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

SUPREME COURT OF THE STATE OF WASHINGTON

DANI FERGEN, individually and as personal representative of the
ESTATE of PAUL J. FERGEN, and minors BRAYDEN FERGEN and
SYDNEY FERGEN, individually,

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.

PETITIONERS' SUPPLEMENTAL BRIEF

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ISSUES PRESENTED ON REVIEW

Petitioners Dani Fergen, individually and as personal representative of the estate of her deceased husband, Paul, and their minor children, Brayden and Sidney (Fergen family), incorporate by reference the statement of issues in their Petition for Review, at 4.

SUPPLEMENTAL STATEMENT OF THE CASE

The Fergen family incorporates by reference the statement of the case in their Petition for Review, at 5-10.

SUPPLEMENTAL ARGUMENT

I. The Court should abandon the exercise of judgment instruction.

The exercise of judgment instruction rests upon this Court's decision in *Watson v. Hockett*, 107 Wn.2d 158, 727 P.2d 669 (1986). *Watson* should be overruled because it was incorrectly decided and has harmful effects on the trial of a medical negligence claim. See *Hardee v. Department of Social & Health Servs.*, 172 Wn.2d 1, 15, 256 P.3d 339 (2011) (noting incorrect-and-harmful test for overruling precedent). *Watson's* approval of the error in judgment instruction is premised upon an incorrect reading of the Court's prior decisions in *Miller v. Kennedy*, 85 Wn. 2d 151, 530 P.2d 334 (1975) (per curiam), *appeal after remand*, 91 Wn.2d 155, 588 P.2d 734 (1978). The exercise of judgment instruction is

unnecessary to remind jurors that medicine is an inexact science in light of the standard of care and other instructions available in a medical negligence case. The instruction unduly emphasizes the limits of a health care provider's liability, and risks confusing the jury. Most troubling, it invites the jury to return a defense verdict in a medical negligence case based upon a mere difference of opinion among the expert witnesses regarding the nature or breach of the standard of care, without resolving factual disputes presented by the conflicting expert testimony. For these reasons, *Watson* should be overruled, and the exercise of judgment instruction should be abandoned.

A. Before *Miller v. Kennedy*, the Court did not approve the exercise of judgment instruction.

The Court first addressed the exercise of judgment instruction¹ in *Dinner v. Thorp*, 54 Wn.2d 90, 97-98, 338 P.2d 137 (1959), and *Samuelson v. Freeman*, 75 Wn.2d 894, 454 P.2d 406 (1969). In both cases, the Court reversed verdicts in favor of health care providers, based in part on early versions of the exercise of judgment instruction that were given to the jury. In *Dinner*, the plaintiff assigned error to the following instruction:

¹ Although many of the authorities refer to an *error* or *mistake* of judgment, this brief uses *exercise of judgment* in accordance with the convention adopted by the pattern jury instructions. See WPI 105.08, reprinted in 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. (6th ed.).

A physician is not liable for damages consequent upon an honest mistake or an error in judgment in making a diagnosis or in determining upon a course of procedure where there is reasonable doubt as to the nature of the physical conditions involved. If a physician b[r]ings to his patient care, skill, and knowledge he is not liable to the patient for damages resulting from his honest mistakes or a bona fide error of judgment. The law requires a physician to base any professional decision he may make on skill and careful study and consideration of the case, *but when the decision depends upon an exercise of judgment the law requires only that the judgment be made in good faith.*

54 Wn.2d at 97-98 (emphasis in original; brackets added). The court held that the instruction is “misleading” and “incorrect” because “[t]he italicized portion indicates to the jury that the exercise of judgment in good faith alone absolves the respondent from liability, irrespective of his exercise of such skill and learning as is usually used by physicians specializing [in the same discipline.]” *Id.* at 98 (brackets added). While the Court disapproved the italicized language, it did not address, let alone approve, the balance of the instruction. *See id.* The disapproval of part of a jury instruction does not entail a holding that the remainder of the instruction is valid. Thus, *Dinner* does not resolve the issue presented in this case regarding the validity of the exercise of judgment instruction.²

In *Samuelson*, the plaintiff assigned error to the multiplicity of instructions dealing with the standard of care, one or more of which

² In its discussion of the exercise of judgment instruction, *Dinner* cites only *Atkins v. Clein*, 3 Wn.2d 168, 100 P.2d 1, 104 P.2d 489 (1940), which addresses the standard of care, not the exercise of judgment. *See Dinner*, 54 Wn.2d at 97-98.

involved the exercise of judgment. *See* 75 Wn.2d at 896. The text of the instructions are not reproduced in the *Samuelson* opinion, but the Court summarized them as follows:

Instructions 5, 6, 8, 9, 10 and 11 all in one way or another told the jury that a physician is held to and must apply an average of the skill ordinarily possessed by similar physicians; he is not required to possess the highest degree of skill, but must apply his average skill and learning with reasonable care; he is liable for failure to properly exercise that skill and is negligent if he fails to inform himself of his patient's condition, but *if, having properly informed himself, he reaches a wrong conclusion, he is not liable for errors in judgment; a physician is not liable for malpractice in choosing one of two or more methods of treatment if his choice was based on honest judgment and was one of several of the recognized methods of treatment; a physician does not insure or guarantee a satisfactory result; lack of success in the treatment is in itself no evidence that the doctor failed to possess or exercise reasonable skill; a doctor should not be liable for an honest mistake in judgment if there was reasonable doubt as to the nature of the physical condition involved or reasonable doubt as to what should have been done according to the current standard of practice in the community; and, finally, that the defendant doctor should not be judged by after-acquired knowledge but only by circumstances then known to him or which should have been known in the exercise of ordinary skill.*

Id. (emphasis added). The Court held that the foregoing instructions “overemphasize[d] the limitations upon the physician’s liability[,]” “overemphasized the physician’s immunities and markedly diminished his responsibilities.” *Id.* at 896-97 (brackets added). The Court did not address whether the exercise of judgment instructions correctly stated the law, but

rather merely assumed that they were correct for purposes of its analysis. *See id.* at 896. Assuming that an instruction is correct does not constitute a holding that the instruction is correct. *See In re Elliott's Estate*, 22 Wn.2d 334, 343, 156 P.2d 427 (1945) (indicating that what is assumed to be the law in a particular case does not become “the established law from that time forward”). Thus, *Samuelson* does not resolve the issue presented by this case any more than *Dinner*.³

B. The Court did not approve the exercise of judgment instruction in either of its opinions in *Miller*.

The Court next addressed the exercise of judgment instruction in successive appeals in *Miller v. Kennedy*, 11 Wn. App. 272, 522 P.2d 852 (1974), *rev. granted*, 84 Wn.2d 1008, *aff'd in part per curiam*, 85 Wn.2d 151, 530 P.2d 334 (1975), *appeal after remand*, 91 Wn.2d 155, 588 P.2d 734 (1978). The plaintiff appealed a defense verdict in a medical negligence case on four principal grounds: failure to instruct the jury regarding the doctrine of *res ipsa loquitur*, *see* 11 Wn.App. at 279; instructing the jury that a physician does not guarantee results, *see id.* at 279-80; giving the exercise of judgment instruction, *see id.* at 280, and

³ The Court in *Samuelson*, 75 Wash. 2d at 897, observed that the “overweighing of the instructions is not likely to recur in the instant case because of the recent publication in this state of Washington Pattern Jury Instructions, 6 Wash. Prac. 105.00 and 105.01, which set forth possible instructions concerning standards of medical practice and seem to do so with fairness and reasonable brevity.” The original pattern jury instructions did not include an instruction based on the exercise of judgment, and the Court’s observation raises the question whether an exercise of judgment instruction is necessary in light of the standard of care instructions. This question is addressed in part E, below.

instructing the jury regarding informed consent, *see id.* at 280-90. The Court of Appeals reversed the verdict and granted the plaintiff a new trial with revised instructions on the issues of *res ipsa loquitur* and informed consent. *See id.* at 290. The court rejected plaintiff's appeal regarding the no guarantee and exercise of judgment instructions. *See id.* at 279-80.⁴

The defendant-health care provider in *Miller* subsequently sought review in this Court, which was granted. *See* 84 Wn.2d 1008. The petition for review raised only the issues of *res ipsa loquitur* and informed consent.⁵ The defendant-health care provider could not have raised the exercise of judgment instruction because he was not aggrieved by the Court of Appeals' resolution of this issue. *See* RAP 3.1 (providing only an aggrieved party may seek review). The answer to the petition for review did not seek cross review of any issues.⁶ This Court's review of the lower court's decision in *Miller* was therefore limited to the issues of *res ipsa*

⁴ With respect to the exercise of judgment, the Court of Appelas held that the following instruction "was appropriate as an abstract statement of the law": "[a] physician is not liable for an honest error of judgment if, in arriving at that judgment, the physician exercised reasonable care and skill, within the standard of care he was obligated to follow." *Miller*, 11 Wn. App. at 280 (brackets added). The court relied on *Dinner, supra*, as the sole Washington authority for the validity of this instruction, and did not address the circumstances under which it may be given. *See id.*

The Court of Appeals also addressed certain evidentiary issues likely to arise on remand, none of which are pertinent here. *See id.* at 291-92.

⁵ A copy of the Petition for Review in the first *Miller* appeal is reproduced in the Appendix to this brief at A-33 to A-42.

