

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT  
APPLICATION FOR DIRECT APPELLATE REVIEW  
DOCKET NO. (TO BE ASSIGNED)

APPEALS COURT  
DOCKET NO. 2021-P-0435

ON APPEAL FROM SUFFOLK SUPERIOR COURT  
DOCKET NO. 1684CV2426

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FREDERICK GRAHAM  
Plaintiff-Appellant

v.

RICHARD A. GOLDMAN, M.D. et al

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**PLAINTIFF-APPELLANT'S APPLICATION FOR  
DIRECT APPELLATE REVIEW**

The plaintiff-appellant Frederick Graham (hereafter "Graham") hereby requests direct appellate review of his appeal from a judgment entered in Suffolk Superior Court in an action for medical malpractice. This case presents novel questions of law which should be submitted for final determination to the Supreme Judicial Court,<sup>1</sup> and includes questions of such public interest that justice requires review by this Court.

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<sup>1</sup> This Application for Direct Appellate Review is filed simultaneously with *Paiva v. Kaplan*, FAR-28310, which presents substantially similar issues for review by this Court. The coincidence that these petitions are being filed at the same time underscores the compelling importance of the issues raised therein to the Superior Court bench and the trial bar as a whole.

## PRIOR PROCEEDINGS IN THE CASE

Graham filed a complaint alleging medical malpractice against Richard A. Goldman, M.D. (hereafter "Goldman"), a cardiologist, Ivan Lesyuk, D.O. (hereafter "Lesyuk"), an anesthesiologist, and Lawrence Anesthesia Services, LLC. The action was filed in Suffolk Superior Court as docket no. 1684CV02426. Graham alleged one count of negligence each against Goldman and Lesyuk, and one count of failure to obtain informed consent against Goldman only. The jury trial of the above referenced matter took place on various dates between October 10, 2019, and November 8, 2019.

After the trial judge's charge to the jury, and after several days of deliberations, the jury returned a verdict in Graham's favor against Goldman for failure to obtain Graham's informed consent, assessing substantial damages. The jury determined that Lesyuk was not liable on the negligence count.<sup>2</sup>

Graham filed a timely Notice of Appeal. He received Notice of Assembly of the Record from Suffolk Superior Court on May 7, 2021. Graham docketed his appeal on May 17, 2021.

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<sup>2</sup> The jury failed to reach a verdict on the negligence count against Goldman; however, the jury entered a verdict of \$33.28 million against Goldman due to lack of informed consent. This verdict was subject to a confidential high-low agreement which was set forth in detail on the record prior to the jury's verdict being returned. Goldman is not involved in this appeal. A copy of the docket entries and relevant written decisions, memoranda, findings, and rulings are attached hereto as **Exhibit A**.

### **STATEMENT OF FACTS RELEVANT TO THE APPEAL**

Lesyuk provided anesthesia care to Graham on November 6, 2013, during a cardiac procedure performed by Goldman at Lawrence General Hospital. Goldman attempted to conduct a transesophageal echocardiogram (TEE) to be followed by a cardioversion.

At 7:30 a.m., Goldman put in an order for an anesthesia consult for the procedure to take place that day. Lesyuk arrived at the procedure room at around 12:25 p.m., minutes before the start of the procedure. The anesthesia plan consisted of monitored anesthesia care. It did not include use of capnography, which measures the patient's exhalations and is an indicator that the patient is not sufficiently oxygenated.

At approximately 12:30 p.m., Lesyuk initiated anesthesia as the TEE procedure began. During the TEE procedure, Graham's respirations slowed. He became apneic (stopped breathing) and hypoxic (low blood oxygen), requiring Goldman to end the TEE exam. Lesyuk attempted to ventilate Graham with a bag valve mask for several minutes to restore his oxygen levels; however, Graham became profoundly bradycardic. He went into cardiorespiratory arrest. Atropine was administered with no response. This was followed by epinephrine as well as cardiopulmonary

resuscitation with chest compressions. Lesyuk then attempted to open Graham's airway and facilitate mask ventilation. This was not successful. The emergency cart for performing endotracheal intubation and ACLS tasks was not located in the procedure room. Dr. Fontes, Graham's expert anesthesiologist, testified that the emergency airway equipment was too distant from the patient during the procedure.<sup>3</sup> Retrieving this equipment delayed intubation. Once Graham was finally intubated, his oxygen level was restored. The lengthy delay in intubating Graham caused him to sustain a severe hypoxic brain injury.<sup>4</sup>

