	15, 22
<i>Watson v. Hockett</i> , 107 Wn. 2d 158, 727 P.2d 669 (1986).....	passim
<i>Zwink v. Burlington Northern, Inc.</i> , 13 Wn. App. 560, 635 P.2d 13 (1974).....	13

Statutes and Rules

CR 2A	6
CR 51(f).....	16

Other Authorities

WPI 105.08	1, 9, 16
------------------	----------

INTRODUCTION

The appeal of this medical negligence case involves the proper interpretation and application of the so-called “error of judgment” rule. *See Watson v. Hockett*, 107 Wn. 2d 158, 164-67, 727 P.2d 669 (1986). In accordance with the rule, the jury was instructed that “[a] physician is not liable for selecting one of two or more alternative diagnoses, if, in arriving at a diagnosis a physician exercised reasonable care and skill within the standard of care the physician was obligated to follow.” CP 3198 (adapting WPI 105.08). The appeal focuses on the question whether it is reversible error to give this instruction under circumstances where the defendant-physician did not, in fact, select between competing alternative diagnoses, but rather considered only a single erroneous diagnosis.

ASSIGNMENTS OF ERROR

1. The superior court erred by giving Instruction No. 18, the error of judgment instruction, to the jury. CP 3198; RP 2144:21-2145:1 & 2146:3-10.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is the error in judgment rule limited to cases where a defendant-health care provider exercises his or her judgment by selecting between competing alternate diagnoses or treatments? Or, does it apply to every medical

negligence case on grounds that the practice of medicine inherently involves the exercise of judgment? (Assignment of Error No. 1.)

2. Is there substantial evidence that Dr. Robert Sestero selected between competing alternative diagnoses of the cancerous lump on Paul Fergen's ankle? Or, does the record reflect that Dr. Sestero considered a single erroneous diagnosis of a benign ganglion cyst? (Assignment of Error No. 1.)
3. Is it prejudicial and reversible error to instruct the jury on the error in judgment rule when not supported by substantial evidence? (Assignment of Error No. 1.)
4. Should the error in judgment rule be abandoned as incorrect and harmful? (Assignment of Error No. 1.)

STATEMENT OF THE CASE

I. Background facts.

On November 17, 2004, Paul Fergen and his wife Dani visited Dr. Robert Sestero to have a lump on Mr. Fergen's ankle examined. Ex. P-1A (chart note). Mr. Fergen noticed the lump during the prior week, and it caused him a small amount of discomfort. Ex. P-1A. After looking at and feeling the lump, Dr. Sestero described it as a "slight nodule" that was

“smooth, soft and nontender.” Ex. P-1A. Based on the history and exam, Dr. Sestero diagnosed it as a benign ganglion cyst. Ex. P-1A.¹

Dr. Sestero also referred Mr. Fergen for an X-ray to make sure that the discomfort he experienced was not caused by any problems in his ankle. Ex. P-1A. The purpose of the X-ray was not to aid in diagnosis of the lump. RP 626:5-15 & 2033:16-2034:9. The X-ray report confirmed an absence of any problems in the ankle. Ex. P-3. The radiologist who interpreted the X-ray stated “[i]f a soft tissue cyst is felt an ultrasound might be of help.” Ex. P-3.² Dr. Sestero left a telephone message for the Fergens that the X-ray was “negative.” RP 457:19-21, 1212:23-1213:12 & 1834:20-1835:2. He did not inform them of the radiologist’s suggestion of an ultrasound, nor did he order one himself. *See id.*

Dr. Sestero never saw Mr. Fergen again after the November 17, 2004, visit. Approximately 13 months later, Mr. Fergen suffered a seizure leading to the discovery of a form of cancer known as Ewing’s sarcoma. The cancer originated in the lump on his ankle and metastasized to his brain, lungs and lymph nodes. After an extended course of treatment involving radiation and chemotherapy, Mr. Fergen died.

¹ The November 17, 2004, chart note was admitted as Exhibit P-1A at RP 408. A copy of the exhibit is reproduced in the Appendix to this brief.

² The November 17, 2004, X-ray report was admitted as Exhibit P-3 at RP 408. A copy of the exhibit is reproduced in the Appendix to this brief.

If an ultrasound had been performed, it would have confirmed that the lump on Mr. Fergen's ankle was not a benign ganglion cyst, and his cancer would have been diagnosed earlier. *See* RP 335:48-338:4, 348:15-23, 627:3-17. Mr. Fergen then would have had a significant chance (approximately 60% or more) of surviving the cancer. *See* RP 489:19-490:11, 492:20-493:6, 1054:17-1056:6, 1067:11-1068:8 & 1196:15-23.³

Dr. Sestero's records do not contain any indication that he entertained diagnoses of the lump other than a ganglion cyst. Ex. P-1A. He does not have a memory other than what is contained in the records. RP 2050:1-6 & 2052:13-14. In describing the exercise of his "clinical judgment" in diagnosing Mr. Fergen, Dr. Sestero does not say that he considered any competing alternative diagnoses. RP 2042:8-18 & 2044:17-24. He did nothing personally to rule out the possibility that the lump was cancerous, and he did not inform the Fergens of the possibility, because he considered it to be unlikely. RP 606:11-611:1. At one point during trial, he testified that "malignancy" is "a consideration anytime you

