

718355

71835-5

No. 718355

Court of Appeals, Division I
of the State of Washington

Group Health Cooperative,
a Washington Corporation,

Appellant,

v.

Annette Baughman,
individually and as guardian of M.S. and M.S., minors,

Respondent.

Appeal from the Superior Court for King County
The Honorable Dean S. Lum

Reply Brief of Appellant
Group Health Cooperative

A. Clarke Johnson, WSBA #8280
Katherine A. Bozzo, WSBA #42899
JOHNSON, GRAFFE, KEAY,
MONIZ & WICK, LLP
Attorneys for Appellant

2115 North 30th, Suite 101
Tacoma, Washington 98403
Phone: (253) 572-5323
Fax: (253) 572-5413

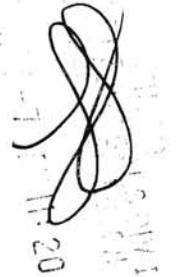


TABLE OF CONTENTS

	Page
Table of Authorities.....	ii
Argument in Reply.....	1
A. Ms. Baughman did not present substantial evidence supporting either a “holding out” instruction or an instruction describing Dr. Milligan as an “emergency medicine physician”.....	1
1. There is no evidence on the record that Dr. Milligan held himself out to the patient or parent as an emergency medicine physician.....	1
2. There is no claim or evidence a UTI is a condition “ordinarily treated” by an emergency medicine physician.....	6
3. Dr. Milligan is a board-certified pediatrician.....	7
B. Instruction No. 7 is not an error of law.....	7
1. Instruction No. 7 mirrors RCW 7.70.040 and WPI 105.02.....	7
2. Instruction No. 7 and the <i>Richards</i> instruction are not “identically worded”.....	8
C. Instruction No. 7 permitted Ms. Baughman to argue her theory of the case and was fairly worded.....	10
1. Ms. Baughman’s contentions are unsupported.....	10
2. Instruction No. 7 was fairly worded.....	18
D. Standard of Review.....	18
Conclusion.....	20

TABLE OF AUTHORITIES

Cases	Page
<i>Bd. of Regents of Univ. of Wash. v. Frederick & Nelson</i> , 90 Wn.2d 82, 579 P.2d 346 (1978)	1
<i>Cooper’s Mobile Homes, Inc. v. Simmons</i> , 94 Wn.2d 321, 617 P.2d 415 (1980)	1
<i>Egede-Nissen v. Crystal Mountain, Inc.</i> , 93 Wn.2d 127, 606 P.2d 1214 (1980)	1
<i>Estate of Dormaier ex rel. Dormaier v. Columbia Basin Anesthesia</i> , 177 Wn.App. 828, 313 P.3d 431 (2013)	1
<i>Hammel v. Rife</i> , 37 Wn.App. 577, 682 P.2d 649 (1984)	1
<i>Richards v. Overlake Hosp. Med. Ctr.</i> , 59 Wn.App. 266, 796 P.2d 737 (1990)	6, 8–9
Washington Statutes	
RCW 7.70.040	7

ARGUMENT IN REPLY

A. Ms. Baughman did not present substantial evidence supporting either a “holding out” instruction or an instruction describing Dr. Milligan as an “emergency medicine physician.”

A party is not entitled to an instruction on their theory of the case unless they have supported that theory with substantial evidence.¹ Specifically, the party must present “supporting facts for a theory and instruction [which] rise above speculation and conjecture,”² and which are “sufficient to persuade a fair-minded, rational person” of the truth of the party’s theory.³ On the other hand, it is prejudicial error to instruct a jury on a theory which hasn’t been supported by substantial evidence.⁴

1. There is no evidence Dr. Milligan held himself out to the patient or parent as an emergency medicine physician.

Although Ms. Baughman initially asked for an instruction which contained “holding out” language, she abandoned that position.⁵ At the hearing on Ms. Baughman’s Motion for a New Trial, her counsel admitted to

¹ *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 139, 606 P.2d 1214 (1980); *Cooper’s Mobile Homes, Inc. v. Simmons*, 94 Wn.2d 321, 327–28, 617 P.2d 415 (1980).

² *Bd. of Regents of Univ. of Wash. v. Frederick & Nelson*, 90 Wn.2d 82, 86, 579 P.2d 346 (1978).

³ *Estate of Dormaier ex rel. Dormaier v. Columbia Basin Anesthesia, P.L.L.C.*, 177 Wn.App. 828, 852–53, 313 P.3d 431 (2013).