At trial, Lesyuk acknowledged that he was aware that Graham had symptoms of congestive heart failure and was morbidly obese. Lesyuk testified that Graham had severe systemic disease, described in the American Society of Anesthesiologists (hereafter "ASA") Physical Status Classification System, admitted as Trial Exhibit 22, as a Level 3 risk for complications.<sup>5</sup> The higher the ASA risk level, the greater the risk for complications during anesthesia. Dr. Haverkamp, an expert called by Lesyuk, confirmed that Graham was at a high risk for airway

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<sup>3</sup> See Trial Transcript, October 18, 2019, at 165-168.

<sup>4</sup> See testimony of Dr. Feldmann, Graham's expert neurologist, at Trial Transcript, October 17, 2019, at 24, 38, and 40.

<sup>5</sup> Level 5 being the most serious risk level.

obstruction, and could undergo a decrease in his oxygen saturation level sooner than a healthy person. Capnography would have indicated when Graham stopped breathing before he suffered a precipitous decrease in his blood oxygen saturation level. Furthermore, capnography would have alerted Lesyuk sooner than his admitted mere visual observation of Graham's breathing.

Graham stopped breathing during the procedure, and suffered hypoxia, heart failure, and brain damage as a result.

**ISSUES OF LAW RAISED BY GRAHAM'S APPEAL, AND  
STATEMENT THAT ISSUES WERE RAISED AND PRESERVED AT TRIAL**

- A. The trial judge erroneously included "range of judgment and "mere errors of judgment" language in the jury instructions.**

The trial judge erroneously instructed the jury in pertinent part as follows:

***Doctors are allowed a range in the reasonable exercise of professional judgment and will not be liable for mere errors in judgment, so long as that judgment does not represent a departure from the requirements of accepted medical malpractice resulting in a failure to do something that accepted medical practice requires, or in doing something that should not be done under the accepted standards.***

***In other words, a doctor is liable for errors of judgment only if those errors represent a departure from the applicable standard of care. [emphasis added]***

Trial Transcript November 1, 2019, at 133.

Graham's attorney objected to this instruction both before and after the jury charge. Following the instructions, the jury returned a verdict stating that Lesyuk was not liable for Graham's catastrophic injuries.

## ARGUMENT

### I. Jury instructions must be reviewed by an objective standard.

"It is the duty of the judge presiding over a jury trial to give full, fair, correct and **clear** instructions as to the principles of law governing all the essential issues presented, so that the jury may understand their duty and be enabled to perform it diligently [emphasis added]." *Fein v. Kahan*, 36 Mass. App. Ct. 967, 967-68 (1994).

Jury instructions are reviewed by an objective standard on appeal. When reviewing objections to instructions, appellate courts "examine the charge in its entirety with a view to what a 'reasonable jury could have interpreted the charge' to mean." *Commonwealth v. Sleeper*, 435 Mass. 581, 596 (2002), citing *Commonwealth v. Nieves*, 394 Mass. 355 (1985). Courts consider the instructions' 'probable impact, appraised realistically ... upon the jury's fact-finding function.'" *Id.* at 360.

Appellate courts "review objections to jury instructions to determine if there was any error, and, if so, whether the error affected the substantial rights of the objecting party." *Hopkins v. Medeiros*, 48 Mass. App. Ct. 600, 611 (2000). The appellant must make a "**plausible** showing that the trier of fact **might** have reached a different result [emphasis added]" absent any erroneous



instruction. *Campbell v. Cape & Islands Healthcare Servs., Inc.*, 81 Mass. App. Ct. 252, 258 (2012) (citation omitted) (hereafter *Campbell*).

**II. The trial judge erred in giving instructions regarding Lesyuk's "range of judgment" and "mere errors of judgment."**

**A. "Error of judgment" instructions are not consistent with Massachusetts law or the majority of jurisdictions in the United States.**

The negligence of a medical professional consists of a failure, either by omission or by action, to exercise the degree of care and skill of the average qualified practitioner practicing that specialty. *Brune v. Belinkoff*, 354 Mass. 102, 109 (1968). The standard established in *Brune* more than fifty years ago is an objective one that does not involve a physician's mental state. *Brune*, the seminal case in defining liability for medical negligence, contains no "best judgment" language.