³ There was a dispute between the parties regarding whether Dr. Sestero also referred the Fergens to an orthopedic specialist. Exhibit P-1A states, "[r]efer to either Dr. Sanwick or Dr. Padrta with NW Orthopedics," but it is not clear from the text of the exhibit whether this is a statement of completed action or future intention. Dr. Sestero testified that this note meant he did, in fact, refer Mr. Fergen. Ms. Fergen denied that any referral occurred. In any event, Dr. Sestero denied that the referral was for the purpose of ruling out a malignancy, RP 609:16-21, and his standard of care experts did not hinge their opinions on the existence or non-existence of a referral, RP 1191:3-12, 1315:10-11, 1428:25-1429:5, 1430:3-9.

see a lump,” although he did not say whether he actually considered it in Mr. Fergen’s case. RP 609:9-13. Later, however, he testified:

Q. (By the Fergens’ counsel): And so you actually did consider cancer on that day and you ruled it out, correct?

A. (By Dr. Sestero): No, I didn’t say I ruled it out that day.

Q. Well, at the time you were considering it was not cancer, correct?

A. I would not have considered cancer as the most likely explanation for this, no.

RP 2069:10-16. The expert witnesses retained on Dr. Sestero’s behalf to address the standard of care likewise omit any mention of diagnoses considered by Dr. Sestero other than a benign ganglion cyst. *See, e.g.*, RP 1151:22-1152:1.

Dani Fergen, individually and as personal representative of the estate of her husband, as well as their minor children Brayden and Sydney (the Fergen Family) filed suit against Dr. Sestero and his employer, Spokane Internal Medicine, alleging negligence and breach of the standard of care in failing to take the steps necessary to ensure that the lump on Mr. Fergen’s ankle was, in fact, a benign ganglion cyst. CP 29-49. At trial, they submitted testimony from experts confirming breach of the standard of care by Dr. Sestero. *See, e.g.*, RP 410:18-414:12 & 889:12-890:24. Throughout trial, the testimony submitted by Dr. Sestero focused on the

exercise of “clinical judgment” involved in diagnosing the lump as a benign ganglion cyst. *See, e.g.*, RP 1329:22-1330:24, 1400:21-1401:12, 2042:8-18 & 2044:17-24.⁴

II. Error in judgment instruction.

At the jury instruction conference near the conclusion of trial, the superior court judge originally indicated that he was not going to instruct the jury on the error of judgment rule. RP 2099:20-2100:5. Before instructing the jury, however, the judge reversed himself, and decided to give the instruction. *Id.*

Counsel for the Fergen family objected to the instruction, focusing on the fact that it was not warranted under the circumstances of this case, given that Dr. Sestero did not consciously choose between competing alternative diagnoses of the lump on Mr. Fergen’s ankle:

If the Court will recall, this is all based upon the testimony of Dr. Sestero. He's the only one who can tell us what he was thinking at the time. Dr. Sestero's chart note says “ganglion cyst.” While Dr. Sestero on cross-examination conceded that cancer or sarcoma might be part of the differential, he also testified it was so far down the list and so exceedingly rare that he would not have considered it. So under the circumstances, if you apply that to what the case law says, it can’t be applied in this case.

⁴ Pursuant to CR 2A, the parties stipulated that Spokane Internal Medicine would be bound by the result in this case to the same extent as Dr. Sestero. RP 2087:4-2088:15.

We put in our brief under “Error in judgment” the citation of the *Watson versus Hockey* case (phonetic) at 165.⁵ And the Court says it has—“It’s clear that it must be given with caution in limited circumstances and only when a physician has consciously weighed multiple options.”

Dr. Sestero stated that he did not weigh this as an option. It was so far down the list, he didn't even consider it. So all we're left with is the ganglion cyst. There has been no conscious weighing, unless we are now going to hear something different that he did, in fact, consciously weigh cancer. And if that's the case, then it would be appropriate and it will allow me to argue to the jury that cancer was indeed one of the considerations. But that's not the position they've adopted.

The other is that the “Error in judgment” instruction is to be given only where there is a choice among competing therapeutic techniques or among medical diagnoses. Again, Dr. Sestero's testimony was that it was so far removed and remote in his mind, he didn't consider it. That does not meet the standard of competing, as set forth by the *Watson* case

If the purpose of these instructions is to have the jury go back and consider it under a law that is not confusing, you will add to that confusion if you give them an instruction that allows Mr. King [counsel for Dr. Sestero] to argue inferentially that Dr. Sestero had competing diagnoses when, in fact, between the cancer and the ganglion cyst there was no competition at all. It was so far remote by his own testimony. He said he did not consider it.

Therefore, I believe, Your Honor, that, in these circumstances, it would be entirely inappropriate to give it. I think the Court was correct last night when it concluded it was unnecessary to give it. It still allows Mr. King to argue his theory of the case, and it doesn't slant the jury instruction in favor of the defendant in this case. If you give

⁵ *Watson v. Hockett*, 107 Wn. 2d 158, 727 P.2d 669 (1986).

this, you run the risk that it does just that, in addition to the confusion.

RP 2110:6-2111:13 & 2111:24-2112:14 (ellipses & brackets added; formatting in original). The objection also raised the issue of abandoning the error in judgment rule altogether:

And lastly, the Ezell case—and I'll just read in from page 491.^{6]} The Court says: “If the Supreme Court chooses to revisit the line of cases that bind us, it seems fair to add that we see no independent reason for giving a separate error in judgment instruction. It appears to us that the standard instructions are adequate to allow argument on the topic without undue emphasis or risk of confusion. In this sense, the error of judgment instruction adds little, while risking unnecessary confusion.”

