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Court of Appeals
Division III
State of Washington

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.

PETITION FOR REVIEW

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I. INTRODUCTION AND SUMMARY OF GROUNDS FOR REVIEW

This review involves the exercise of judgment jury instruction in medical negligence cases:

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

WPI 105.08 (brackets & italics in original); *accord* CP 3198 (Jury Instruction No. 18, adapting WPI 105.08 to this case).¹ The instruction is based on *Watson v. Hockett*, 107 Wn.2d 158, 727 P.2d 669 (1986). *See* WPI 105.08 cmt.

In *Watson*, this Court stated that the exercise in judgment instruction should be given with “caution” and limited “to situations where the doctor is confronted with a choice among competing therapeutic techniques or among medical diagnoses.” 107 Wn.2d at 165. Despite the language of the instruction requiring a selection between alternative treatments or diagnoses and the admonition of the Court in *Watson*, the Court of Appeals below expressly declined “to limit the ... instruction to circumstances where a physician ‘consciously selected between competing

¹ WPI 105.08, including the Note on Use and Official Comment, and Jury Instruction No. 18, CP 3198, are reproduced in the Appendix to this brief. In accordance with the title of the pattern jury instruction, this petition refers to the instruction as the “exercise of judgment” instruction.

alternative diagnoses or treatments.” Appendix, at A-5 (ellipses added). In so doing, the court seems to have adopted the physician’s argument that the exercise of judgment instruction is warranted in every medical negligence case on grounds that the practice of medicine inherently involves the exercise of judgment. This conflict warrants review under RAP 13.4(b)(1).

At the very least, the published Court of Appeals decision creates uncertainty for the bench and bar regarding the meaning of this Court’s limitation on the use of the exercise of judgment instruction: Is it truly limited to cases where a defendant-health care provider exercises his or her judgment by selecting between competing alternate diagnoses or treatments? Or, does it apply in nearly every medical negligence case on grounds that the practice of medicine inherently involves the exercise of judgment? This uncertainty creates an issue of substantial public interest that should be determined by this Court under RAP 13.4(b)(4).

The Court should also take this opportunity to address the continuing vitality of its decision in *Watson* and the exercise of judgment instruction. *Watson* should be overruled and the exercise of judgment instruction should be abandoned because the case is incorrectly decided and harmful. *Watson* was incorrectly decided because the Court improperly gave stare decisis effect to prior decisions involving the

exercise of judgment instruction, and, in light of the standard of care and bad result/no guarantee instructions applicable in medical negligence cases, the instruction is unnecessary to remind the jury that medicine is not always an exact science.

The harm resulting from *Watson* and the exercise of judgment instruction includes juror confusion and undue emphasis on the limits of a health care provider's liability, as noted by the Court of Appeals below. See Appendix, at A-5 to A-6 (citing *Ezell v. Hutson*, 105 Wn.App. 485, 491, 20 P.3d 975, rev. denied, 144 Wn.2d 1011 (2001), noting concerns). Particularly troublesome, the instruction 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 the factual disputes presented by the conflicting expert testimony. The jury thereby relegates the standard of care to a matter of "judgment," and can infer the absence of negligence from nothing more than the mere existence of a conflict in the standard of care testimony. The pernicious effect that *Watson* and the exercise of judgment instruction have on the trial of a medical negligence case presents another issue of substantial public interest that should be determined by this Court under RAP 13.4(b)(4).

II. IDENTITY OF PETITIONER

Dani Fergen, individually and as personal representative of the estate of her deceased husband, Paul, and their minor children Brayden and Sydney (the Fergen family) ask this Court to accept review of the Court of Appeals decision terminating review designated below.

III. COURT OF APPEALS DECISION

A copy of the published Court of Appeals decision, filed April 9, 2013, is reproduced in the Appendix to this Petition at pages A-1 to A-6.