⁴ *Hammel v. Rife*, 37 Wn.App. 577, 584, 682 P.2d 649 (1984).

⁵ RP 1180:2–7.

having no objection to the removal of the holding-out language and approved of Version 2.0 of the jury instructions, which removed any issue of holding out.⁶

In addition, there is simply no evidence that the jury was faced with the question of whether Group Health held Dr. Milligan out to the patient (M.S.) or her parent (Ms. Baughman) as an emergency medicine physician. To the contrary, Ms. Baughman testified that she “decided to take [M.S.] to the urgent care” because it hurt M.S. to urinate and there was blood in her urine.⁷ She called M.S.’s normal pediatrician, not 911, and asked for an appointment.⁸ Unable to fit M.S. in for an appointment—because it was approximately twenty-minutes before closing—a nurse at the pediatrician’s office suggested Ms. Baughman take M.S. to the Group Health Bellevue Urgent Care Center, not the emergency room.⁹ Ms. Baughman characterized the events of December 22, 2010, as a trip to the pediatrician’s office diverted to an urgent care center, not as a trip to the emergency room to see an emergency medicine physician.¹⁰

Similarly, the record is void of any testimony that Ms. Baughman ever thought that Dr. Milligan was an emergency medicine physician or that he

⁶ RP 1180:2–7.

⁷ RP 382:3–15.

⁸ RP 382:6–7.

⁹ RP 382:12–15.

¹⁰ RP 380:7-384:4.

presented himself as one.¹¹ Nor did Ms. Baughman testify that she felt like the care she sought for M.S., which Dr. Milligan provided, had been emergency care. In fact, Dr. Milligan testified that his role at the Group Health Urgent Care was to provide after-hour pediatric care for children who were unable to get in to see their regular pediatrician.¹²

And then [Group Health] decided at that point to say, “We still want that pediatric coverage on an after hours basis.” You know, the ideal would be that kids would be seen in the office by their own pediatrician, or family practitioner, but when the office is closed, there were enough of a volume of kids who had come to an urgent care setting that everybody felt it was in the kids’ best interests to have somebody who maybe had a little bit more of a comfort level and experience with kids.

Ms. Baughman references *one* (purported) fact to support her new holding out theory: a portion of the medical record—which Ms. Baughman represents without support to be Dr. Milligan’s signature block—contains the “title” EMERGENCY MEDICINE written under Dr. Milligan’s name.¹³ However, this is a strained and out of context view of the actual medical record which appears as follows:

¹¹ RP 380:7–393:7.

¹² RP 855:4–11.

¹³ Resp. Br., 19; CP 102 (Note: In its moving Brief, Group Health cited to the Clerk’s Papers by using the sub-number and original page number of the document. Moving forward, Group Health will cite to the Clerk’s Papers using the consecutive page numbers assigned by the Clerk.).

DPM:ML 859399

Dictated: 12/23/2010 4:48AM

Donald R Milligan, MD

Transcribed: 12/23/2010 5:21AM

EMERGENCY MEDICINE

This document has not been signed
Draft copy - this document is not available for patient care

Display only: Transcription (447373588Q) on 12/23/2010 4 48 AM by Milligan, Donald R, MD

PROVIDER NOTES

ED Notes signed by Milligan, Donald R, MD at 12/23/10 0448

Author: Milligan, Donald R, MD	Service: (none)	Author Type:	Physician
Filed: 12/23/10 0448	Note Time:	12/23/10 0448	

Dictated = # 859399.

Electronically signed by Milligan, Donald R, MD at 12/23/2010 4:48 AM

A plain reading of the record shows that Dr. Milligan completed his dictation of the report at 4:48 a.m. on December 23, 2010.¹⁴ And, as seen at the bottom of the page, at the same time, electronically signed the document “Milligan, Donald R, MD.”¹⁵ His report was subsequently transcribed by a person in “EMERGENCY MEDICINE” at 5:21 am on that same day.¹⁶ Given proper context, this excerpt of the record could not lead a reasonable mind to believe the entry “EMERGENCY MEDICINE” was part of a “signature block” as claimed by Ms. Baughman.

But more importantly, Ms. Baughman did not testify that she viewed the chart note during, or even after M.S.’s visit to the Bellevue Urgent

¹⁴ CP 102.