RP 2111:14-23 (brackets added).

In response to the objection, Dr. Sestero’s counsel argued that his diagnosis of a benign ganglion cyst inherently involved the exercise of judgment, warranting the error in judgment instruction even in the absence of a conscious weighing of alternatives such as cancer:

[The e]rror in judgment instruction still requires the physician to comply with the standard of care. And the testimony from both Dr. McGough and Dr. Michlin is that, when he failed to pursue with definitive testing and imaging, which is the judgment call, his diagnosis of ganglion cyst, that he deviated from the standard of care. Likewise, the testimony of Dr. Sestero is that he considered when you see a bump, it's atypical, but the differential list, the likelihood of this being cancer is so far down the list that you don't go any further in terms of weighing that alternative. That's a judgment call. The determination of the

⁶ *Ezell v. Hutson*, 105 Wn. App. 485, 20 P.3d 975, *rev. denied*, 144 Wn. 2d 1011 (2001).

treatment, the referral, the X ray, et cetera, is a judgment call.

Watson tells us that, when there are alternative diagnostic considerations, it is entirely appropriate, and I believe in this case it cries out for an error of judgment instruction. This was a diagnostic issue from the get-go. And under these circumstances, and particularly the way the plaintiffs have tried the case, I can argue as an error in judgment that he was within the standard of care, and they can argue that he was outside of the standard of care for the judgment he made. And, in fact, that's the way they've tried the case. That's what the instruction says. He still has to comply with the standard of care. And their proof is that the judgments he made were wrong; they were outside the standard.

RP 2112:23-2113:24 (brackets added; formatting in original). The superior court adopted this reasoning. RP 2113:25-2115:7.

When the court subsequently instructed the jury, it initially used a form of the error in judgment instruction submitted by Dr. Sestero:

Instruction 18. A physician is not liable for selecting one or two or more alternative courses of treatment if, in arriving at the judgment to follow the particular course of treatment, the physician exercised reasonable care and skill within the standard of care the physician was obliged to follow.

RP 2144:21-2145:1. Upon realizing that this instruction was incorrect, the court instructed the jury using the error in judgment instruction adapted from the pattern jury instruction (WPI 105.08):

Members of the jury, I want to withdraw the last instruction. There's a change in the language. And so the last one is withdrawn and the instruction should read—this is number 18. A physician is not liable for selecting one or—one of two or more alternative diagnoses if, in arriving

at a diagnosis, a physician exercised reasonable care and skill within the standard of care the physician was obligated to follow.

RP 2146:3-10; *accord* CP 3198 (Instruction No. 18 from the court's instructions to the jury).

In closing argument, counsel for the Fergen family tried to address the instruction as follows:

Number 18, this is the error in judgment instruction, and it's one you will undoubtedly hear from the defense. Error in judgment is the one where he's going to get up, meaning Mr. King, and he is going to suggest to you that, even if the doctor considered cancer on that day, as long as he exercised his clinical judgment, he gets a pass. That's not what that jury instruction says. That jury instruction says that you don't get a pass until you show that the exercise of your judgment was reasonable. And you have to decide if feeling a cancer⁷ is reasonable; and if it's not, then number 18 doesn't apply.

RP 2170:4-14 (brackets added). Dr. Sestero's counsel again emphasized the exercise of judgment inherent in his diagnosis:

And that gets to this issue of judgment, the judgment instruction, I believe it's Instruction Number 18 that Judge Sypolt has given you. The law is that a physician is not liable for an error in judgment in making a diagnosis if, in arriving at that judgment, he followed an appropriate standard of care. So in the judgments that Dr. Sestero did, you have to reflect on this: Did he blow the patient off according to the contemporaneous record? Not at all. He took a history from the patient. He looked at the lump. He palpated the lump. He made a determination in his mind, after going through what's likely, what's unlikely, what's

⁷ In context, the reference to "feeling a cancer" relates to the argument and evidence that cancer cannot be diagnosed or ruled out based on visual appearance or touch.

absolutely unheard of, as to what it might be. He determined because of its location, appearance, consistency, and recent onset, lack of pain or tenderness, the softness, the regularity of the lesion, smooth, that it was likely a ganglion cyst. And he informed the patient of that.

RP 2203:1-17. With respect to ultrasound suggested by the radiologist, Dr. Sestero's counsel attributed the lack of follow up as the exercise of judgment as well:

Judgment again. The judgment, for example, with the note back from the radiologist, If soft tissue cyst is felt, ultrasound may be of assistance. Ultrasound isn't going to alter Dr. Sestero's diagnosis or management.

RP 2204:20-23.

Based on these instructions and argument, the jury returned a verdict of no negligence, and the superior court entered judgment in favor Dr. Sestero. RP 2222:8-2224:12; CP 3200-02 (verdict form); CP 4336-37 (judgment). From the verdict and judgment, the Fergen family timely appeals. CP 4338-40.

ARGUMENT

I. The superior court erred by giving the error of judgment instruction to the jury.

Because Dr. Sestero did not consciously choose between competing alternative diagnoses of the cancerous lump on Mr. Fergen's ankle, but rather made a singular diagnosis of a benign ganglion cyst, he was not entitled to have the jury instructed on the error of judgment rule.

