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S. Ct. No. 88819-1
(Consolidated with 89192-3)

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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*,

vs.

JOHN D. SESTERO, M.D., individually and as an
employee/shareholder/agent of defendant SPOKANE INTERNAL
MEDICINE, P.S., a Washington corporation, *Respondents*.

ANIL APPUKUTTAN, *Petitioner*,

vs.

OVERLAKE MEDICAL CENTER; PUGET SOUND PHYSICIANS,
PLLC; ALAN B. BROWN, M.D.; MARCUS TIORNE, M.D.; and TINA
NEIDERS, M.D., *Respondents*.

JOINT RESPONSE OF FERGEN AND APPUKUTTAN TO
WASHINGTON STATE MEDICAL ASSOCIATION AND
WASHINGTON STATE HOSPITAL ASSOCIATION AMICUS
CURIAE BRIEF

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In these consolidated cases, Petitioners Dani Fergen, individually and as personal representative of the estate of her deceased husband, Paul, and their minor children Brayden and Sydney (Fergen), and Appellant Anil Appukuttan (Appukuttan) submit the following joint answer to the amicus curiae brief filed by the Washington State Medical Association (WSMA) and the Washington State Hospital Association (WSHA)¹:

I. Contrary to the health care provider amici, the exercise of judgment, or a choice among diagnoses or treatments, does not constitute a “defense” to breach of the standard of care, nor does it warrant a separate jury instruction.

WSMA/WSHA repeatedly characterize the exercise of judgment, defined in terms of a choice among diagnoses or treatments, as a “defense” or “an essential element to a defense” of a medical negligence claim. *See* WSMA/WSHA Am. Br., at 1-9, 11-12. This characterization is at odds with the Court’s description of the exercise of judgment as merely supplementing or clarifying the standard of care, and it reveals the extent to which the exercise of judgment instruction is being misused in the trial courts. *See Watson v. Hockett*, 107 Wn.2d 158, 166-67, 727 P.2d 669 (1986); *Christensen v. Munsen*, 123 Wn.2d 234, 249, 867 P.2d 626 (1994); *see also* WPI 105.08 Note on Use & Comment (indicating instruction supplements standard of care instruction).

¹ WSMA and WSHA shall be referred to collectively in this brief as the health care provider amici.

When the health care provider amici describe the exercise of judgment as a defense, presumably they mean it is a defense in the sense that it negates an element of the plaintiff's claim, rather than an affirmative defense, which must be pled and on which they bear the burden of proof. *See Harting v. Barton*, 101 Wn.App. 954, 962, 6 P.3d 91 (2000) (noting distinction between controverting opposing party's case and an affirmative defense), *rev. denied*, 142 Wn.2d 1019 (2001). However, it does not follow that an instruction emphasizing one way of negating the plaintiff's claim is necessary or desirable. Slanted instructions that emphasize one party's theory of the case should be avoided, as noted in the briefing of the parties. *See Fergen Supp. Br.*, at 16 (quoting *Loudermilk v. Carpenter*, 78 Wn.2d 92, 100-01, 457 P.2d 1004 (1969)). The health care provider amici do not address the slanted nature of the exercise of judgment instruction. *See Ezell v. Hutson*, 104 Wn. App. 485, 491, 20 P.3d 975 (noting "undue emphasis" on the limits of a health care provider's liability), *rev. denied*, 144 Wn.2d 1011 (2001).²

² The authorities cited by health care provider amici either involve affirmative defenses or confirm the deferential standard of review that applies to review of instructional errors. *See WSMA/WSHA Am. Br.*, at 6-7 & n.2.

II. The health care provider amici fail to acknowledge the inconsistencies between the exercise of judgment instruction and the statutory elements of liability for medical negligence: the instruction requires the plaintiff to disprove that the physician exercised judgment or made a choice between diagnoses or treatments in addition to proving a breach of the standard of care, and the instruction omits any reference to the “learning” expected of a reasonably prudent health care provider, which is part of the definition of the standard of care.

At the same time that they characterize the exercise of judgment as a defense, the health care provider amici also claim that it “clarifies what is already stated in Ch. 7.70 RCW,” that it is “an inherent part of the statute,” and that it defines the “boundaries of a physician’s liability” under the statute. WSMA/WSHA Am. Br., at 1-4 & 15. Of course, the statute is actually phrased in terms of the standard of care, rather than the exercise of judgment or a choice among diagnoses or treatments. *See* RCW 7.70.040. The standard of care permits argument and evidence regarding the exercise of judgment and choices among diagnoses or treatments, and no further instruction is necessary. *See Ezell*, 104 Wn. App. at 491 (noting “the standard instructions are adequate to allow argument on the topic”); *see also Loudermilk*, 78 Wn. 2d at 100-01 (noting counsel’s responsibility to argument refinements of the basic and essential legal rules necessary for the jury to reach its verdict).

The exercise of judgment instruction actually conflicts with the statutory elements of liability for medical negligence. To establish liability

under the statute, a plaintiff must prove that injury resulted from his or her health care provider's failure to follow the standard of care. *See* RCW 7.70.030 & .040. The exercise of judgment instruction is inconsistent with the statute in two respects. First, the negative phrasing of the instruction (i.e., "a physician is not liable ...") essentially requires the plaintiff to disprove that the defendant exercised judgment or chose from alternate diagnoses or treatments in addition to the statutory requirements. Second, the instruction omits any reference to the "learning" expected of a reasonably prudent health care provider, which is part of the definition of the standard of care. *Compare* RCW 7.70.040(1), WPI 105.08, Fergen CP 3198 (Instruction 18), *and* Appukuttan CP 23 (Instruction 10). In these respects, the exercise of judgment instruction is an improper formula instruction in addition to being slanted and unnecessary. *See* Fergen Supp. Br., at 15 n.14. The health care provider amici do not address the conflict between the exercise of judgment instruction and the statute governing medical negligence claims.