¹⁵ *Id.*

¹⁶ *Id.*

Care Center.¹⁷ And, again, she never testified that she ever believed Dr. Milligan to be an emergency medicine physician.¹⁸ In fact, the *only* document Ms. Baughman received at the time of the visit was discharge instructions.¹⁹ The discharge instructions were signed “Dr. Don Milligan, MD Bellevue Urgent Care/ED – Pediatrics”²⁰ Dr. Milligan testified he signed the discharge instructions as he always had and that he “always” identified himself as “pediatrics.”²¹ And, as noted above, Dr. Milligan testified that the reason he worked at the Urgent Care was because Group Health wanted to staff the urgent care with a pediatrician who could provide after-hour pediatric care to children.²² To identify Dr. Milligan’s profession or class as that of a “pediatrician practicing in an urgent care/emergency room setting” was entirely consistent with the overwhelming evidence presented to the jury.

Ultimately, there is no evidence of Dr. Milligan holding himself out in any way to the patient or the parent as an emergency medicine physician. There is similarly no evidence of Dr. Milligan holding himself out to other Group Health members who presented to the Urgent Care for treatment,

¹⁷ RP 380:7–393:7.

¹⁸ RP 380:7–393:7.

¹⁹ CP 1147:18–1148:1.

²⁰ CP 240 (Trial Ex. 1); RP 1146:25–1147:10.

²¹ RP 1146:25–1147:10 (“I have always identified myself as pediatrics.”).

²² RP 855:4–11.

and there is no evidence the patient or the parent believed the treatment sought and provided had been emergency care or that it had been provided in an emergency room. The evidence on the record shows that Dr. Milligan's specific purpose at the Group Health Urgent Care was providing pediatric care on an after-hours basis. Indeed, Ms. Baughman did not elicit any testimony from Dr. Milligan on this purportedly critical issue.

2. There is no claim or evidence a UTI is a condition “ordinarily treated” by an emergency medicine physician.

In addition to the absence of any evidence of “holding out,” there is similarly no evidence that Dr. Milligan, a pediatrician, assumed care or treatment of a condition ordinarily treated by an emergency medicine physician. As evidenced by the instruction in *Richards*, if a physician “assumes the care or treatment of a condition which is ordinarily treated by” another specialty, there is a factual question for the jury to determine.²³ Here, no such question exists. If it had, Ms. Baughman would have proposed language similar to that found in the *Richards* instruction.²⁴ The care at issue in this case—diagnosis and treatment of a urinary tract infection in a young child—is ordinarily provided by a pediatrician. There is no claim or evidence to the contrary.

²³ *Richards v. Overlake*, 59 Wn.App. 266, 276, 796 P.2d 737 (1990).

²⁴ CP 46 (Ms. Baughman's originally proposed standard-of-care instruction).

3. Dr. Milligan is a board-certified pediatrician.

Dr. Milligan is a board-certified pediatrician and, as he testified, was practicing as a pediatrician when he was working in the urgent care.²⁵ He is not an Emergency Medicine Physician and there was no evidence presented on the holding-out issue. Ms. Baughman's endorsement of Version 2.0 of the instruction, (which would have told the jury a pediatrician who works in Emergency Medicine must be held to the standard of care of a reasonably prudent Emergency Medicine Physician) would have been inherently misleading to the jury because it was not supported by substantial evidence.²⁶ Ms. Baughman was not entitled to such an instruction.

B. Instruction No. 7 is not an error of law.

1. Instruction No. 7 mirrors RCW 7.70.040 and WPI 105.02.

The applicable law, RCW 7.70.040, requires healthcare providers to provide care consistent with reasonably prudent providers from the same professional class practicing in the same or similar circumstances.²⁷ Although Ms. Baughman claims that Instruction No. 7 "flatly misstated the law," it accurately translated RCW 7.70.040. Instruction No. 7 instructed the jury that a pediatrician practicing in an urgent care/emergency room setting has to be held to the standard of a reasonably prudent pediatrician

²⁵ RP 847:5–855:25.

²⁶ CP 245, Version 2.0 of the standard-of-care instruction.

²⁷ RCW 7.70.040.

practicing an urgent care/emergency room setting.²⁸ Because Jury Instruction No. 7 accurately reflects the statute, and mirrors the language in WPI 105.02, it is not a misstatement of the law.