⁶ A copy of the Answer to Petition for Review in the first *Miller* appeal is reproduced in the Appendix to this brief at A-43 to A-55.

loquitur and informed consent. See RAP 13.7(b) (limiting scope of review to issues raised in petition or cross petition).

This Court affirmed the Court of Appeals in a per curiam opinion, stating:

We granted a petition for review of the Court of Appeals' disposition of issues revolving about the doctrines of res ipsa loquitur and informed consent in a medical malpractice case. *Miller v. Kennedy*, 11 Wash.App. 272, 522 P.2d 852 (1974), petition for review granted, 84 Wash.2d 1008 (1974).

Our review of the record convinces us that the Court of Appeals did not err in its discussion or disposition of the issues involved. We can add nothing constructive to the well considered opinion of that court and, accordingly, approve and adopt the reasoning thereof.

85 Wn.2d at 151-52. The language of the per curiam opinion referring to "the Court of Appeals disposition of issues revolving about the doctrines of res ipsa loquitur and informed consent" and "the issues involved" confirms the limited scope of the affirmance. This Court did not approve the Court of Appeals' reasoning as it relates to the exercise of judgment instruction. See *Ezell*, 105 Wn. App. at 488 n.1 (stating "[t]he Supreme Court affirmed ... in a short, per curiam opinion on issues other than the error of judgment instruction").

On remand in *Miller*, the trial court again gave the exercise of judgment instruction to the jury. See 91 Wn.2d at 160. In a subsequent direct appeal, the plaintiff argued it was misleading to give the instruction

because “no issue of judgment appears in this case.” *Id.* This Court noted that “[t]he appellate court” had previously approved the instruction, citing to the Court of Appeals decision, thereby indicating that the instruction was the law of the case. *See id.*⁷ Application of the law of the case doctrine is not precedential. *See* 14A Wash. Prac., Civil Procedure § 35:55 (2d.ed.) (indicating the law of the case is typically confined to successive proceedings within a single case).

The Court rejected the plaintiff’s argument regarding the applicability of the instruction under the particular circumstances, stating “[t]he exercise of professional judgment is an inherent part of the care and skill involved in the practice of medicine.” *Miller*, 91 Wn.2d at 160.⁸ The Court did not otherwise independently address the validity of the instruction. *See Ezell*, 105 Wn.App. at 488-89 (stating “[i]n a second appeal in the *Miller* case, our Supreme Court expressly upheld the use of this instruction, although not explicitly on the ground that it was legally correct but on the basis that it was ... supported by the facts in that case”).

A decision applying an unchallenged rule of law is not *stare decisis* as to

⁷ The Brief of Appellant filed in the second *Miller* appeal, at pages 22-26, makes specific reference to the law of the case doctrine, and appears to presume that the validity of instruction was settled by the Court of Appeals decision in the first appeal. A copy of the brief is reproduced in the Appendix to this brief at A-1 to A-32.

⁸ This understanding of the exercise of judgment appears to have been modified or superseded by *Watson*’s admonition to give the instruction with “caution” and only “where the doctor is confronted with a choice among competing therapeutic techniques or among medical diagnoses.” *See* 107 Wn. 2d at 165. *Watson* is discussed further in part C, below.

the validity of the rule, especially where the rule in question is applied as the law of the case.

In light of the foregoing, it cannot be said that this Court's opinions in *Miller* constitute binding precedent regarding the validity of the exercise of judgment instruction, and Respondents' argument to the contrary is incorrect. *See* Ans. to Pet. for Rev., at 2-3.

C. *Watson v. Hockett* is incorrect to the extent it considered *Miller* as stare decisis regarding the exercise of judgment instruction.

After the *Miller* decisions, this Court affirmed a trial court's refusal to give the same exercise of judgment instruction in *Watson*, 107 Wn.2d at 164-67. In the course of its opinion, the Court in *Watson* considered the decisions in *Miller* to constitute binding precedent.⁹ On this basis, the Court concluded that the exercise of judgment instruction is "proper," although the Court criticized the phrasing of the instruction as being argumentative. *See id.* at 164-65.¹⁰ Ultimately, however, the Court

⁹ *See Watson*, 107 Wn.2d at 161 (stating "[t]he proposed instructions on the principles of law in question were all approved in a unanimous opinion of this court"); *id.* at 162 & n.11 (stating "both the Court of Appeals and this Court unanimously held that the trial court did not err when it gave instructions to the effect of those proposed by the doctor in the present case"); *id.* at 164 (referring to "[t]he 'error of judgment' instruction unanimously upheld by this court in *Miller*"); *id.* at 165 (stating "[t]he error in judgment is accepted in this state as *Miller* makes clear").

¹⁰ The Court also determined that the modification of the standard of care following the adoption of Ch. 7.70 RCW did not foreclose the exercise of judgment instruction. *See Watson*, 107 Wn.2d at 165-67. However, the Court did not address the difference in the statutory language describing the standard of care and the exercise of judgment instruction. The statute refers to "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

held that the failure to give the exercise of judgment instruction in *Watson* was not prejudicial error, finding it unnecessary for the defendant-physician to argue his theory of the case. *See id.* at 167-69.¹¹

From the review of the *Miller* decisions in part B, above, it is evident that *Watson's* reliance on *Miller* as stare decisis is incorrect.

Moreover, the Court's discussion of the exercise of judgment instruction in *Watson* seems to be incompatible with both the language and the facts of *Miller*. In a key passage of the *Watson* opinion, the Court states:

This "error in judgment" instruction is, however, to be given with caution. 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.

Id. at 165 (quotation marks & brackets in original). The "caution" with which the exercise of judgment instruction is supposed to be given, and

or she belongs, in the state of Washington, acting in the same or similar circumstances[.]" RCW 7.70.040(1) (brackets added); accord CP 3185 (instruction 6 re: standard of care). The exercise of judgment instruction omits "learning," and contains no reference to time, profession or class, state, or circumstances. *See* WPI 105.08; CP 3198 (instruction 18 re: exercise of judgment). The difference in language engenders the potential for confusion. Juror confusion resulting from the exercise of judgment instruction is further discussed in part G, below.

¹¹ It could be argued that *Watson's* discussion of the exercise of judgment instruction is actually dicta, given the Court's determination that the instruction was not warranted by the facts. *But see Ezell v. Hutson*, 105 Wn.App. 485, 489-90, 20 P.3d 975 (concluding *Watson's* discussion of exercise of judgment instruction is not dicta), *rev. denied*, 144 Wn.2d 1011 (2001).

the limitation of the instruction to cases involving a choice among competing treatments or diagnoses per *Watson*, is a marked contrast with and departure from the Court's statement in the second *Miller* appeal that "[t]he exercise of professional judgment is an inherent part of the care and skill involved in the practice of medicine," which would seem to justify

the instruction in every case. *Miller*, 91 Wn.2d at 160 (brackets added).

The cautionary and limiting language of *Watson* also appears to be in tension with the facts of *Miller*, where there was no choice among competing alternative treatments or diagnoses. See *Miller*, 91 Wn.2d at 160 (stating the doctor "was called upon to exercise his professional judgment in performing the delicate surgery of a kidney biopsy"). The opinion in *Watson* does not address these incongruities.

D. Subsequent cases have relied on *Watson* as controlling.

In *Christensen v. Munsen*, 123 Wn.2d 234, 248-49, 867 P.2d 626 (1994), the Court affirmed a trial court decision to give the exercise of judgment instruction under circumstances where the defendant-health care provider had a choice of treatments, relying on *Watson*. The Court also determined, in light of *Watson*, that the instruction does not constitute an

impermissible comment on the evidence. *See* 123 Wn.2d at 249. The Court of Appeals has likewise cited *Watson* as controlling.¹²

E. The exercise of judgment instruction is unnecessary to remind the jury that medicine is not an exact science or that more than one diagnosis or treatment may be within the standard of care.

Respondents argue that the exercise of judgment instruction provides “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.” Ans. to Pet. for Rev., at 4 (quoting *Watson*, 107 Wn.2d at 166-67; internal quotation omitted). It is not clear from this quotation or the text of the *Watson* opinion why a jury instruction would be necessary to remind the judge of anything. In any event, “useful watchwords” hardly justify a claim of necessity. The Court in *Watson* did not indicate that the exercise of judgment instruction *must* be given to the jury, only that it *may* be given with caution and under limited circumstances. *See* 107 Wn.2d at 164-67.

¹² *See 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*, 105 Wn.App. at 489-90; *Housel v. James*, 141 Wn. App. 748, 760, 172 P.3d 712 (2007).

Respondents wrongly attribute precedential significance to the denial of review in *Gerard* and *Ezell*. *See* Ans. to Pet. for Rev., at 6; *see also Mattia Contractors v. City of Bellingham*, 144 Wn.App. 445, 452, 183 P.3d 1082 (2008) (noting “the Supreme Court’s denial of review has never been taken as an expression of the court’s implicit acceptance of an appellate court’s decision”).

Contrary to the implication of Respondents' briefing, the quotation from *Watson* on which they rely is not addressed solely to the exercise of judgment instruction. Respondents omit the first words of the quotation that refer to "these doctrines," the antecedents of which include the no guarantee and bad result instructions, as well as the exercise of judgment instruction. Compare *Watson*, 107 Wn.2d at 167, with *Ans. to Pet. for* Rev., at 4. The no guarantee and bad result instructions provide that a health care provider "does not guarantee the results of his or her care and treatment," and a "poor medical result is not, by itself, evidence of negligence." WPI 105.07, reprinted in 6 Wash. Prac., *supra*. The exercise of judgment instruction adds little, if anything, to these other instructions, which are otherwise available in a medical negligence case.