In this respect, the superior court's instruction was not supported by substantial evidence and therefore constitutes error. The error is inherently prejudicial because of the confusion that results any time the jury is instructed on an issue that is not supported by substantial evidence.

Furthermore, the prejudice is exacerbated in this case because, with respect to the error in judgment instruction, a lack of substantial evidence that the defendant-health care provider in question consciously selected between competing alternative diagnoses or treatments transforms the instruction from a protection against second-guessing of genuine exercises of professional judgment into a cloak for professional misfeasance. It invites the jury to return a defense verdict based on a mere difference of opinion among expert witnesses regarding the nature and breach of the standard of care, without resolving the factual disputes presented by the conflicting expert testimony. The superior court judgment should be reversed and remanded for retrial with proper instructions.

A. Giving a jury instruction that is not supported by substantial evidence is prejudicial error, requiring reversal and remand.

Regardless of whether a jury instruction correctly states the law, it is prejudicial error to give an instruction that is not supported by substantial evidence. *See Albin v. National Bank of Commerce*, 60 Wn. 2d

745, 754, 375 P.2d 487 (1962). This rule has been consistently followed in Washington. *See id.*, 60 Wn. 2d at 754; *Columbia Park Golf Course, Inc. v. City of Kennewick*, 160 Wn. App. 66, 90, 248 P.3d 1067 (2011); *see also Bean v. Stephens*, 13 Wn. App. 364, 369, 534 P.2d 1047 (applying rule to dental malpractice action based on informed consent), *rev. denied*, 86 Wn. 2d 1003 (1975); *Klink v. G.D. Searle & Co.*, 26 Wn. App. 951, 955 & n.2, 614 P.2d 701 (1980) (citing *Bean* and applying rule in medical malpractice action involving variant of the error of judgment rule).

An instruction that is not supported by substantial evidence injects collateral issues into the case and misleads the jury. *See Blodgett v. Olympic Savings & Loan Ass'n*, 32 Wn. App. 116, 123, 646 P.2d 139 (1982) (collecting cases). Moreover, giving such an instruction in the absence of substantial evidence is tantamount to an improper comment on the evidence, to the extent it indicates to the jury that the court must think there is evidence on the issue. *See Albin*, 60 Wn. 2d at 754. It thereby invites the jury to speculate upon an issue not supported by evidence. *See State v. O'Connell*, 83 Wn.2d 797, 818, 523 P.2d 872 (1974); *Columbia Park*, 160 Wn. App. at 90; *see also Zwink v. Burlington Northern, Inc.*, 13 Wn. App. 560, 569, 635 P.2d 13 (1974) (discussing rationale of *Albin* in analogous context).

Case law describes the resulting prejudice as “axiomatic.” *See, e.g., Blodgett*, 32 Wn. App. at 123; *Manzanares v. Playhouse Corp.*, 25 Wn. App. 905, 910, 611 P.2d 797 (1980); *Haynes v. Moore*, 14 Wn. App. 668, 672, 545 P.2d 28 (1975); *see also Hammel v. Rife*, 37 Wn. App. 577, 584, 682 P.2d 949 (describing prejudice as “probable”), *rev. denied*, 102 Wn. 2d 1007 (1984). Based on the likelihood of juror confusion resulting from the injection of collateral issues and the implicit comment on the evidence, arguments that the jury was not influenced are unavailing. *See Albin*, at 754. The judgment must be reversed and remanded for new trial under proper instructions. *See Glenn v. Brown*, 28 Wn. App. 86, 88-89, 622 P.2d 1279 (1980), *rev. denied*, 95 Wn. 2d 1018 (1981); *Manzanares*, 25 Wn. App. at 911.

B. The error of judgment rule is only applicable, and an error of judgment instruction should only be given to the jury, when the defendant-health care provider in question considers two or more alternative diagnoses or treatments.

Under the error of judgment rule, a health care provider is not deemed to be negligent under circumstances where he or she chooses between two or more alternative diagnoses or courses of treatment, as long as the diagnosis or treatment chosen complies with the applicable standard of care. *See Miller v. Kennedy*, 91 Wn. 2d 155, 160, 588 P.2d 734 (1978) (approving instruction); *Watson v. Hockett*, 107 Wn. 2d 158, 164-67, 727

P.2d 669 (1986) (modifying instruction approved in *Miller* and delineating circumstances in which it may be given); *Christensen v. Munsen*, 123 Wn. 2d 234, 248-49, 867 P.2d 626 (1994) (following *Watson*). However, an error of judgment instruction is to be given with caution. *See Watson*, 107 Wn.2d at 165.⁸ In particular, after *Watson*, “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. The cases following *Watson* have uniformly acknowledged this limitation on the use of the error of judgment instruction. *See Christensen*, 123 Wn. 2d at 249; *Housel v. James*, 141 Wn. App. 748, 760, 172 P.3d 712 (2007); *Ezell*, 105 Wn. App. at 489, 20 P.3d 975, *rev. denied*, 144 Wn. 2d 1011 (2001); *Gerard v. Sacred Heart Med. Ctr.*, 86 Wn. App. 387, 389, 937 P.2d 1104, *rev. denied*, 133 Wn. 2d 1017 (1997); *Thomas v. Wilfac, Inc.*, 65 Wn. App. 255, 264, 828 P.2d 597, *rev. denied*, 119 Wn. 2d 1020 (1992); *Vasquez v. Markin*, 46 Wn. App. 480, 488-89, 731 P.2d 510 (1986), *rev. denied*, 108 Wn. 2d 1021 (1987).