IV. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err by declining “to limit the exercise of judgment instruction to circumstances where a physician consciously selected between competing alternative diagnoses or treatments,” Appendix, at A-5, in light of this Court’s limitation of the instruction “to situations where the doctor is confronted with a choice among competing therapeutic techniques or among medical diagnoses” in *Watson v. Hockett*, 107 Wn.2d 158, 727 P.2d 669 (1986)?
2. Did the defendant-health care provider made a choice between competing alternative diagnoses of the cancerous lump on Paul Fergen’s ankle necessary to give the exercise of judgment instruction to the jury? Or, does the record reflect that the he considered a single erroneous diagnosis of the lump as a benign cyst?
3. Should *Watson*, 107 Wn.2d at 165, be overruled as incorrectly decided and harmful with respect to the exercise of judgment instruction?

V. STATEMENT OF THE CASE

On November 17, 2004, Paul and Dani Fergen visited Dr. Robert Sestero to have a lump on Mr. Fergen's ankle examined. Ex. P-1A.² Mr. Fergen had noticed the lump during the prior week, and it caused him a small amount of discomfort. *Id.* After looking at and feeling the lump during the brief office visit, Dr. Sestero diagnosed it as a benign ganglion cyst. *Id.*

Dr. Sestero also referred Mr. Fergen for an X-ray in case the discomfort was being caused by problems in the ankle joint. Ex. P-1A. The purpose of the X-ray was not to aid in diagnosis of the lump. RP 626:5-15 & 2033:16-2034:9. The X-ray confirmed the absence of any problems in the ankle, but the radiologist who interpreted the X-ray suggested "[i]f a soft tissue cyst is felt an ultrasound might be of help." Ex. P-3.³ Dr. Sestero left a telephone message for the Fergens stating that the X-ray was "negative," but he did not inform them of the radiologist's suggestion, nor did he order an ultrasound himself. RP 457:19-21, 1212:23-1213:12 & 1834:20-1835:2.

Approximately 13 months later, Mr. Fergen suffered a seizure leading to the discovery of a form of cancer known as Ewing's sarcoma.

² Exhibit P-1A is Dr. Sestero's chart note for the office visit. A copy is reproduced in the Appendix to this brief.

³ Exhibit P-3 is the X-ray report. A copy is reproduced in the Appendix to this brief.

The cancer originated in the lump on his ankle and metastasized to his brain, lungs and lymph nodes. After an extended course of treatment involving radiation and chemotherapy, Mr. Fergen died.

If Dr. Sestero had ordered the ultrasound, it would have confirmed that the lump on Mr. Fergen's ankle was not a benign cyst, RP 335:8-339:4, 348:8-23 & 627:3-17, and his cancer would have been diagnosed in sufficient time to give him a 60-65% chance of survival, RP 490:11, 493:2-6, 1067:19-1068:8, 1196:15-23.

Dr. Sestero's chart note does not contain any indication that he entertained diagnoses of the lump on Paul Fergen's ankle other than a benign cyst. Ex. P-1A; RP 2043:4-21. He denies having any memory of his visit with the Fergens, other than what is contained in the note. RP 2050:5-6 ("Right. I stated that I don't remember anything outside of what was documented in the note"); RP 2052:14 ("It's all in the note").

In describing the exercise of his "clinical judgment" in diagnosing the lump, Dr. Sestero does not say that he considered cancer or any other competing diagnoses. RP 2042:8-18 & 2044:17-24. He did not tell the Fergens about cancer or any other competing diagnoses. RP 610:6-611:1. At one point during trial, he testified that malignancy is "a consideration anytime you see a lump," although he did not say whether he actually

considered it in connection with Mr. Fergen's lump. RP 609:9-13. Later, however, he clarified that he did nothing to rule it out:

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

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

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

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

RP 2069:10-16. Likewise, Dr. Sestero's chart note and testimony do not contain any indication that he considered performing an ultrasound or other diagnostic procedures for the lump.⁴

The Fergen family filed suit against Dr. Sestero and his employer, Spokane Internal Medicine, for the death of their husband and father, alleging negligence and breach of the standard of care in failing to order the ultrasound or take other steps necessary to ensure that the lump on Paul Fergen's ankle was, in fact, benign. CP 29-49. At trial, they submitted testimony from medical experts confirming that this was a breach of the standard of care by Dr. Sestero. *See, e.g.*, RP 410:18-414:12