As *Watson* recognizes, the touchstone of liability for medical negligence is the standard of care, and the exercise of judgment instruction at most supplements or clarifies the standard of care. See 107 Wn.2d at 166-67. The Court's earlier decision in *Samuelson* implies that such supplementation and clarification is unnecessary, given the pattern jury instructions regarding the standard of care and burden of proof in a

medical negligence case. *See* 75 Wn.2d at 897 (citing former WPI 105.00 & 105.01).¹³ As further explained by the Court of Appeals:

we see no independent reason for giving a separate “error of 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.

Ezell, 105 Wn. App. at 491. Even in the absence of an error of judgment instruction, defendant-health care providers are free to introduce evidence and argue that medicine is not an exact science or that more than one diagnosis or treatment may be within the standard of care under the general standard of care instruction.

F. The exercise of judgment instruction is harmful because it is an improper slanted instruction, unduly emphasizing the limits of a health care provider’s liability.

This Court has already recognized the potential for the exercise of judgment instruction to unduly emphasize the limits on a health care provider’s liability, at least in combination with other instructions. *See Samuelson*, 75 Wn.2d at 896-97. The Court of Appeals suggests that the instruction carries an inherent risk of such undue emphasis. *See Ezell*, 105 Wn.App. at 491.

¹³ The current versions of the standard of care and burden of proof jury instructions can be found at WPI 105.01, 105.02 & 105.03, *reprinted in* 6 Wash. Prac., *supra*.

The risk of undue emphasis appears to stem from the fact that the exercise of judgment instruction is an improper slanted instruction. A slanted instruction tends to minimize the rule of law applicable in a given case. See, e.g., *Gaunt v. Alaska S.S. Co.*, 57 Wn.2d 847, 849-50 & n.2, 360 P.2d 354 (1961). For example, in *Gaunt*, the plaintiff in a maritime injury case proposed a separate instruction that evidence of custom and usage is not dispositive of the standard of care, even though it may be relevant. See *id.*, 57 Wn.2d at 849 & n.2. The Court affirmed the trial court's rejection of this proposal as a slanted instruction because it minimized the standard of care. See *id.* at 850. In a similar way, the exercise of judgment instruction tends to minimize the standard of care instructions applicable in a medical negligence case. As in *Gaunt*, the Court should disapprove of a separate instruction for the exercise of judgment as an improper slanted instruction.¹⁴

¹⁴ The exercise of judgment instruction may also be an erroneous formula instruction, which is an instruction that "purports to contain all the elements necessary for a verdict for either party, but which neither includes all such elements nor refers to other instructions which do." *Ryder's Estate v. Kelly-Springfield Tire Co.*, 91 Wn.2d 111, 115, 587 P.2d 160 (1978). Omission of a single element from the formula instruction renders it "fatally defective." *Poston v. Mathers*, 77 Wn.2d 329, 335-36, 462 P.2d 222 (1969) (finding reversible error where contributory negligence instruction in automobile collision case omitted reference to reasonable reaction time). The exercise of judgment instruction is a formula instruction to the extent that it provides a physician is not liable under certain circumstances. See WPI 105.08 (pattern exercise of judgment instruction); CP 3198 (instruction 18 re: exercise of judgment). It is erroneous because it refers only to "reasonable care and skill," and omits any reference to "learning." Compare RCW 7.70.040(1) (statutory definition of standard of care); CP 3185 (instruction 6 re: standard of care). It is not clear whether a jury would interpret the reference to "standard of care"

The exercise of judgment instruction appears to be a vestige of the same pre-modern approach to jury instructions that the Court in *Watson* criticized when it disapproved the word "honest," as used in a prior version of the instruction. See 107 Wn.2d at 164-65. In fact, the policy underlying the modern approach to instructing juries is at odds with the exercise of judgment instruction in its entirety:

It has, for some years, been the policy of our Washington system of jurisprudence, in regard to the instruction of juries, to avoid instructions which emphasize certain aspects of the case and which might subject the trial judge to the charge of commenting on the evidence, and also, to avoid slanted instructions, formula instructions, or any instruction other than those which enunciate the basic and essential elements of the legal rules necessary for a jury to reach a verdict. Under this theory, counsel has been free, and, indeed, has the responsibility, to argue to the jury, the refinements of these rules within the factual framework of his case. Detailed instructions, such as those proposed here, though once common, are now deemed to be instructions which 'point up,' 'underline,' or 'buttress' portions of counsel's argument.

Laudermilk v. Carpenter, 78 Wn. 2d 92, 100-01, 457 P.2d 1004 (1969). In accordance with the modern approach, the exercise of judgment instruction should be abandoned as an improper slanted instruction that unduly emphasizes the limits of a health care provider's liability.

in the exercise of judgment instruction as incorporating the remaining elements of the standard of care instruction, i.e., time, profession or class, state, or circumstances.

- G. The exercise of judgment is additionally harmful because it is confusing, and invites the jury to return a defense verdict in a medical negligence case based upon a mere difference of opinion among the expert witnesses regarding the nature or breach of the standard of care, without resolving factual disputes presented by the conflicting expert testimony.**

The Court's admonition to give the exercise of judgment instruction with caution seems to reflect, if only implicitly, the potential for the instruction to confuse the jury. *See Watson*, 107 Wn.2d at 165. The Court of Appeals explicitly recognizes the potential for confusion, albeit based on the particular wording of another version of the exercise of judgment instruction. *See Ezell*, 105 Wn.App. at 491. Under the wording of the instructions given in this case, confusion may result from textual differences between the standard of care and exercise of judgment instructions, and the uncertain relationship between the two instructions, noted above.

Confusion may also result from the application of the instruction to the conflicting expert testimony regarding the nature or breach of the standard of care. If the plaintiff's experts testify, as they did here, that the defendant-health care provider breached the applicable standard of care, *see, e.g.*, RP 410:18-414:12 & 889:12-890:24; and the defendant's experts testify, as they did here, that the defendant did not breach the applicable standard of care; then the exercise of judgment instruction invites the jury

to conclude that the defendant is not liable simply because he or she produced expert testimony supporting his or her actions, without resolving the factual disputes presented by the conflicting expert testimony. In other words, the jury may infer the absence of negligence from nothing more than the existence of the conflict in the expert testimony regarding the standard of care. The risk of this confusion is too great to continue giving the exercise of judgment instruction.

II. If the Court does not abandon the exercise of judgment instruction, it should clarify that the instruction is warranted only where the health care provider makes a conscious choice between competing alternative diagnoses, and hold that Dr. Sestero failed to make the requisite choice in this case.

While acknowledging that *Watson* limits the exercise of judgment instruction to cases involving a choice among competing diagnoses, Respondents resist any requirement that the choice be a conscious one. *See* Ans. to Pet. for Rev., at 12-13. The reason for the resistance is evident from the way that Respondents characterize the exercise of judgment. First, they equate the “judgments” involved in arriving at a *singular diagnosis* with the judgments involved in making a choice among *competing diagnoses*.¹⁵ Second, they define diagnosis in terms of

¹⁵ *See, e.g.*, RP 2112:24-2113:4 (jury instruction conference, describing the failure to perform imaging or other definitive testing of the lump on Paul Fergen’s ankle as “the judgment call”); RP 2203:6-17 (closing argument, describing the history and visual and tactile inspection of the lump as “the judgments that Dr. Sestero did”); RP 2204:20-23 (closing argument, describing the failure to order further imaging as “judgment”); RP

distinguishing one disease from another, and reason tautologically that the selection of one diagnosis necessarily entails the rejection of all other possible diagnoses.¹⁶ Thus, Respondents argue that the diagnosis of the lump on Paul Fergen's ankle as benign, ipso facto, involved a choice not to diagnose it as cancer or anything else. In sum, Respondents seek to turn every step along the way toward making a diagnosis, and the diagnosis itself, into a choice among competing diagnoses, thereby justifying the exercise of judgment instruction in every medical negligence case. This is contrary to the limits on the use of the instruction delineated in *Watson* and renders them meaningless.

There is a lack of evidence of a conscious choice among competing diagnoses in this case.¹⁷ In the absence of such evidence, giving the exercise of judgment instruction is presumed to be prejudicial

2042:8-18 & 2044:17-24 (Dr. Sestero, testifying that "clinical judgment" "involves everything" and that "clinical judgment plays everything in our coming up with a plan"); Resp. Br., at 40 (quoting defense expert testimony, describing "putting together the history," "seeing with your eyes" and "feeling with your hands" as "clinical judgment").

¹⁶ Resp. Br., at 34 (quoting medical dictionary for definition of diagnosis); *id.* at 39 (referring to "the medical judgment that is involved in making any diagnosis" and referring again to "the judgment a physician exercises when making any diagnosis").