The pattern jury instruction incorporating the error of judgment rule (albeit entitled “Exercise of Judgment”) is likewise phrased in terms of a selection between one of two or more alternative courses of treatment

⁸ Although *Watson* does not expressly state the grounds for such caution, in context it appears to be the risks of unduly emphasizing limits of a defendant-health care provider’s liability and juror confusion, as this Division of the Court of Appeals recognized in *Ezell*, 105 Wn. App. at 491.

or diagnosis. *See* WPI 105.08. In accordance with *Watson's* caution regarding use of the instruction, the official Note on Use for the pattern jury instruction states that “[t]his instruction may be used only when the doctor is confronted with a choice among competing therapeutic techniques or among medical diagnoses.”⁹

The superior court below adapted the pattern jury instruction to this case, maintaining the requirement of a selection between two or more alternative diagnoses. *See* CP 3198. While the Fergen family objected and assigned error to giving this instruction, neither they nor Dr. Sestero objected to the wording of the instruction in the superior court below insofar as it accurately reflects the statement of the rule in *Watson* and subsequent cases. *See* CR 51(f) (requiring specific objection to jury instructions). To this extent, the phrasing of the error of judgment rule contained in the court’s instruction may essentially be considered as law of the case. *See Roberson v. Perez*, 156 Wn. 2d 33, 41, 123 P.3d 844 (2005) (stating “law of the case also refers to the principle that jury instructions that are not objected to are treated as the properly applicable law for purposes of appeal”).

Although there is a sense in which the practice of medicine always involves the exercise of judgment—as is true with any profession—the

⁹ The full text of the current version of WPI 105.08, including the official Note on Use and Comment, is reproduced in the Appendix to this brief.

error of judgment instruction is not thereby warranted in every medical negligence case. As authority for limiting the error of judgment instruction to cases involving a choice between competing alternative diagnoses or treatments, the Washington Supreme Court in *Watson* cites *Spadaccini v. Dolan*, 63 A.D.2d 110, 120, 407 N.Y.S.2d 840 (N.Y. App. Div. 1978). See 107 Wn. 2d at 165 n.22. *Spadaccini* states that an error of judgment instruction “is appropriate in a case where a doctor is confronted with several alternatives and, in determining appropriate treatment to be rendered, exercises his judgment by following one course of action in lieu of another.” See 63 A.D.2d at 120; see also *Nestorowich v. Ricotta*, 97 N.Y.2d 393, 399-400, 767 N.E.2d 125 (N.Y. 2002) (citing *Spadaccini* with approval and discussing rule stated therein). Absent a conscious choice between alternatives, an error of judgment instruction is inappropriate. See *Nestorowich*, 97 N.Y.2d at 399. The rationale for this limitation is explained as follows:

This limited application of the error in judgment charge preserves the established standard of care. Broader application of the charge 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. The doctrine was intended to protect those medical professionals who, in exercising due care, choose from two or more responsible and medically acceptable approaches. A distinction must therefore be made between an “error in judgment” and a doctor’s failure to exercise his or her best judgment. Giving the “error in

judgment” charge without regard for this distinction would otherwise relieve doctors whose conduct would constitute a breach of duty from liability.

Nestorowich, 97 N.Y.2d at 399-400. It is a misperception of the rationale, and a misapplication of the rule, to give an error of judgment instruction on grounds that the practice of medicine inherently involves the exercise of judgment, where the defendant-health care provider does not actually make a conscious choice between competing alternatives. *See Anderson v. House of Good Samaritan Hosp.*, 44 A.D.3d 135, 140-41, 840 N.Y.S.2d 508 (N.Y. App. Div. 2007) (discussing *Spadaccini* and *Nestorowich*). To avoid transforming the error in judgment instruction from “a protection against second-guessing of genuine exercises of professional judgment in treatment or diagnoses into a cloak for professional misfeasance,” its application should be limited to cases where there is substantial evidence that the defendant-health care provider in question consciously selected between competing alternative diagnoses or treatments.¹⁰

¹⁰ *Miller*, 91 Wn. 2d at 160, does not address the limitation on the use of the error in judgment instruction that was later delineated in *Watson* and subsequent cases. However, it does not appear that the parties raised the issue of a choice between competing alternative diagnoses or treatments, even though prior proceedings reveal that the case simply involved a negligent performance of a kidney biopsy. *See Miller v. Kennedy*, 11 Wn. App. 272, 522 P.2d 852 (1974), *aff'd*, 85 Wn. 2d 151, 530 P.2d 334 (1975). Nonetheless, to the extent of any conflict, *Watson* should be deemed controlling as the Supreme Court’s last word on the subject. *See Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn. 2d 643, 659, 272 P.3d 802 (2012) (stating the more recent pronouncement should control when there is conflicting case law).

C. There is a lack of substantial evidence that Dr. Sestero considered two or more alternative diagnoses of the cancerous lump on Mr. Fergen’s ankle; instead, he considered a singular diagnosis of a benign ganglion cyst.