⁴ There was a dispute at trial whether Dr. Sestero also referred the Fergens to an orthopedic specialist. Exhibit P-1A states, "[r]efer to either Dr. Sanwick or Dr. Padra with NW Orthopedics," although it is not clear from the text of the exhibit whether this is a statement of completed action or future intention. Dr. Sestero testified that this note meant he did, in fact, make the referral, but Mrs. Fergen denied that any referral occurred. In any event, Dr. Sestero denied that the referral was for the purpose of ruling out malignancy, RP 609:16-21, and his standard of care experts did not hinge their opinions on the existence or non-existence of a referral, RP 1315:10-11, 1428:25-1429:5

& 889:12-890:24. The Fergen family did not claim that Dr. Sestero was negligent in failing to recognize immediately that the lump on Paul Fergen's ankle was malignant, but only that he should have taken steps required by the standard of care to confirm (or disprove) his erroneous diagnosis that the lump was benign.

Dr. Sestero's witnesses disagreed regarding the standard of care and focused on the exercise of "clinical judgment" involved in the diagnosis of the lump as a benign cyst and not ordering an ultrasound or taking other steps to confirm the diagnosis. *See, e.g.*, RP 1329:22-1330:24, 1400:21-1401:12, 2042:8-18 & 2044:17-24. For example, one defense witness testified "[t]here is literally not an interaction that goes on in the office on a daily basis that doesn't involve some degree of physician judgment." RP 1330:19-21. Similarly, Dr. Sestero testified that clinical judgment "involves everything," RP 2042:10, and that it "plays everything [sic] in our coming up with a plan," RP 2044:20-21 (brackets added).

At the jury instruction conference near the conclusion of trial, the judge originally indicated that he was not going to give the exercise of judgment instruction to the jury, but he reversed himself and ultimately decided to give the instruction. RP 2099:20-2100:5. Counsel for the Fergen family objected, focusing on the fact that the instruction was not warranted under the circumstances of this case because Dr. Sestero did not

choose between competing alternative diagnoses of the lump on Paul Fergen's ankle. RP 2110:6-2111:13. Counsel also argued that the exercise of judgment instruction should be abandoned, relying on the Court of Appeals' criticism of the instruction in *Ezell, supra*. RP 2111:14-2112:14. In response to the objection, counsel for Dr. Sestero argued that his diagnosis of a benign cyst inherently involved the exercise of judgment, warranting the instruction even in the absence of a conscious weighing of alternatives such as cancer. RP 2112:23-2113:10. The trial court adopted Dr. Sestero's reasoning. RP 2113:25-2115:7.

The jury returned a defense verdict and the Fergen family timely appealed, again arguing that the exercise of judgment instruction was inapplicable under the circumstances and that the instruction should be abandoned. *See* Brief of Appellants, at 14-22 & 24 n.14; Reply Brief of Appellants, at 6-14. In response, Dr. Sestero defined diagnosis in terms of "distinguishing one disease from another." Brief of Respondents, at 34. On the basis of this definition, he reasoned that the selection of one diagnosis necessarily entails the rejection of all other possible diagnoses, and is therefore tantamount to a choice among competing alternative diagnoses. *Id.* at 39 (referring twice to the judgment involved in making any diagnosis).

The Court of Appeals affirmed, believing itself to be constrained by decisions of this Court notwithstanding concerns about the risk of confusion and undue emphasis on the limits of a health care provider's liability resulting from the exercise of judgment instruction. *See* Appendix, at A-5 to A-6 (citing *Ezell*). The Fergen family now seeks review by this Court.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Overview Of The Exercise Of Judgment Instruction.