2. Instruction No. 7 and the *Richards* instruction are not “identically worded.”

Ms. Baughman asserts that, based on *Richards v. Overlake Hospital*, Jury Instruction No. 7 was a misstatement of the law because it “invaded the factual province of the jury.”²⁹ To support this position, Ms. Baughman claims Instruction No. 7 is “identically worded” to the *Richards* instruction.³⁰ But Ms. Baughman fails to note the clear difference between the *Richards* instruction and Jury Instruction No. 7:

<i>Richards</i> Instruction³¹ (as given)	Instruction No. 7³²
If a family practitioner holds himself out as qualified to provide pediatric care, or assumes the care or treatment of a condition which is ordinarily treated by a pediatrician , he has a duty to possess and exercise the degree of skill, care and learning of a reasonably prudent family practitioner	A pediatrician practicing in an urgent care/emergency room setting has a duty to exercise the degree of skill, care, and learning expected of a reasonably prudent pediatrician in an urgent care/emergency room setting in the State of Washington acting in the same or similar circumstances. . . .

²⁸ CP 128, 5:16–7:2; Resp. Br., 20–21.

²⁹ CP 128, 5:16–7:2; Resp. Br., 20–21.

³⁰ Resp. Br., 20.

³¹ *Richards*, 59 Wn.App. at 276.

³² CP 67 (Instruction No. 7).

The instruction in *Richards* was an error of law because it asked the jury to consider whether or not Dr. Haeg (a family practitioner) held himself out as a pediatrician or assumed care or treatment of a condition which is ordinarily treated by a pediatrician, but then forced the jury to apply the standard of care of a reasonably prudent family practitioner.³³ Because it contained the “holding out” and “assumes the care” language, the instruction invited the jury to consider two different standards while, at the same time, only allowing it to apply one to Dr. Haeg.

And even though the jury instruction contained an error of law, the *Richards* Court found the error harmless for two reasons.³⁴ First, the *Richards* failed to submit substantial evidence on the standard of care for a pediatrician.³⁵ Therefore, they were not entitled to an instruction that allowed the jury to hold Dr. Haeg to that standard.³⁶ Second, the jury found the injury to be independent of any treatment by Dr. Haeg, and, therefore, the instruction could not have had any effect on the jury’s verdict.³⁷

Here, Instruction No. 7 does not contain that same inconsistency that made the *Richards* instruction an error of law. Instruction No. 7 consistently informed the jury of the applicable standard of care which was support-

³³ *Richards*, 59 Wn.App. at 276.

³⁴ *Richards*, 59 Wn.App. at 276–277.

³⁵ *Richards*, 59 Wn.App. at 276–277.

³⁶ *Id.*

³⁷ *Id.*

ed by substantial evidence at trial. Instruction No. 7 could not have restricted the jury's role as trier of fact because it appropriately—and with express approval of Ms. Baughman—did not contain the “holding-out” or “assumes the care” language contained in the *Richards* instruction. Instruction No. 7 was not a *Richards* instruction.

C. Instruction No. 7 permitted Ms. Baughman to argue her theory of the case and was fairly worded.

1. Ms. Baughman's contentions are unsupported.

Ms. Baughman claims Instruction No. 7 prevented her from arguing her theory of the case.³⁸ She provides *one* statement in support of this conclusion: during opening statements, counsel for Ms. Baughman “made clear that they would be presenting evidence that Group Health had held Dr. Milligan out as a specialist in Emergency Medicine without first ensuring that he was properly trained.”³⁹ Noticeably absent is any citation to the evidence that supports that statement. Perhaps most important, the trial court appropriately instructed the jury that attorney remarks, statements, and arguments are not evidence and are to be disregarded if they are not supported by evidence.⁴⁰

³⁸ Resp. Br., 24.

³⁹ Resp. Br., 24.

⁴⁰ CP 59–61.

The overwhelming evidence presented in this case does not support a conclusion that Ms. Baughman’s theory of the case had been that Group Health held Dr. Milligan out as a specialist in emergency medicine and therefore could have been held to a different standard of care. For example, Ms. Baughman’s trial brief is void of any reference to this purported theory of the case.⁴¹ Instead, Ms. Baughman’s trial brief tightly framed her case around two claims: (1) that “Group Health failed to have proper policies and failed to train their physicians to identify signs of possible child sex abuse”; and (2) that Dr. Milligan “was negligent in failing to take a proper history, failing to notify M.S.’s mother of the possibility of sexual abuse, and failing to ask questions that would have led to the disclosure of the abuse.”⁴²

Understanding a trial brief is not evidence, Ms. Baughman’s trial brief provides critical insight into her actual theories of the case. But, had there been any doubt, Ms. Baughman made herself clear by extensively questioning each expert using the following two illustrative exhibits:⁴³

⁴¹ CP Sub 89 (Documents not yet transmitted to Court of Appeals at time of filing Reply Brief).