In order to be deemed “substantial,” the evidence must be sufficient to persuade a fair-minded rational person of the truth of the declared premise. *See McCleary v. State*, 173 Wn. 2d 477, 514, 269 P.3d 227 (2012). The supporting facts must rise above speculation and conjecture before an instruction can be given to the jury. *See Board of Regents of Univ. of Wash. v. Frederick & Nelson*, 90 Wn. 2d 82, 579 P.2d 346 (1978); *Glenn*, 28 Wn. App. at 88. Evidence or inferences from the evidence establishing a mere possibility are insufficient to warrant giving the instruction. *See Board of Regents*, 90 Wn. 2d at 86.

Here, there is a lack of substantial evidence that Dr. Sestero considered any diagnoses of the lump on Mr. Fergen’s ankle other than a ganglion cyst. The medical records, Dr. Sestero’s testimony, and the testimony of his own experts belies the existence of any conscious selection between competing alternative diagnoses of the lump on Mr. Fergen’s ankle.

This case is similar to *Klink*, 26 Wn. App. at 955-56, where the court held that it would have been prejudicial error to give a variant of the error of judgment instruction to the jury in the absence of substantial

evidence. *Klink* involved a claim that the defendant-physician negligently prescribed birth control pills to a patient who suffered from amenorrhea, causing her to suffer a stroke. *See id.* at 953-54. On appeal of an adverse verdict, the defendant-physician in *Klink* assigned error to the superior court's refusal to instruct the jury as follows:

You are instructed that a family practitioner is not bound to use any particular method of treatment if, among physicians of ordinary skill and learning, more than one method is recognized as proper, and it is not negligence for the physician to adopt any one of such methods. The testimony of other physicians that they would have employed a different method than that employed by the defendant Fields, or a disagreement of physicians of equal skill and learning as to the method which should have been employed, does not establish negligence.

See id. at 955 n.2. This instruction is materially identical to the error in judgment instruction given in this case, in that both instructions preclude a finding of negligence based on a conscious selection among competing alternative treatments or diagnoses that comply with the standard of care. *Compare id.* (referring to “more than one method . . . recognized as proper”) with CP 3198 (referring to selection of “one of two or more alternative diagnoses”).

The defendant-physician in *Klink* argued that the error of judgment instruction was warranted because of evidence in the record that birth control pills could and should be used as a diagnostic tool to determine the

underlying cause of amenorrhea as well as for birth control. *See* 26 Wn. App. at 955. The Court of Appeals held that the superior court properly rejected the instruction, in part because there was a lack of substantial evidence that using birth control pills for the length of time prescribed the defendant-physician complied with the standard of care, and also in part because the doctor’s testimony indicated that the primary purpose for prescribing the pills was birth control rather than diagnosis of amenorrhea. *See id.* at 955. In the latter respect, the defendant-doctor did not consciously select among competing alternative treatments for his patient. Without such evidence, the court stated that “[i]t would have been prejudicial error to instruct a jury on this issue[.]” *Id.* (brackets added). As in *Klink*, the superior court in this case should have rejected the error of judgment instruction for lack of substantial evidence.¹¹

This case is unlike those approving an error of judgment instruction under circumstances involving a selection among competing

¹¹ A subsequent case discussing *Klink* recognizes the lack of substantial evidence that prescribing birth control pills under the circumstances complied with the standard of care, but omits any mention of the lack of substantial evidence that the defendant-physician consciously selected birth control pills to diagnose his patient’s amenorrhea. *See Ketchum v. Overlake Hosp. Med. Ctr.*, 60 Wn. App. 406, 411, 804 P.2d 1283, *rev. denied*, 117 Wn. 2d 1004 (1991). Despite this oversight, *Ketchum* does not undermine the proposition stated in *Klink* that the error of judgment instruction must be supported by substantial evidence. Furthermore, *Ketchum* recognizes that another variant of the error of judgment instruction, phrased in terms of “disagreement between health care providers,” is misleading and constitutes reversible error. *See* 60 Wn. App. at 409 (quoting instruction); *id.* at 412-13 (describing instruction as misleading).

alternative diagnoses or treatments. *See Christensen*, 123 Wn. 2d at 249 (noting “evidence that he [the defendant-physician] had a choice of therapeutic techniques”); *Housel*, 141 Wn. App. at 760 (stating “the record discloses that Dr. James was presented with at least three treatment choices”); *Ezell*, 105 Wn. App. at 487 (involving choice between two antibiotics); *Gerard*, 86 Wn. App. at 389 (involving choice between using or not using restraints on patient); *Vasquez*, 46 Wn. App. at 489 (involving choice between interrupting one surgery to perform another or asking another physician to perform the other surgery).¹² In the absence of a comparable conscious selection between alternative diagnoses in this case, the superior court erred in giving the error of judgment instruction to the jury.

D. The error of judgment instruction misled and confused the jury, exacerbating the prejudice that normally occurs when a jury instruction is not supported by substantial evidence.