This Court's treatment of the exercise of judgment instruction begins with *Dinner v. Thorp*, 54 Wn.2d 90, 97-98, 338 P.2d 137 (1959), where the Court reversed a defense verdict in a medical negligence case based in part on the following instruction:

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 brings 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.*

Id., 54 Wn.2d at 97-98 (emphasis in original). 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], practicing in the same or similar communities.” *Id.* at 98 (brackets added). While the Court disapproved of the italicized language, it did not address, let alone approve, the balance of the instruction. *See id.*

Next, in *Samuelson v. Freeman*, 75 Wn.2d 894, 896-97, 454 P.2d 406 (1969), the Court reversed a defense verdict in a medical negligence case because an exercise of judgment instruction⁵ combined with other instructions “overemphasize[d] the limitations upon the physician’s liability.” (Brackets added.) The Court did not address whether the exercise of judgment instruction or any of the other instructions correctly stated the law, but rather merely assumed that they were correct for purposes of its analysis. *See id.*, 75 Wn.2d at 896.

The Court then addressed the exercise of judgment instruction in successive appeals of a single case, *Miller v. Kennedy*, 11 Wn. App. 272, 522 P.2d 852 (1974), *aff’d in part per curiam*, 85 Wn.2d 151, 530 P.2d 334 (1975), *appeal after remand*, 91 Wn.2d 155, 160, 588 P.2d 734 (1978). In the first appeal, this Court issued a per curiam opinion, *see* 85 Wn.2d at 151-52, approving and adopting the reasoning of a Court of

⁵ The text of the instruction is not reproduced in the opinion, but the Court summarized it as “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.” *Samuelson*, 75 Wn.2d at 896.

Appeals opinion that reversed a defense verdict in a medical negligence case on grounds that the trial court failed to properly instruct the jury on the issues of res ipsa loquitur and informed consent, *see* 11 Wn. App. at 276-90 (concluding “[t]he plaintiff is entitled to a new trial with revised instructions given on res ipsa loquitur and informed consent”).

The Court of Appeals in *Miller* addressed other instructional and evidentiary issues, including a form of the exercise of judgment instruction. The lower court 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.

11 Wn. App. at 280.⁶ However, this Court did not approve or adopt the Court of Appeals’ reasoning as it relates to the exercise of judgment issue. The grant of review was limited to the “disposition of issues revolving about [sic] the doctrines of res ipsa loquitur and informed consent in a medical malpractice case.” 85 Wn.2d at 151 (brackets added). Accordingly, the Court’s approval and adoption of the Court of Appeals decision was limited to “the issues involved” in the grant of review. *Id.* at 152.

⁶ The Court of Appeals relied on *Dinner, supra*, as the sole Washington authority for the validity of this instruction, and did not address the circumstances under which the instruction may be given. *See Miller*, 11 Wn. App. at 280.

Following remand in *Miller*, the trial court gave the exercise of judgment instruction to the jury. In a subsequent direct appeal, the plaintiff argued it was misleading to give the instruction under the particular circumstances because “no issue of judgment appears in this case.” 91 Wn.2d at 160. 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.* The Court did not suggest that its earlier per curiam opinion had approved or adopted this portion of the lower court’s opinion, nor did it independently address the validity of the instruction. *See id.* The Court rejected the plaintiff’s argument regarding the applicability of the instruction on grounds that “[t]he exercise of professional judgment is an inherent part of the care and skill involved in the practice of medicine.” *Id.*

After the *Miller* decisions, the Court affirmed a trial court’s refusal to give the same exercise of judgment instruction at issue in *Miller* in *Watson v. Hockett*, 107 Wn.2d 158, 727 P.2d 669 (1986), finding harmless error under the circumstances. In the course of its opinion, the Court indicates that it considered the decisions in *Miller* to constitute binding precedent. *See id.*, 107 Wn.2d at 162 & nn.10-11 (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 principle is accepted in this state as *Miller* makes clear”). On this basis, the Court concluded that the exercise of judgment instruction is “proper,” although the Court criticized the inclusion of the word “honest” in the instruction as being argumentative. *See id.* at 164-65. The Court also determined that the modification of the standard of care following adoption of Ch. 7.70 RCW did not affect the exercise of judgment instruction. *See id.* at 165-67.