¹⁷ The sole evidence identified by Respondents is RP 609. *See* Ans. to Pet. for Rev., at 8. The cited page contains testimony from Dr. Sestero that malignancy is "a consideration anytime you see a lump," without saying whether he actually considered it in this case. *See* RP 609:9-13. Elsewhere, Dr. Sestero testified that he did not have a memory other than what was in his chart note, RP 2050:5-6 & 2051:14. The note does not contain any indication that he entertained or ruled out any other diagnosis. Ex. P-1A; RP 2043:4-21. In describing the "clinical judgment" exercised in this case, he did not say that he entertained or ruled out any other diagnosis. *See* RP 2042:8-18 & 2044:17-24. He did not inform the Fergen family of any other competing diagnoses, *see* RP 610:6-611:1; nor did he rule out any competing diagnoses, *see* RP 2069:10-16.

error. *See Albin v. National Bank of Commerce*, 60 Wn.2d 745, 754, 375 P.2d 487 (1962) (holding it is presumptively prejudicial error to give jury instruction unsupported by substantial evidence).

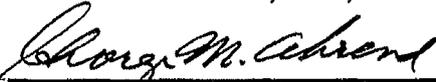
CONCLUSION

The Fergen family asks the Court to reverse the Court of Appeals and the superior court, vacate the judgment entered in Dr. Sestero's and his employer's favor, and remand this case for a new trial with proper instructions.

Respectfully submitted this 7th day of October, 2013.

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CERTIFICATE OF SERVICE

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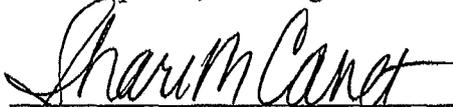
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Attached for filing please find:

Petitioners' Supplemental Brief; and
Amended Certificate of Service Re: Appendix to Petitioners' Supplemental Brief.

Thank you.

--

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S. Ct. No. 88819-1

Ct. App., Div. III, No. 305236

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,

Petitioner,

vs.

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

Respondent.

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No. 4418-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION NO. 1

RICHARD R. MILLER, Appellant,

vs.

JOHN A. KENNEDY, M.D., Respondent.

APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

The Honorable James V. Ramsdell, Judge

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This case is before the Court of Appeals for the second time after a new trial on all issues ordered by this Court and affirmed by the Supreme Court. This case was originally tried in May, 1972, and resulted in a jury verdict for the defendant. Plaintiff appealed to the Court of Appeals, which in May, 1974 reversed the verdict and ordered a new trial. Upon defendant's petition for review, the Supreme Court, in Miller v. Kennedy 85 Wn. 2d 151, 530 P.2d 334 (1975), adopted the opinion of Judge Callow, who wrote for the unanimous Court of Appeals, Division I. Miller v. Kennedy, 11 Wn. App. 272, 522 P.2d 852 (1974).

The new trial was had in the Superior Court for Pierce County before Judge James V. Ramsdell and a jury in November, 1975. The facts developed at the new trial were in all respects material to this appeal identical to those recited in the opinion of the Court of Appeals in Miller v. Kennedy, supra, at pages 274-276. Most of the testimony was identical, since both parties, due to unavailability of witnesses, read verbatim portions of the transcribed statement of facts from the prior trial. Most significantly, this occurred with the testimony of appellant's expert witness, Dr. Hickman.

The only fact which is material to this appeal is that sufficient evidence was adduced at the second trial to submit the issues of informed consent and negligent performance to the jury. This fact is admitted by the defendant (St. 8, 24). The following facts, stated by the way of background, are taken directly from the opinion of Judge Callow in Miller v. Kennedy, supra, at pages 274-276:

"Dr. Kennedy is a board certified specialist in internal medicine with subspecialties in heart and nephrology, practicing in Tacoma, Washington. The plaintiff first consulted Dr. Kennedy on January 14,

1970, complaining of fatigue, lightheadedness, tiring out easily and becoming shortwinded with exercise. Dr. Kennedy examined Mr. Miller, wrote down his medical history, and took an electrocardiogram. At that time Dr. Kennedy found that Mr. Miller had first degree heart block. On January 20, 1970, Mr. Miller returned for further examination and was found to have second and third degree heart block. Mr. Miller was immediately hospitalized and placed in intensive care. On January 26, 1970, Mr. Miller was removed from intensive care and placed in a ward.

"Many tests were performed to assist Dr. Kennedy in his efforts to diagnose the cause of Mr. Miller's heart disease. Various tests showed evidence of a kidney problem, and therefore Dr. Kennedy felt that a kidney biopsy was necessary. Witnesses for both parties testified that the decision to perform the biopsy was not malpractice. However, Mr. Miller testified that Dr. Kennedy did not advise him of the risk of the loss of the kidney nor explain the alternative ways of performing biopsies. The plaintiff further testified that he would not have consented to the biopsy had he known there was a risk of loss of the kidney. Dr. Kennedy testified that he did so inform the patient, and this testimony is substantially corroborated by the hospital record

and by the prior conduct of the doctor in which he diagramed and explained in detail to Mr. Miller what was happening in his heart.

"In performing the biopsy, the biopsy needle was inserted some 3 or 4 centimeters above the intended biopsy site...The plaintiff alleged that the biopsy needle was negligently inserted penetrating the calyceal system of the kidney causing damage and injury which eventually resulted in loss of the kidney. The defendant contended that the calyceal area was not punctured and that a small artery may have been injured. There is no dispute in the testimony that the loss of the kidney proximately resulted from the kidney biopsy, that the kidney was healthy prior to the biopsy and that the biopsy specimens were negative as to any of the conditions for which the biopsy was performed. The position of the plaintiff is that the defendant violated the standard of care while the defendant states that the standard of care was met and claims that an unfortunate chance led to the result.

"Following the biopsy, the plaintiff remained in the hospital from January 29, 1970 until February 26, 1970, suffering continual bleeding from his kidney

and considerable pain. On February 26, 1970, Dr. Kennedy called upon another physician, Dr. Osborne, to examine Mr. Miller. In spite of his weakened condition and extensive bleeding, Mr. Miller was released from the hospital. Mr. Miller was again, at his own insistence, examined by Dr. Osborne who removed blood clots from his bladder and returned him home. After the condition returned, Mr. Miller was again hospitalized on March 30, 1970. It was suggested that an operation be performed to see if the upper portion of the kidney, where the bleeding was taking place, could be surgically removed in an attempt to save the balance of the kidney. On April 4, the date set for the surgical procedure, Mr. Miller hemorrhaged, and the surgical procedure was expedited. Dr. Osborne performed the surgery, attempted to remove the upper portion of the kidney, but was unable to do so. Finally, he was required to do a complete nephrectomy, removing the entire kidney. Mr. Miller was released from the hospital on April 10, 1970."

The testimony and exhibits of the present trial contained all of the above facts, and at the close of the trial the Court removed from the jury's

consideration the issues of negligence in determining to do the biopsy and negligence in post-biopsy care. The Court instructed the jury on the remaining issues of negligence in the performance of the biopsy and failure to obtain the informed consent of the patient. (St. 23-33). The jury returned a verdict for the defendant, and plaintiff moved for a judgment n.o.v., or in the alternative, for a new trial (Tr. 12-13). The Court denied these motions (Tr. 2) and entered judgment on the jury's verdict (Tr. 3). Appellant filed notice of appeal (Tr. 1) and proceeded to perfect this appeal on a short record, the only issues being that certain instructions and the instructions as a whole were conflicting, misleading and erroneous as a matter of law.

ASSIGNMENTS OF ERROR

1. The Court erred in giving Instruction No. 3, which reads as follows:

The plaintiff has the burden of proving by a preponderance of the evidence:

1. The standard of care applicable, at the time of the incident in question, and

2. That the defendant failed to follow the standard of care, and was thereby negligent, and
3. That the acts or omissions of the defendant were the proximate cause of the injury to the plaintiff.

If the plaintiff fails to prove any one of these requirements, plaintiff may not recover.

Exception taken (St. 9-11)

2. The Court erred in giving Instruction No. 5, which reads as follows:

You are instructed that a physician employed to treat or administer to a patient does not and cannot insure or in any sense guarantee a satisfactory result, nor is the physician responsible for unsatisfactory results of his treatment or care unless his own lack of professional knowledge and skill or his negligent failure to exercise it is the proximate cause of such result. The fact in a particular case that complications result is not in itself any evidence that the treatment was improper or that the physician failed to exercise the professional knowledge and skill necessary to proper professional practice, nor is it any evidence that the doctor failed to exercise his skill with reasonable care.

Exception taken (St. 11-12, 18-20, 21-22)

3. The Court erred in giving Instruction No. 5-1/2, which reads as follows:

A physician or surgeon is not liable for an honest error in 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.

Exception taken (St. 18, 21-22)

4. The Court erred in that its instructions to the jury when taken as a whole are misleading, conflicting, and constitute an erroneous statement of the law.

ARGUMENT FOR APPELLANT

At the present trial Judge Ramsdell, in his instructions to the jury, attempted to closely follow the directions of the Court of Appeals in Miller v. Kennedy, supra. In only three respects did he depart from the precedent of the first Miller case, and these departures are the basis for the errors complained of herein.

The Court of Appeals directed that instructions on res ipsa loquitur and informed consent be given, and indicated what form they should take. The trial court complied, but also gave instructions No. 3 and 5 which conflict with the approved instructions on these two points. The Court of Appeals had also approved an "error of judgment" instruction, but that was on a record which included the issue of pre-biopsy negligence. At the entreaty of defense counsel the present trial court gave instruction number 5-1/2 despite the fact that it had expressly removed the pre-biopsy negligence issue, the only "judgment" issue, from the consideration of the jury.

The error and resulting prejudice in these three instructions and in the instructions as a whole is detailed below in the separate argument for each assignment of error.