As noted above, prejudice is “axiomatic” whenever a jury instruction is not supported by substantial evidence, because it injects collateral issues and constitutes an implicit comment on the evidence, leading to juror confusion and speculation. These types of prejudice are

¹² *See also Thomas*, 65 Wn. App. 255. The plaintiff-patient in *Thomas* argued that the error of judgment instruction was inappropriate, but it is unclear from the court’s recitation of the facts or discussion of the assignment of error whether there was a conscious choice between competing alternative diagnoses or treatments. *See id.* at 258-59 (factual background); *id.* at 263-64 (discussion of assigned error).

equally present here. In the absence of substantial evidence, the error in judgment instruction injects a collateral issue into the case, and communicates to the jury that the trial court judge believed that Dr. Sestero did, in fact, consciously select between competing alternative diagnoses of the lump on Mr. Fergen's ankle. Under the rule stated in *Albin, supra*, this is sufficient grounds for reversal and remand with proper instructions.¹³

The normal prejudice is exacerbated in this case, given the nature of the error in judgment instruction. As this Division of the Court of Appeals observed in *Ezell*, 105 Wn. App. at 491, the error in judgment instruction unduly emphasizes the limits on a defendant-health care provider's liability and entails the risk of juror confusion. This undue emphasis and risk of confusion is unnecessary because the conventional standard of care instructions in a medical negligence case are adequate to allow argument on the topic of a health care provider's exercise of judgment. *See id.* The prejudice identified in *Ezell* can only be greater, as

¹³ In *Christensen*, 123 Wn. 2d at 249, the Court held that an error in judgment instruction given in a case involving "a choice of therapeutic techniques" does not constitute an impermissible comment on the evidence by the trial judge in violation of Wash. Const. Art. 4, § 16. *Christensen* does not involve an error of judgment instruction given in the absence of evidence of such a "choice" between competing alternative diagnoses or treatments. Furthermore, the Fergen family does not claim that the instruction violates the constitutional provision against comments on the evidence, but rather that the implicit comment on the evidence is a form of prejudice resulting from the error as recognized in *Albin*.

the need for the instruction is less, when the error in judgment instruction is unsupported by substantial evidence.¹⁴

Moreover, the rationale for limiting the error in judgment instruction to cases involving a conscious selection between competing alternative diagnoses or treatments confirms the existence of prejudice. The limitation is necessary to avoid transforming the rule into “a cloak for professional misfeasance,” as described in *Nestorowich, supra*; and it is why *Watson, supra*, states that the instruction should only be given with caution. If the error in judgment instruction is deemed to be proper in the absence of a conscious selection between competing alternative diagnoses, then it invites the jury to return a defense verdict based on a mere difference of opinion among expert witnesses regarding the nature or breach of the standard of care, without resolving the factual disputes presented by the conflicting expert testimony. The only viable remedy for this prejudice is reversal and remand for retrial with proper instructions.

¹⁴ For the reasons stated in *Ezell*, the Fergen family urges that the error in judgment rule should be abandoned as incorrect and harmful. *See Hardee v. Department of Soc. & Health Servs.*, 172 Wn. 2d 1, 15, 256 P.3d 339 (2011) (stating incorrect and harmful test for overruling precedent). While recognizing *Ezell*'s holding that the Court of Appeals is bound by precedent, and that any such arguments need to be addressed to the Supreme Court, the error in judgment rule is incorrect to the extent it is unnecessary to protect the legitimate exercise of judgment by a health care provider or to remind the jury that medicine is not an exact science. *See Ezell*, 105 Wn.2d at 491 (stating “the standard instructions are adequate” and the risk of confusion from the error in judgment rule is “unnecessary”); *Watson*, 107 Wn. 2d at 167 (stating rationale for error in judgment rule as reminding judge and jury that medicine is an inexact science). It is harmful based on the undue emphasis and risk of confusion identified in *Ezell*, at 491.

CONCLUSION

Based on the foregoing, 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 June, 2012.

MARKAM GROUP, INC., P.S.

AHREND ALBRECHT PLLC

For  
By: Mark D. Kamitomo By: George M. Ahrend
WSBA #18803 WSBA #25160

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

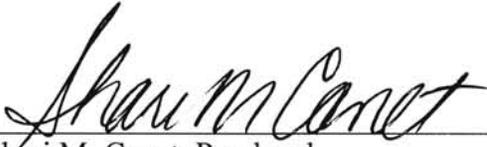
The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On June 26, 2012, I served the document to which this is annexed by First Class Mail, postage prepaid, as follows:

James B. King
Evans, Craven & Lackie, P.S.
818 W. Riverside Ave., Ste. 250
Spokane, WA 99201-0994

Mary H. Spillane
Williams, Kastner & Gibbs PLLC
Two Union Square
601 Union St., Ste. 4100
Seattle, WA 98101-2380

Signed on June 26, 2012 at Moses Lake, Washington.



Shari M. Canet, Paralegal

APPENDIX

November 17, 2004, Spokane Internal Medicine Record, Ex. P-1A

November 17, 2004, Inland Imaging Medical Record, Ex. P-3

Jury Instruction No. 18, CP 3198

WPI 105.08 and official Note on Use and Comment

Patient Chart

Fergen, Paul

202382

Sex: M

Age: 30

Date Printed: 01/09/06

DOB: 02/24/1975

Progress Notes

11/17/04 : FERGEN, PAUL: 202382
RT ANKLE PAIN

OFFICE VISIT: Paul presents today complaining of a growth on the right ankle and it is causing a small amount of discomfort, he has noticed it in the last week. He has no other erythema, swelling, or other abnormalities noted.

PHYSICAL EXAMINATION: Right foot and ankle is unremarkable. There is slight nodule just below the lateral malleolus. This is smooth, soft, and nontender to palpation.

ASSESSMENT/PLAN: Ganglion cyst right ankle. We will obtain an x-ray to make sure that there are no other structural abnormalities in the ankle. Refer to either Dr. Sanwick or Dr. Padrta with NW Orthopedics. He will otherwise follow-up with us as needed.

John D. Sestero, M.D.