In a key passage of *Watson*, the Court admonished trial courts to give the exercise of judgment instruction with “caution,” stating that “its application will ordinarily be limited to situations where the doctor is confronted with a choice among competing therapeutic techniques or among medical diagnoses.” *Watson*, 107 Wn.2d at 165. This limitation appears to contrast with the Court’s previous statement in *Miller*, 91 Wn.2d at 160, 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. The limitation also appears to be in tension with the facts of *Miller*, where there was no choice among competing alternative diagnoses or treatments. *See id.* (stating “Dr. Kennedy was called upon to exercise his professional

judgment in performing the delicate surgery of a kidney biopsy”). However, the Court did not address the apparent conflict between *Watson* and *Miller*.

Finally, 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, citing *Watson* as controlling. The Court also determined, in light of *Watson*, that the instruction does not constitute an impermissible comment on the evidence. *See id.* at 249.

With the foregoing understanding of this Court’s treatment of the exercise of judgment instruction, it is now possible to address the grounds for review.

B. The Court Of Appeals Decision Below Conflicts With *Watson*’s Limitation Of The Exercise Of Judgment Instruction “To Situations Where The Doctor Is Confronted With A Choice Among Competing Therapeutic Techniques Or Among Medical Diagnoses,” Justifying Review Under RAP 13.4(b)(1).

Review is warranted when a decision of the Court of Appeals is in conflict with a decision of this Court. RAP 13.4(b)(1). Although the Court of Appeals below acknowledged *Watson*’s limitation of the exercise of judgment instruction to cases where “the evidence shows the physician was ‘confronted with a choice among competing therapeutic techniques or

among medical diagnoses,” Appendix, at A-4 (quoting *Watson*), this is impossible to reconcile with the court’s subsequent refusal “to limit the exercise of judgment instruction to circumstances where a physician ‘consciously selected between competing alternative diagnoses or treatments,’” *id.* at A-5 (quoting Brief of Appellants). The statements cannot be harmonized on the basis that *Watson* permits the instruction to be given based upon hypothetical alternative diagnoses or treatments, because, in the absence of a conscious choice between competing alternatives, the health care provider does not exercise any judgment in selecting one rather than the other(s). The limitation would thereby become meaningless. In the context of a medical negligence case based upon an erroneous diagnosis, the requisite “choice ... among medical diagnoses” means that the defendant-health care provider consciously rules in or rules out more than one diagnosis. *See, e.g., Thomas v. Wilfac, Inc.*, 65 Wn. App. 255, 258-59 & 263-64, 828 P.2d 597, *rev. denied*, 119 Wn.2d 1020 (1992) (following *Watson* and affirming decision to give exercise of judgment instruction to the jury under circumstances where the diagnosing physician specifically “ruled out” alternative diagnosis).⁷

⁷ The remaining published decisions involve a choice among competing alternative treatments, rather than diagnoses, but they still seem to require a *choice* among the alternatives. *See Christensen*, 123 Wn.2d at 249 (noting “evidence that he [the defendant-health care provider] had a choice of therapeutic techniques”); *Housel v. James*, 141 Wn. App. 748, 760, 172 P.3d 712 (2007) (stating “the record discloses that Dr. James was

C. The Court Of Appeals Decision Below Creates Uncertainty Regarding The Meaning of *Watson's* Limitation Of the Exercise Of Judgment Instruction, And Whether the Instruction Is Warranted In Nearly Every Medical Negligence Case On Grounds That The Practice Of Medicine Inherently Involves The Exercise Of Judgment, Justifying Review Under RAP 13.4(b)(4).

Review is also warranted when a Court of Appeals decision involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(4). In this case, the Court of Appeals' refusal "to limit the exercise of judgment instruction to circumstances where a physician 'consciously selected between competing alternative diagnoses or treatments,'" Appendix, at A-5, creates uncertainty for the bench and bar regarding the meaning of *Watson's* limitation on the error of judgment instruction.