I. Burden of Proof Instruction.

The defendant offered and the Court accepted an instruction setting forth the burden of proof which rested on the plaintiff. This instruction No. 3 enumerated three elements which the plaintiff must prove by a preponderance of the evidence as follows:

- "1. The standard of care applicable, at the time of the incident in question, and
2. That the defendant failed to follow the standard of care, and was thereby negligent, and
3. That the acts or omissions of the defendant were the proximate cause of injury to the plaintiff.

If plaintiff fails to prove any one of these requirements, plaintiff may not recover."

In the abstract, this instruction is a proper statement of a plaintiff's burden in a suit for professional negligence. However, in this case, the issue of "informed consent" was also submitted to the jury without objection from the defendant.

The burden of proof on a claim of lack of informed consent is radically different from that required to support an allegation of negligent performance. Under the law of the State of Washington there is no "standard of care" in disclosure of relevant information to the patient. The duty to disclose is absolute and imposed by law, not by the standards of the medical profession. Miller v. Kennedy, supra. The Miller court cited and expressly followed the cases from other jurisdictions which announce the "better view" that the plaintiff need not prove a medical standard of disclosure and the departure therefrom on a claim of lack of informed consent. Getchell v. Mansfield, 260 Or. 174, 489 P.2d 953 (1971); Canterbury v. Spence, 464 F. 2d 772 (D.C. Cir. 1972); Cobbs v. Grant, 8 Cal. 3rd 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972); Wilkinson v. Vesey, 110 R.I. 606, 295 A. 2d 676 (1972).

At the close of the present trial a proper instruction on informed consent taken directly from the suggestion of Miller v. Kennedy, supra, at pages 289-290 was given, setting forth what the plaintiff must prove to recover on that theory. The informed consent instruction, No. 7, correctly indicated that the plaintiff need not prove a standard of care but merely that the defendant doctor failed to inform him of all relevant facts and risks.

Once the failure to disclose is shown, plaintiff need only prove that a reasonable patient would not have consented and that the treatment in question caused injury. This standard of proof for informed consent is in direct conflict with that stated in Instruction No. 3. Plaintiff specifically requested that the scope of instruction No. 3 be limited to the contention of negligent performance, but this modification was refused. Without this qualification, the jury might well have concluded that the burden imposed by Instruction No. 3 applied to both of plaintiff's claims and was in addition to the requirements of Instruction No. 7, specifically applicable to the issue of informed consent.

It has long been held that it is prejudicial error to give conflicting and inconsistent instructions on a material issue of a case. Babcock v. M & M Construction Company, 127 Wash. 303, 220 Pac. 803 (1923); Atkins v. Clein, 3 Wn. 2d 168, 100 P.2d 1 (1940); Smith v. Rodene, 69 Wn. 2d 482, 418 P.2d 741 (1966); Hall v. Corporation of Catholic Archbishop, 80 Wn. 2d 797, 498 P.2d 844 (1972). Wherever there is such a conflict of instructions prejudice results "for the reason that it is impossible to know what effect they may have had on the verdict." Atkins v. Clein, supra, at page 171. This is the

situation present herein. The two instructions, Nos. 3 and 7, conflict with each other by setting forth different burdens of proof, both of which ostensibly apply to the informed consent claim. The burden of proof has been held to be a "material issue" for the purpose of the rule relating to conflicting instructions. Smith v. Rodene, supra.

As the Court explained in Hall v. Corporation of Catholic Archbishop, supra, neither of the contradictory instructions needs to be patently erroneous for the rule to come into play. In Hall the plaintiff, injured on defendant's property, asserted alternate claims for negligence per se by violation of a building ordinance and common law negligence to her as an invitee. The trial court gave a negligence per se instruction and, without qualification, a common law duty to an invitee instruction. The Supreme Court readily found a conflict and reasoned, at pages 803 - 804:

"In fact as applied to this case, Instruction No. 9 [the common law instruction] virtually negates the impact of Instruction No. 6, which informs the jury that: 'The violation, if you find any, of an ordinance, is negligence as a matter of law. Such negligence has the same effect as any other negligence.' Instruction No. 9 informs the jury in effect, that even though an ordinance

t
may require the erection of hand-rails under certain circumstances, 'the owner is under no duty to reconstruct or alter the premises so as to obviate known or obvious dangers.'

". . . [I]nstruction No. 9 added a statement of the law which dealt incorrectly with legislatively imposed duties. At best, Instruction No. 9 added confusion.

"As we stated in Smith v. Rodene [supra] we have held consistently that it is prejudicial error to give irreconcilible instructions upon a material issue in the case, where instructions are inconsistent or contradictory on a given material point their use is prejudicial. . ."

Taken together, as they must be, Instructions No. 3 and 7 in the present case are in irreconcilible conflict on the issue of the burden of proof required on plaintiff's claim of lack of informed consent. To paraphrase the Hall court, Instruction No. 3 virtually negates the impact of Instruction No. 7, which informs the jury that the plaintiff need not prove a medical standard of disclosure, that the non-disclosure by the physician need not be the proximate cause of the injury, and that such non-disclosure is negligence as a matter of law. Instruction No. 3 informs the jury, in effect, that even though negligence may be established by mere failure to disclose, if plaintiff fails to prove

a standard of care, departure therefrom and proximate cause he cannot recover.

Without the limitation suggested by plaintiff, clearly stating that Instruction No. 3 was to apply solely to the claim of negligent performance of the biopsy, it was error to give this instruction where a material issue in the case was the claim of lack of informed consent and the burden of proof thereof. No speculation is necessary as to the prejudicial effect of the conflict between these two instructions. Plaintiff may well have satisfied his burden under Instruction No. 7 but been deprived of a verdict on the informed consent claim because he failed to prove the standard of care, breach and proximate cause unequivocally required by Instruction No. 3.

II. Unsatisfactory Result Instruction.

Instruction No. 5, vigorously objected to by the plaintiff, is a strange hybrid, containing elements of "bad result", "physician is not a guarantor", and "standard of care" instructions. This instruction is objectionable for several different reasons which will be detailed below.

The first sentence of Instruction No. 5 was taken by defendant almost directly from an instruction expressly rejected by the Supreme Court in Cook, Flanagan & Berst v. Clausing, 73 Wn.2d 393, 438 P.2d 865 (1968). In that case, a legal malpractice counterclaim by a client sued for a fee, wherein Wayne J. Davies represented the attorneys, the challenged instruction read:

"An attorney at law, when he enters into the employ of another person as such, undertakes that he possesses a reasonable amount of skill and knowledge as an attorney, and that he will exercise a reasonable amount of skill in the course of his employment, but he is not ordinarily a guarantor of results and is not liable for the loss of a case unless such loss occurred by reason of his failure to possess a reasonable amount of skill or knowledge or by reason of his negligence or failure to exercise a reasonable amount of skill and knowledge as an attorney." Cook v. Clausing, supra at 394-395.

The language of the Cook instruction was taken word for word from Ward v. Arnold, 52 Wn.2d 581, 328 P.2d 164 (1958), at page 584, and has been repeated in later cases. Hansen v. Wrightman, 14 Wn. App. 78, 538 P.2d 1238 (1975). Even so, the Cook court immediately recognized that it was clearly inappropriate as a jury instruction.

The Court dismissed the instruction at pages 395-396, stating:

"We agree with the defendants [clients] that this instruction is also erroneous. It fails to set forth a standard for the degree of skill and knowledge that an attorney undertakes on behalf of a client. In a case based on negligent malpractice, it is essential for the guidance of the jury that the court set forth in its instructions the applicable standard of conduct against which the actions complained of are to be measured."

In the current case, of course, there was a proper instruction setting forth the applicable standard of care to which Dr. Kennedy is to be held, but that proper instruction (No. 4) cannot cure the error and prejudice to the plaintiff which is present in Instruction No. 5. Instruction No. 5 attempts three times and in three different ways to express a standard for the defendant's conduct, all of which incorrectly state that standard and conflict with Instruction No. 4. As stated, supra, at pages 11 - 14, such a conflict on a material issue is prejudicial error.

The first sentence of Instruction No. 5 predicates liability on "lack of professional knowledge and skill" or "negligent failure to exercise" such knowledge and skill. No mention is made in this instruction of the care and prudence which are also required, nor does this sentence attempt to explain what constitutes a "lack" of skill or a "negligent" failure to exercise it. This indefiniteness may seem harmless when considered in conjunction with the proper Instruction No. 4. However, the second sentence of Instruction No. 5 proceeds to complicate the difficulty and increase the conflict with the proper instruction by setting forth two clearly erroneous standards for the conduct of the defendant.

What is knowledge and skill "necessary to proper professional practice" is a mystery, and must remain so. The so-called standard of "proper professional practice" was not, of course, subject to proof at the trial, nor should it have been. Medical testimony was properly confined to whether the defendant's actions met the standard of skill, knowledge and care possessed and applied by the "average" physician practicing the specialty involved. Appellant is at a loss to guess how the jury was to

measure the defendant's conduct against a standard which was presented to them for the first time in the instructions.