III. The health care provider amici's stated rationale for the exercise of judgment instruction is non sequitur.

The health care provider amici attempt to justify the exercise of judgment instruction on grounds that it prevents the jury from inferring negligence based on an incorrect diagnosis or a bad outcome. *See*

WSMA/WSHA Am. Br., at 1-2, 8-9 & 11. They go so far as to equate a medical negligence trial without the instruction as akin to imposing strict liability or liability based on the doctrine of *res ipsa loquitur*. *See id.* at 8-9. This concern is already addressed by the need to prove a violation of the standard of care, rather than simply proving an incorrect diagnoses or bad result. *See* RCW 7.70.040; WPI 105.01 & 105.02. It is further addressed by the bad result/no guarantee instruction that is otherwise available in a medical negligence case. *See* WPI 105.07. It does not relate to the exercise of judgment or a choice among diagnoses or treatments. Whatever the merits of the health care provider amici's concern, it does not support the exercise of judgment instruction.

IV. The health care provider amici do not address the fundamental tension between *Watson v. Hockett* and *Miller v. Kennedy*, which renders any limits on the use of the exercise of judgment instruction illusory.

WSMA/WSHA cite the Court's decisions in *Watson, supra*, and *Miller v. Kennedy*, 91 Wn.2d 155, 588 P.2d 734 (1978), as precedential. *See* WSMA/WSHA Am. Br., 9-10. While *Watson* is admittedly precedential, it was incorrectly decided in part because it deemed *Miller* to be precedential. *See* Fergen Pet. for Rev., at 18-20; Fergen Supp. Br., at 9-11. The health care provider amici do not address this problematic aspect of *Watson*.

Just as importantly, the health care provider amici do not address the fundamental tension between *Watson* and *Miller*. As noted in the parties' briefing, *Watson* states that the exercise of judgment instruction should be given only with caution in cases involving a choice among diagnoses or treatments, *see* 107 Wn.2d at 165; whereas *Miller* seems to suggest that the instruction is proper in every medical negligence case, on grounds that the exercise of judgment inheres in the practice of medicine, *see* 91 Wn. 2d at 160. *See also* Fergen Supp. Br., at 10-11.

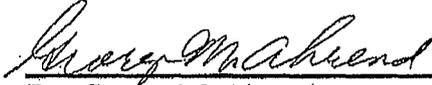
This incongruity effectively leaves lower courts without guidance in exercising their discretion regarding when, if ever, to give the exercise of judgment instruction to the jury. The Court of Appeals below acknowledged *Watson's* limitation on the exercise of judgment instruction, but at the same time declined to limit it to circumstances where a physician consciously selects between alternative diagnoses or treatments. *See Fergen v. Sestero*, 174 Wn. App. 393, 298 P.3d 782, *rev. granted*, 178 Wn.2d 1001 (2013). Health care providers are able to argue that the choice of diagnoses or treatments warranting the instruction does not even have to be consciously made, describing every diagnosis or treatment as an implicit "choice" not to make any other diagnosis or render any other treatment. *See* Fergen Supp. Br., at 18-19 n.15 (collecting record citations); *see also* Fergen Pet. for Rev., at 6-7. Thus, the limits on

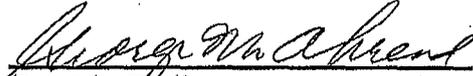
use of the exercise of judgment instruction described in the health care provider amici's brief are illusory.³

Respectfully submitted this 6th day of January, 2014.

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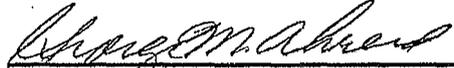
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³ In describing the ostensible limits on the use of the exercise of judgment instruction, WSMA/WSHA misstate the record in the *Fergen* case in two significant ways. First, they assert that Dr. Sestero considered and dismissed cancer as a diagnosis of the lump on Paul Fergen's ankle. WSMA/WSHA Am. Br., at 14 (citing *Fergen*, 174 Wn. App. at 395). This assertion is contrary to the record. See *Fergen* Supp. Br., at 19 n.17 (collecting record citations); see also *Fergen* Pet. for Rev., at 6-7; *Fergen* App. Br., at 4-5.

Second, the health care provider amici incorrectly describe the gravamen of Fergen's claim as a failure to diagnose cancer. See WSMA/WSHA Am. Br., at 15 (citing *Sestero* Ans. to Pet. for Rev., at 9-12; *Sestero* Resp. Br., at 36-37). In fact, the breach of the standard of care consisted of diagnosing the lump on Mr. Fergen's ankle based solely on a brief history and visual and tactile inspection, without taking any additional steps required by the standard of care to confirm (or disprove) the diagnosis of the lump as a benign cyst. See *Fergen* App. Br., at 5.

CERTIFICATE OF SERVICE

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

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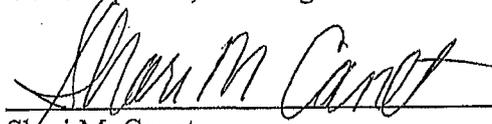
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A handwritten signature in cursive script, appearing to read "Shari M. Canet", written over a horizontal line.

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Attachments: 2014-01-06 Ans to AC Brf of WSMA and WSHA .pdf

Attached hereto for filing please find the **Joint Response of Fergen and Apputkuttan to Washington State Medical Association and Washington State Hospital Association Amicus Curiae Brief.**

Thank you.

--

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