The uncertainty is compounded by the fact that *Watson* relied on *Miller* as controlling authority, and never disapproved of the statement seeming to justify the exercise of judgment instruction in every case on grounds that "[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. Moreover, *Watson* never addressed the facts of *Miller*, where the

presented with at least three treatment choices"); *Ezell*, 105 Wn. App. at 487 (involving choice between two antibiotics); *Gerard v. Sacred Heart Med. Ctr.*, 86 Wn. App. 387, 389, 937 P.2d 1104, *rev. denied*, 133 Wn.2d 1017 (1997) (involving choice between using or not using restraints on patient); *Vasquez v. Markin*, 46 Wn. App. 480, 489, 731 P.2d 510 (1986), *rev. denied*, 108 Wn.2d 1021 (1987) (involving choice between interrupting one surgery to perform another or asking another physician to perform the other surgery).

Court affirmed giving the exercise of judgment instruction despite the lack of an apparent choice among alternative treatments or diagnoses. *See id.*

The uncertainty engendered by the Court of Appeals decision allows health care providers such as Dr. Sestero to equate the judgments involved in arriving at a singular diagnosis with a choice among competing diagnoses. *See, e.g.*, RP 2042:8-18 & 2044:17-24 (stating clinical judgment “involves everything”). It also permits them to argue tautologically that a singular diagnosis implies a rejection of all other possible diagnoses, regardless of whether they actually rule out any competing alternative diagnoses. *See, e.g.*, Brief of Respondents, at 34 & 39.

This is an issue of substantial public interest because it will potentially affect all medical negligence cases, and it should be determined by this Court because only this Court can clarify what *Watson*’s limitation on the exercise of judgment instruction means.

D. The Continuing Vitality Of *Watson* And The Exercise Of Judgment Instruction Presents An Issue Of Substantial Public Interest That Should Be Decided By This Court Under RAP 13.4(b)(4).

Watson should be overruled, and the exercise of judgment should be abandoned, because the case was incorrectly decided and has harmful effects. *See Hardee v. DSHS*, 172 Wn.2d 1, 15, 256 P.3d 339 (2011)

(stating incorrect-and-harmful test for overruling precedent). Before the *Miller* decisions, this Court did not approve the exercise of judgment instruction. In *Dinner*, 54 Wn.2d at 97-98, the Court merely disapproved a portion of an exercise of judgment instruction without addressing the balance of the instruction, and in *Samuelson*, 75 Wn.2d at 896-97, the Court merely assumed for the sake of argument that an exercise of judgment instruction was correct.

The Court did not approve the exercise of judgment instruction in the *Miller* decisions, either. In the first per curiam *Miller* opinion, which adopted and approved part of a lower court decision, the Court did not approve the part of the lower court decision dealing with the error of judgment instruction. See 85 Wn.2d at 151-52. In the second *Miller* opinion, the Court applied the lower court's decision regarding the error of judgment instruction as a matter of law of the case. See 91 Wn.2d at 160. Thus, *Watson* was incorrectly decided to the extent that it relied on the *Miller* decisions as binding precedent. See *Watson*, 107 Wn.2d at 162 & nn.10-11, 164 & 165.

Moreover, *Watson*'s approval of the error of judgment instruction is incorrect and harmful because it is unnecessary in light of the standard of care and bad result/no guarantee instructions available in medical negligence cases, and because it risks confusing the jury and unduly

emphasizing the limits on a health care provider's liability. *See Ezell*, 105 Wn. App. at 491 (stating concerns); Appendix, at A-5 to A-6 (citing *Ezell*). This case represents the second time that the Court of Appeals has invited this Court to review these deficiencies in the error of judgment instruction. *See Ezell*, at 491 (including discussion of concerns "[i]f the Supreme Court chooses to revisit the line of cases that bind us"); Appendix, at A-5 ("deferring to our Supreme Court the task of redefining when the instruction should apply, if at all"). It presents a substantial issue of public concern that should be finally decided by this Court.

VII. 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 9th day of May, 2013.

MARKAM GROUP, INC., P.S.