This multi-faceted instruction concludes by informing the jury that only "reasonable care" need be exercised by the physician in order to avoid liability for a "bad result" or complications. Reasonable care is certainly required of a physician, but the standard of care requires much more, as was pointed out in Hansen v. Wrightman, supra, at page 90. The Hansen court quoted from Cook v. Clausing, supra, as follows:

"Prosser explains that:
'Professional men in general and those who undertake any work calling for special skill are required not only to exercise reasonable care in what they do but also to possess a standard minimum of special knowledge and ability'. (Italics ours). W. Prosser, Torts § 32, p. 164 (3rd Ed. 1964).
We therefore. . . hold that the correct standard to which the plaintiff [attorney] is held . . . is that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer. . ."

Even though Miller v. Kennedy, supra, held it was proper to instruct that a physician does not guarantee results and that a bad result is not alone evidence of negligence, the injection of incorrect statements of the standard of care required of the defendant renders

Instruction No. 5 dangerously misleading as well as totally in conflict with the proper instruction on the standard of care. The statements in Instruction No. 5 regarding the standard of care cannot stand compatibly with the proper Instruction No. 4 and must only have confused the jury.

In addition to the conflict and error regarding the standard of care, Instruction No. 5 is especially inappropriate in relation to the instruction concerning circumstantial evidence and *res ipsa loquitur*.

(Instruction No. 8). The Supreme Court in Miller v. Kennedy, supra, expressly held that this case was a proper one for a *res ipsa loquitur* instruction, on the basis of Dr. Hickman's testimony in the first trial. This testimony was read verbatim to the jury at the present trial. Since an instruction on *res ipsa loquitur* is unquestionably appropriate under the facts of this case, the jury should be allowed to consider it without the cloud presented by Instruction No. 5.

The very basis of the doctrine of *res ipsa loquitur* as it exists in the State of Washington

is that the complications and bad results occurring, together with the other circumstances which bring the doctrine into play, do provide circumstantial evidence of negligence. The United States Supreme Court in Sweeney v. Erving, 228 U.S. 233, 57 L. Ed 815, 33 Sup. Ct. 416 (1912), explained the doctrine of res ipsa loquitur in jurisdictions following the approach Washington does as follows:

" . . . res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient. . ."

In a jurisdiction such as Washington where res ipsa merely allows the bad result to be considered as circumstantial evidence, it is clearly improper for the instructions to contain a statement to the jury, such as in the second sentence of Instruction No. 5, that

"The fact. . . that complications result is not in itself any evidence that the treatment was improper. . . nor is it any evidence that the doctor failed to exercise his skill with reasonable care." (Emphasis added.)

Such a statement is in direct conflict with an instruction which, after explaining direct and circumstantial evidence, allows the jury to draw an inference of negligence from "the injury sustained by the plaintiff, and the attendant circumstances." The res ipsa loquitur doctrine clearly should allow the "bad result" to be considered as circumstantial evidence of negligence, but when Instruction No. 5 states twice that it is "not any evidence", the heart of the doctrine is torn out. Plaintiff was entitled to have his theory of negligence considered by the jury, aided by res ipsa loquitur, but the last sentence of Instruction No. 5 destroys that consideration.

Instruction No. 5 certainly could not have helped the jury in their understanding and application of the law. This instruction must at least have confused, if not misled, that body. Because of its conflict with the two proper instructions on standard of care and res ipsa loquitur, "it is impossible to know what effect [it] may have had on the verdict," Atkins v. Clein, supra, and therefore it constitutes prejudicial error.

III. Error in Judgment Instruction.

Instruction No. 5-1/2 was literally forced upon the Court by defendant's experienced counsel, who stated:

"I have never tried a malpractice case without the judgment instruction being given, Judge." (St. 19)

Defendant cited Miller v. Kennedy, supra, for its supposedly unqualified acceptance of this instruction and its position as "the law of the case." The Miller court, however, did not explore the various fact situations under which such an instruction would be applicable, but merely stated, at page 280:

"This instruction also was appropriate as an abstract statement of the law."

We are not dealing in the abstract, however, and it must always be ascertained whether a particular instruction, correct in itself, is appropriate in relation to the facts and issues of the case. Even "the law of the case" is of little help in framing instructions where some of the issues presented to the jury change at the second trial. The case considered by the court in the first appeal, Miller v. Kennedy, supra, was different in one substantial area from the present case.

After the first trial, the jury was allowed to consider the issue of whether the defendant had been negligent in determining to do the biopsy. This instruction was indeed "appropriate" under the issues of the first trial. The decision to do or not to do the biopsy was clearly an exercise of judgment by the defendant. However, the case considered by the present jury did not contain the issue of negligent diagnosis and so did not present any issue in which the element of "judgment" was involved.

The present jury was directed to consider only the issues of informed consent and of negligent performance of the biopsy, and was specifically instructed "that the plaintiff's contention that the defendant was negligent in determining that a biopsy should be performed" had been withdrawn from consideration as a basis for liability. On the informed consent issue as presented herein there is no element of judgment, no discretion but a legal duty to make the requisite disclosures. The use of any discretion in withholding information from the patient is a matter of defense for the doctor.

Miller v. Kennedy, supra, and cases cited therein.

Dr. Kennedy's defense, however, was not that he exercised his judgment and decided to withhold information, but that he did make the required disclosures. It cannot be argued that there was any judgment to be considered in the issue of whether or not the defendant had in fact revealed all relevant and material facts and risks to his patient.

In the actual performance of the biopsy the defendant doctor is required by the standard of care applicable to him to exercise not "honest judgment" but knowledge, skill and care in inserting the needle into the proper place in the kidney. As was so correctly pointed out by the trial judge in discussion of this proposed instruction, the instant case presents a situation involving not an error of judgment but an error of performance (St. 17). This conclusion is underscored by the fact that the jury was specifically instructed in Instruction No. 6 that "no negligence may be found. . . for choosing the closed biopsy method rather than the fluoroscopy method. . .", thus removing the only possible element of judgment from the actual performance of the biopsy.

While appropriate "in the abstract" such an instruction as No. 5-1/2 is only applicable where the challenged decision or action of the defendant depends on the exercise of judgment. The only Washington case appellant has been able to find which considered this type of instruction is Dinner v. Thorp, 54 Wn.2d 90, 338 P.2d 137 (1959), which was cited by defendant to support instruction No. 5-1/2. This was a medical malpractice case where the key issues obviously involved the judgment of the doctor in choosing the proper method of delivery of a baby and in taking various predelivery precautions. The Dinner court had no occasion to discuss the specific applicability of the instruction to a case where the liability was claimed to rest on negligent performance of a medical procedure.

The giving of an instruction which relates to an issue which is not in the case is reversible error, where it tends to mislead the jury and prejudices the complaining party. It seems only common sense to conclude that the presentation of such an instruction as No. 5-1/2 on issues totally devoid of any occasion for an exercise of judgment to a jury which was already subjected to conflicting instructions dealing with informed consent and the professional

standard of care can only tend to confuse the jury. This instruction further obfuscates the standard which the law sets for the defendant's conduct.

IV. Instructions as a Whole.

The interrelation of the various instructions given by the Court has already been detailed in the discussion of the preceding assignments of error. From that discussion it can readily be seen that there exist several serious conflicts and inconsistencies among the instructions to the jury, all on material issues of this case and all prejudicial. Hall v. Corporation of Catholic Archbishop, supra. The effect of these conflicts has been to deprive the plaintiff of the opportunity to argue his theories of lack of informed consent and res ipsa loquitur and to deprive the jury of a cohesive, understandable statement of the law to be applied to the facts.

Such a conflict on material issues is virtually presumed to be prejudicial to the complaining party, Atkins v. Clein, supra, but here no such presumption is really necessary. Aside from the single inconsistencies pointed out above, the instructions taken as a whole create such a surfeit of conflict and confusion, by injecting improper statements of the standards required of both the plaintiff's proof

and the defendant's conduct, that the prejudice is clear. The instructions as a whole specifically take from the jury any consideration of the defendant's "honest judgment", then superimpose this exonerating standard upon claims to which "honest judgment" is legally not a defense.

When the instructions are read as a whole it becomes ultimately clear that the erroneous instructions were not cured by the proper ones nor could the conflicts go unnoticed by the jury. If the jury did as instructed and read the instructions together, giving them equal weight, they were unable to apply the correct law to this case, being unable to find it in the maze of contradictions presented to them.

CONCLUSION

Appellant has attempted to delineate, as far as is possible on the short record utilized in this appeal, the several errors which occurred in the Court's final instructions to the jury. A consideration of the evidence submitted is unnecessary to the assignments of error herein, since it is

admitted by the defendant that the evidence was sufficient to go to the jury on the issues of informed consent and negligence performance of the kidney biopsy. This being the case, the jury was entitled to receive a correct, understandable statement of the law which they were sworn to apply.

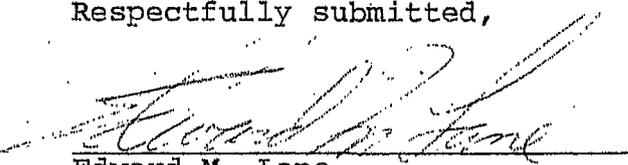
Although plaintiff's theories were before the jury on proper instructions framed by the appellate courts of this state, there were interspersed among them three instructions whose effect, if not whose purpose, was to add nothing to the charge to the jury except confusion, conflict and patent error. Despite the diligent efforts of the Court of Appeals in Miller v. Kennedy, supra, to frame the law for an error-free retrial, under the present instructions the standard of care was emasculated and diluted, informed consent was returned to the standard of the medical profession, *res ipsa loquitur* ceased to be a rule of circumstantial evidence, and "honest judgment" became a defense to legal duty and a requirement of skillful performance.