Graham contends that the trial judge's "errors in judgment" instructions were confusing to the jury, and contrary to Massachusetts law and that of most state courts. This erroneous instruction led the jury to find for Lesyuk on his negligence claim.

In *Shine v. Vega*, 429 Mass. 456 (1999), this Court reversed a defense verdict in a medical malpractice case based in part on the following jury instruction:



[A] doctor, a hospital and its employees are permitted a wide range in the exercise of their professional judgment concerning the treatment to be given a patient as long as the exercise of that professional judgment is in accordance with the duty of care....

*Id.* at 462 n. 12.<sup>6</sup> The Court specifically concluded that this instruction was erroneous, and that the error was prejudicial. The Court vacated the judgment and remanded the case to Superior Court for a new trial.

This holding is consistent with other state court decisions. See, e.g., *Francoeur v. Piper*, 776 A.2d 1270, 1274 (N.H. 2001) ("error in judgment" instruction confuses and misleads jury by "improperly introduc[ing] subjective element regarding standard of care").

The confusion caused by such judgment-based instructions is further articulated in cases that, as the trial judge did in this case, use the expression "mere errors of judgment":

[B]y using the word 'mere,' the instruction implies that some errors, which fall below the standard of care, are not serious enough to be actionable. This could lead the jury to conclude incorrectly that a defendant is not liable for malpractice even if he is negligent.

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<sup>6</sup> As one commentator states: "This language is misleading. It is frequently passed off as an alternative standard of care. This is error. A physician's best judgment may be substandard and not good enough. He may be in doubt because of a lack of skill and learning which he is required to possess. In these cases, he is not exculpated by using his best judgment." Joseph R. Nolan, *Tort Law*, 37 Mass. Prac. Series § 15.3 at 472 (2005).

*Francoeur, supra* at 1275. See also *Riggins v. Mauriello*, 603 A.2d 827, 830-31 (Del. 1992) ("mere error of judgment" instruction permits jury to conclude incorrectly that physician may not be liable even if negligent).

"[E]ven if accompanied by the 'reasonably prudent doctor' language ..., [the instruction] creates a risk that a jury will find that, because a physician exercised his or her best judgment, there can be no liability despite a failure to adhere to generally accepted standards of care." *Anderson v. House of Good Samaritan Hosp.*, 840 N.Y.S.2d 508, 512 (N.Y. App. Div. 2007).

The Appeals Court recently decided *Paiva*, 99 Mass. App. Ct. 645, 2021 WL 2175860 (2021) (hereafter *Paiva*), which also involved a medical malpractice claim. The trial judge in *Paiva* gave virtually the identical jury charge that Graham claims was erroneous at his trial:

**Doctors are allowed a range in the reasonable exercise of professional judgment, and they are not liable for mere errors of judgment,** so long as that judgment does not represent a departure from the standard of care, resulting in a failure to do something that the standard of care requires, or in doing something that should not be done under the standard of care. In other words, a doctor is liable for errors of judgment only if those errors represent a departure from the standard of care.

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Evidence that a doctor who testified in this case or any other doctor might or would have undertaken a different course of treatment is not

enough in itself evidence that the defendant's treatment was negligent because **doctors are entitled to a range of medical judgment that falls within the standard of care.**

*Paiva* trial transcript 92-98 (emphasis added); *Paiva* at \*6.

The Appeals Court determined that the instruction was acceptable because "mere errors of judgment" was followed by the caveat "so long as that judgment does not represent a departure from the standard of care." The Court stated, however, that "that does not mean that we necessarily approve of the precise manner in which the instruction was formulated here." *Id.*, at \*5.

The Appeals Court reviewed several cases around the country criticizing the use of "mere error in judgment" as inherently misleading. In doing so, the Court cited with approval the *Francoeur* and *Riggins* cases cited *supra*.

