

5.50G MEDICAL JUDGMENT¹ (06/2014)

¹ If a case does not involve a legitimate judgment call or two schools of thought, then the trial judge should omit this portion of the charge. In *Velazquez v. Portadin*, 163 N.J. 677 (2000), the Supreme Court instructed that the judgment charge should be "limited to cases in which the physician exercised judgment in selecting among acceptable courses of action." *Id.* at 687. The *Velazquez* Court requires that "Court and counsel should analyze the parties' testimony and theories in detail, on the record, to determine whether the charge is applicable at all and, if so, to which specific issues. The charge should then be tailored accordingly." *Id.* at 690. The Supreme Court explained that "the trial court's failure to untangle the facts in relation to the medical judgment charge left the jury free to excuse defendants based on the evidence of judgment in areas where no judgment was exercised. Because that error was not harmless, a new trial is necessary." *Id.* at 685. The Court therefore reversed a judgment for the defendants, explaining:

[T]he bulk of this case implicated the question of deviation from the standard of care, not judgment...Although one or possibly a few judgment issues may have been implicated, the heart of the case was about whether there was a deviation from the standard of care. The undifferentiated instruction on medical judgment misled the jury and thus improperly insulated the defendants from liability... Because the judgment charge was not tailored to the facts of this case, its coverage was overbroad and had the potential to improperly insulate defendants from liability. Accordingly, a new trial is required. *Id.* at 689-690.

The *Velazquez* Court held that whether fetal monitor strips were readable and what action was required if the fetal monitor strips were not readable did not involve issues of medical judgment.

If a case involves judgment issues on some theories of liability, but not on others, the charge should be tailored to those facts. *Patton v. Amblo*, 314 N.J. Super. 1 (App. Div. 1998), (trial judge committed reversible error when he failed to separate out what aspects of care involved judgment and which did not) and *see Campos v. Firestone Tire and Rubber Company*, 98 N.J. 198, 210 (1984). Medical malpractice practitioners should assist the court in framing tailored, objective statements of those issues which do involve legitimate dispute issues of judgment or two schools of thought. To give one example among many, if a distinct issue in a case involved a doctor who ordered a test and never received the result, the jury would appropriately be charged that there was no exercise of judgment or two schools of thought defense to that claim. In contrast, what steps to take in response to a test result might involve one or more issues of judgment.

See also, Patton v. Amblo, 314 N.J. Super. 1, 9 (App.Div.1998)(holding that doctor was not entitled to "exercise of judgment" charge where alleged malpractice involved making scalpel incision too deep because alleged deviation was in manner doctor performed procedure); *Adams v. Cooper Hosp.*, 295 N.J. Super. 5, 10-11, (App. Div.1996)(holding that court did not err by refusing to charge jury with "exercise of judgment" instruction where issue was whether nurse had duty to constantly monitor patient because case did not involve selection between one of two courses of treatment or two schools of thought), *certif. denied*, 148 N.J. 463 (1997), cited with approval in *Velazquez* at 687. *See also, Campos v. Firestone Tire and Rubber Company*, 98 N.J.

A doctor may have to exercise judgment when diagnosing and treating a patient. However, alternative diagnosis/treatment choices must be in accordance with accepted standards of medical practice. Therefore, your focus should be on whether accepted standards of medical practice allowed judgment to be exercised as to diagnosis and treatment alternatives and, if so, whether what the doctor actually did to diagnose or treat this patient was accepted as standard medical practice. If you determine that the accepted standards of medical practice for treatment or diagnosis with respect to *[specify what type(s) treatment or diagnosis is involved]* did not allow for the diagnosis/treatment alternatives the defendant doctor made here, then the doctor would be negligent. If you determine that the accepted standards of medical practice for treatment or diagnosis with respect to *[specify what type(s) of treatment or diagnosis is involved]* did allow for the diagnosis/treatment alternatives the defendant doctor made here, then the doctor would not be negligent.