⁴² *Id.*

⁴³ CP Trial Exs. 137; CP Trial Ex. 95.



H **Standard of Care**
Corporations Providing Healthcare

Corporations providing healthcare must:

1. Take reasonable steps to protect children from abuse and neglect.
2. Train all medical staff to recognize the Red Flags of child sexual abuse.
3. Establish policies for the identification and reporting of child abuse and neglect, including child sexual abuse.



Star of Life **Standard of Care**
Physician in Urgent Care Setting

1. The doctor must know the red flags of child sexual abuse.
2. If there are findings consistent with child sexual abuse, the doctor must:
 - Take reasonable steps to rule out the possibility of abuse;
 - Take a detailed family and patient history, including events leading up to the injury or illness; and
 - Inform and educate the parent or guardian.
3. If there are findings consistent with child sexual abuse, the doctor must not assume an innocent cause.

Notably, these exhibits talk about a “physician in an urgent care setting” and “all medical staff.”⁴⁴ They do not differentiate between specialties, such as an emergency medicine and pediatrics. Nor is there any reference to an emergency room or the purported issue of “holding out.” Moreover, all three of Ms. Baughman’s experts—Dr. Cummins, Dr. Gausche-Hill, and Dr. Kliman—testified that these standards of care, as they described them, apply universally to all corporations providing healthcare and physicians; especially physicians (such as pediatricians) working with children.⁴⁵

And, as Ms. Baughman’s experts built on the foundation she had laid with her illustrative exhibits, they further supported all of their testimony

⁴⁴ *Id.*

⁴⁵ RP 56:1–57:8 (Dr. Cummins’ testimony); 237:14–25 (Dr. Gausche-Hill’s testimony); 426:9–427:21 (Dr. Kliman’s testimony).

with pediatric literature. Each of her experts referred to pediatric textbooks and placed considerable weight on the guidelines for identifying sexual abuse produced by the American Pediatric Association.⁴⁶ Ms. Baughman's experts' testimony does not square with her claim that her theory at trial had been that Dr. Milligan violated the standard of care of an emergency medicine physician.

In her Response Brief, Ms. Baughman fails to acknowledge the great lengths to which her counsel went to elicit testimony that established a universal standard of care for identifying child sexual abuse and specifically honing in on the practice of pediatricians in the urgent care setting.⁴⁷ Consistent with her theory of the case, Ms. Baughman did not elicit any testimony from Group Health's experts on whether there was any difference between the standards of care for pediatricians and emergency medicine physicians.

Instead, she extensively cross-examined Dr. Lindberg and Dr. Frasier on the American Academy of Pediatrics' standards for identifying child

⁴⁶ RP 115:8–116:5 (Dr. Cummins agreed that article in American Academy of Pediatrics provided “consensus guideline” for “red flags” of sexual abuse); RP 250:6–251:21 (Dr. Gausche-Hill supported her opinions with articles from the American Academy of Pediatrics and the textbook, “The Pediatric Patient”); RP 427:18–2; 480:3–13 (Dr. Kliman supported his opinions with the “American Pediatric” guidelines.).

⁴⁷ RP 56:1–57:8; 222:9–18; 237:14–25; 279:9–13; 426:9–427:21; 806:11–15.

abuse.⁴⁸ Dr. Lindberg—a board-certified emergency medicine physician—was asked to define the standard of care of a “doctor” for recognizing signs of child sexual abuse.⁴⁹ He was also questioned regarding the hidden “pediatric problem” of child sexual abuse and was asked to agree that the “primary responsibility of the pediatrician is the protection of a child.”⁵⁰ Dr. Frasier similarly was asked to define the standard of care for “providers” and “pediatricians” and was also questioned regarding why pediatricians need to pay particular attention to childhood sexual abuse.⁵¹ Dr. Heger was questioned on standard of care for “front line medical providers.”⁵²

Ms. Baughman points to a single jury question which asked Dr. Heger to “compare the standard of care theories for ERs (sic) unifying diagnosis versus assume the worst.”⁵³ Without any context, this question might support Ms. Baughman’s argument on appeal. Ms. Baughman made no refer-

⁴⁸ RP 920:22–923:8, 924:2–8, 926:11–17, RP 1034:1–1035:2.