The Appeals Court also noted that "an instruction that physicians are allowed a 'range in the reasonable exercise of professional judgment' may be one that is appropriate **only** in cases where the trial evidence in fact shows a range of acceptable treatment options within the standard of care [emphasis added]." *Paiva* at \*6.<sup>7</sup>

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<sup>7</sup> The Appeals Court claimed that the *Paiva* plaintiffs did not preserve specific objections to the trial judge's instructions. The *Paiva* plaintiffs will address this and other errors if this matter is heard by the Supreme Judicial Court.

Graham's attorney objected in writing to the use of these terms in the trial judge's draft instructions, again on the record during the pre-charge conference, and yet again at a sidebar conference immediately following the judge's instructions to the jury. Accordingly, as Graham did preserve his objection to the charge, it is ripe for appellate review.

Paiva is petitioning this Court for further appellate review regarding the same jury instructions that Graham disputes in his case. See FAR-28310. The parties plan to file simultaneously.

**B. The Massachusetts Superior Court Civil Practice Jury Instructions do not mention "mere" errors of judgment and limit the use of the phrase "range of medical judgment."**

Recently, the Chief Justice of the Superior Court directed a committee of Superior Court judges to draft model jury instructions "designed to be legally accurate and easy for jurors to understand and for judges and practitioners to use."<sup>8</sup> The committee's Guidelines For Drafting Model Jury Instructions (hereafter "Guidelines") state:

Jury instructions need to be both accurate and understandable. ... We must ... ensure that jurors can make sense of our instructions. Otherwise they will be flying blind. Even though appellate courts will

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<sup>8</sup> See generally: <https://www.mass.gov/guides/superior-court-model-jury-instructions>.

presume that jurors understand instructions they are given, we serve justice better if we provide instructions that jurors of all backgrounds can actually absorb and follow.

*Id.* at 2.

In Graham's case, the safety guidelines of the ASA, admitted in evidence and supported by expert testimony, prescribed only one acceptable treatment option under the circumstances in this case: the use of capnography to monitor the patient's carbon dioxide level.

The trial judge's instructions in this case regarding a doctor's judgment are inconsistent with both the concept and language of the Superior Court Civil Practice Jury Instructions, which state in pertinent part:

Doctors are expected to use their judgment as long as that judgment does not fall below the standard of care.

Sometimes more than one course of action or conclusion may be consistent with the required standard of care. If so then a doctor [provider] may exercise his or her best judgment as to the appropriate steps to take, and doing so is not negligence. However, a doctor is negligent and may be held liable for an error of judgment if that judgment represents a departure from the standard of care.

These instructions are clearer and more concise than those used in *Paiva* and in the present case.<sup>9</sup> Because

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<sup>9</sup> This formulation is consistent with *Riggs v. Christie*, 342 Mass. 402, 406 (1961), cited favorably in *Paiva*, that physicians "will in cases of doubt use [their] best judgment as to the treatment to be given in order to produce a good result [emphasis added]." Cf. *Barrette v. Hight*, 353 Mass. 268, 275 n. 7 (1967).

capnography was the standard of care, there was no judgment for Lesyuk to make. This was not a situation where "more than one course of action or conclusion may be consistent with the required standard of care." The one proper course of action under the circumstances was to use capnography; therefore, whether Lesyuk exercised proper judgment was not a question for the jury. The second paragraph of the model instructions, which limit the use of the phrase "range of judgment," was thus irrelevant in this particular case.

**III. Graham has made a plausible showing that the jury might have reached a different result had the proper instructions been given.**

The trial judge's jury instructions were unclear, overly long, and confusing. He injected a subjective standard into what should have been an objective analysis of Lesyuk's performance. His instructions failed to "capture the essence of the applicable law." *Teixeira v. Town of Coventry*, 882 F.3d 13, 16 (1st Cir. 2018).

Without being fully informed about the standard of care, the jury could not perform their duty intelligently. Appropriate instructions would have, more likely than not, affected the jury's verdict on the negligence count against Lesyuk.



IV. The trial judge erroneously refused to give an instruction to the effect that violation of a safety standard is evidence of negligence. In the context of his instructions on a physician's wide range of judgment, the erroneous absence of such an instruction was particularly harmful.

The ASA safety standards in evidence and the testimony of experts at trial outlined the standard of care for the procedure Lesyuk performed on Graham. The trial judge refused to give the requested instruction, ostensibly because there was no testimony that the safety standards had been violated. The trial judge was incorrect as a matter of law.