JDS:bh

d: 11/17/04

000012

PATIENT: FERGEN, PAUL J
EXAM DATE: Nov-17-2004
REFERRING: SESTERO, JOHN D, MD
1215 N MCDONALD #101
SPOKANE, WA 99216

TELEPHONE: (509) 926-3386
CLINIC-ALL ORGANIZATIONS

INLAND IMAGING VALLEY CENTER - Diagnostic Radiography

RIGHT ANKLE
CLINICAL INFORMATION

Cyst of the right ankle. Special attention to the lateral malleolus.

FINDINGS

There is no bony abnormality. No erosion or destruction. No fractures. no foreign body is seen. There does appear to be some soft tissue swelling laterally and anteriorly.

CONCLUSION

No bony abnormality identified. No erosion or destruction. If a soft tissue cyst is felt an ultrasound might be of help.

D: 11/17/04

T: 1410

2792624

MRN: 00-13-10-44

EXAM#: 3635932

DOB: Feb-24-1975

AGE: 29 Years

Dictated by:

MURPHY, JOHN MD

Transcribed on:

Nov-17-2004

Released by:

MURPHY, JOHN MD

Interpreted and

Authenticated by:

MURPHY, JOHN MD

This report is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential, and exempt from disclosure under law. If you have received this report in error, you are hereby notified that we do not consent to any reading, distribution, or copying of this information. If you have received this report in error, please notify the sender immediately and destroy this information.

INSTRUCTION NO. 18

A physician is not liable for selecting one of two or more alternative diagnoses, if, in arriving at a diagnosis a physician exercised reasonable care and skill within the standard of care the physician was obligated to follow.

WPI 105.08 Exercise of Judgment

A physician is not liable for selecting one of two or more alternative *[courses of treatment][diagnoses]*, if, in arriving at the judgment to *[follow the particular course of treatment] [make the particular diagnosis]*, the physician exercised reasonable care and skill within the standard of care the physician was obliged to follow.

NOTE ON USE

This instruction may be used only when the doctor is confronted with a choice among competing therapeutic techniques or among medical diagnoses. The current form of the instruction is intended to respond to the Supreme Court's statement that the instruction is to be used with caution; see the Comment below. Use this instruction to supplement either WPI 105.01, Negligence—General Health Care Provider, or WPI 105.02, Negligence—Health Care Provider—Specialist. The court should give WPI 105.07 (first bracketed language) with this instruction.

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

COMMENT

Reformulation of former “error of judgment” instruction. The committee previously reformulated this instruction, which had become known as the “error of judgment” instruction. In holding that the giving of such an instruction in certain limited circumstances was not erroneous, appellate courts have repeatedly urged caution in its use.

In *Watson v. Hockett*, 107 Wn.2d 158, 727 P.2d 669 (1986), the court held that it is appropriate to give an “error of judgment” instruction to supplement a “proper” standard of care instruction in some instances. The instruction at issue in *Watson* stated: “A physician or surgeon is not liable for an honest error of judgment if, in arriving at that judgment, the physician or surgeon exercised reasonable care and skill within the standard of care he was obliged to follow.” 107 Wn.2d at 164. In approving the use of the instruction in the case before it, the court emphasized that an “error of judgment” instruction is to be given “with caution,” that it should not contain the word “honest,” and that its use should “be limited to situations where the doctor is confronted with a

choice among competing therapeutic techniques or among medical diagnoses.” 107 Wn.2d at 165.

In *Christensen v. Munsen*, 123 Wn.2d 234, 249, 867 P.2d 626 (1994), the Supreme Court approved the use of a similar instruction modified in accordance with *Watson*. See also *Ezell v. Hutson*, 105 Wn.App. 485, 20 P.3d 975 (following *Watson* but questioning the need for the instruction). The same cautions for its use were repeated by the court.

Nevertheless, there has been considerable criticism of this type of instruction (in Washington and elsewhere), which has focused on the use of the term “error.” The Supreme Court of Oregon, in expressing its disapproval of the use of the word, made the following observation:

To state that a doctor is not liable for bad results caused by an error of judgment makes it appear that some types of negligence are not culpable. It is confusing to say that a doctor who has acted with reasonable care has nevertheless committed an error of judgment because untoward results occur. In fact, bad results notwithstanding, if the doctor did not breach the standard of care, he or she by definition has committed no error of judgment. The source of the problem is the use of the word “error.” Error is commonly defined as “an act or condition of often ignorant or imprudent deviation from a code of behavior.” Webster's Third New International Dictionary 772 (unabridged 1971). These sentences could lead the jury to believe that a judgment resulting from an “ignorant or imprudent deviation from a code of behavior” is not a breach of the standard of care.

Rogers v. Meridian Park Hosp., 307 Or. 612, 620, 772 P.2d 929, 933 (1989). See also *Hirahara v. Tanaka*, 87 Haw. 460, 959 P.2d 830 (1998) (adopting the *Rogers* court's analysis).

Sharing these concerns, while also recognizing the wisdom of the *Watson* court's conclusion that it can sometimes be helpful to remind jurors that “medicine is an inexact science where the desired results cannot be guaranteed, and where professional judgment may reasonably differ,” 107 Wn.2d at 167, the committee published this rewritten instruction in the fifth edition. Its language has since been approved by the Court of Appeals. *Housel v. James*, 141 Wn.App. 748, 760, 172 P.3d 712 (2007).

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

[Current as of June 2009.]