⁴⁹ RP 927:22–929:3.

⁵⁰ RP 920:22–923:18.

⁵¹ RP 1025:13–17; 1032:12–16; 1033:2–25; 1038:25–1040:20; RP 1034:1–1035:2.

⁵² RP 1109:17–1110:2 (“The front line medical providers, the pediatricians, the emergency room physicians, those people play an important role in identifying victims of abuse and helping to bring that abuse to an end; isn’t that true?”), 1116:4–19 (“We talk about the front line providers, the pediatricians, the emergency room doctors being part of the solution to the problem of child abuse...”).

⁵³ RP 1129:22–23.

ence to Dr. Heger's response. In response, Dr. Heger testified that urgent care centers and emergency rooms "work up the most logical diagnosis before going to the worst diagnosis."⁵⁴ She explained that the "unifying diagnosis does not allow you to go to the worst case scenario unless you have enough information to push you in that direction."⁵⁵ Dr. Heger did not testify that there were different standards of care depending on a provider's specialty or the location of treatment. In fact, no expert provided such testimony.

The inherent problem with Ms. Baughman's attempt to distinguish between "unifying diagnosis" and "assume the worst," is that neither her experts nor Group Health's experts connected the unifying diagnosis or assume-the-worst diagnosis with any particular work setting or professional class. Rather they used these terms as vehicles to characterize their view of the approach providers use to arrive at a diagnosis. A close look at the testimony of the experts reveals that their characterization of the standard of care did not substantially differ, but for the conclusions they drew in the case.

⁵⁴ RP 1130:3-22.

⁵⁵ *Id.*

Ms. Baughman's experts testified that all providers should assume (as Dr. Cummins testified⁵⁶) or "consider" (as Dr. Gaushe-Hill testified⁵⁷) the worst diagnosis when confronted with a symptom which could be consistent with sexual abuse and take reasonable steps to rule out the worst possible diagnosis.⁵⁸ Group Health's experts—two pediatricians and one emergency medicine physician nationally renowned for their expertise in the field of child sexual abuse—agreed that physicians should "consider" the worst when coming to a diagnosis, but disagreed that in every circumstance a physician has to rule out the worst case scenario, especially when there is a "unifying diagnosis" that explains the patient's history and symptoms.⁵⁹ Dr. Lindberg—Group Health's emergency medicine expert—aptly explained this concept in response to the following jury question:

THE COURT: "A previous witness, an emergency doctor from the University of Washington Hospital, said that a diagnosis should consider all possibilities, not just the obvious ones. Should his statement apply to [M.S.]'s case?"

DR. LINDBERG: I think you should consider all possibilities, but there are a couple ways that we winnow a differential diagnosis. Sometimes we take this list of possibilities and check every single thing off until there's one thing left. That's a diagnosis of exclusion.

⁵⁶ RP 36:4-38:7.

⁵⁷ RP 225:9-21.

⁵⁸ RP 223:10-225:21.

⁵⁹ RP 940:18-941:18 (Dr. Lindberg); RP 992:18-25, 1010:24-1011:23 (Dr. Frasier); RP 1088:4-1090:14, 1094:23-1100:13 (Dr. Heger).

But sometimes you test for the most likely things, do a reasonable job of looking for the dangerous things, and when your test comes back positive for the thing that you think is the most likely thing, that's what you call it.

You know, when people say, "You have to assume the worst. You always have to test for everything," let me give you an example. A woman comes to see me, she says, "I haven't had a period for three months." I know that the most common reason for that is that she's pregnant. But I know that it can also be ovarian cancer. If I do a pregnancy test and it's positive, and I say, "You're pregnant," and she says, "Great. My husband will be thrilled. We've been trying for months," I shouldn't then go on to say, "Just to be sure, let's do a CAT scan and take out your ovary, because it could be ovarian cancer."

You have to use your judgment and weigh what's the most likely, what's the risk of testing, and, you know, what's the risk of missing the other disease?