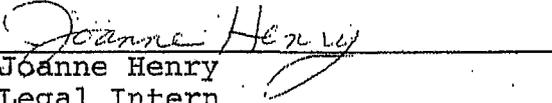
Taken at their best, the instructions may merely have confused the jury sufficiently to

render a preponderance of the evidence impossible. At anything but their best, which appears to be the natural effect, they caused the jury to apply the wrong "law" to the facts. It cannot be speculated that the jury went unaffected by receiving four different statements of the standard of care, two different measures for the burden of proof, two different explanations of the weight accorded to circumstantial evidence, and a defense not applicable to the issues submitted.

Appellant respectfully appeals to this Court to reverse the judgment upon the verdict and remand this case for a new trial under proper instructions.

Respectfully submitted,


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Attorney for Appellant


Joanne Henry
Legal Intern

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

RICHARD R. MILLER,

Appellant,

vs.

JOHN A. KENNEDY, M.D.,

Respondent.

PETITION FOR REVIEW

COURT OF APPEALS NO. 1766-1

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

RICHARD R. MILLER,

Appellant,

Vs.

JOHN A. KENNEDY, M.D.,

Respondent.

PETITION FOR REVIEW

The respondent, John A. Kennedy, M.D., hereby petitions the Supreme Court of the State of Washington to review the Opinion of Division One, Court of Appeals, No. 1766-I filed on May 20, 1974 and their Order denying respondent's petition for rehearing dated July 18, 1974.

This petition is based upon the following grounds:

- (1) The decision of the Court of Appeals is in conflict with prior decisions of the Supreme Court; and,
- (2) The decision of the Court of Appeals is in conflict with the decision of another division.
- (3) A significant issue of public interest is involved that should be decided by the Supreme Court.

The issues raised by this petition deal with the application of the doctrine of res ipsa loquitur, informed consent and the failure of counsel for the appellant to take exception to the instruction given by the trial court on informed consent.

The Court of Appeals failed to follow the holding of the Supreme Court in Zebarth v. Swedish Hospital Medical Center, 81 W2d 12, 499 P2d 1, as it relates to Res Ipsa Loquitur and informed consent, was in conflict with the holding of Division III of the Court of Appeals in Mason v. Ellsworth, 3 Wn. App. 298, as it relates to Res Ipsa Loquitur and informed consent and is in conflict with Teig v. St. Johns Hospital, 63 W2d 369, 387 P2d 369 which holds that a bad result is not evidence of negligence; and is in conflict with the holdings of the Supreme Court in the cases of Galvin v. Prosser Packers, 82 W2d 690, State v. Scott, 77 W2d 246 and State v. O'Connell, 83 W2d 797, as they relate to the duty of counsel to properly except to an instruction proposed and given by the trial court.

Our outline of the facts will be limited to those facts that are essential to the above contentions.

FACTS

The plaintiff, Miller, was a heart patient of the defendant, Kennedy, and was hospitalized for treatment of his

heart condition. As a diagnostic procedure, Dr. Kennedy took a biopsy specimen from plaintiff's kidney. This biopsy was preceded by x-rays to locate the kidney. The patient was then placed face down on a table with a sandbag under the abdomen, the location of the biopsy entry was diagramed on the back of the patient and two biopsy specimens were secured. Following the biopsy, the kidney continued to bleed, further x-rays were taken, treatment instituted and eventually the kidney had to be surgically removed.

The cause of the loss of the kidney was that one of the biopsy punctures hit an artery and a vein that were in close proximity causing an arterial shunt, where the high pressure artery pushed blood into the low pressure vein causing a fissure that would not heal. In all kidney biopsies there is some bleeding because the kidney has thousands and thousands of blood vessels.

Various medical witnesses were called, the surgeon who removed the kidney, an expert in nephrology called by defendant, a radiologist called by the defendant and the defendant himself. An expert in nephrology, Dr. Hickman, was called by the plaintiff.

There was no evidence of negligence on the part of the defendant except from Dr. Hickman whose material testimony is attached hereto on pages 4, 5, 6 and 7 of Petition For Rehearing and by reference included herein.

Dr. Hickman testified that the defendant was specifically negligent in inserting the biopsy needle too far medially and in failing to properly locate the outer margin of one kidney.

Dr. Hickman did not testify that the loss of a kidney would not occur in the absence of negligence. He did testify that loss of a kidney follows biopsy, with or without negligence in 1/10th of 1% of kidney biopsies.

Respecting informed consent, the plaintiff testified that Dr. Kennedy did not explain the risks of the biopsy, particularly the possibility that the kidney could be lost and that if he had been so informed he would not have submitted to the procedure.

Dr. Kennedy testified that he did fully explain all risks to the plaintiff. (The jury believed Dr. Kennedy).

At trial the Court refused to give a Res Ipsa Loquitur instruction, stating "I can't imagine a case that could be more fully explained" and gave an instruction on informed consent which is set forth on page 24 in the Opinion of the Court of Appeals, attached hereto.

The attorney for the plaintiff did not take any exception to the instruction on informed consent given by the trial court and did not propose an instruction which met the approval of the Court of Appeals.

Upon appeal to the Court of Appeals the Court of Appeals reversed stating that the Res Ipsa Loquitur instruction should have been given and that the informed consent instruction was improper. The Court of Appeals, in its Opinion did not mention the fact that counsel for appellant did not take exception to the trial court's informed consent instruction, although this contention was raised by respondent.

DISCUSSION

RES IPSA LOQUITUR.

The decision of the Court of Appeals is in conflict with the following Supreme Court and Court of Appeals decisions in the following respects:

(1) Zebarth v. Swedish Hospital, supra., held that where there was testimony from an expert in an esoteric field that the result ordinarily would not occur unless there was negligence on the part of the defendant, a Res Ipsa Loquitur instruction was proper.

The holding of the Court of Appeals ignores the necessity for such testimony, does not mention any testimony and merely states (P. 6) "the testimony of the medical witness testifying on behalf of the plaintiff was such that the trier of the fact could deduce from that testimony that the defendant was negligent".

We respectfully submit that this is not the test for res ipsa loquitur to apply and greatly extends the rule and is in conflict with all Supreme Court holdings in this area and in particular with Zebarth.

Mason v. Ellsworth, Division III, supra., held that res ipsa loquitur enters the case when (all other requirements being met) the result is more likely the result of negligence than for some other cause for which the defendant is not responsible.

Here, the Court of Appeals, Division I. holding, conflicts in that Division One now allows res ipsa loquitur whenever negligence may be inferred! The Court did not and can not point out evidence from which negligence is inferred in this case.

There is a substantial difference between evidence from which negligence may be inferred and evidence that the result is more likely the result of negligence. Hence, the conflict between the Divisions of the Court of Appeals.

In Teig v. St. Johns Hospital, supra., and in the opinion of the Court of Appeals in the instant case it was held that a bad result is not evidence of negligence, yet here with no testimony to permit an inference of negligence the Court obviously allowed a "bad result" to justify the inference.

The only testimony of negligence on the part of defendant was the direct specific testimony of Dr. Hickman. This negligence was argued to the jury under appropriate instructions. There was no inference of negligence by the defendant. There was direct testimony that defendant was specifically negligent.

INFORMED CONSENT

Plaintiff's attorney did not take exception to the giving of the informed consent instruction by the trial court. Nevertheless, the Court of Appeals reversed on the informed consent issue and, by avoidance, did not discuss the issue of failure to except.

In this way, by avoiding the issue, the Court of Appeals refused to follow the law as set forth in Galvin v. Prosser Packers, supra., State v. Scott, supra., and State v. O'Connell, supra. which hold that a failure to except to an instruction precludes consideration of a claim of error directed to that instruction in the Appellate Court.

This court in discussing the issue of informed consent in Zebarth, supra., stated that the duty upon the physician to inform must be proven by testimony of a standard from members of the medical profession (P. 24) ---the duty to inform does not require explanation of all possible risks, but only those of a serious nature (P. 25) so that the patient can make

an intelligent choice.

The Court of Appeals, in the instant case, goes beyond Zebarth in that the Court of Appeals does not require evidence of a standard or medical testimony of a breach.

The trial court's instruction on informed consent read as follows:

"Under the legal doctrine of 'informed consent,' a patient may recover from a physician for damages proximately caused by a procedure performed without the patient's 'informed consent,' irrespective of any negligence or lack of negligence of the physician in the procedure itself.

In order to recover on this basis in this case, plaintiff must prove by a preponderance of the evidence:

1. That he was not informed of a reasonably foreseeable risk or that he inquired of defendant as to all risks and was not informed thereof;
2. That he would not have consented to the procedure had he been so informed;
3. That he has been insured as a proximate result of the procedure."

This instruction meets all the criteria set forth by the Court of Appeals in its Opinion with the exception that it only required plaintiff to state that he would not have consented if fully informed, rather than requiring plaintiff to establish that a "reasonable man" would not have consented.

The trial court's instruction was more favorable to plaintiff than the proposed instruction set forth by the Court of Appeals.

SUBSTANTIAL PUBLIC INTEREST

Since the decision of the Court of Appeals in this case affects the relationship between all physicians and their patients, substantial public interest is involved.

Practically all people in this state, at one time or another, receive treatment from physicians.

The decisions of the appellate court seriously affect the method and manner of the practice of medicine, and, therefore, affect the entire population.