It is well settled that a violation of a safety standard is evidence of negligence. *Perry v. Medeiros*, 369 Mass. 836, 841 (1976). "Safety rules, governmental regulations, and industry standards may be offered by either party in civil cases as evidence of the appropriate care under the circumstances." *Doull v. Foster*, 487 Mass. 1, 21 (2021), quoting Mass. G. Evid. § 414 (2020).

The trial judge also disregarded evidence at trial. Dr. Fontes testified that the ASA sets the standards for patient safety in this area of medicine. Dr. Fontes further stated that it was a breach of the standard of care not to use capnography to monitor Graham's carbon dioxide levels during the procedure. Trial Transcript,

October 18, 2019 at 134-135, 137. As noted above, Dr. Haverkamp confirmed that Graham was at a high risk for airway obstruction, and could undergo a decrease in his oxygen saturation level sooner than a healthy patient. Trial Transcript, October 28, 2019, at 78-80.

The trial judge's refusal to instruct was particularly prejudicial in the context of the erroneous "judgment" charge. In the absence of an instruction that the ASA Standards are evidence of negligence, the jury had no clear guidance regarding the standard of care. This compounded the trial judge's confusing instruction on the judgment rule and thus the jury was not given "full, fair, correct and **clear** instructions as to the principles of law governing all the essential issues presented," as required by *Fein, supra*, and related appellate decisions cited herein.

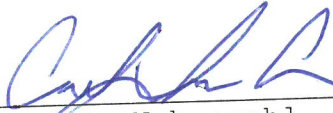
STATEMENT OF REASONS WHY  
DIRECT APPELLATE REVIEW IS APPROPRIATE

1. Direct appellate review is necessary to guide all trial judges and the trial bar of the Commonwealth in preparing the proper format for jury instructions in medical malpractice cases.
2. Direct appellate review is necessary to encourage trial judges to give instructions in such cases that are clear, concise, and consistent with the Massachusetts Superior Court Civil Practice Jury Instructions regarding a doctor's use of judgment in a medical malpractice action.
3. Direct appellate review is necessary to adopt the standards regarding the use of terms such as "mere errors" and "range of judgment" that were stated in *Paiva* only as dicta. Direct appellate review was denied in *Paiva*, but the subsequent Appeals Court decision, rather than eliminating confusion in this area, raised more questions than it answered.
4. Direct appellate review is necessary because this case presents questions of such public interest that justice requires a final determination by this Court.

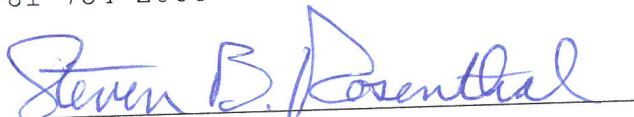
### CONCLUSION

For the foregoing reasons, the plaintiff-appellant Frederick Graham requests that this Court grant his application for direct appellate review.

By his attorneys,



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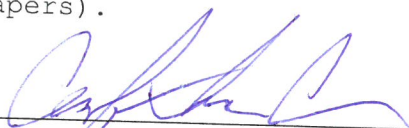
MASS. R.A.P. 16(k) CERTIFICATE OF COMPLIANCE

I, Carly J. LaCrosse, Esq., attorney for the plaintiff-appellant Frederick Graham, hereby certify that the foregoing Application for Direct Appellate Review complies with the rules of court that pertain to the filing of such briefs, including but not limited to:

Mass. R.A.P. 16(e) (references to the record);

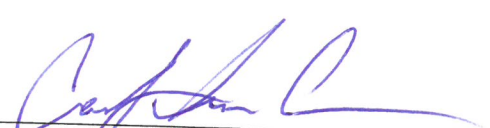
Mass. R.A.P. 16(h) (length of briefs);

Mass. R.A.P. 20 (form of briefs, appendices, and other papers).

  
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CERTIFICATE OF SERVICE

I, Carly J. LaCrosse, attorney for the plaintiff-appellant in the above referenced matter, hereby certify that on July 15, 2021, I served the foregoing pleading on all parties via efilings to all appellate counsel of record.

  
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Carly J. LaCrosse