More specifically, Ms. Baughman's experts opined that M.S. presented with symptoms that were consistent with symptoms of sexual abuse as defined by the American Academy of Pediatrics, and that Dr. Milligan failed to act accordingly. Group Health's experts testified M.S.'s symptoms were consistent with symptoms of a UTI, were confirmed by laboratory workup, and did not require an inquiry into the possibility of sexual abuse. This expert testimony does not amount to different standards of care based on physician specialty or professional setting, but rather, is nothing more than common expert disagreement. The "differences" in these experts' opinions simply do not amount to the substantial evidence which Ms. Baughman needs in order to be entitled to an instruction that Group Health

held Dr. Milligan out as an emergency medicine physician or that there were two “different” standards of care for the jury to decide between. Because none of the experts argued that the standard of care differed according to specialty, and the expert testimony differed only in conclusion, it is impossible for Jury Instruction No. 7 to have deprived Ms. Baughman of her theory of the case.

2. Instruction No. 7 was fairly worded.

When read in conjunction with the testimony of the experts on standard of care, Instruction No. 7 was fairly worded. Dr. Milligan is a board-certified pediatrician who was unquestionably practicing in an urgent care setting at the time of the treatment in question. But Instruction No. 7 not only included “urgent care” language, it also included the phrase “emergency room.” Instructing the jury to hold Dr. Milligan to the standard of care of a reasonably prudent “pediatrician in an urgent care/emergency room setting,” gave equal consideration to both parties’ experts.

D. Standard of Review.

Judge’s Lum’s ruling at the trial court level was two-pronged: (1) he concluded that Plaintiff preserved the issue she brought on her motion for new trial; and (2) Jury Instruction No. 7 misstated the applicable law.⁶⁰

⁶⁰ RP 1329:5–13; 1330:1–1331:4.

The *only* aspect of Judge Lum’s ruling that is reviewed for abuse of discretion is whether or not Ms. Baughman properly preserved the issue raised in her motion for new trial during exceptions to jury instructions. After Judge Lum made that threshold ruling, he then granted Ms. Baughman’s Motion for New Trial for a purely legal reason: he ruled that Jury Instruction No. 7 was a misstatement of law.⁶¹ Because Judge Lum based his entire ruling regarding Instruction No. 7 on a legal error, his decision on that issue is reviewed de novo.⁶²

//

//

//

⁶¹ *Id.*

⁶² *Id.*

CONCLUSION

Instruction No. 7 was not an error of law and did not prevent Ms. Baughman from arguing her theory of the case. Instruction No. 7 was fairly worded and gave the expert testimony equal consideration. There is simply no substantial evidence supporting Ms. Baughman's post-verdict contention that the jury should have decided whether Dr. Milligan held himself out as an emergency medicine physician or that the jury had two standards of care to decide between. This Court should reverse the trial court's order granting Ms. Baughman's motion for new trial and reinstate judgment in favor of Group Health.

Respectfully submitted this 6 day of November, 2014.

JOHNSON, GRAFFE, KEAY, MONIZ & WICK, LLP

By 
A. Clarke Johnson, WSBA #8280
Katherine A. Bozzo, WSBA #42899
Attorneys for Appellant
Group Health Cooperative

No. 718355

NOV 07 2014

Court of Appeals, Division I
of the State of Washington

Group Health Cooperative,
a Washington Corporation,

Appellant,

v.

Annette Ms. Baughman,
individually and as guardian of M.S. and M.S., minors,

Respondent.

Appeal from the Superior Court for King County
The Honorable Dean S. Lum

Declaration of Service

A. Clarke Johnson, WSBA #8280
Katherine A. Bozzo, WSBA #42899
JOHNSON, GRAFFE, KEAY,
MONIZ & WICK, LLP
Attorneys for Appellant

2115 North 30th, Suite 101
Tacoma, Washington 98403
Phone: (253) 572-5323
Fax: (253) 572-5413

DECLARATION OF SERVICE

I, **Krystle Bonnes**, hereby declare under penalty of perjury under the laws of the State of Washington that I am employed by **Johnson, Graffe, Keay, Moniz & Wick, LLP**, and that on today's date, November 6, 2014, I served in the manner indicated by directing delivery to the following individuals:

legal messenger

fax

hand delivery

John R. Connelly, Jr.
Nathan P. Roberts
Connelly Law Offices
2301 N. 30th St.
Tacoma, WA 98403
Phone: (253) 593-5100
Fax: (253) 593-0380

Dated this 5 day of November, 2014.

By Krystle Bonnes
Krystle Bonnes