The law is presently in conflict on res ipsa loquitur and informed consent.

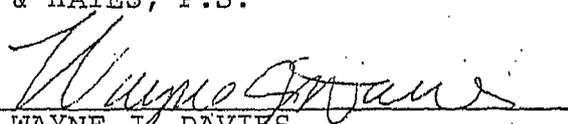
To settle these conflicts a determination by the Supreme Court is necessary. The present case affords such a vehicle.

Attached find copy of the decision of the Court of Appeals, copy of Petition For Rehearing and Order Denying Petition For Rehearing.

Respectfully submitted,

DAVIES, PEARSON, ANDERSON, GADBOW
& HAYES, P.S.

By:


WAYNE J. DAVIES
Attorneys for Respondent.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

RICHARD R. MILLER,

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JOHN A. KENNEDY, M.D.,

Respondent.

ANSWER TO PETITION FOR REVIEW

SUPREME COURT NO. 43388

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

RICHARD R. MILLER,

Appellant,

vs.

JOHN A. KENNEDY, M.D.,

Respondent.

ANSWER TO PETITION FOR REVIEW

The respondent, John A. Kennedy, M.D., through his counsel, has petitioned the Supreme Court for a review of the Opinion of Division One of the Court of Appeals filed on May 20, 1974, the latter being attached to the Petition for Review filed with this Court. The Petition of the respondent essentially asks for review on three main grounds. (1) That the decision is in conflict with prior decisions of the Supreme Court, (2) that the decision is in conflict with decisions of another division of the Court of Appeals, and (3) that a significant issue of public interest is involved. The appellant attaches hereto and incorporates herein its answering brief to the Petition for Rehearing before the Court of Appeals and

refers in addition to the appellant's brief, the reply brief and the memorandum of additional authorities, all submitted to the Court of Appeals prior to its decision of May 20, 1974. In specific response to the respondent's Petition, the appellant answers as follows:

I.

CONFLICT WITH PRIOR DECISIONS OF SUPREME COURT

In answer to the contention of the respondent that the decision of the Court of Appeals is in conflict with prior decisions of the Supreme Court, the appellant can only deny said contention. The decision of the Court of Appeals with reference to the Res Ipsa Loquitur instruction is in precise conformity with the Supreme Court's decision in Zebarth v. Swedish Hospital Medical Center, 81 Wn2d 12, 499 P2d 1. It also is in conformity with the case of Younger v. Webster, 9 WnApp 87 (June 6, 1973), which construed the Zebarth decision. The Court in applying the Zebarth case, specifically found:

"The testimony of a medical witness testifying on behalf of the plaintiff was such that the trier of the fact could deduce from the testimony that the defendant was negligent."

The Court further said:

"The currently prevailing trend of the Washington cases would instruct the jury that it could infer negligence when the plaintiff's evidence supports the deduction that the injury would not have occurred otherwise. Siegler v. Kuhlman, 81 Wn2d 448, 502 P2d 1181 (1972). They were not so instructed here."

The Court further stated that "an inference that negligence caused the injury to the patient may follow from the testimony of the plaintiff's medical witness, and Washington law entitled the plaintiff to an instruction that the jury could make that inference." It is beyond question at this point, that the Court has both properly construed the evidence and the Zebarth case in applying the rules of Res Ipsa Loquitur to the present case.

The argument that the Court of Appeals has rendered an opinion in conflict with Teig v. St. John's Hospital, 63 Wn2d 369, 387 P2d 527 (1963) is obviously in error in view of the Court's citation of that case for the proposition that a "bad result is not, of itself, evidence of negligence."

The respondent has throughout its briefs in the Court of Appeals, Petition for Rehearing and the Petition for Review consistently overlooked the fact that in Zebarth the Supreme Court held that only an inference of negligence need arise from the testimony of the medical expert to entitle the plaintiff to a Res Ipsa instruction. The

Court of Appeals, in reviewing the testimony, has clearly stated that such an inference did arise from the testimony of the plaintiff's medical expert.

With reference to informed consent the primary thrust of the respondent's argument is the contention that the respondent did not except to the instruction given by the Court. The Court of Appeals has properly reviewed the instruction on informed consent given under the cases of Greene v. Rothschild, 68 Wn2d 1, 402 P2d 356, 414 P2d 1013 (1965) and Stratton v. Department of Labor and Industries, 7 WnApp 652, 501 P2d 1072 (1972), both of which are authority for the proposition that the law of the case doctrine will not be inflexibly applied where changes or clarifications of law were made after the case was tried. In addition to that, the Court of Appeals has clearly pointed out in its opinion that the appellant did present an instruction to the Court which properly recited the law as it then stood at the time the case was tried, except for the assault and battery theory. The Court's instruction after refusal to give the appellant's proposed instruction, was accepted by the appellant, in view of the Court's determination that if that instruction were not acceptable, he would not give any instruction on informed consent. In many cases of this nature where the law is unclear and

the Court undertakes itself to draft an instruction which is met with objections by both parties and is finally accepted under these circumstances and later case law shows changes in clarifications of the law, the Court is completely within its jurisdiction under the authority of the Greene case and the Stratton case and also Helling v. Carey, 83 Wn2d 514 (1974) to grant relief. The Court will note that in the Statement of Facts the appellant strongly argued on its Motion for New Trial that the instruction given by the Court was in error and also took exception to the failure of the Court to give its own instruction on informed consent at the time of trial. These circumstances and those exceptions are sufficient for this issue to be raised before the Court of Appeals. The Court of Appeals specifically pointed out in its decision with reference to the Court's instruction, that the "instruction was misleading in emphasizing that the duty to inform existed regardless of negligence or the exercise of due care by the physician in the procedure itself without making it clear also the duty to inform of the risk inherent in the treatment existed as a matter of law". The Court also pointed out that the instruction stressed that the plaintiff was required to prove that he, the plaintiff patient, would

not have consented to the treatment had he been fully informed; "while the proper approach requires the plaintiff to prove instead that a reasonable person in the plaintiff patient's position would not have consented." The Court concluded that the instruction incorrectly stated the precepts of the law of informed consent. The appellant disagrees with the respondent's contention that the instruction was more favorable to the appellant than the instructions that the Court of Appeals would have approved. The Court, certainly, in its footnotes spelled out with more particularity that the trial court's instruction was vague in its directive to the jury regarding a doctor's duty imposed by law to inform the patient of the risk of treatment. The court said the instruction confused the issue by negating consideration of the concepts of negligence or due care in the performance of treatment, "a correct statement in the abstract, but a statement which placed the theory of informed consent before the jury in the negative, rather than in the affirmative. "The trial court's instruction was faulty also in telling the jury to consider whether the plaintiff would have consented rather than consider whether a reasonably prudent patient in the patient's position would have consented."

II.

CONFLICT WITH DECISIONS OF
ANOTHER DIVISION OF COURT OF APPEALS

The only case the respondent cites as having conflict with the decision of Miller v. Kennedy is Mason v. Ellsworth, 3 WnApp 298, 474 P2d 909 (1970). This case was decided prior to the Zebarth case and also before Younger v. Webster. The Zebarth case must put any conflict between Zebarth and Mason to rest and if, as the appellant argues, the Zebarth case is consistent with the rulings in the Miller v. Kennedy case, that matter is resolved. Therefore, with reference to the holdings of Mason regarding Res Ipsa Loquitur, the Zebarth decision of the Supreme Court rendered in 1973 is controlling.

With reference to the issue of informed consent, the Court in Mason specifically said at p. 305 as follows:

"The question of whether plaintiff was sufficiently informed by defendant, prior to the examination so that she could intelligently give her consent, is extremely complex. There is marked divergence of opinion among courts of the various jurisdictions as to what rules are applicable in an informed consent dispute. Our Supreme Court has not been called on directly for an adjudication on the issue."

It is clear now that the case of Zebarth v. Swedish Hospital, supra, has answered those questions. The case, therefore, of Miller v. Kennedy being decided after Zebarth and after Younger v. Webster, supra, cannot, under any circumstances be determined to be in conflict with Mason v. Ellsworth in view of those decisions.

III.

SUBSTANTIAL PUBLIC INTEREST

Each decision of the Court of Appeals in some way affects the public interest by making a determination as to the relationship between the parties and is used as authority for application of the same rules in future relationships between future parties. The argument of the respondent that because the decision affects the relationship between physicians and their patients is not necessarily convincing on the question as to whether the Supreme Court, by virtue of that fact, should be required to review the decision of the Court of Appeals.

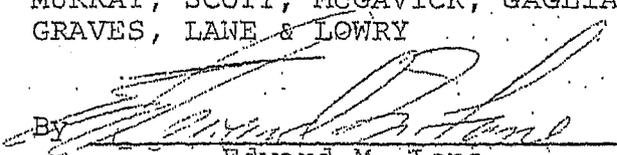
IV.

CONCLUSION

It is apparent to the appellant that none of the reasons offered by the respondent for review of the decision of the Court of Appeals exist and, therefore, the respondent's Petition for Review by the Supreme Court should be denied.

Respectfully submitted,

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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 October 4, 2013, I served the document to which this is annexed by email and First Class Mail, postage prepaid, as follows:

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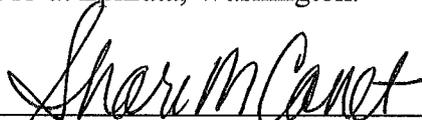
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