AHREND ALBRECHT PLLC



for By: Mark D. Kamitomo
WSBA #18803

By: George M. Ahrend
WSBA #25160

Attorneys for Plaintiffs-Petitioners

CERTIFICATE OF SERVICE

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

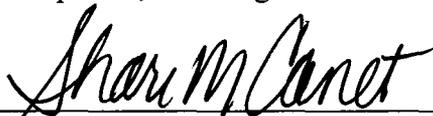
On May 9, 2013, I served the document to which this is annexed as follows:

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Signed on May 9, 2013 at Ephrata, Washington.



Shari M. Canet, Paralegal

APPENDIX

FACTS

In November 2004, Paul Fergen found a lump on his right ankle causing him minor discomfort. He consulted Dr. Sestero regarding the lump the next week. In his chart notes, Dr. Sestero described the lump as a “slight nodule” that was “smooth, soft, and nontender” but presented “no other erythema, swelling, or other abnormalities.” Ex. 1A. Dr. Sestero tentatively diagnosed the lump as a benign ganglion cyst, ordered an x-ray of the ankle to ensure no structural defects, referred Mr. Fergen to an orthopedic specialist, and instructed him to follow-up as necessary. The radiologist noted “some soft tissue swelling” and stated, “If a soft tissue cyst is felt an ultrasound might be of help.” Ex. 3. Dr. Sestero told Mr. Fergen the x-ray results were “negative” and encouraged him to seek medical attention if the lump grew bigger or became painful. Report of Proceedings at 1212-13, 1834-35. Mr. Fergen had a seizure 13 months later. Pathologists eventually diagnosed him with Ewing’s sarcoma, a rare and aggressive cancer that originated in the lump on his ankle and metastasized to his lungs, brain, and lymph nodes. Mr. Fergen died in January 2007.

Ms. Fergen sued Dr. Sestero for medical negligence on behalf of Mr. Fergen’s estate and the couple’s minor children. At trial, Dr. Sestero testified he considered malignancy in deciding Mr. Fergen’s lump was most likely a benign ganglion cyst. His expert witnesses testified he faced a choice between at least two differential medical diagnoses, one very likely and one very unlikely, and he acted within the standard of

care in choosing a tentative diagnosis. The trial court instructed the jury, based on WPI 105.08² and over Ms. Fergen's objection, regarding a physician's exercise of judgment:

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

Clerk's Papers at 3198. The jury returned a defense verdict. Ms. Fergen appealed.

ANALYSIS

The issue is whether the trial court erred by instructing the jury on a physician's exercise of judgment. Ms. Fergen contends the instruction lacks substantial evidence because the record shows Dr. Sestero considered solely whether Mr. Fergen's lump was a benign ganglion cyst. She characterizes this as a singular medical diagnosis, as opposed to a conscious choice between differential medical diagnoses. Additionally, Ms. Fergen contends the instruction prejudiced her by injecting collateral issues and evidentiary comments, causing jury confusion and speculation.

We review a decision on whether to give an exercise of judgment instruction for abuse of discretion.³ *Seattle W. Indus., Inc. v. David A. Mowat Co.*, 110 Wn.2d 1, 9,

² WPI 105.08, *supra* note 1, at 612.

³ Ms. Fergen incorrectly contends our review is de novo. We review alleged legal errors in jury instructions de novo. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012). While she argues the exercise of judgment instruction lacks substantial evidence, she does not argue a legal error. *See Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995) (a jury instruction contains a legal error if it does not allow a party to argue his or her theory of the case, misleads the jury, or, when considered with other jury instructions as a whole, improperly informs the jury of the applicable law). Therefore, the abuse of discretion review standard applies. *See Seattle W. Indus., Inc. v. David A. Mowat Co.*, 110 Wn.2d 1, 9, 750 P.2d 245 (1988); *Thomas v. Wilfac, Inc.*, 65 Wn. App. 255, 264, 828 P.2d 597 (1992).

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750 P.2d 245 (1988); *Thomas v. Wilfac, Inc.*, 65 Wn. App. 255, 264, 828 P.2d 597 (1992). If a party's case theory lacks substantial evidence, a trial court must not instruct the jury on it. *Albin v. Nat'l Bank of Commerce of Seattle*, 60 Wn.2d 745, 754, 375 P.2d 487 (1962); *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). The converse is true as well. *Kelsey v. Pollock*, 59 Wn.2d 796, 798-99, 370 P.2d 598 (1962); *Cooper's Mobile Homes, Inc. v. Simmons*, 94 Wn.2d 321, 327, 617 P.2d 415 (1980). In this context, evidence supporting a party's case theory "must rise above speculation and conjecture" to be substantial. *Bd. of Regents of Univ. of Wash. v. Frederick & Nelson*, 90 Wn.2d 82, 86, 579 P.2d 346 (1978). In other contexts, evidence is substantial if a "sufficient quantum [exists] to persuade a fair-minded person of the truth of the declared premise." *Holland v. Boeing Co.*, 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978).

In a medical negligence case, a trial court may, "with caution," instruct the jury on a physician's exercise of judgment if the evidence shows the physician was "confronted with a choice among competing therapeutic techniques or among medical diagnoses" and, "in arriving at a judgment, the physician . . . exercised reasonable care and skill, within the standard of care he or she was obliged to follow." *Watson v. Hockett*, 107 Wn.2d 158, 165, 727 P.2d 669 (1986) (internal quotation marks and alteration omitted);

"A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997) ("A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.").

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see also 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 105.08 note on use at 612 (6th ed. 2012).

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

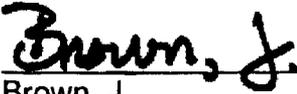
Ms. Fergen invites us to limit the exercise of judgment instruction to circumstances where a physician "consciously selected between competing alternative diagnoses or treatments." Br. of Appellants at 18. Ms. Fergen alternatively invites us to abandon the instruction "as incorrect and harmful." Br. of Appellants at 24 n.14. Honoring stare decisis principles, we decline Ms. Fergen's invitations, deferring to our Supreme Court the task of redefining when the instruction should apply, if at all. See *Ezell v. Hutson*, 105 Wn. App. 485, 491, 20 P.3d 975 (this division adhering to binding

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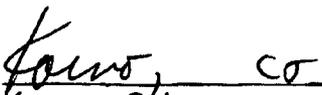
Supreme Court precedent on the former error of judgment instruction despite concerns),
review denied, 144 Wn.2d 1011 (2001).

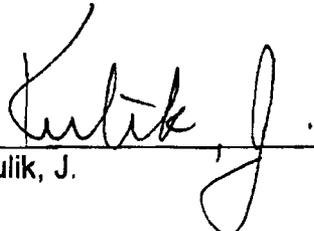
In sum, we hold the trial court did not err by instructing the jury on a physician's
exercise of judgment. Considering our analysis, we do not reach Ms. Fergen's
prejudice contentions.

Affirmed.


Brown, J.

WE CONCUR:


Korsmo, C.J.


Kulik, J.

WPI 105.08 Exercise of Judgment

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

NOTE ON USE

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

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

COMMENT

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

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

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

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

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

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

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

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

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

[Current as of June 2009.]

INSTRUCTION NO. 18

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

Patient Chart

Fergen, Paul

202382

Sex: M

Age: 30

Date Printed: 01/09/06

DOB: 02/24/1975

Progress Notes

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

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

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

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

John D. Sestero, M.D.

JDS:bh

d: 11/17/04

000012

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1A

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

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

INLAND IMAGING VALLEY CENTER - Diagnostic Radiography

RIGHT ANKLE

CLINICAL INFORMATION

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

FINDINGS

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

CONCLUSION

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

D: 11/17/04

T: 1410

2792624

MRN: 00-13-10-44

EXAM#: 3635932

DOB: Feb-24-1975

AGE: 29 Years

dictated by:

MURPHY, JOHN MD

transcribed on:

Nov-17-2004

released by:

MURPHY, JOHN MD

interpreted and

authenticated by:

MURPHY, JOHN MD

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